

**INTERNATIONAL COVENANT
ON CIVIL AND POLITICAL RIGHTS**

**SELECTED DECISIONS OF
THE HUMAN RIGHTS COMMITTEE
under
THE OPTIONAL PROTOCOL**

Volume 8

*Seventy-fifth to eighty-fourth sessions
(July 2002 – July 2005)*



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INTRODUCTION

1. The International Covenant on Civil and Political Rights and the Optional Protocol thereto were adopted by the General Assembly on 16 December 1966 and entered into force on 23 March 1976.

2. In accordance with article 28 of the Covenant, the States parties established the Human Rights Committee on 20 September 1976.

3. Under the Optional Protocol, individuals who claim that any of their rights set forth in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Human Rights Committee for consideration. No communication can be received by the Committee if it concerns a State party to the Covenant that is not also a party to the Optional Protocol. As of 31 July 2005, 105 of the 149 States that had acceded to or ratified the Covenant had accepted the competence of the Committee to receive and consider individual complaints by ratifying or acceding to the Optional Protocol.

4. Under the terms of the Optional Protocol, the Committee may consider a communication only if certain conditions of admissibility are satisfied. These conditions are set out in articles 1, 2, 3 and 5 of the Optional Protocol and restated in rule 96 of the Committee's rules of procedure (CCPR/C/3/Rev.8), pursuant to which the Committee shall ascertain:

(a) That the communication is not anonymous and that it emanates from an individual, or individuals, subject to the jurisdiction of a State party to the Protocol;

(b) That the individual claims, in a manner sufficiently substantiated, to be a victim of a violation by that State party of any of the rights set forth in the Covenant. Normally, the communication should be submitted by the individual himself or by his representative; a communication submitted on behalf of an alleged victim may, however, be accepted when it appears that he is unable to submit the communication himself;

(c) That the communication is not an abuse of the right to submit a communication under the Protocol;

(d) That the communication is not incompatible with the provisions of the Covenant;

(e) That the same matter is not being examined under another procedure of international investigation or settlement;

(f) That the individual has exhausted all available domestic remedies.

5. Under rule 92 (old rule 86) of its rules of procedure, the Committee may, prior to the forwarding of its final Views on a communication, inform the State party of whether "interim measures" of protection are desirable to avoid irreparable damage to the victim of the alleged violation. The request for interim measures, however, does not imply the determination of the merits of the communication. The Committee has requested such interim measures in a number of cases, for example where the carrying out of a death sentence or the expulsion or extradition of a person appeared to be imminent. Pursuant to rule 94 (2), the Committee may deal jointly with two or more communications, if deemed appropriate.

6. With respect to the question of burden of proof, the Committee has established that such burden cannot rest alone on the author of a communication, especially in view of the fact that the author and the State party do not always have equal access to the evidence and that the State party frequently has sole possession of the relevant information. It is implicit in article 4 (2) of the Optional Protocol that the State party has a duty to investigate in good faith all allegations of violations of the Covenant made against it and its authorities.

7. The Committee started work under the Optional Protocol at its second session in 1977. From then until its eighty-fourth session in July 2005, 1414 communications relating to alleged violations by 78 States parties were placed before it for consideration. By the end of July 2005, the status of these communications was as follows:

(a) Concluded by adoption of Views under article 5 (4) of the Optional Protocol	500
(b) Declared inadmissible	394
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8. Since 1976, the Committee received many more than the 1414 registered communications mentioned above. The Secretariat regularly receives inquiries from individuals who intend to submit a communication to the Committee. Such inquiries are

not immediately registered as cases. In fact, the number of authors who eventually submit cases for consideration by the Committee under the Optional Protocol is relatively small, partly because the authors discover that their cases do not satisfy certain basic criteria of admissibility, such as the required exhaustion of domestic remedies, and partly because they realize that a reservation or a declaration by the State party concerned may operate to preclude the Committee's competence to consider the case. These observations notwithstanding, the number of communications placed before the Committee is increasing steadily, and the Committee's work is becoming better known to lawyers, researchers and the general public. The purpose of the *Selected Decisions* series is to contribute to the dissemination of its work.

9. The first step towards wider dissemination of the Committee's work was the decision taken during the seventh session to publish its Views: publication was desirable in the interests of the most effective exercise of the Committee's functions under the Protocol, and publication in full was preferable to the publication of brief summaries. From the Annual Report of the Human Rights Committee in 1979 up to the 2005 report incorporating the eighty-fourth session in July 2005, all of the Committee's Views and decisions declaring communications inadmissible, have been published in full.

10. At its fifteenth session, the Committee decided to proceed with a separate project, the periodical publication of a selection of its decisions under the Optional Protocol, including certain important decisions declaring communications admissible and other decisions of an interlocutory nature. Volume 1 of this series, covering decisions taken from the second to the sixteenth session inclusive, was published in 1985 in English.¹ Volume 2 covers decisions taken from the seventeenth to the thirty-second session and includes all decisions declaring communications admissible, two interim decisions requesting additional information from the author and State party, and two decisions under rule 86 of the Committee's rules of procedure, requesting interim measures of

protection. Volume 3 contains a selection of decisions adopted from the thirty-third to thirty-ninth sessions, Volume 4 a selection of decisions adopted from the fortieth to the forty-sixth sessions, Volume 5 covers sessions forty-seven to fifty-five, Volume 6 covers sessions fifty-six to sixty-five and Volume 7 covers sessions sixty-six to seventy-four.

11. During the period covered by the present volume, there has been once again a significant increase in the number of communications submitted to the Committee. The Special Rapporteur for New Communications of the Committee, whose mandate had been amended in 1991 to cope with the increasing caseload, has continued to further review and finetune his working methods. During the period covered by the present volume, the Special Rapporteur requested interim measures of protection in cases.

12. So as to enable it to cope with an increasing number of registered cases and in order to avoid a growing backlog of pending cases, the Committee, during its eighty-third session, authorized the Working Group on Communications to adopt decisions declaring communications inadmissible if all members so agree. At its eighty-fourth session (July 2005), the Committee introduced the following rule 93(3) in its rules of procedure: "A working group established under rule 95, paragraph 1, of these rules of procedure may decide to declare a communication inadmissible, when it is composed of at least five members and all members so agree. The decision will be transmitted to the Committee plenary, which may confirm it and adopt it without further discussion. If any Committee member requests a plenary discussion, the plenary will examine the communication and take a decision."

13. The Special Rapporteur on Follow-Up on Views also continued to review his working methods during the period covered by the present volume. In 1997, his mandate was formally reviewed, and changes to the mandate incorporated into the Committee's rules of procedure. Under the revised follow-up procedure, the Committee no longer considers follow-up information on a confidential basis but in public session. Follow-up missions by the Special Rapporteur have also been suggested to States parties.

14. As in the past, there has been a steady increase in the number of individual opinions appended by members of the Committee to decisions on admissibility or final Views (rule 104 of the rules of procedure). It is noteworthy that many members have appended joint individual opinions, whether concurring or dissenting. Readers will find numerous examples of this practice in the present volume.

¹ *Human Rights Committee, Selected Decisions under the Optional Protocol (Second to sixteenth sessions)*, New York, 1985 (United Nations publication, Sales No. E.84.XIV.2), hereinafter referred to as *Selected Decisions*, vol.1.

For a detailed overview of the Committee's jurisprudence under the Optional Protocol, see Manfred Nowak: *ICCPR Commentary*, 2nd edition (Engel Verlag, 2005).

FINAL DECISIONS

A. Decisions declaring a communication inadmissible

Communication No. 837/1998

Submitted by: Janusz Kolanowski
Alleged victim: The author
State party: Poland
Declared inadmissible: 6 August 2003

Subject matter: Absence of judicial control over decisions about police promotions

Procedural issues: Incompatibility *ratione materiae* and *ratione temporis* - Level of substantiation of claim

Substantive issues: Interpretation of notion of “suit at law”

Articles of the Covenant: 14, paragraph 1; 26

Articles of the Optional Protocol: 2; 3

1. The author of the communication is Janusz Kolanowski, a Polish citizen, born on 13 July 1949. He claims to be a victim of a violation by Poland¹ of articles 14, paragraph 1, and 26 of the International Covenant on Civil and Political Rights (the Covenant). He is not represented by counsel.

The facts as submitted

2.1 The author has been employed in the Polish police (formerly the Civic Militia) since 1973. In 1975, he completed the School for Non-commissioned Officers of the Police in Pila. He obtained a doctoral degree in “Sciences of Physical Culture” in 1991.

2.2 On 7 January 1991, the author requested the Chief Commander of the Police to appoint him to the rank of officer in the police. His request was denied on 22 February 1991, since he lacked the required “officer” training to be appointed to that rank. The author appealed this decision before the Minister of Internal Affairs, arguing that article 50, paragraph 1, of the Police Act (PA) only required professional

training rather than officer’s training for policemen with a higher education degree.

2.3 On 24 April 1991, the author had a conversation with the Under-Secretary of State in the Ministry of Internal Affairs concerning his appointment to the higher rank. In a memorandum reflecting the conversation, the Under-Secretary of State expressed his approval for the author’s appointment to the rank of an *aspirant*, a transitional rank between that of non-commissioned officers and the rank of officer. However, this approval was annulled by the Chief Commander of the Police on 20 August 1991, on the basis that the author’s appointment to the “aspirant rank” by means of an exceptional procedure was unjustified.

2.4 By letter of 26 August 1991 to the General Commander of the Police in Warsaw, the author appealed the rejection of his appointment. On 28 August 1991, he sent a similar complaint to the Under-Secretary of State in the Ministry of Internal Affairs. In his response, dated 16 September 1991, the General Commander of the Police once again informed the author that he did not have the required officer’s training. On 29 June 1994, the Minister of Internal Affairs refused to institute proceedings with respect to the rejection of the author’s appointment to the aspirant rank, which was not considered an administrative decision within the meaning of article 104 of the Code of Administrative Procedure (CAP).

2.5 On 25 August 1994, the Ministry of Internal Affairs rejected another motion of the author for appointment to the aspirant rank dated 19 July 1994. After the author had unsuccessfully filed an objection to this decision with the Ministry of Internal Affairs, he lodged a complaint with the High Administrative Court in Warsaw on 6 December 1994, challenging the non-delivery of an administrative decision on his appointment. On 27 January 1995, the Court dismissed the complaint, as the refusal to appoint the author to the higher rank was not an administrative decision.

¹ The Covenant and the Optional Protocol to the Covenant entered into force for the State party respectively on 18 June 1977 and 7 February 1992.

2.6 By letter of 1 March 1995 addressed to the High Administrative Court, the author complained that the Court had failed to give the reasons and the legal provisions on which its decision to dismiss his complaint was based. This motion was rejected by the Court on 14 March 1995. The author subsequently sent a letter to the Minister of Justice, accusing the judges who had decided on his complaint of “perversion of justice”. On 30 March 1995, the President of the High Administrative Court, to whom the letter had been forwarded by the Ministry of Justice, informed the author that, while no grounds existed for reopening his case, he was free to lodge an extraordinary appeal against the Court’s decision of 27 January 1995.

2.7 On 11 July 1995, the author requested the Polish Ombudsman to lodge an extraordinary appeal with the Supreme Court, with a view to quashing the decision of the High Administrative Court. By letter of 28 August 1995, the Ombudsman’s Office informed the author that its competence to lodge an extraordinary appeal was limited to alleged violations of citizens’ rights and was subsidiary in that it required a prior unsuccessful request to an organ with primary competence to lodge an extraordinary appeal with the Supreme Court. The Ombudsman denied the author’s request, since it failed to meet these requirements.

2.8 The author then asked the Ombudsman to forward his request to the Minister of Justice. On 13 November 1995, he sent a copy of the request to lodge an extraordinary appeal with the Supreme Court to the Minister of Justice, in the absence of any reaction from the Ombudsman. At the same time, he requested reinstatement to the previous condition, arguing that the expiry of the six-month deadline to appeal the Court’s decision of 27 January 1995 could not be attributed to any failure on his part. On 20 February 1996, the Ministry of Justice denied the request to lodge an extraordinary appeal, since the six-month deadline had already expired at the time of the submission of the request (16 November 1995) and because there was no basis for the Minister to act, as the case raised no issues affecting the interests of the Republic of Poland.

2.9 On 4 March 1996, the author asked the Ombudsman to reconsider his request to submit an extraordinary request to the Supreme Court, arguing that the delay in handling his first request of 11 July 1995 had caused the expiry of the six-month deadline. In subsequent letters, he reiterated doubts over the legality of the examination of his complaint by the High Administrative Court. In his reply, dated 2 September 1996, the Ombudsman rejected the request. He warned the author that his accusations against the judges of the High Administrative Court might be interpreted as constituting a criminal offence.

2.10 In parallel proceedings, the author had been dismissed from police service in 1992, but was reinstated following a decision of the High Administrative Court of 18 August 1993, declaring the dismissal null and void. In 1995, he was dismissed a second time from police service. By decision of 8 May 1996, the High Administrative Court upheld the dismissal, apparently because the author had failed to comply with service discipline. Appeal proceedings against this decision were still pending at the time of the submission of the communication.

The complaint

3.1 The author claims to be a victim of violations of articles 14, paragraph 1, and 26 of the Covenant, as he was denied access to the courts, on the basis that the refusal to appoint him to the rank of an aspirant was not regarded as an administrative decision and therefore not subject to review by the High Administrative Court.

3.2 He argues that his complaint against the refusal of appointment and the non-delivery of an administrative decision involves a determination of his rights and obligations in a suit at law, since article 14, paragraph 1, must be interpreted broadly in that regard. Moreover, he claims that the bias shown by the judges of the High Administrative Court and the fact that he was deprived of the possibility to lodge an extraordinary appeal with the Supreme Court, either through the Minister of Justice or the Ombudsman, since the Ombudsman’s Office had failed to process his request in a timely manner, constitute further violations of article 14, paragraph 1.

3.3 The author contends that the delivery of administrative decisions is required in similar situations, such as in cases of deprivation or lowering of military ranks of professional soldiers or when an academic degree is granted by the faculty council of a university. Since soldiers and academic candidates can appeal such decisions before the courts, the fact that such a remedy was not available to him is said to constitute a violation of article 26.

3.4 The author claims that he has exhausted domestic remedies and that the same matter is not being examined under another procedure of international investigation or settlement.

State party’s submission on the admissibility and merits of the communication

4.1 By note verbale of 22 June 1999, the State party submitted its observations on the communication, challenging both admissibility and merits. While not contesting exhaustion of domestic remedies, it submits that the communication should

be declared inadmissible *ratione temporis*, insofar as it relates to events which took place before the entry into force of the Optional Protocol for the State party on 7 February 1992.

4.2 Moreover, the State party considers the author's claim under article 26 of the Covenant inadmissible for lack of substantiation. In particular, any comparison between the deprivation and lowering of military ranks of professional soldiers, which is made in form of an administrative decision, under paragraph 1 of the Ordinance of the Minister of Defence of 27 July 1992, and (internal) decisions taken under the provisions of the Police Act is inadmissible, given the limited application of paragraph 1 of the Ordinance to exceptional cases only. Similarly, no parallel can be drawn to the granting of an academic degree by administrative decision, a matter which is different from the refusal to appoint someone to a higher service rank.

4.3 The State party submits that the delivery of administrative decisions is subject to the existence of legislative provisions which require the administrative organ to issue such a decision. For example, the delivery of an administrative decision is explicitly required for the establishment, alteration or termination of labour relationships in the Bureau of State Protection (UOP).² However, this rule only applies to appointments and not the refusal to appoint UOP officers to higher service ranks. A landmark judgment of 7 January 1992 of the Constitutional Court holds that the provisions of the Border Guard Act of 12 October 1990, which exclude the right to trial in cases about service relationships of Border Guard officers, are incompatible with arts. 14 and 26 of the Covenant. The State party argues that this ruling is irrelevant to the author's case, since the contested provisions of the Border Guard Act concerned external service relationships, which are subject to special legislation requiring the delivery of an administrative decision.

4.4 With regard to the alleged violation of article 14, paragraph 1, of the Covenant, the State party submits that every national legal order distinguishes between acts which remain within the internal competence of administrative organs and acts which extend beyond this sphere. The refusal to appoint the author to the rank of an 'aspirant' is of purely internal administrative character, reflecting his subordination to his superiors. As internal acts, decisions concerning appointment to or refusal to appoint someone to a higher service rank cannot be appealed before the courts, but only before the

superior organs to which the decision-making organ is accountable.

4.5 The State party emphasizes that article 14, paragraph 1, guarantees the right of everyone to a fair trial in the determination of his or her rights and obligations in a suit at law. Since this provision essentially relates to the determination of *civil* rights and obligations, the present case falls outside the scope of article 14, paragraph 1, being of purely administrative character. Moreover, the State party argues that the author's complaint against the refusal to appoint him to a higher service rank bears no relation to the determination of a *right*, in the absence of an entitlement of policemen or other members of the uniformed services to request such appointment as of *right*.

Author's comments

5.1 By letter of 15 November 1999, the author responded to the State party's observations. He contends that the relevant events took place after the entry into force of the Optional Protocol for Poland on 7 February 1992, without substantiating his contention.

5.2 The author insists that the refusal to appoint him to the rank of an aspirant constituted an administrative decision, citing several provisions of administrative law he considers pertinent. He argues that there is no basis in Polish law which would empower State organs to issue internal decisions. By reference to article 14, paragraph 2, of the Police Act, the author submits that it follows from the subordination of the Chief Commander of the Police to the Minister of Internal Affairs that the Chief Commander was obliged to follow the "order" of the Under-Secretary of State in the Ministry of Internal Affairs to appoint him to the higher service rank. The refusal to appoint him to that rank was also illegal in substance, since he fulfilled all legal requirements for such appointment.

5.3 With regard to the State party's argument that his claim under article 26 is unsubstantiated, the author submits that, even though the special provisions concerning the deprivation and lowering of military ranks of professional soldiers and the granting of academic degrees, which are made by administrative decision, are not applicable to his case, the legislation precluding policemen from appealing decisions on their appointment or non-appointment to a higher service rank is in itself discriminatory.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is

² See paragraph 33 of the Ordinance of the Prime Minister of 10 January 1998 concerning the service of officers of the UOP.

admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being and has not been examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a) of the Optional Protocol, and that the author has exhausted domestic remedies, in accordance with article 5, paragraph 2 (b), of the Optional Protocol.

6.3 The Committee takes note of the State party's argument that the communication is inadmissible insofar as it relates to events which took place before the entry into force of the Optional Protocol for Poland on 7 February 1992. Under its established jurisprudence, the Committee cannot consider alleged violations of the Covenant which occurred before the entry into force of the Optional Protocol for the State party, unless the violations complained of continue after the entry into force of the Optional Protocol. The Committee notes that the author first requested to be promoted in 1991, i.e. prior to the entry into force of the Optional Protocol in respect of the State party. Although the author continued after the entry into force of the Optional Protocol with proceedings to contest a negative decision to his request, the Committee considers that these proceedings in themselves do not constitute any potential violation of the Covenant. However, the Committee notes that subsequent to the entry into force of the Optional Protocol in respect of the State party the author initiated a second set of proceedings aiming at his promotion (see paragraph 2.5) and that any claims related to these proceedings are not inadmissible *ratione temporis*.

6.4 As to the author's claims under article 14, paragraph 1, the Committee notes that they relate to the author's efforts to contest a negative decision on his request to be promoted to a higher rank. The author was neither dismissed nor did he apply for any specific vacant post of a higher rank. In these circumstances the Committee considers that the author's case must be distinguished from the case of *Casanovas v. France*, communication 441/1990. Reiterating its view that the concept of "suit at law" under article 14, paragraph 1, is based on the nature of the right in question rather than on the status of one of the parties, the Committee considers that the procedures initiated by the author to contest a negative decision on his own request to be promoted within the Polish police did not constitute the determination of rights and obligations in a suit at law, within the meaning of article 14, paragraph 1, of the Covenant. Consequently, this part of the communication is incompatible with that provision and inadmissible under article 3 of the Optional Protocol.

6.5 In relation to the alleged violations of article 26, the Committee considers that the author has failed to substantiate, for purposes of admissibility, any claim of a potential violation of article 26. Consequently, this part of the communication is inadmissible under article 2 of the Optional Protocol.

7. The Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;

(b) That this decision shall be communicated to the author, and, for information, to the State party.

Communication No. 901/1999

Submitted by: Deborah Joy Laing (represented by Gavan Griffith)

Alleged victims: Deborah Joy Laing, Jessica Joy Surgeon and Samuel Colin John Surgeon

State party: Australia

Declared inadmissible: 9 July 2004 (eighty-first session)

Subject matter: Family separation - Child custody

Procedural Issues: Substantiation of claims

Substantive Issues: Effective remedy - Cruel treatment - Liberty of movement and right to enter one's country - Fair trial - Interference with family life - Protection the family - Protection of minor

Articles of the Covenant: 2, paragraph 3; 7; 12, paragraphs 1 and 4; 14, paragraph 1; 17; 23, paragraph 1; 24, paragraph 1; and 26

Article of the Optional Protocol: 2

1. The author of the communication dated 30 November 1999, is Ms. Deborah Joy Laing (Ms. Laing). She submits the communication on behalf of herself and her two children Jessica Joy Surgeon and Samuel Surgeon. She claims that she is victim of violations by Australia¹ of articles 2, paragraph 3; 7; 14, paragraph 1; 17; 23, paragraph 1; and 26, of the International Covenant on Civil and

¹ The Optional Protocol entered into force for Australia on 25 September 1991.

Political Rights (the Covenant); that Jessica is victim of violations of articles 2, paragraph 3; 7; 12, paragraphs 1 and 4; 14, paragraph 1; 17; 23, paragraph 1; and 24, paragraph 1; and that Samuel is victim of violations of articles 2, paragraph 3; 7; 17, paragraph 1; 23, paragraph 1; and 24, paragraph 1, of the Covenant. They are represented by counsel.

1.2 On 10 December 1999, the Special Rapporteur on New Communications and Interim Measures rejected the author's request for interim measures.

The facts as submitted

2.1 Ms. Laing married Lance Lynn Surgeon on 30 March 1991. Jessica was born on 9 November 1993, in the United States; she holds both Australian and American citizenship. The marriage disintegrated, and on 12 March 1994, Ms. Laing and Jessica, with Mr. Surgeon's consent, travelled to Australia where they remained until November 1994. They returned to the US upon request from Mr. Surgeon, who had suffered a heart attack in the meanwhile.

2.2 On 12 January 1995, Ms. Laing and Jessica left the matrimonial home in the US for Australia without the knowledge of Mr. Surgeon. On 17 January 1995, he filed an action for divorce in Georgia Superior court. On 27 February 1995, the Court ordered Jessica's return to the State of Georgia, US. In April and May 1995, the Georgia Superior Court heard a Rule Nisi application of Mr. Surgeon *ex parte*, without Ms. Laing's attendance, and ordered the dissolution of the marriage. It awarded the father "sole permanent custody" of Jessica, with no visitation rights for Ms. Laing until further order by a court of competent jurisdiction.

2.3 On 5 June 1995, Mr. Surgeon filed an application under the Hague Convention on the Civil Aspects of Child Abduction (the Hague Convention) to the US Central Authority. That application was communicated to the Australian Central Authority, which initiated proceedings in the Family Court on 28 June 1995, seeking an order that Mr. Surgeon be permitted to remove Jessica from Australia to the US. The Central Authority's application was listed for hearing on 5 September 1995, but the hearing dates were vacated and proceedings adjourned. On 22 September 1995, Ms. Laing's and Mr. Surgeon's son Samuel was born in Australia.

2.4 The application was heard before Justice O'Ryan in the Family Court of Australia on 2 and 5 February 1996. On 20 February 1996, he ordered that Jessica be returned to her father in the US. Ms. Laing appealed to the Full Court of the Family Court, requesting that new evidence be heard. The

appeal was heard on 3 and 4 July 1996. The Full Court refused to receive the new evidence, and dismissed the appeal on 10 October 1996.

2.5 Following the dismissal of the appeal, Ms. Laing went into hiding with her two children. They were located on 9 January 1998 and detained.

2.6 On 9 April 1998, Ms. Laing lodged an application for leave to appeal to the High Court of Australia. The High Court refused the application on 7 August 1998 as Ms. Laing had not appealed within the statutory time-limit.

2.7 Ms. Laing then returned to the Full Court of the Family Court, and requested a re-opening of the case. The Full Court of the Family Court reconstituted as a bench of five, heard the application to re-open the case on 27 and 28 August and 14 September, and dismissed the application on 9 February 1999, by a 3-2 majority.

2.8 At this point, Ms. Laing only had two remaining options; (a) to seek appeal to the High Court again, or (b) to apply to the Family Court and request that the Court issue a certificate to enable her to appeal to the High Court. The Family Court had issued only three such certificates since 1975; a certificate would only be issued if the case involves an important question of law or is of public interest. On 24 April 1999, the Family Court issued a certificate allowing the author to appeal again to the High Court, on the ground that the Full Court of the Family Court should re-open its decision to allow the application to be determined by reference to the proper and applicable law. Up to this point, Ms. Laing was not offered legal aid. However, she received a limited grant of legal aid for the appeal to the High Court. The High Court hearing started on 7 October 1999, on its final day on 18 November 1999, it dismissed the appeal without giving reasons. Ms. Laing therefore claims that domestic remedies have been exhausted.

2.9 From 1994, Ms. Laing has written letters and sent photographs and other information about the children to the father in the US. She contends that he has shown no interest in the children, nor made any financial contribution for their maintenance, or visited them in Australia, or maintained telephone contact with them over the years.

The complaint

3.1 Ms. Laing claims that in violation of article 2, paragraph 3 of the Covenant, she does not have an adequate and effective remedy, since the Covenant is not incorporated into Australian domestic law in a manner which would enable her to enforce these rights. She submits that the Covenant is not part of Australian law and hence it has no legal effect upon

the rights and duties of individuals.² While she has raised issues under the Covenant in her appeal to the High Court, she has not been provided with the Court's reasons in relation to this aspect of her appeal.

3.2 Ms. Laing claims that the forcible removal of her daughter Jessica, whom she would not see for many years, violates her rights under article 7. Neither she nor her son has the right to enter the US, nor, given the current court orders, is there any possibility of their visiting Jessica, even if they were able to enter the US. Ms. Laing has no means to pursue any further judicial action. She submits that such separation of a mother from her small child in the present circumstances amounts to cruel treatment in violation of article 7.

3.3 Ms. Laing claims that she was denied a fair trial, in violation of article 14, first in that the Family Court applied the incorrect law in its decision to remove Jessica from her custody. In the application to the Family Court in 1998 to re-consider the first appeal judgement, a majority of 3 judges, acknowledged that the first appeal court had applied the incorrect law, yet refused to re-open the matter. At the level of the High Court, it was conceded by all parties that the trial judge and the first full court had applied the incorrect law. However, on 18 November 1999, the High Court dismissed the appeal without giving reasons.

3.4 Secondly, Ms. Laing submits that the High Court did not provide reasons for its decision, in violation of article 14, paragraph 1. While the High Court decision implies that the removal orders for Jessica have immediate effect, the High Court indicated that the reasons for its decision would be provided later, thus leaving Ms. Laing without knowledge as to why the appeal failed before Jessica's return to the US.

3.5 It is further claimed that in view of the delays in resolving the proceedings concerning Jessica, any interference of the authors' home cannot not be said to be reasonable in terms of article 17, when measured against the irreparable damage and consequences to the authors' family.

3.6 Ms. Laing claims that the removal of Jessica from her family impairs her enjoyment of family life, in violation of article 23, paragraph 1, in particular as the resolution of the case was seriously delayed.

3.7 She finally argues a violation of her rights under article 26, in that, while by operation of the Hague Convention the father's court costs in

Australia were paid, no equivalent assistance was paid to the author. This is particularly serious, given that the divorce judgement granted the father all matrimonial property.

3.8 On behalf of Jessica, it is claimed that in violation of article 2, paragraph 3 of the Covenant, she does not have an effective remedy, since the Covenant is not incorporated into Australian domestic law in a manner which would enable her to assert her Covenant rights. She submits that the Covenant has no legal effect upon the rights and duties of individuals or governments, and refers in this context to an Australian court case and to the Attorney-General's submission in the High Court proceedings in the present case.³ Also, Jessica has not been able to present any submissions or arguments about her interests. While the Family Court appointed a separate representative for her, he could not play an active role in the proceedings, since he could not participate at the separate court hearing of Jessica.

3.9 It is claimed that Jessica will suffer severe psychological damage if she were to be removed from the only family she has known and the source of her emotional, physical and social wellbeing, as well as her school friends. Returning her to her father, who has played no active role in her life, and to a place where there are no arrangements in place for her immediate care nor schooling, would amount to cruel treatment, in violation of article 7 of the Covenant.

3.10 Jessica, as she is lawfully within Australian territory, she has a right, under article 12, paragraph 1 and 4, to remain in the country. If she were to be returned to the US, this right would be violated.

3.11 It is claimed that Jessica was denied a fair trial, in violation of article 14. First, she was denied the right to participate in the proceedings regarding her own rights and to challenge the decision to remove her from Australia. The inability to have her interests determined separately and independently of her mother's interests, has had a significant impact on Jessica's ability to have the merits of her case considered. For example, when the Second Full Court of the Family Court judges refused to re-open the case, considering the mother's default and conduct to be a determining factor against re-opening of the case, Jessica's interest in having the case re-opened was not considered separately.

3.12 Secondly, she was denied a fair trial in that the Family Court judge applied the incorrect law when deciding that she was to be returned. Counsel

² *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 183 CLR 273, at page 287 of supporting documentation.

³ *Minister for Immigration and Ethnic Affairs v. Teoh*, and *DJL v. The Central Authority*, in the High Court proceedings of 7 October 1999, paragraph 48-50.

refers to the Convention on the Rights of the Child, which states that a child shall not be separated from his or her parents unless it is determined in accordance with applicable law and procedures that such separation is necessary for the best interest of the child. When Jessica's mother's final appeal to the High Court was dismissed, they were provided with no reasons for the decision.

3.13 The proposed forced removal of Jessica from her mother and brother would amount to arbitrary interference with her family and home, in violation of article 17 of the Covenant. Counsel refers to the Committee's views in *Toonen v. Australia*.⁴ It is contended that the delays in resolving the proceedings regarding Jessica's removal, entail that any interference with Jessica's home could not be considered reasonable when measured against the irreparable damage and consequences to her family. There is allegedly no legal avenue for Jessica to seek protection against this interference.

3.14 Finally, it is claimed, on behalf of Jessica, that the application of the Hague Convention in this case did not properly address the best interests of the child, which amounted to a violation of articles 23, paragraph 1, and 24, paragraph 1, of the Covenant. The removal of Jessica from her family would impair with her right to enjoyment of family life, since the strict application of the Hague Convention, operates to affect her interest adversely when the application and removal have not been dealt with expeditiously – that is at least within a year. It is also argued that the denial of access to her mother and brother in the event of removal would constitute a breach of article 10, paragraph 2, of the Convention on the Rights of the Child, and of article 24, paragraph 1, of the Covenant.

3.15 As to Samuel's rights, it is contended that, in violation of article 2, paragraphs 3 (a) and (b), the State party failed to provide him with an effective remedy to assert Covenant rights, as the Covenant is not justifiable in Australian law. Moreover, in the proceedings affecting his interests in that he risked a permanent separation from his sister, he was not able to participate. He has no independent standing in legal proceedings.

3.16 It is also claimed that Samuel's rights under article 7 would be violated, in that his sister's removal from the family would break the close bond between the two children and cause mental suffering to Samuel.

3.17 Jessica's imminent removal from her family, would amount to an arbitrary interference with Samuel's family and home, contrary to article 17.

⁴ Communication No. 488/1992, Views adopted on 31 March 1994, paragraph 6.4.

3.18 It is argued that the removal of Jessica from her family would impair Samuel's enjoyment of family life, since he has no right to enter and remain in the US or to visit his sister, and which would constitute a violation of articles 23 and 24 in this regard. Counsel submits that when determining a child's right, the Committee may have regard to article 3 of the Convention on the Rights of the Child providing that the best interests of the child shall be a primary consideration in all actions concerning children. By failing to take any steps that would enable Samuel to protect his rights, the State party violated article 24, paragraph 1, of the Covenant.

State Party's admissibility and merits submission

4.1 By note verbale of 8 February 2001, the State party made its submission on the admissibility and merits of the communication. It submits that the communication is inadmissible and that the Committee should dismiss it without consideration on the merits. In the alternative, should the Committee be of the view that the allegations are admissible; the State party submits that they should be dismissed as unfounded.

4.2 With regard to the authors' article 2 claim, the State party submits that there were no violations of other Covenant articles, and therefore no issue of a violation under article 2 of the Covenant arises. Consequently, this aspect of the communication should be dismissed as inadmissible. In any event, Australia does provide effective remedies for violations of Covenant rights. The provisions of international treaties to which Australia becomes a party do not become part of domestic law by virtue only of the formal acceptance of the treaty by Australia. This long-standing principle of Australian law was recognised by the High Court in *Minister for Immigration and Ethnic Affairs v. Teoh*. Australia submits that there are sufficient remedies available to enable Ms. Laing, Jessica and Samuel to assert their rights under the Covenant.

4.3 With regard to the authors' claim under article 7 that the return of Jessica to the US will result in her being forcibly removed from her mother and brother, causing mental suffering, the State party submits that the allegations are inadmissible *ratione materiae*, as there is no evidence of infliction of any such mental suffering by Australia.

4.4 Firstly, Australia pursues the lawful objective of returning an abducted child to the country of habitual residence in accordance with the Hague Convention, and to have her custody determined by the relevant and competent court. Ms. Laing was ordered by the Family Court to return to the US as the proper forum to determine the issue of Jessica's custody. This was a *bona fide* attempt by Australia

to give Jessica the opportunity to be reunited with her father and have the issue of custody finally determined. The actions of a State in fulfilling its obligations under international law cannot be interpreted as evidence of cruel, inhuman or degrading treatment.

4.5 Secondly, it is incorrect to assume that Jessica's return to the US will conclusively result in her permanent removal from Australia, from Ms. Laing and from Samuel. There is a possibility that Jessica may be returned to her father, but this is a matter for US courts to determine. There is no evidence of the infliction of deliberate or aggravated treatment by Australia in violation of article 7 of the Covenant.

4.6 Thirdly, Ms. Laing claims that she and Samuel may not be allowed to enter and remain in the US. The State party submits that this is irrelevant for the purposes of establishing aggravated or deliberate treatment by Australia, in violation of article 7 of the Covenant. In any event, the Full Court of the Family Court sought to ensure that Ms. Laing and her children are permitted to enter and remain in the US, by ordering that Mr. Surgeon support the visa application of Ms. Laing and refrain from prosecuting her for Jessica's abduction.

4.7 Furthermore, while Australia concedes that Ms. Laing, Jessica and Samuel may suffer some degree of mental strain as a result of overseas travel or the court proceedings in the US, any such strain would not reach the severity of suffering required to find a violation of article 7. Australia therefore submits that the allegation of a breach of article 7 should be declared inadmissible as inconsistent with article 2 of the Optional Protocol.

4.8 In the alternative, the State party submits that the allegations ought to be dismissed as unfounded, since the applicants do not give any evidence of relevant treatment by Australia, nor that it would attain the minimum level of severity to constitute treatment in violation of article 7.

4.9 With regard to Ms. Laing's allegation under article 7, the State party submits that these matters are yet to be determined and therefore it cannot reasonably be maintained that they show that any relevant treatment has been or will be inflicted on her. Moreover, these matters will be determined by the US and cannot be regarded as deliberate treatment by Australia. In any event, there is no evidence to suggest that Ms. Laing would not be able to enter, or remain, in the US. The US recently extended the Public Benefit Parole category of visas to include abduction cases, as to allow an abducting parent to enter and remain in the US so as to be able to participate in court proceedings.

4.10 With regard to Jessica, the State party submits that it does not intend to harm her in any way by

returning her to the US. Australia's actions therefore cannot constitute treatment relevant under article 7 of the Covenant. Moreover, the Full Court of the Family Court considered whether there was a grave risk that Jessica would be physically or psychologically harmed, or otherwise placed in an intolerable situation, as a result of her removal to the US. It considered a report by a child psychologist on this point, and found that the alleged abrupt and permanent separation from her mother would cause Jessica some distress, but that she could adapt to the change and a new carer.

4.11 Finally, it is submitted that Samuel's allegation that he will be forcibly separated from his sister lacks merit for the reasons outlined in relation to admissibility of the claim.

4.12 The State party rejects Jessica's claim under article 12 as inadmissible pursuant to article 1 of the Optional Protocol, for inconsistency with the Covenant requirements to protect the family and provide special protection to the child (articles 23 (1) and 24 (1) of the Covenant). It submits that Jessica's allegation incorrectly interprets article 12 (1) of the Covenant as implying the right to remain in Australia. However, the State party understands that article 12 (1) of the Covenant is concerned with the right to movement and residence *within* Australia. Jessica's allegation therefore raises no issue under the Covenant, nor does it substantiate any claim under article 12.

4.13 The State party submits that should the Committee find sufficient evidence to demonstrate a restriction by Australia of the rights in article 12 (1) of the Covenant, such a restriction would fall within the scope of restrictions permitted by article 12 (3). Jessica's return is necessary for the maintenance of public order, that is, the prevention of child abduction and regulation of return arrangements. Jessica's return to the US is also in the interests of the protection of the family, consistent with article 23 (1) of the Covenant.

4.14 Furthermore, the State party submits that Jessica's allegation of a breach of article 12 (4) of the Covenant is without merit, since it is prohibited from arbitrarily depriving Jessica of her right to enter Australia. The Full Court of the Family Court of Australia considered whether Jessica has the right to remain in Australia. It found that she does have this right but that it has to be balanced with other rights. The judgement of the Full Court of the Family Court on 9 February 1998 found that to return Jessica to the US on application of the Hague Convention, would not affect her right, as an Australian citizen, to live in Australia. In any event, there is no reason advanced as to why her basic right to live in Australia is any more significant or worthy of protection than her basic right to not be wrongfully removed from the US.

4.15 With regard to the allegation that the Australian courts failed to determine the issue of Jessica's return to the US fairly and in accordance with the proper law, the State party submits that the Full Court of the Family Court considered, in its appeal of 14 September 1998, that the lower court applied the wrong laws but that it did not affect the outcome of the case. This decision was subsequently reviewed by another sitting of the Full Court of the Family Court and the High Court. To the extent that Ms. Laing's communication would require the Committee to assess the substantive, rather than the procedural of the decision of the High Court, the State party submits that this would require the Committee to exceed its proper functions under the Optional Protocol and that the allegations under article 14 are therefore incompatible with the Covenant. In this respect, it refers to the Committee's decision in *Maroufidou v. Sweden*.⁵ Furthermore, it submits that the authors failed to provide sufficient evidence to substantiate a violation of that article of the Covenant, and in the alternative that the Committee should find the communication admissible, that it is without merits.

4.16 The State party submits that Jessica's allegation of a violation of article 14, paragraph 1, for failure to ensure separate representation in the court proceedings, is inadmissible for failure to raise an issue under the Covenant, since she is no victim of a violation of the Covenant. It submits that while an application was made to the Family Court for a representation on Jessica's behalf, it presented insufficient reasons for why a separate representation would be of benefit to her, taken into account that Australian courts consider the child's interests to be of paramount importance. In the alternative, the communication should be dismissed as unfounded.

4.17 Finally, with regard to the allegation under article 14, paragraph 1, that no reasons were provided by the High Court, the State party submits that the reasons for the High Court decision were published on 13 April 2000; and this allegation therefore is unsubstantiated.

4.18 With regard to the authors' allegation that Jessica's return to the US is an arbitrary interference with the family and home by Australia, under article 17, the State party submits that the authors have not provided evidence of a violation, and thus fail to raise an issue under this provision. Moreover, they fail to demonstrate how they have been directly affected by the alleged lack of legal protection, and may therefore not be deemed victims of a Covenant violation.

⁵ Communication No. 58/1979, Views adopted on 9 April 1981, paragraph 10.1.

4.19 In the alternative that the Committee finds the claim under article 17 admissible, the State party finds that it is without merits, since Jessica is being returned to the US in accordance with Australia's international obligations under the Hague Convention to have the issue of Jessica's custody determined in the competent US Court. Accordingly, the intervention is in accordance with the law and not arbitrary.

4.20 The State party submits that the allegation that Jessica's return to the US constitutes a violation of the obligation to protect the family under article 23 (1), is incompatible with this provision of the Covenant. It refers to the preamble to the Hague Convention, where the signatory States affirm that they are 'firmly convinced that the interests of the child are of paramount importance in matters relating to their custody', and that the Hague Convention was drafted "to protect children internationally from the harmful effects of their wrongful removal or retention..." The fact that Australia is a party to this Convention is sufficient evidence of Australia's commitment to a protection of the family and, indeed, the child.

4.21 The State party adds that article 23 (1) requires that Australia protect the family as an institution and that Ms. Laing, Jessica and Samuel fail to provide any evidence to substantiate a claim that it has violated this obligation. The authors' allegation that applications for the return of a child made after one year are too late is deemed incorrect. In any event, the application for the return of Jessica was made within one year. The State party submits that the authors fail to establish that they are victims of any breach of article 23 (1) of the Covenant, and that the return of Jessica to the US for her custody proceedings will take into account the rights of each family member.

4.22 On the merits, the State party submits that the courts' decision to return Jessica protects the interests of the individual family members and the interests of the community as a whole in the protection of families. The Full Court of the Family Court specified that Jessica's interests were of paramount importance, notwithstanding the unlawful actions of Ms. Laing. Jessica's father is included in the definition of family under article 23 (1); the return of Jessica to the US to determine whether she will have access to her father is an active pursuit by Australia of the recognition of her right to enjoy family life.

4.23 On Jessica and Samuel's claim under article 24 (1) of the Covenant, the State party submits that the object of the Hague Convention proceedings in Australia was to determine the proper forum and not the issues of custody of, and access to, Jessica. It reiterates that the underlying principle

of that Convention is the best interests of the child. Moreover, the fact that the US Court may award custody to Jessica's father is not evidence of a violation of article 24 (1) of the Covenant. In relation to child abduction hearings, the Full Court of the Family Court has determined that it is an abducted child's best interests to be returned to its habitual country of residence and to have issues of custody and access determined by the courts of that country. In the alternative that the Committee finds this claim admissible, the State party submits that it is unfounded.

4.24 The State party submits that Ms. Laing's claim under article 26 is inadmissible *ratione materiae* on three grounds; firstly, she has no claim under article 1 of the Covenant because she has not submitted evidence to the effect that she suffered financial discrimination; secondly, she has not substantiated her claim; and thirdly, in the event that the Committee is satisfied that the author has shown a difference in the treatment of Ms. Laing and Jessica's father based on one of the prohibited grounds in Article 26, it submits that there is a failure to substantiate the assumption that this differentiation was not reasonable and objective and that the aim was not to achieve a purpose which is legitimate under the Covenant.

4.25 In this respect, it submits that Ms. Laing received legal or financial assistance from the Australian authorities in respect of the Hague Convention proceedings in Australia. She was granted legal aid by the New South Wales Legal Aid Commission in respect of the original hearing of the Hague Convention application in 1996, and the proceedings in 1999 before the Full Court of the Family Court. She was also granted financial assistance in respect of her subsequent appeal to the High Court. No financial contribution was required from her towards the cost of these proceedings; counsel had agreed to represent Ms. Laing in these proceedings on a pro bono basis, notwithstanding the provision of legal aid. In addition, the Full Court of the Family Court of Australia ordered on 9 April 1998, that Jessica's father pay costs relating to their return to the US for Ms. Laing, Jessica and Samuel. In the alternative that the Committee finds this claim admissible, the State party submits that it should be dismissed as unfounded.

Author's comments

5.1 In his response of 23 April 2001 to the State party's submission, counsel submits that the State party is mistaken when stating that the Australian courts considered Jessica's interests to be of paramount importance. The operation of the Hague Convention and its implementing legislation, show that the child's best interest is not taken into account.

Furthermore, he submits that the State party's assumption that Jessica's future custody remains to be finally determined by a US court lacks foundation, since there are final orders of an American court awarding permanent custody to Jessica's father, with no visitation rights for the mother.

5.2 In respect of the State party's allegation that article 2 is not an autonomous right, counsel submits that the jurisprudence of the Committee may be reversed at any time, in light of further arguments regarding consideration of another case, and that recent jurisprudence of the Committee reveals a shift in the application of article 2, paragraph 3 of the Covenant towards providing a freestanding right for individuals. Moreover, in view of the particular circumstances that Australia has no Bill of Rights, no uniform constitutional, statutory or common law protections, which reflect the Covenant, leaves the authors with no effective remedies to safeguard their rights.

5.3 In respect of the claim under article 7 of the Covenant, counsel submits that the salient issue is whether a certain treatment which a State party is responsible for has the effect of being cruel. She considers that the forced separation of Jessica from her family constitutes cruel treatment because it has the effect of imposing severe suffering on Jessica and her family. Furthermore, the question of whether the treatment of a child is cruel requires an assessment of the child's particular circumstances, and in that regard a mere threat of such treatment is sufficient.

5.4 Counsel also submits that where the objectives of the Hague Convention for a speedy return of a child are not satisfied, the strict and inflexible application may be oppressive and unfair in certain circumstances. In the present case it took 13 months from the time of the unlawful removal until the first decision of an Australian court, and after 6 years, final resolution of the case remained outstanding.

5.5 Moreover, the psychiatric report submitted by the authors' suggest that Jessica is sensitive to change and has difficulty with sleep and nightmares as a result of the temporary separation by police from her family in 1998. The State party has not challenged this evidence. Another report prepared for the Family Court when Jessica was 2 years old noted that "an abrupt and permanent separation from her mother would be associated with protest and extreme distress..." Counsel submits that mental distress may constitute cruel treatment.

5.6 In relation to the State party's contention under article 12 of the Covenant, that Jessica has the right to be reunited with her father as a child and as an individual within a family, counsel submits that a

claim concerning a family life must be real and not hypothetical, like in the case of Jessica.

5.7 Counsel reiterates the claim of a violation of article 14, paragraph 1. The State party's response that even if the proper law had been applied the result would have been the same, did not represent the view of second Full Court of the Family Court, but merely represents the view of one judge. Moreover, the views of the Chief Justice and another judge of that court considered that in the light of the correct law, the result may not have been the same.

5.8 In relation to the State party's contention that it is not the role of the Committee to review the facts, counsel acknowledges the Committee's established jurisprudence, but contends that the application of an incorrect law and the failure to correct the error makes the decisions of Jessica's removal "manifestly arbitrary". He adds that the authors' right to a fair trial includes a right to be provided with reasons at the time the orders were made.

5.9 In respect of the claim under article 17, counsel submits that interference with home in this case, is the interference with the authors' family arrangements and home life, including the extended family.

5.10 In respect of the claim under article 23 of the Covenant, counsel notes that the ECHR has constantly held that article 8 of the Convention includes a right for the parent to have measures taken with a view to his or her being reunited with the child, and an obligation for the national authorities to take such action. In Jessica's case, there are no family bonds between father and child, and the only family requiring protection is Jessica, Samuel, Ms. Laing, as well as the extended family in Australia,

5.11 With regard to the alleged discrimination of Ms. Laing, counsel submits that Mr. Surgeon was represented by the Central Authority, and that she only received a grant which covered a small proportion of the overall costs.

Supplementary submissions

6.1 On 3 September 2001, the State party submitted further comments. With regard to counsel's contention that there is no factual foundation for Australia's assertion that American courts may give Ms. Laing custody of, and access to, Jessica, it submits that the custody order in favour of Mr. Surgeon, may, under the Georgia Code, be challenged and subsequently changed by the Court if there is a material change in the circumstances.

6.2 Furthermore, in relation to the authors' claim that Australia has no statutory or common law protections which reflect the terms of the Covenant,

the State party submits that both legislation and the common law protect the rights in the Covenant. For example, under the *Human Rights and Equal Opportunity Commission Act 1986*, the Human Rights and Equal Opportunity Commission (the Commission) has the power to inquire into alleged Commonwealth violations of the rights set out in the Covenant.

6.3 On 7 November 2001, counsel submitted further comments and notes that the Commission does not provide an effective remedy, since its only power is to prepare a report on human rights violations to the government. The Commission cannot issue enforceable decisions.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

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

7.3 As to the claims presented by the author on behalf of her daughter Jessica, the Committee notes that at the time of her removal from the United States Jessica was fourteen months old, making her ten and a half years old at the time of the adoption of the Committee's decision. Notwithstanding the consistent practice of the Committee that a custodial, or, for that matter, non-custodial, parent is entitled to represent his or her child under the Optional Protocol procedure without explicit authorization, the Committee points out that it is always for the author to substantiate that any claims made on behalf of a child represent the best interest of the child. In the current case, the author had the opportunity to raise any concerns related to Covenant rights in the proceedings before the national courts. While the Committee takes the position that the application of the Hague Convention in no way excludes the applicability of the Covenant it considers that the author has failed to substantiate, for purposes of admissibility, that the application of the Hague Convention would amount to a violation of Jessica's rights under the Covenant. Consequently, this part of the communication is inadmissible pursuant to article 2 of the Optional Protocol.

7.4 As to the alleged violations of the author's own rights, the Committee notes that the present situation, including its possible adverse effect on the

enjoyment of Covenant rights by the author, is a result of her own decision to abduct her daughter Jessica in early 1995 from the United States to Australia and of her subsequent refusal to allow for the implementation of the Hague Convention for the purpose of letting the competent courts to decide about the parents' custody and access rights in respect of Jessica. In the light of these considerations, the Committee finds that this part of the communication has not been substantiated, for purposes of admissibility and is, consequently, inadmissible pursuant to article 2 of the Optional Protocol.

7.5 As to the remaining part of the communication, related to the author's claims presented on behalf of the author's son Samuel who was born in September 1995 in Australia, the Committee notes that the exercise of Samuel's rights is not governed by the Hague Convention. Noting also that the decisions of the United States courts may potentially affect the possibilities of Samuel to maintain contact with his sister Jessica, the Committee in the light of its conclusions above nevertheless takes the view that the author has failed to substantiate, for purposes of admissibility, any claim that such effects would amount to a violation of the Covenant. Consequently, this part of the communication is inadmissible pursuant to article 2 of the Optional Protocol.

8. The Committee therefore decides:

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

(b) that this decision shall be communicated to the State party and to the author.

APPENDIX

*Individual opinion (dissenting) by Committee members
Mr. Prafullachandra Natwarlal Bhagwati and
Mr. Walter Kälin*

The majority of the members of the Committee have declared this communication inadmissible with regard to all alleged victims. While we concur in the inadmissibility decision regarding the author and her son, we dissent when it comes to her daughter Jessica. In paragraph 7.3 of the views adopted by the Committee, the majority considers that the author has failed to substantiate, for the purposes of admissibility, that the application of the Hague Convention on the Civil Aspects of Child Abduction (the Hague Convention) would amount to a violation of Jessica's rights under the Covenant. This opinion seems to rest on the assumption that the application of the Hague Convention is in the best interest of the child and therefore automatically compatible with the Covenant. We agree with this view in principle, but disagree as regards its application in the circumstances of the present case.

The purpose of the Hague Convention is to "secure the prompt return of children wrongfully removed" (article 1) to the country from where they were abducted in order to reunite them with the parent who has been granted sole custody or to enable the courts of that country to determine the issue of custody without delay if this question is contentious. The Convention is thus based on the idea that it is in the best interest of the child to return to that country. This is certainly true if the return is executed within a relatively short period of time after the wrongful removal, but may be no longer the case if much time has elapsed since then. The Hague Convention recognizes this by allowing States not to return the child, inter alia if the child has spent a prolonged period of time abroad and is firmly settled there, if the return would cause serious harm and expose the child to serious dangers, or if the child is opposing return and is old and mature enough to take such a decision (articles 12 and 13). While the Committee had not to examine the application of the Convention by Australia as such, it is relevant to note that this treaty accepts that return may not always safeguard the rights and the best interest of the child.

In the present case, the Committee has to decide whether upholding the decision by the competent Australian courts to return Jessica to the USA would violate her rights under the Covenant, in particular those under Articles 17, 23 and 24 of the Covenant. As she has not yet been returned, the material point in time must be that of the Committee's consideration of the case, i.e. it is the present conditions which are decisive.

In this regard, we note that Jessica is almost 11 years old and is clearly opposing the envisaged return to her father. She has spent all of her life in Australia except the first four months after her birth and another three months after her first birthday. When she was approximately three years old, the Full Court of the Family Court of Australia dismissed the appeal of her mother in this case. Since then, almost eight years have passed without any full examination of the question as to whether the circumstances mentioned in articles 12 and 13 of the Hague Convention would apply in her case. This raises serious questions under the Covenant, in particular the following: Can the right of Jessica to lead a family life with her mother and brother still be trumped by the right of a distant father who was granted, more than a decade ago, sole permanent custody of the child, with no visitation rights of the mother? Would it be compatible with her right to such measures of protection as are required by her status as a minor to force her to live with a man who she most probably will battle in court and who she only knows as the person who wanted to separate her from her mother and brother as long as she can remember? These and similar questions are serious enough to warrant a thorough examination on the merits. Therefore, we would declare the communication admissible with regard to Jessica's claim to be a victim of a violation of Articles 17, 23 and 24 of the Covenant.

*Individual opinion (concurring) by Committee member
Mr. Martin Scheinin*

While I joined the majority in finding the communication inadmissible due to lack of substantiation in respect of all three alleged victims I feel a need to

present additional reasons in respect of the claims made on behalf of Jessica Joy Surgeon, now aged ten years.

First of all, I wish to make it clear from the outset that I see no problem in the Committee's approach to derive from article 2 of the Optional Protocol an admissibility condition of substantiation of any claims made of a violation of the Covenant. The reference to a "claim" of a violation in article 2 of the Optional Protocol must be understood as referring to a claim substantiated by relevant facts and legal arguments.

Secondly, when finding that Ms. Laing has not managed to substantiate her claims presented on behalf of Jessica, I attach significant importance on article 19 of the Hague Convention on Child Abduction, according to which a decision taken pursuant to the Convention on the return of a child "shall not be taken to be determination on the merits of any custody issue". As is reflected in paragraph 2.2 of the Committee's decision, the existing US court decision of May 1995, awarding Mr. Surgeon sole custody of Jessica with no visitation rights for Ms. Laing was made "until further order by a court of competent jurisdiction". Hence, the case before the Committee is not about returning Jessica to the sole custody of Mr. Surgeon without any visiting rights afforded to Ms. Laing. The result of the application of the Hague Convention would have been in 1996, and still is, merely that Jessica is to be returned to the effective jurisdiction of United States courts so that they can decide about all matters related to custody and access rights. This is pointed out by the State party in paragraphs 4.4, 4.5, 4.19, 4.23 and 6.1 of the Committee's decision. It has not been substantiated, for purposes of admissibility, that the application of this principle would amount to a violation of Jessica's rights under the Covenant. This is my main reason for finding the claim presented on behalf of Jessica inadmissible. What follows hereafter, should be seen as supplementary reasons.

As is spelled out in paragraph 7.3 of the Committee's decision, it is its consistent practice that a parent is entitled to represent an under-aged child in the Optional Protocol proceedings without explicit written authorization. This approach also means that either one of the parents, custodial or non-custodial, is entitled to submit a communication on behalf of a child, alleging violations of his or her rights. While this approach means that a parent

will always have formal standing to bring a case on behalf of his or her child, it is for the Committee to assess whether the custodial or non-custodial parent has managed to substantiate that he or she is representing the free will and the best interest of the child. For this reason it would always be best if the Committee could receive either a letter of authorization or another expression of the child's opinion whenever a child has reached an age where his or her opinion can be taken into account. In the current case, Jessica is approaching the age in which many jurisdictions attach legal significance to the freely expressed will of the child. For my assessment that Ms. Laing failed to substantiate the claims presented on behalf of Jessica, for purposes of admissibility, it was of some relevance that the Committee received no letter of authorization or other free and direct expression of Jessica's own opinion.

However, I attach more relevance to the fact that the Optional Protocol procedure always is between two parties, i.e. one or more individuals and a State party to the Optional Protocol. The requirement of substantiation relates to the claims made by the author, not merely to the issue whether the rights of a child have been violated. It may very well be that Jessica is a victim of violations by Australia of her rights under the Covenant. Those violations may result from the decisions made by Australian courts in the case, or from the non-implementation of those decisions, or from the possibility that the decisions would be implemented in the future by returning Jessica to the United States. The claim made by Ms. Laing on behalf of Jessica relates, at least primarily, to the third one of these options. It would be a part of her duty to substantiate the claim to demonstrate to the Committee that the implementation of the Court decisions taken several years ago is now likely or at least a real possibility, instead of mere speculation. In addressing the question whether such a claim is substantiated the Committee would need to keep in mind also the alternative scenario of a parent claiming a violation of the human rights of an abducted child due to the non-implementation of the decisions of a State party's own courts to return the child to the jurisdiction of the country from which he or she was removed. While there is no general solution to such conflicting human rights claims, this setting of potentially conflicting claims affects the application of the substantiation requirement as one of the admissibility conditions.

Communication No. 939/2000

Submitted by: Georges Dupuy

Alleged victim: The author

State party: Canada

Declared inadmissible: 18 March 2005

Subject matter: Impact of failure to disclose a document during criminal proceedings

Procedural issues: Level of substantiation of claim; exhaustion of domestic remedies

Substantive issues: Right to a fair trial - Right to have adequate time for the preparation of the defence - Right to be tried without undue delay - Equality of sexes.

Articles of the Covenant: 2, paragraph 3; 3; 14, paragraph 3 (b); and 26

Articles of the Optional Protocol: 2 and 5, paragraph 2

1. The author of the communication is Mr. Georges Dupuy, a Canadian citizen, born on 9 May 1947. He claims to be the victim of violations by Canada of articles 2, paragraph 3; 3; 14, paragraph 3 (b); and 26 of the International Covenant on Civil and Political Rights. He is unrepresented.

Factual background

2.1 On 16 August 1991, Ms. Gascon, the author's ex-wife, lodged a complaint against the author for allegedly making death threats against her.

2.2 Following a preliminary investigation on 19 December 1991, the Criminal Court of Quebec convicted the author on 24 April 1992 of having deliberately threatened, by telephone on or about 12 and 15 August 1991, to kill or seriously hurt Ms. Gascon. On 12 March 1993, the judge handed down a suspended sentence of two years with probation.

2.3 On 15 February 1994, the Quebec Court of Appeal refused to alter the verdict and on 11 August 1994 the Canadian Supreme Court rejected the author's application for leave to appeal. The author specifies that the decisions of the courts were based on the sole testimonies of Ms. Gascon and himself.

2.4 The author says that it was only in December 1994 that he saw a police report containing a written statement about him by Ms. Gascon dated 16 August 1991.

2.5 On 3 April 1995, under section 690 of the Criminal Code, the author requested the Minister of Justice to order a new trial on grounds of the non-

disclosure of the above-mentioned statement during the trial.

2.6 On 14 December 1995, the author sued the Government of Quebec for what he alleged was the malicious conduct of the deputy Crown prosecutor handling the case for failing to submit the written statement of 16 August 1991 during the trial.

2.7 On 20 March 1996, the Superior Court of the district of Montreal allowed the deputy prosecutor's motion for dismissal and rejected the author's appeal. On 17 June 1997, the Court of Appeal held that certain allegations in the complaint of 14 December 1995 might warrant the reopening of the trial; it quashed the judgement of the trial court and ruled that the outcome of the present appeal depended initially on the decision the Minister of Justice would take on the author's application under section 690 of the Criminal Code and subsequently on the outcome of any new trial ordered by the Minister.

2.8 On 7 May 2001, the Minister of Justice rejected the author's application for a retrial.

The complaint

3.1 The author declares that he is innocent and that he was, in fact, sentenced on the basis of false accusations by Ms. Gascon so that she could obtain possession of the family home when the couple separated.

3.2 The author maintains that Ms. Gascon's written statement was deliberately and maliciously withheld from him during the trial in order to weaken his defence. The author considers that this statement constituted new evidence which would have enabled him to contest the complainant's version. The author thus asserts that he is the victim of a miscarriage of justice. He also emphasizes the delay in the decision of the Minister of Justice under section 690 of the Criminal Code.

3.3 The author explains that his case is the result of the Quebec Government's sexist policy of punishing men in matters of conjugal violence for the benefit of extremist feminist groups, thereby undermining the equality of marriage partners.

3.4 The author complains that because he has a criminal record it is difficult for him to find a job. He says that domestic remedies have been exhausted, as described above.

State party's submission on admissibility and merits

4.1 In its submissions of 21 June 2002, the State party's principal assertion is that the communication is inadmissible. Firstly, it maintains that domestic remedies have not been exhausted with regard to the complaint of a violation of article 14, paragraph 3 (b). According to the State party, a decision under section 690 of the Criminal Code may be the subject of an application for judicial review before the Federal Court of Canada under article 18.1 of the Federal Courts Act. The Court may therefore strike down a decision and return the case to the judge for a new decision. The State party specifies that the Federal Court had in fact had to handle an application for judicial review following a refusal for a new trial in the case of an applicant who alleged that a document - the victim's medical report in this case - had not been made available to the accused before or during the trial. The Court refused to intervene, however, on the grounds that it had been established that the accused had known of the document's existence even before the trial started. The Federal Courts Act provides for a period of 30 days to submit an application for judicial review. The Court may, on request, extend this period. The decision of the Trial Division of the Federal Court may be appealed against before the Federal Court of Appeal. The latter decision may also be appealed against before the Supreme Court of Canada subject to the latter's granting of leave to appeal. The State party considers that the author of the present communication cannot be excused for not having exhausted domestic remedies because he did not observe the prescribed deadlines.

4.2 Secondly, the State party maintains that there was no prima facie violation of article 14 of the Covenant. It considers that the author is actually requesting the Committee to re-evaluate the Canadian courts' findings of fact and credibility. The State party recalls the Committee's jurisprudence according to which it is not for the Committee to question the assessment of the evidence by the domestic courts unless this assessment amounted to a denial of justice. According to the State party, the author has not established that justice was denied in the case in question, since his conviction is based on his testimony and the Court's assessment of it. The Court of Appeal of Quebec rejected the appeal against the conviction and the Supreme Court of Canada refused the application for leave to appeal against this decision. The State party stresses in this instance the importance of the doctrine of *res judicata*. The author furthermore took advantage of the application for mercy under section 690 of the Criminal Code after exhausting the rights of appeal and alleged that the trial was not fair, particularly in respect of article 14, paragraph 3 (b). According to the State party, the author cites the same grounds to

the Committee as those put forward in support of his application for mercy, namely, that Ms. Gascon's statement should have been disclosed to him during the trial. The State party maintains that the approach to follow in the present case should be based on the *Stinchcombe* decision, in which the Supreme Court of Canada stated that in the event of a failure to disclose information, it had to be ascertained whether disclosing the information might have affected the outcome of the proceedings. In this connection, the State party also mentions the jurisprudence of the European Court of Human Rights and Canada.

4.3 The State party explains that the disclosure of the victim's statement to the author would not have influenced the result of the trial and that he did receive a fair trial. The State party specifies that a criminal conviction in Canada for threatening to kill or inflict serious injury is based on evidence beyond reasonable doubt brought by the deputy Crown prosecutor that threats were made (*actus reus*) and that the accused made these threats intentionally (*mens rea*). The State party recalls that the author was well aware of the facts that gave rise to the charges against him at his trial on 24 April 1992 since on 19 December 1991 Ms. Gascon had testified and had been cross-examined on them during the preliminary investigation. The author had moreover admitted that he had made the two telephone calls to Ms. Gascon in which threats were allegedly made and that the words he had used might have been interpreted by Ms. Gascon as threats.

4.4 Although he denied making threats, the author admitted that he said the following during his telephone conversation with Ms. Gascon on 12 August 1991:

“That's why I called her again on the 12th, I mean, it was to tell her she had been violent when she was in the car with me. I mentioned her screams and her attitude. Then I said ... I told her that there could be a fatal accident if it happened again, that sort of situation. ... Perhaps she interpreted what I said as death threats, it's quite possible, I don't know. ... *Question by the Court:* So you're telling us that what you said to her was that if ever she did that again, you might lose patience, you might grab the brake ... *Reply:* Right. *Question:* ... and that that could be fatal? *Reply:* Yes, it could cause an accident. *Question:* For whom? For whom? *Reply:* Well, both of us or ... well, if there's a car accident, you don't know what might happen; I could die in the accident, or perhaps both of us ...” (Annex B, transcript of the proceedings, testimony of Mr. Dupuy, pp. 34 and 35).

4.5 According to the State party, the Court considered that these words, indicating an intention to take action while Ms. Gascon was driving, constituted a threat and that he had said them

intentionally. It was not necessary for the author to have intended to put his threats into effect and kill Ms. Gascon to establish that the offence had been committed.

4.6 With regard to the second threat to kill or injure her, which was made, according to the State party, during the telephone call of 15 August 1991, the author said that he did not recollect saying the words attributed to him by Ms. Gascon, that is, that when he left the hospital he was going to kill her. He said, however, that he thought he had said things that she had perhaps misinterpreted as threats. As the Court stressed in its judgement, the author hesitated for a long time before denying that he had made the remarks recounted by Ms. Gascon.

4.7 The State party maintains that the author's conviction is based first and foremost on the assessment of his credibility and the statements he made to the Court. The Court found that he had deliberately threatened Ms. Gascon with serious injury or even death even if he had not had any intention of carrying out the threats. According to the State party, since the two elements of the offence - the intention to cause fear by intimidating language and the act of uttering such words - have been established, the reason for making the threats is not relevant. The State party maintains that Ms. Gascon's statement conveys no new or pertinent information on the elements of the crime and would not have had the impact the author claims. Moreover, according to the State party, the author claims that he would only have used the statement to cross-examine Ms. Gascon on two points, namely the motive for the crime and the month in which the events leading to the accusations took place, so as to undermine Ms. Gascon's credibility and thus obtain a different verdict.

4.8 The State party maintains that this cross-examination would not have had any effect. The author basically alleges that Ms. Gascon said in her written statement that the motive for the crime was that she wanted to put an end to their relationship, but the author contests this and claims rather that she wanted to obtain ownership of their joint residence. The State party considers that the author appears to be confusing "motive for the crime" he is accused of committing and "motive for filing the complaint", in other words, Ms. Gascon's reasons for filing a complaint. According to the State party, even if it had been established that Ms. Gascon's desire to acquire ownership of the joint residence had been the reason for filing the complaint, this issue is completely separate from the concept of the "motive for the crime" and is not relevant to the author's being found guilty of deliberately making threats. Furthermore, the State party explains that, contrary to the author's allegations before the Committee, the "motive" for the offence is not relevant in terms of

the intention required for a finding of guilt. Consequently, even if the victim's assessment of the facts did not prove correct, the "motive for the crime" is not an element of the offence in question and is of no relevance.

4.9 According to the State party, the author could not be unaware of the connection Ms. Gascon made between the separation she had announced and his threats against her. He had been informed of this during Ms. Gascon's testimony in the preliminary investigation. Furthermore, Ms. Gascon's testimony during the trial began with a reminder that she had announced her intention of leaving him at the end of June 1991 and she stated, during cross-examination, that it was on 12 August, when he first threatened her, that the author reproached her for this decision. According to the State party, the author's counsel endeavoured to establish from the start of the cross-examination that the spouses had had a dispute over the sale of the house, but Ms. Gascon replied that that was not the case since it had been mutually agreed to wait until the author was in better health before proceeding with the sale. The author's counsel therefore cross-examined Ms. Gascon, in Mr. Dupuy's words, on the "motive for the crime". During cross-examination at the trial, Ms. Gascon repeated her statement and the testimony she had given during the preliminary investigation concerning the dispute with the author. Since she was giving her interpretation of the facts and since the versions she gave did not differ, the State party considers that the cross-examination on this point could not possibly reveal any contradiction or incompatibility that might cast doubt on her credibility. Furthermore, during the author's testimony at the trial, he gave his version of the events that had preceded and given rise to the telephone calls, which he admitted making. According to the State party, the Court had not held against him the fact that he did not accept the break-up since it was not an element of the offence, contrary to the author's claim. In any case, the Court was able to assess the testimonies of the author and the victim with regard to the events that had preceded and given rise to the telephone calls in question and was in a position to draw the appropriate conclusions.

4.10 With regard to the inconsistency of the dates in Ms. Gascon's statement, which has been pointed out by the author, the State party considers that it should be noted that in the first reference in the statement to the events, the word "June" has been struck through and replaced by "August". The word "June", however, can be found in two other places in connection with the threats made by the author. According to the State party, the only additional remedy open to the author, if he had had the written statement in his possession during the cross-

examination, would have been to ask Ms. Gascon why the rectification was incomplete. Even if Ms. Gascon had provided an incorrect explanation, the State party considers that the author, according to the law of evidence as cited in the decision of the Minister of Justice, would have been unable to prove the inaccuracy of her statement.

4.11 The State party maintains that although Ms. Gascon in her written statement had sometimes referred to the month of June rather than August, both in her testimony in the preliminary investigation and in the trial she had placed the events in August. The decisive factor is that at his trial the author was perfectly aware of the nature of the offence with which he was charged and the manner in which he allegedly committed it.

4.12 In view of the fact that Ms. Gascon's written statement shows only a partial inconsistency with regard to the dates of the events, does not contradict the content of her testimonies and adds only secondary evidence, and that the Court was able to assess the credibility of Ms. Gascon and the author, the State party considers that the disclosure of this document furnishes no additional arguments for the author's defence.

4.13 The State party adds that, with regard to the aforementioned developments, the author benefited from the presumption of innocence. According to the State party, the judge based his ruling on evidence beyond all reasonable doubt furnished by the deputy Crown prosecutor in respect of the various elements of the offence in question.

4.14 With regard to the complaint concerning the consequences of the conviction, namely the difficulty of finding a job, the State party points out that under the Criminal Records Act, a person who has been convicted of an offence under an Act of Parliament (including the Criminal Code) may apply to the National Parole Board for a pardon in respect of that offence. In the author's case, such application may be made five years after the legal expiry of the probation period. The Canadian Human Rights Act also prohibits discrimination, including in the field of employment, on grounds of sex or a conviction for which a pardon has been granted. "A conviction for which a pardon has been granted" means "a conviction of an individual for an offence in respect of which a pardon has been granted by any authority under law and, if granted or issued under the Criminal Records Act, has not been revoked or ceased to have effect". Any person who considers that he or she is the victim of discrimination by an employer or a body covered by federal legislation may lodge a complaint with the Canadian Human Rights Commission. Article 18.2 of the Charter of Human Rights and Freedoms stipulates, moreover, that "No one may dismiss,

refuse to hire or otherwise penalize a person in his employment owing to the mere fact that he was convicted of a penal or criminal offence, if the offence was in no way connected with the employment or if the person has obtained a pardon for the offence". Remedies are open to the author in the event of a violation of this article, in that he can lodge a complaint with Quebec's Commission des droits de la personne et de la jeunesse or take the case to the Human Rights Tribunal or to an ordinary court.

4.15 With regard to the complaint of the violation of article 2, paragraph 3, of the Covenant, the State party considers that this article does not constitute a substantive right as such but is appurtenant to the violation of a right guaranteed by the Covenant. In the State party's view, the author has not established the existence of a violation of this nature.

4.16 With regard to the complaint of violations of articles 3 and 26 of the Covenant, the State party maintains that there is no prima facie evidence of a violation. The State party points out that its policy is not discriminatory and is aimed at furthering equality between men and women. In addition, all actions by the police, the judiciary or other bodies in Quebec must observe the judicial rights and legal guarantees of all persons concerned, and in particular the impartiality and independence of the judiciary, as stipulated in the Charter of Human Rights and Freedoms and the Canadian Charter of Rights and Freedoms. In correspondence with a national who brought up this subject, the Commission des droits de la personne et des droits de la jeunesse in Quebec has already concluded that the policy is not discriminatory.

4.17 The State party maintains, subsidiarily, that the applicant's allegations are unfounded for the reasons set out above.

Author's comments

5.1 In his comments dated 30 August 2002, the author contests the State party's arguments of inadmissibility for failure to exhaust domestic remedies, on grounds of the undue delay in the decision of the Minister of Justice under section 690 of the Criminal Code, which was handed down on 7 May 2001 in respect of an application by the author dated 3 April 1995.

5.2 He also states that he is not seeking a re-evaluation of the Canadian courts' findings of fact and credibility, although he considers that the failure to disclose Ms. Gascon's statement, which was essential to his defence, can only be understood in the context of the trial. The author considers that the judge invented a scenario based on simple remarks made by the author during the trial which were

subsequently used to support a trumped up charge, despite all the lies told by Ms. Gascon.

5.3 With regard to the non-disclosure of the document, the author contests the State party's arguments and points out that Ms. Gascon's written statement was essential for his full answer and defence. Unlike the State party, the author considers that the evidence of the defendant's criminal intent (*mens rea*) that emerges from this statement is relevant to the evaluation of his guilt. The author explains that while the complainant and the deputy prosecutor were able to prepare their strategies on the basis of the statement, the accused was deprived of this strategic information during the trial. The author explains that he would have been able to use the statement to cross-examine Ms. Gascon, not only on the "motive for the crime" and the dates of the events, but also on many other points, all of which, according to the author, would have been relevant in revealing the scope and gravity of Ms. Gascon's false accusations. Furthermore, in his opinion, even though the written statement contains the two accusations of death threats which led to his conviction, this in no way justifies the fact that the document was, as he alleges, concealed from him.

5.4 The author asserts that his case reveals an omnipresent sexism in Quebec's policy with respect to conjugal violence. As president of the association "Coalition pour la défense des droits des hommes du Québec" and vice-president of the Groupe d'entraide aux pères et de soutien à l'enfant, the author says that he has identified numerous cases of men who have been aggrieved, particularly by the non-disclosure of written statements by women complainants, and that this demonstrates how the courts treat men. The author considers that the judges acted maliciously in his case by not disclosing the aforementioned document, truncating the author's remarks and basing themselves on extreme feminist positions, under the overall protection of the Minister of Justice (who is a woman).

5.5 In his additional comments of 7 March 2003, 15 June 2003 and 26 October 2004, the author repeats his arguments concerning the exhaustion of domestic remedies, based essentially on the excessive delay in the decision of the Minister of Justice under section 690 of the Criminal Code. He adds that the Criminal Code does not provide for a right of appeal against that decision. Lastly, he asserts that the jurisprudence concerning applications for judicial review stemming from the case *William R. v. The Honourable A. Anne McLellan, Minister of Justice and Attorney General of Canada* is practically unknown, is not indexed and is in contradiction with the Criminal Code.

Supplementary submissions by the State party

6.1 In its submissions of 11 August 2003, the State party reiterates its position that the communication is inadmissible and, subsidiarily, unfounded.

6.2 The State party specifies that although the decision of the Minister of Justice cannot be appealed against, it is nevertheless subject to judicial review by the Federal Court, as is any decision taken by a "federal board, commission or other tribunal", as currently defined (since 1 February 1992) by the Federal Courts Act. A decision taken under section 690 of the Criminal Code may thus be the subject of an application for judicial review to the Federal Court of Canada under article 18.1 of the Federal Courts Act. The Court may strike down the decision and return the case to the judge for a new decision if one of the grounds justifying its intervention is established (see paragraph 4.1). According to the State party, this is a remedy which could have given the author satisfaction. The State party adds that the *Williams* case, which is available on the Internet, clearly establishes the existence of a domestic remedy, and that the author cannot be excused for not having exhausted that remedy.

Admissibility considerations

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

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

7.3 With regard to the complaint of a violation of article 14, paragraph 3 (b) read together with article 2 (3), the Committee has taken note of the State party's arguments concerning inadmissibility for failure to exhaust domestic remedies (see paragraphs 4.1 and 6.2) and the author's comments in this regard. The Committee notes that the author admits that he did not submit an application for judicial review of the decision of the Minister of Justice of 7 May 2001 partly because of the excessive delay in taking the decision and partly because of the absence of public awareness of the jurisprudence in the *Williams* case, which the author further considers to be contrary to the Criminal Code (see paragraph 5.5). After examining the evidence in the file, the Committee considers, firstly, that the complaint concerning the excessive duration of the procedure under section 690

of the Criminal Code need not be addressed, since the author did not complain to the Minister of Justice about delays during the procedure. In addition, the Committee considers that the author has not effectively refuted the State party's submission that the application for judicial review to the Federal Court of Canada under article 18.1 of the Federal Courts Act was indeed an available and effective remedy. The Committee also considers that the author's argument that he was unaware of that remedy is not a valid argument, and that the State party cannot be held responsible for that situation. The Committee consequently finds that this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

7.4 Concerning the complaints of violations of articles 3 and 26 of the Covenant, the Committee considers that the author's allegations that his sentence and the non-disclosure of Ms. Gascon's

statement were the result of Quebec's allegedly sexist policy have not been sufficiently substantiated, for purposes of admissibility. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

7.5 Concerning the author's complaint of his difficulties in finding a job because of his criminal record, the Committee considers that the author has not exhausted domestic remedies with respect to this allegation of discrimination. Consequently, this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

8. The Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and article 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be communicated to the author and to the State party.

Communication No. 989/2001

Submitted by: Walter Kollar (represented by Alexander H. E. Morawa)

Alleged victim: The author

State party: Austria

Declared inadmissible: 30 July 2003

Subject matter: Equality in access to court

Procedural issues: Non-exhaustion of domestic remedies - Examination under another procedure of international investigation or settlement

Substantive issues: "Same matter" within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.

Articles of the Covenant: 14, paragraph 1, and 26

Articles of the Optional Protocol: 5, paragraph 2 (a) and (b)

1.1 The author of the communication is Mr. Walter Kollar, an Austrian citizen, born on 3 August 1935. He claims to be a victim of violations by Austria¹ of articles 14, paragraph 1, and 26 of the Covenant. He is represented by counsel.

1.2 Upon ratification of the Optional Protocol on 10 December 1987, the State party entered the following reservation: "On the understanding that,

¹ The Covenant and the Optional Protocol to the Covenant entered into force for the State party respectively on 10 December 1978 and 10 March 1988.

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 European Convention for the Protection of Human Rights and Fundamental Freedoms."

The facts as submitted by the author

2.1 Since 1978, the author was employed as independent examining doctor (*Vertrauensarzt*) and, as of February 1988, as senior medical doctor (*Chefarzt*) at the Salzburg Regional Medical Health Insurance for Workers and Employees (*Salzburger Gebietskrankenkasse für Arbeiter und Angestellte*).

2.2 On 22 September 1988, following accusations of illegal and inappropriate conduct against the author and his former supervisor, the Chairman of the Insurance unsuccessfully sought approval by the employees' representative committee (*Betriebsrat*) to suspend the author from his function.

2.3 On 23 September 1988, the employer brought criminal charges against the author, which were ultimately not pursued by the prosecutor. The employer then initiated an equally unsuccessful private criminal prosecution.

2.4 On 27 October 1988, the Board of the Insurance initiated disciplinary proceedings against the author and suspended him on reduced pay. On 22 February 1989, a disciplinary committee was constituted. The author was accused of inappropriate conduct involving personal enrichment, at the expense of his employer. On 22 January 1990, the disciplinary committee, having met several times *in camera*, found the author guilty on certain counts, such as illegal prescription of medication to the financial detriment of his employer, a violation of his loyalty and confidentiality duties by holding a press conference on the charges against his former supervisor, and the illegal admission of patients to a specific rehabilitation centre. No appeal from this decision was possible.

2.5 On 23 January 1990, the Insurance purported to dismiss the author from service on the basis of the disciplinary committee's findings, allegedly without having complied with certain procedural requirements. After complying with these requirements, the Insurance, on 9 November 1990, stated that it considered the first dismissal effective and, in any event, dismissed the author from service a second time.

2.6 On 14 December 1988, the author appealed against his suspension of 27 October 1988 before the Salzburg Regional Court (*Landgericht Salzburg*) which, by decision of 15 February 1989, dismissed his action. On 19 September 1989, the Linz Court of Appeal (*Oberlandesgericht Linz*) dismissed his appeal; but the Supreme Court (*Oberster Gerichtshof*), on 28 February 1990, allowed the author's appeal and referred the case back to the Regional Court, holding that it had not been established whether sufficient grounds for the suspension existed. On 7 August 1990, the Salzburg Regional Court again rejected the author's claim. This decision was upheld by the Linz Court of Appeal on 29 January 1991. On 10 July 1991, the Supreme Court again granted the author's appeal, holding that the lower courts had again failed to establish sufficient grounds for the author's suspension. On 13 July 1992, the Salzburg Regional Court rejected the author's legal action for the third time. Both the Linz Court of Appeal, on 9 March 1993, and the Supreme Court, on 22 September 1993, dismissed the author's appeal.

2.7 The author also brought a legal action against his first dismissal from service, dated 23 January 1990. On 9 October 1990, the Salzburg Regional Court, acting under its labour and social law jurisdiction, granted the author's claim. On 11 June 1991, the Linz Court of Appeal and, on 6 November 1991, the Supreme Court dismissed the employer's appeal, holding that the employment relationship between the author and his employer remained effective.

2.8 On 16 November 1990, the author brought a legal action against his second dismissal from service, dated 9 November 1990. Despite his objection, the proceedings were suspended on 19 March 1991, pending the final outcome of the proceedings against the first dismissal. Subsequent to the Supreme Court's decision of 6 November 1991, legal proceedings in respect of the second dismissal resumed, and, on 25 November 1993, the Salzburg Regional Court rejected the author's claim. On 29 November 1994, the Linz Court of Appeal and, on 29 March 1995, the Supreme Court, dismissed the author's appeals, finding him guilty of negligent breaches of duty, which justified his dismissal.

2.9 On 7 February 1996, the author lodged an application with the former European Commission on Human Rights, alleging violations of his rights under articles 6, 10, 13 and 14 of the European Convention on Human Rights and Fundamental Freedoms, as well as article 2, paragraph 1, of Protocol No. 7 thereto. This application was never examined by the Commission. Instead, the European Court of Human Rights, sitting as a panel of three judges, on 17 March 2000 (after the entry into force of Protocol No. 11), declared the application inadmissible. With regard to the author's complaints about the disciplinary proceedings instituted by his employer, the Court held that "the role of the Health Insurance Office was that of a private employer, the disciplinary proceedings complained of were not conducted by a body exercising public power, but were internal to the applicant's workplace for the purpose of establishing whether or not he should be dismissed [...]".² The Court concluded that this part of the application was incompatible *ratione personae* with the Convention. With respect to articles 13 and 14 of the Convention as well as article 2 of Protocol No. 7, the Court found that the matters complained of did not disclose any appearance of a violation of these rights.³

The complaint

3.1 The author claims that he is a victim of violations of articles 14, paragraph 1, and 26 of the Covenant because he was denied equal access to an independent and impartial tribunal, as the Austrian courts only reviewed the findings of the disciplinary committee for gross irregularities.

² European Court of Human Rights, 3rd Section, decision on admissibility, Application No. 30370/96 (*Walter A.F. Kollar v. Austria*), 17 March 2000, at para. 1.

³ *Ibid.*, at para. 3.

3.2 By reference to the Committee's decision in *Nahlik v. Austria*,⁴ the author contends that article 14, paragraph 1, of the Covenant also applies to the proceedings before the disciplinary committee. He submits that the disciplinary committee denied him a public hearing by meeting *in camera*. The exclusion of the public was not necessary to protect his patients' right to privacy, since their names could have been replaced by acronyms. The author claims that his right to a fair hearing has been violated because the principle of 'equality of arms' was infringed in several ways. Firstly, the prosecuting party was given an opportunity to discuss the charges against him with the chairman of the disciplinary committee, while his defence was not provided such an opportunity. Moreover, the time he was given to prepare his defence was disproportionately short. Since the committee's chairman refused to receive his lawyer's written reply to the written accusations of the prosecuting party, the defence was required to present all arguments orally during the hearings. As a result, a medical expert who testified before the committee had no access to the written submissions of the defence, relying solely on the prosecuting party's submissions.

3.3 Furthermore, the author claims that the disciplinary committee lacked the impartiality and independence required by article 14, paragraph 1, of the Covenant. Despite repeated complaints which were never decided upon by the disciplinary committee, the committee was composed of, in addition to the chairman, two members appointed by the employer and two members appointed by the employees' representative committee (*Betriebsrat*) who were subordinate to the employer. Similarly, the author's motion to replace at least one member by a medical expert was not decided upon.

3.4 The author contends that the committee's chairperson was biased since he privately discussed the case for several hours with the prosecuting party and because he rejected his written reply to the charges, pretending that it had been submitted after the expiry of the deadline and by pasting over the original note, in the file, with an instruction to transmit the submission to the prosecuting party. Moreover, the chairman reportedly also ignored various procedural objections of the defence, manipulated the records of the hearings and intimidated the author's defence lawyer as well as, on one occasion, a medical expert testifying in the author's favour. By reference to the Committee's

Views in *Karttunen v. Finland*,⁵ the author concludes that the chairperson displayed a bias, in violation of article 14, paragraph 1, of the Covenant.

3.5 The author also claims that he was discriminated against, contrary to articles 14, paragraph 1, and 26 of the Covenant, which require that objectively equal cases be treated equally. In support of this claim, he submits that his former supervisor, who faced similar charges, was treated differently during disciplinary proceedings and was ultimately acquitted. In the supervisor's case, three members of the disciplinary committee were replaced by senior medical doctors at the supervisor's request, while not a single member of the committee was replaced by a medical doctor in the author's own case, even though his request to that effect was based on identical arguments and formulated by the same lawyer. Moreover, his former supervisor was acquitted of the charge of having issued private prescriptions using health insurance forms, on the ground that this practice had already been established by his predecessor. Furthermore, despite an agreement between one of the author's predecessors and the Salzburg Regional Medical Health Insurance permitting such use of health insurance forms, the author was found guilty by the committee on the same charge. The committee argued that, since the predecessor had concluded the agreement in his personal capacity, the author could have invoked it only after a renewal *ad personam*.

3.6 With regard to the Austrian reservation to article 5, paragraph 2 (a), of the Optional Protocol, the author argues that the same matter "has not been examined by the European Commission of Human Rights". Thus, his complaint was declared inadmissible not by the European Commission but by the European Court of Human Rights. Moreover, the Registry of the European Court failed to advise him of its concerns about the admissibility of his application, thereby depriving him of an opportunity to clarify doubts or to withdraw his application in order to submit it to the Human Rights Committee. The author also argues that the European Court did not even formally decide on his complaint that the extremely limited review by the Austrian courts of the disciplinary committee's decision violated his right to an independent and impartial tribunal established by law (article 6, paragraph 1, of the European Convention on Human Rights and Fundamental Freedoms).

3.7 The author contends that there are substantial differences between the Convention articles and the Covenant rights invoked by him. Thus, a free-

⁴ Communication No. 608/1995, *Nahlik v. Austria*, decision on admissibility adopted on 22 July 1996, at para. 8.2.

⁵ Communication No. 387/1989, Views adopted on 23 October 1992, at para. 7.2.

standing discrimination clause similar to article 26 of the Covenant cannot be found in the European Convention. Furthermore, article 14, paragraph 1, of the Covenant guarantees a right to equality before the courts which is unique in its form. By reference to the Committee's decision in *Nahlik v. Austria*,⁶ the author adds that the scope of applicability of that provision has been interpreted more broadly than that of article 6, paragraph 1, of the European Convention.

State party's observations

4.1 By note verbale of 17 September 2001, the State party made its submission on the admissibility of the communication. It considers that the Committee's competence to examine the communication is precluded by article 5, paragraph 2 (a), of the Optional Protocol read in conjunction with the Austrian reservation to that provision.

4.2 The State party argues that the reservation is applicable to the communication because the author has already brought the same matter before the European Commission of Human Rights, resulting in the subsequent examination of the application by the European Court of Human Rights, which assumed the tasks of the Commission following the reorganization of the Strasbourg organs pursuant to Protocol No. 11.

4.3 In the State party's opinion, the fact that the European Court rejected the application as being inadmissible, does not mean that the Court has not "examined" the author's complaints, as required by the Austrian reservation. The Court's reasoning that "there is no appearance of a violation of the applicant's rights"⁷ and that the matters complained of "do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols"⁸ clearly showed that the decision to dismiss the application on grounds of admissibility "also comprises far reaching aspects on the merits".

4.4 While admitting that the European Court did not examine the nature of the disciplinary proceedings against the author, the State party emphasizes the Court's finding that it cannot be held responsible for disputes between private employers, such as the Regional Health Insurance Board for Workers and Employees, and their employees.

⁶ Communication No. 608/1995, decision adopted on 22 July 1996, at para. 8.2.

⁷ See European Court of Human Rights, 3rd Section, decision on admissibility, Application No. 30370/96 (*Walter A.F. Kollar v. Austria*), 17 March 2000, at para. 2.

⁸ See *ibid.*, para. 3.

Author's comments

5.1 By letter of 15 October 2001, the author responded to the State party's submission, reiterating that, based on the ordinary meaning as well as the context of the State party's reservation, the Committee is not precluded from examining his communication. He insists that the Austrian reservation does not apply to his communication since the same matter was never "examined" by the European Commission. He compares the Austrian reservation to similar but broader reservations to article 5, paragraph 2 (a), of the Optional Protocol made by 16 other States parties to the European Convention, and submits that the State party is the only one that refers to an examination "by the European Commission of Human Rights".

5.2 The author considers it irrelevant that the State party, when entering its reservation, intended to prevent a simultaneous and successive consideration of the same facts by the Strasbourg organs and the Committee, arguing that the intent of the party making a reservation is merely a supplemental means of interpretation under article 32 of the Vienna Convention on the Law of Treaties, which may only be utilized when an interpretation pursuant to article 31 of the Vienna Convention (ordinary meaning, context, and object and purpose) proves insufficient.

5.3 By reference to the jurisprudence of the European and the Inter-American Courts of Human Rights, the author emphasizes that reservations to human rights treaties must be interpreted in favour of the individual. Any attempt to broaden the scope of the Austrian reservation must therefore be rejected, especially since the Committee disposes of adequate procedural devices to prevent an improper use of parallel proceedings at its disposal, such as the concepts of "substantiation of claims" and "abuse of the right to petition", in addition to article 5, paragraph 2 (a), of the Optional Protocol.

5.4 The author concludes that the communication is admissible in the light of article 5, paragraph 2 (a), of the Optional Protocol, since the Austrian reservation does not come into play. Subsidiarily, he submits that the communication is admissible insofar as it relates to the alleged violations of his rights in the disciplinary proceedings, and to the lack of an effective remedy to have these proceedings reviewed by a court of law, because the European Court of human Rights failed to examine his complaints in that regard.

Additional observations by the parties

6.1 By note verbale of 30 January 2002, the State party made an additional submission on the admissibility of the communication in which it

explained that the Austrian reservation was made on the basis of a recommendation by the Committee of Ministers, suggesting that member States of the Council of Europe “which sign or ratify the Optional Protocol might wish to make a declaration [...] whose effect would be that the competence of the UN Human Rights Committee would not extend to receiving and considering individual complaints relating to cases which are being or already have been examined under the procedure provided for by the European Convention”.⁹

6.2 The State party argues that its reservation differs from similar reservations made by other member States pursuant to that recommendation only insofar as it directly addresses the relevant Convention mechanism, for the sake of clarity. All reservations aim at preventing any further international examination following a decision of one of the mechanisms established by the European Convention. It would, therefore, be inappropriate to deny the Austrian reservation its validity and continued scope of application on the mere basis of an organizational reform of the Strasbourg organs.

6.3 Moreover, the State party contends that, following the merger of the European Commission and the “old” Court, the “new” European Court can be considered the “legal successor” of the Commission since several of its key functions, including decisions on admissibility, establishment of the facts of a case and making a first assessment on the merits, were formerly discharged by the Commission. Given that the reference to the European Commission in the State party’s reservation was specifically made in respect of these functions, the reservation remains fully operative after the entry into force of Protocol No. 11. The State party contends that it was not foreseeable, when it entered its reservation in 1987, that the protection mechanisms of the European Convention would be modified.

6.4 The State party reiterates that the same matter was already examined by the European Court which, in order to reject the author’s application as being inadmissible, had to examine it on the merits, if only summarily. In particular, it follows from the European Court’s rejection of the complaints concerning the disciplinary proceedings that the Court considered the merits of the complaint prior to taking its decision.

7.1 By letter of 25 February 2002, the author notes that nothing prevented the State party from entering a reservation upon ratification of the Optional Protocol precluding the Committee from examining communications if the same matter has

already been examined “under the procedure provided for by the European Convention”, as recommended by the Committee of Ministers, or from using the broader formulation of a previous examination by “another procedure of international investigation or settlement”, as other member States of the European Convention did.

7.2 Moreover, the author submits that the State party could even consider entering a reservation to that effect by re-ratifying the Optional Protocol, as long as such a reservation could be deemed compatible with the object and purpose of the Optional Protocol. What is not permissible, in his view, is to broaden the scope of the existing reservation in a way contrary to fundamental rules of treaty interpretation.

7.3 The author rejects the State party’s argument that key tasks of the “new” European Court, such as decisions on admissibility and ascertainment of the facts of a case, were originally within the exclusive competence of the European Commission. By reference to the Court’s jurisprudence, he argues that the “old” European Court also consistently dealt with these matters.

7.4 The author challenges the State party’s contention that the reorganization of the Convention organs was not foreseeable in 1987, by quoting parts of the Explanatory Report to Protocol No. 11, which summarize the history of the “merger” deliberations from 1982 until 1987.

Issues and proceedings before the Committee

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

8.2 The Committee notes that the State party has invoked the reservation it made under article 5, paragraph 2 (a), of the Optional Protocol, which precludes the Committee from considering claims that have previously been “examined” by the “European Commission on Human Rights”. As to the author’s argument that the application which he submitted to the European Commission was, in fact, never examined by that organ but declared inadmissible by the European Court of Human Rights, the Committee observes that the European Court, as a result of treaty amendment by virtue of Protocol No. 11, has legally assumed the former European Commission’s tasks of receiving, deciding on the admissibility of, and making a first assessment on the merits of applications submitted under the European Convention. The Committee observes, for purposes of ascertaining the existence of parallel or, as the case may be, successive

⁹ Council of Europe, Committee of Ministers, Resolution (70) 17 of 15 May 1970.

proceedings before the Committee and the Strasbourg organs, that the new European Court of Human Rights has succeeded to the former European Commission by taking over its functions.

8.3 The Committee considers that a reformulation of the State party's reservation, upon re-ratification of the Optional Protocol, as suggested by the author, only to spell out what is in fact a logical consequence of the reform of the European Convention mechanisms, would be a purely formalistic exercise. For reasons of continuity and in the light of its object and purpose, the Committee therefore interprets the State party's reservation as applying also to complaints which have been examined by the European Court.

8.4 With respect to the author's argument that the European Court has not "examined" the substance of his complaint when it declared the application inadmissible, the Committee recalls its jurisprudence that where the European Commission has based a declaration of inadmissibility not solely on procedural grounds,¹⁰ but on reasons that comprise a certain consideration of the merits of the case, then the same matter has been "examined" within the meaning of the respective reservations to article 5, paragraph 2 (a), of the Optional Protocol.¹¹ In the present case, the European Court went beyond an examination of purely procedural admissibility criteria, considering that the author's application was inadmissible, partly for incompatibility *ratione personae*, partly because it disclosed no appearance of a violation of the provisions of the Convention. The Committee therefore concludes that the State party's reservation cannot be denied simply on the assumption that the European Court did not issue a judgment on the merits of the author's application.

8.5 As regards the author's contention that the European Court has not examined his claims under article 6, paragraph 1, of the Convention regarding the proceedings before the disciplinary committee, and that it has not even formally decided on his

¹⁰ See, for example, Communication No. 716/1996, *Pauger v. Austria*, Views adopted on 25 March 1999, at para. 6.4.

¹¹ See, for example, Communication No. 121/1982, *A.M. v. Denmark*, decision on admissibility adopted on 23 July 1982, at para. 6; Communication No. 744/1997, *Linderholm v. Croatia*, decision on admissibility adopted on 23 July 1999, at para. 4.2.

complaint related to the limited review of the decision of the disciplinary committee by the Austrian courts, the Committee notes that the European Court considered "that the disciplinary proceedings complained of were not conducted by a body exercising public power, but were internal to the applicant's workplace for the purpose of establishing whether or not he should be dismissed". On this basis, the Court concluded that the author's right to an effective remedy (article 13 of the European Convention and article 2, paragraph 1, of Protocol No. 7) had not been violated.

8.6 The Committee further observes that, despite certain differences in the interpretation of article 6, paragraph 1, of the European Convention and article 14, paragraph 1, of the Covenant by the competent organs, both the content and scope of these provisions largely converge. In the light of the great similarities between the two provisions, and on the basis of the State party's reservation, the Committee considers itself precluded from reviewing a finding of the European Court on the applicability of article 6, paragraph 1, of the European Convention by substituting its jurisprudence under article 14, paragraph 1, of the Covenant. The Committee accordingly finds this part of the communication inadmissible under article 5, paragraph 2 (a), of the Optional Protocol, as the same matter has already been examined by the European Court of Human Rights.

8.7 With regard to the author's claim under article 26 of the Covenant, the Committee recalls that the application of the principle of non-discrimination in that provision is not limited to the other rights guaranteed in the Covenant and notes that the European Convention contains no comparable discrimination clause. However, it equally notes that the author's complaint is not based on free-standing claims of discrimination, since his allegation of a violation of article 26 does not exceed the scope of the claim under article 14, paragraph 1, of the Covenant. The Committee concludes that this part of the communication is also inadmissible under article 5, paragraph 2 (a), of the Optional Protocol.

9. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

Communication No. 1019/2001

Submitted by: Mercedes Carrión Barcáiztegui (represented by Carlos Texidor Nachón and José Luis Mazón Costa)

Alleged victim: The authors

State party: Spain

Declared inadmissible: 30 March 2004 (eightieth session)

Subject matter: Alleged discrimination in succession to hereditary title of nobility

Procedural Issues: Examination of "same matter" - Exhaustion of domestic remedies - Incompatibility *ratione materiae*

Substantive Issues: Discrimination on ground of sex - Equality before the law

Articles of the Covenant: 3; 17 and 26

Article of the Optional Protocol: 3

1. The author of the communication, dated 8 March 2001, is Mercedes Carrión Barcáiztegui, a Spanish national, who claims to be a victim of violations by Spain of articles 3, 17 and 26 of the International Covenant on Civil and Political Rights. She is represented by counsel. The Optional Protocol to the Covenant entered into force for Spain on 25 January 1985.

The facts as submitted by the author

2.1 Ms. María de la Concepción Barcáiztegui Uhagón¹ - the author's aunt - held the title of *Marquise of Tabalosos*. By a notarized deed of 20 June 1989, she provided that on her death, her brother Íñigo Barcáiztegui Uhagón should succeed her as holder of the title. She died on 4 April 1993 without issue.

2.2 In February 1994 the author initiated a legal action against her uncle, Íñigo Barcáiztegui Uhagón, and her cousin, Javier Barcáiztegui Rezola, claiming the noble title of Marquis of Tabalosos.² The author claimed the greater right, since she occupied by representation the place of her mother, Mercedes Barcáiztegui - deceased on 7 September 1990 - who

was the younger sister of Concepción Barcáiztegui y Uhagón and the older sister of Íñigo Barcáiztegui Uhagón. The author also claims that renunciation of the title in favour of her uncle supposes a modification of the line of succession to the noble title and a contravention of the inalienable nature of titles of nobility.

2.3 In response, counsel for the defendants cited, among other arguments, the fact that regardless of the validity of the transfer, the principle of male succession remained the preferential criterion for succession to the Marquisate of Tabalosos, which was governed not by a general norm, but by a specific act, at the royal prerogative, which did not constitute part of the legal order.

2.4 In a judgement of 25 November 1998, the Madrid Court of First Instance dismissed the author's action, finding that the suit concerned a situation involving collateral relatives of the last holder of the title; the court abided by the judgement of the Constitutional Court of 3 July 1997,³ which declared the historical preferential criteria for the transmission of titles of nobility to be constitutional. These criteria are: firstly, the degree of kinship; next, sex - precedence of male descendants over female; and, thirdly, age. With regard to transfer of the title, the Madrid court determined that it did not represent a modification of the order of succession to titles of nobility.

2.5 The author claims that she has exhausted all remedies, since by virtue of the judgement of the Constitutional Court of 3 July 1997 no remedy is available to her.⁴ However, on 10 December 1998, she appealed before the National High Court. In her communication she states that despite the manifest

¹ Concepción Barcáiztegui Uhagón was the firstborn daughter of José Barcáiztegui y Manso, the third Marquis of Tabalosos. María Mercedes Barcáiztegui Uhagón, the author's mother, was his second daughter and Íñigo Barcáiztegui Uhagón's elder sister. According to the author, Íñigo conceded the title to his son, Javier Barcáiztegui Rezola.

² The author relates that she asked her cousin why her uncle had conceded the title to him.

³ This judgement prompted the Supreme Court to modify its jurisprudence, which had departed from historical precedent with regard to equality of men and women.

⁴ Article 38, paragraph 2, of the Constitutional Court Organization Act provides that "judgements for dismissal of appeals on matters of constitutionality and in disputes in defence of local autonomy may not be the subject of any subsequent appeal on the issue by either of these two means based on the same violation of the same constitutional precept".

futility of such an appeal, she submitted it with the aim of preventing her case from becoming *res judicata*, thereby ensuring the right to an effective remedy, as provided for in article 2, paragraph 3 (a), of the Covenant. According to the author, if the Committee decides to accept her claims, the National High Court could ultimately find in her favour in her appeal.

The complaint

3.1 The author claims that the facts submitted to the Committee for its consideration constitute a violation of article 26 of the Covenant, in that male descendants are given preference as heirs to the detriment of women, thereby placing women in a situation of unjustified inequality. She argues that preference for males in succession to titles of nobility is not a mere custom of a private group, but a precept established in legal norms, regulated by Spanish laws of 4 May 1948, 11 October 1820 and *Partidas* II.XV.II. The author reminds the Committee that Economic and Social Council resolution 884 (XXXIV) recommends that States ensure that men and women, in the same degree of relationship to a deceased person, are entitled to equal shares in the estate and have equal rank in the order of succession. She maintains that in this case the estate comprises a specific item, namely the title of nobility, which can be transmitted to one person only, selected on the basis of the status of firstborn. The author claims that even if article 2 of the Covenant limits its scope to protection against discrimination of the rights set forth in the Covenant itself, the Committee, in its general comment No. 18, has taken the view that article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right, prohibiting discrimination in law or in fact in any field regulated by public authorities and imposing a duty of protection on them in that regard.

3.2 The author claims that the facts constitute a violation of article 3 of the Covenant, in conjunction with articles 17 and 26. She reminds the Committee that in its general comment No. 28 of March 2000, on article 3, it drew attention to the fact that inequality in the enjoyment of rights by women was deeply embedded in tradition, history and culture, including religious attitudes.

State party's observations

4.1 The State party, in its written submission of 14 December 2001, argues that the communication is inadmissible by virtue of article 2 and article 5, paragraph 2 (b) of the Optional Protocol, since domestic remedies have not been exhausted. The State party asserts that the complaint embodies a contradiction, since the author claims on the one

hand that she has exhausted all domestic remedies, since the judgement by the plenary Constitutional Court rules out any resubmission of the issue before domestic courts, yet, on the other hand, states that she filed an appeal with the aim of rendering effective possible views by the Committee.

4.2 The State party observes that proceedings and the successive appeals possible are regulated under the Spanish legal regime. In the present case, after the judgement by the court of first instance, it was possible to appeal before the Provincial High Court, whose decision could be set aside on appeal by the Supreme Court; if it was considered that some fundamental right had been violated, an appeal for protection could be made before the Constitutional Court. The State party argues that the author is seeking to incorporate the Committee as an intermediate judicial body between those existing under Spanish law, thus violating its subsidiary nature and the legality of domestic proceedings. The State party contends that it is contrary to law to submit a case before a domestic court and before the Committee simultaneously, and in this connection refers to the United Nations Basic Principles on the Independence of the Judiciary, arguing that to make simultaneous submissions of the complaint is to seek undue interference by the Committee with a domestic court.

4.3 The State party asserts that the communication fails to substantiate any violation of article 26, since the use of a title of nobility is merely a *nomen honoris*, devoid of legal or material content, and that, furthermore, the author does not argue a possible inequality before the law or that there is a violation of articles 3 and 17 of the Covenant, in view of which the State party contests the admissibility of the communication *ratione materiae* in accordance with article 3 of the Optional Protocol.

4.4 The State party refers to the decision by the European Court of Human Rights of 28 October 1999 that the use of noble titles does not fall within the scope of article 8 of the European Convention. It argues that while the name of the applicant does not appear in that decision, the case concerned the same subject, in view of which it requests the Committee to find the complaint inadmissible in accordance with article 5, paragraph 2 (a), of the Optional Protocol.

4.5 In its written submission of 15 April 2002 the State party reiterates its arguments on inadmissibility, and on the merits recalls that when the title of nobility in question was granted to the first Marquis of Tabalosos, in 1775, it was not the case that men and women were considered to be born equal in dignity and rights. The State party argues that nobility is a historical institution, defined by inequality in rank and rights owing to the "divine

design” of birth, and claims that a title of nobility is not property, but simply an honour of which use may be made but over which no one has ownership. Accordingly, succession to the title is by the law of bloodline, outside the law of inheritance, since the holder succeeding to the title of nobility does not succeed to the holder most recently deceased, but to the first holder, the person who attained the honour, with the result that the applicable rules of succession to use of the title are those existing in 1775.

4.6 The State party points out to the Committee that the author is disputing use of the noble title of Marquis of Tabalosos, not with a younger brother, but with her uncle and her first cousin; that she is not the firstborn daughter of the person who held the title before, but the daughter of the sister of the deceased holder, who was indeed the “firstborn female descendant” according to the genealogical tree provided by the author herself; the State party also notes that her sex did not prevent the deceased holder from succeeding to the title before her younger brother.

4.7 The State party affirms that the rules of succession for use of the title of nobility in question are those established in Law 2 of title XV of part II of the so-called *Código de las partidas* (legal code) of 1265, to which all subsequent laws dealing with the institution of the nobility and the transfer of the use of noble titles refer. According to the State party these rules embody a first element of discrimination by reason of birth, since only a descendant can succeed to the title; a second element of discrimination lies in birth order, based on the former belief in the better blood of the firstborn; and, lastly, sex constitutes a third element of discrimination. The State party contends that the author accepts the first two elements of discrimination, even basing some of her claims thereon, but not the third.

4.8 The State party asserts that the Spanish Constitution allows the continued use of titles of nobility, but only because it views them as a symbol, devoid of legal or material content, and cites the Constitutional Court to the effect that if use of a title of nobility meant “a legal difference in material content, then necessarily the social and legal values of the Constitution would need to be applied to the institution of the nobility”, and argues that, admitting the continued existence of a historical institution, discriminatory but lacking material content, there is no cause to update it by applying constitutional principles.⁵ According to the State party, only 11 judgements of the Supreme Court - not adopted

⁵ The State party cites a case in which the Constitutional Court rejected an appeal for protection by a person who sought to succeed to a title of nobility, but did not accept the condition of marrying a noble.

unanimously - have departed from the ancient doctrine of the historical rules of succession to titles of nobility, as a result of which the question of constitutionality arose, the matter being decided by the judgement of the Constitutional Court of 3 July 1997. The State party affirms that respect for the historical rules of institutions is recognized by the United Nations and by the seven European States which admit the institution of nobility with its historical rules, as it does not represent any inequality before the law, since the law does not recognize that there is any legal or material content to titles of nobility, in view of which there can be no violation of article 26 of the Covenant.

4.9 The State party contends that use of a title of nobility is not a human right, or one of the civil and political rights set forth in the Covenant, and that it cannot therefore be considered part of the right to privacy, since being part of a family is attested to by the name and surnames, as regulated under article 53 of the Spanish Civil Register Act and international agreements. To consider otherwise would lead to various questions, such as whether those who do not use titles of nobility had no family identification, or whether relatives in a noble family who did not succeed to the title would not be identified as members of the family. According to the State party, inclusion of the use of a title of nobility in the human right to privacy and to a family would undermine equality of human beings and the universality of human rights.

Author's comments

5.1 In her written submission of 1 April 2002 the author reiterates that, in her case, it was futile to make a further submission to the domestic courts since article 38, paragraph 2, and article 40, paragraph 2, of the Constitutional Court Organization Act pre-empt reopening of consideration of the constitutionality of the Spanish legal system as it relates to succession to titles of nobility. She emphasizes that she continued with domestic remedies to avoid the case being declared *res judicata*, thereby preventing possible views by the Committee against the State party from being made effective. She argues that if the Committee found in her favour, for example, before the Supreme Court concluded its consideration of her appeal for annulment, she could enter the decision as evidence with sufficient effect that it would lead to a return to the former jurisprudence of equality of men and women in succession to titles of nobility, thereby obtaining effective redress for the harm suffered to her fundamental right to non-discrimination, that is, recovery of the title. The author further affirms that in accordance with the Committee's often stated jurisprudence the victim is not obliged to use remedies that are futile.

5.2 The author claims that the ground for inadmissibility cited by the State party relating to article 5, paragraph 2 (a), is erroneous, since she was not a party to the proceedings brought by four Spanish women regarding succession to titles of nobility before the European Court of Human Rights.⁶ The author recalls the Committee's decision in *Antonio Sánchez López v. Spain* that the concept of "the same case" should be understood as including the same claim and the same person.

5.3 The author alleges a violation of article 3 of the Covenant, in conjunction with articles 26 and 17, since the sex of a person is an element in privacy and to accord unfavourable treatment solely by virtue of belonging to the female sex, irrespective of the nature of the discrimination, constitutes invasion of the privacy of the individual. She further argues that the title of nobility is itself an element of the life of the family to which she belongs.

5.4 In a further written submission of 12 June 2002 the author reiterates her comments on the admissibility of her complaint and argues in addition that consideration of her appeal has been unduly delayed, since five years have elapsed. As to the merits, the author asserts that the Spanish legal system regulates the use, possession and enjoyment of titles of nobility as a genuine individual right. While succession to the title occurs with respect to the founder, succession to concessions of nobility does not arise until the death of the last holder, and that as a result the laws current at that time are applicable. The author maintains that while titles of nobility are governed by special civil norms based on bloodline, that is, outside the Civil Code with regard to succession, that does not mean that succession to titles falls outside the law of inheritance by blood relatives.

5.5 The author affirms that, with regard to the rules of succession to titles of nobility referred to by the State party, in the view of many theorists and the Supreme Court's own jurisprudence, the rule applies only to succession to the crown of Spain.

5.6 As for use of a title of nobility not being a human right, as contended by the State party, the author claims that article 26 of the Covenant establishes equality of persons before the law and that the State party violates the article in according, on the one hand, legal recognition of succession to titles of nobility while, on the other hand, discriminating against women, in which connection the lack of any financial value of the titles is without importance since for the holders they possess great emotional value. The author asserts that the title of Marquis of Tabalosos is part of the private life of the

Carrión Barcáiztegui family, from which she is descended, and that even if certain family assets may not be heirlooms owing to being indivisible or having little financial value, they should enjoy protection from arbitrary interference. Accordingly she maintains that she is entitled to the protection established under article 3, in conjunction with article 17, of the Covenant, inasmuch as those provisions prevent discrimination in enjoyment of the rights protected by the Covenant. The author notes that between 1986 and 1997 the Supreme Court held that passing over women in the matter of succession to titles of nobility infringed article 14 of the Constitution, guarantee of equality before the law, a precedent that was overturned by the Constitutional Court judgement of 1997.

5.7 The author asserts that the reference by the State party to discrimination by birth with respect to titles of nobility is erroneous, since this view would hold that inheritance as a general concept was discriminatory, and that allegation of discrimination in terms of descendants was also erroneous, since that allegation referred to a situation other than that raised by the communication. She adds that consideration of progeniture in awarding a singular hereditary asset, such as a title of nobility, is a criterion that does not discriminate against men or women, or create unjust inequality, given the indivisible and essentially emotional nature of the inherited asset.

5.8 As for the information transmitted by the State party regarding the regime governing titles of nobility in other European countries, the author contends that in those countries the titles have no formal legal recognition, as they do in Spain, and that as a result any disputes that may arise in other States are different from that in the present case. What is at stake is not recognition of titles of nobility, but only an aspect of such recognition already existing in legislative provisions in Spain, namely discrimination against women with regard to succession. The author claims that for the State party the "immaterial" aspect of the title justifies discrimination against women in terms of succession, without taking account of the symbolic value of the title and the great emotional value, and that the precedence of males is an affront to the dignity of women.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The State party claims that the author's communication should be inadmissible on the basis

⁶ Case No. 777/1997, decision dated 25 November 1999, para. 6.2.

of article 5, paragraph 2 (a), of the Optional Protocol. In this regard the Committee notes that while the complaint that was submitted to the European Court of Human Rights concerned alleged discrimination with regard to succession to titles of nobility, that complaint did not involve the same person. Accordingly, the Committee considers that the author's case has not been submitted to another international procedure of investigation or settlement.

6.3 The State party maintains that the communication should be found inadmissible, affirming that domestic remedies have not been exhausted. Nevertheless the Committee notes the author's argument with respect to her case that any resubmission before domestic courts would be futile, since article 38, paragraph 2, and article 40, paragraph 2, of the Constitutional Court Organization Act rule out reopening of consideration of the constitutionality of the Spanish legal system governing succession to titles of nobility. Accordingly, the Committee recalls its often stated view that for a remedy to be exhausted, the possibility of a successful outcome must exist.

6.4 The Committee notes that while the State party has argued that hereditary titles of nobility are devoid of any legal and material effect, they are nevertheless recognized by the State party's laws and authorities, including its judicial authorities. Recalling its established jurisprudence,⁷ the Committee reiterates that article 26 of the Covenant is a free-standing provision which prohibits all discrimination in any sphere regulated by a State party to the Covenant. However, the Committee considers that article 26 cannot be invoked in support of claiming a hereditary title of nobility, an institution that, due to its indivisible and exclusive nature, lies outside the underlying values behind the principles of equality before the law and non-discrimination protected by article 26. It therefore concludes that the author's communication is incompatible *ratione materiae* with the provisions of the Covenant, and thus inadmissible pursuant to article 3 of the Optional Protocol.

7. The Committee therefore decides:

(a) That the communication is inadmissible under article 3 of the Optional Protocol;

(b) That this decision shall be communicated to the State party, to the author and to her counsel.

⁷ See e.g. Views on communication No. 182/1984 (*Zwaan de Vries v. The Netherlands*), Views adopted on 9 April 1987.

Individual opinion (dissenting) by Committee member Rafael Rivas Posada

1. At its meeting on 30 March 2004, the Human Rights Committee decided to rule communication No 1019/2001 inadmissible under article 3 of the Optional Protocol. While recalling its consistent jurisprudence that article 26 of the Covenant is an autonomous provision prohibiting any discrimination in any area regulated by the State party, it states, in paragraph 6.4 of the decision, that article 26 "cannot be invoked in support of claiming a hereditary title of nobility, an institution that, due to its indivisible and exclusive nature, lies outside the underlying values behind the principles of equality before the law and non-discrimination protected by article 26". On the strength of that reasoning, the Committee concludes that the author's complaint is incompatible *ratione materiae* with the Covenant and, thus, inadmissible under article 3 of the Optional Protocol.

2. In her complaint, the author alleges a violation of article 26 by the State party, pointing out that male descendants are given preference as heirs to the detriment of women, thereby placing women in a situation of unjustified inequality. Her application thus relates to discriminatory treatment she has suffered because of her sex, and the Committee should accordingly have restricted itself to considering this key element of her complaint and not, where admissibility is concerned, gone into other matters relating to the institution of hereditary titles.

3. The author's claim to be recognised as the heir to a noble title was based on Spanish law, not a caprice. The law was declared unconstitutional by a ruling of the Supreme Court on 20 June 1987 insofar as it related to a preference for the male line in succession to noble titles, i.e. because it discriminated on grounds of sex. Later, however, on 3 July 1997, the Constitutional Court found that male primacy in the order of succession to noble titles as provided for in the Act of 11 October 1820 and the Act of 4 May 1948 was neither discriminatory nor unconstitutional. As such decisions by the Constitutional Court are binding in Spain, legal discrimination on grounds of sex in the matter of succession to noble titles was reinstated.

4. The Committee, in deciding to find the communication inadmissible on the basis of a supposed inconsistency between the author's claim and the "underlying values behind" (sic) the principles protected by article 26, has clearly ruled *ultra petita*, i.e. on a matter not raised by the author. The author confined herself to complaining of discrimination against her by the State party on the grounds of her sex; the discrimination in the case before us was clear, and the Committee should have come to a decision on admissibility on the strength of the points clearly made in the communication.

5. Besides ruling *ultra petita*, the Committee has failed to take account of a striking feature of the case. Article 26 says that "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as race, colour, sex, language, religion, political or

other opinion, national or social origin, property, birth or other status". Yet the law in Spain not only does not prohibit discrimination on grounds of sex where succession to noble titles is concerned, it positively requires it. There is, in my opinion, no doubt that this provision is incompatible with article 26 of the Covenant.

6. For the above reasons I consider that the Committee ought to have found communication No. 1019/2001 admissible, since it raises issues under article 26, and not declare it incompatible *ratione materiae* with the provisions of the Covenant.

Individual opinion (dissenting) by Committee member Hipólito Solari-Yrigoyen

I should like to express the following dissenting views with regard to the communication under consideration.

The communication is admissible

The Committee takes note of the State party's affirmation that, in its opinion, the rules of succession to titles of nobility embody three elements of discrimination: the first element stipulates that only a descendant can succeed to the title; the second element upholds the right of primogeniture; and the third deals with sex. At the same time, the Committee also takes note of the author's claims that the State party refers to situations different from those mentioned in the communication; that primogeniture is based on the indivisible nature of the title and does not constitute discrimination because it does not favour men over women; and, lastly, that the issue at hand is not recognition of titles of nobility but only an aspect of such recognition, namely discrimination against women, since Spanish legislation and a judgement of the Constitutional Court uphold the precedence of males, which is an affront to the dignity of women. The Committee observes that, in the present communication, the title is being disputed between collateral relations: the author as the representative of her deceased mother, and her mother's younger brother, and that the claim deals exclusively with discrimination on the ground of sex.

The Committee notes that, for the purposes of admissibility, the author has duly substantiated her claim of discrimination by reason of her sex, which could raise issues under articles 3, 17 and 26 of the Covenant. Consequently, the Committee is of the view that the communication is admissible and proceeds to consider the merits of the communication in accordance with article 5, paragraph 1, of the Optional Protocol.

Merits considerations

The *ratio decidendi*, or the grounds for the decision as to the merits, is limited to determining whether or not the author was discriminated against by reason of her sex, in violation of article 26 of the Covenant. The Committee could not include in its decisions issues that had not been submitted to it because, if it did so, it would be exceeding its authority by taking decisions *ultra petito*. Consequently, the Committee refrains from considering the form of government (parliamentary monarchy) adopted by the State party in article 3 of its Constitution, and the nature and scope of titles of nobility since these issues are extraneous to the subject of the communication

under consideration; however, the Committee notes that such titles are governed by law and are subject to regulation and protection by the authorities at the highest level, since they are awarded by the King himself, who, under the Spanish Constitution, is the Head of State (art. 56) and the sole person authorized to grant such honours in accordance with the law (art. 62 (f)).

The Committee would be seriously renouncing its specific responsibilities if, in its observations concerning a communication, it proceeded in the abstract to exclude from the scope of the Covenant, in the manner of an *actio popularis*, sectors or institutions of society, whatever they may be, instead of examining the situation of each individual case that is submitted to it for consideration for a possible specific violation of the Covenant (article 41 of the Covenant and article 1 of the Optional Protocol). If it adopted such a procedure, it would be granting a kind of immunity from considering possible cases of discrimination prohibited by article 26 of the Covenant, since members of such excluded sectors or institutions would be unprotected.

In the specific case of the present communication, the Committee could not make a blanket pronouncement against the State party's institution of hereditary titles of nobility and the law by which that institution is governed, in order to exclude them from the Covenant and, in particular, from the scope of article 26, invoking incompatibility *ratione materiae*, because this would mean that it was turning a blind eye to the issue of sex-based discrimination raised in the complaint. The Committee has also noted that equality before the law and equal protection of the law without discrimination are not implicit but are expressly recognized and protected by article 26 of the Covenant with the broad scope that the Committee has given it, both in its comments on the norm and in its jurisprudence. This scope, moreover, is based on the clarity of a text that does not admit restrictive interpretations.

In addition to recognizing the right to non-discrimination on the ground of sex, article 26 requires States parties to ensure that their laws prohibit all discrimination in this regard and guarantee all persons equal and effective protection against such discrimination. The Spanish law on titles of nobility not only does not recognize the right to non-discrimination on the ground of sex and does not provide any guarantee for enjoying that right but imposes *de jure* discrimination against women, in blatant violation of article 26 of the Covenant.

In its general comment No. 18 on non-discrimination, the Human Rights Committee stated:

"While article 2 limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, article 26 does not specify such limitations. That is to say, article 26 provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds. In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated

and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory.”

At the same time, in its general comment No. 28 on equality of rights between men and women, the Committee stated:

“Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes. The subordinate role of women in some countries is illustrated by the high incidence of prenatal sex selection and abortion of female fetuses. States parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women’s right to equality before the law and to equal enjoyment of all Covenant rights.”

With regard to the prohibition of discrimination against women contained in article 26, the same general comment does not exclude in its application any field or area, as is made clear by the following statements contained in paragraph 31:

“The right to equality before the law and freedom from discrimination, protected by article 26, requires States to act against discrimination by public and private agencies in all fields.”

“States parties should review their legislation and practices and take the lead in implementing all measures necessary to eliminate discrimination against women in all fields.”

The Committee’s clear and unambiguous position in favour of equal rights between men and women, which requires States parties to amend their legislation and practices, should cause no surprise in a United Nations treaty body, since the Organization’s Charter, signed in San Francisco on 26 June 1945, reaffirms in its preamble faith in the equal rights of men and women as one of its fundamental objectives. However, history has shown that, in spite of the efforts that the recognition of rights requires, the most arduous task is to put them into practice, and that ongoing measures must be taken to ensure their effective implementation.

In the communication under consideration, María de la Concepción Barcáiztegui Uhagón, the previous holder of the disputed title of marquis, transferred her hereditary title of nobility to her brother Íñigo and, without entering into a consideration of the validity of the transfer, the Committee notes that, when María de la Concepción Barcáiztegui Uhagón died on 4 April 1993 without issue, the author, as the representative of her deceased mother, met the criterion of primogeniture. Believing that she had the better right, she initiated a legal action against her uncle, claiming the noble title of Marquis of Tabalosos. Madrid Court of First Instance No. 18 dismissed the author’s claim on the basis of the binding jurisprudence of the Constitutional Court which, in a divided judgement issued on 3 July 1997, ruled by majority that the better rights that the law grants to men over women of equal

lineage and kinship in the normal order of transfer mortis causa of titles of nobility are not discriminatory or in violation of article 14 of the Spanish Constitution of 27 December 1978, which is still in force, “since it declares that historical rights are applicable”. The aforementioned article of the Constitution provides that Spaniards are equal before the law.

Although the right to titles of nobility is not a human right protected by the Covenant, as the State party rightly contends, the legislation of States parties must not deviate from article 26. It is true that, as the Committee has pointed out in its jurisprudence, a difference in treatment based on arguments, including sex, of relevance to the purposes of article 26 does not constitute prohibited discrimination provided that it is based on reasonable and objective criteria. However, the establishment of the superiority of men over women, which is tantamount to saying that women are inferior to men, in matters of succession to titles of nobility governed by Spanish law and implemented by its courts, would not only deviate from such criteria but would be going to the opposite extreme. While States are allowed to grant legal protection to their historical traditions and institutions, they must do so in conformity with the requirements of article 26 of the Covenant.

The Committee is of the view that, in ruling legally that a particular honour should be granted principally to men and only accessorially to women, the State party is taking a discriminatory position vis-à-vis women of noble families that cannot be justified by reference to historical traditions or historical rights or on any other grounds. The Committee therefore concludes that the ban on sexual discrimination established by virtue of article 26 of the Covenant has been violated in the author’s case. This being so, it is unnecessary to consider whether there may have been a violation of article 17 in conjunction with article 3 of the Covenant.

I am therefore of the view that the facts before the Committee disclose a violation of article 26 of the Covenant with respect to Mercedes Carrión Barcáiztegui.

*Individual Opinion by Committee member,
Ruth Wedgwood*

In its review of country reports, as well as in its Views on individual communications, the Human Rights Committee has upheld the rights of women to equal protection of the law, even in circumstances where compliance will require significant changes in local practice. It is thus troubling to see the Committee dismiss so cavalierly the communication of Mercedes Carrión Barcáiztegui.

The distribution of family titles in Spain is regulated by public law. Decisions on succession to titles of honour or nobility are published as official acts of state in the Boletín Oficial del Estado. The order of succession is not a matter of private preference of the current titleholder. Rather, female descendants are statutorily barred from any senior claim to a title, pursuant to the preference for males regardless of the wishes of the ascendant titleholder. Such a statutory rule, see statute of 4 June 1948, would seem to be a public act of discrimination.

The Committee's stated reasons for dismissing the communication of Ms. Carrión Barcáiztegui, in her claim to inheritance of the title of the Marquise of Tabalosos, can give no comfort to the state party. In rejecting her petition, as inadmissible *ratione materiae*, the Committee writes that hereditary titles of nobility are "an institution that ... lies outside the underlying values behind the principles of equality before the law and non-discrimination protected by article 26." This cryptic sentence could be read to suggest that the continuation of hereditary titles is itself incompatible with the Covenant. One hopes that the future jurisprudence of the Committee will give appropriate weight to the desire of many countries to preserve the memory of individuals and families who figured prominently in the building of the national state.

The use of titles can be adapted to take account of the legal equality of women. Even within the tradition of a title, a change of facts may warrant a change in discriminatory rules. For example, in an age of national armies, it is no longer expected that a titleholder must have the ability to fight on the battlefield. (Admittedly, Jeanne d'Arc might suggest a wider range of reference as well.)

In its accession to modern human rights treaties, Spain recognized the difficulties posed by automatic male preference. Spain ratified the International Covenant on Civil and Political Rights on 27 July 1977. Spain also approved the Convention on the Elimination of All Forms of Discrimination against Women on 16 December 1983. In the latter accession, Spain made a single reservation that has importance here. Spain noted that the Convention shall not affect the constitutional provisions concerning succession to the Spanish crown. This unique protection for royal succession was not accompanied by any other similar reservation concerning lesser titles.

Spain did not make any similar reservation to the International Covenant on Civil and Political Rights in 1977. Still, good practice would suggest that Spain should be given the benefit of the same reservation in the application of the Covenant, in light of the Committee's later interpretation of Article 26 as an independent guarantee of equal protection of the law. But the bottom line is that, even with this reservation, Spain did not

attempt to carve out any special protection to perpetuate gender discrimination in the distribution of other aristocratic titles.

It is not surprising that a state party should see the inheritance of the throne as posing a unique question, without intending to perpetuate any broader practice of placing women last in line. Indeed, we have been reminded by the incumbent King of Spain that even a singular and traditional institution such as royalty may be adapted to norms of equality. King Juan Carlos recently suggested that succession to the throne of Spain should be recast. Under Juan Carlos' proposal, after his eldest son completes his reign, the son's first child would succeed to the throne, regardless of whether the child is a male or a female. In an age when many women have served as Heads of State, this suggestion should seem commendable and unremarkable.

In its judgement of 20 June 1987, upholding the equal claim of female heirs to non-royal titles, the Supreme Court of Spain referenced the Convention on the Elimination of All Forms of Discrimination against Women, as well as Article 14 of the 1978 Spanish Constitution. In its future deliberations, Spain may also wish to reference General Comment No. 18 of the Human Rights Committee, which states that Article 2 of the Covenant "prohibits discrimination in law or in fact in any field regulated and protected by public authorities." And it is worth recalling that under the rules of the Committee, the disposition of any particular communication does not constitute a formal precedent in regard to any other communication or review of country reports.

The hereditary title in question here has been represented by the State party as "devoid of any material or legal content" and purely *nomen honoris* (see paragraphs 4.4 and 4.8 *supra*). Thus, it is important to note the limits of the Committee's instant decision. The Committee's views should not be taken as sheltering any discriminatory rules of inheritance where real or chattel property is at stake. In addition, these views do not protect discrimination concerning traditional heritable offices that may, in some societies, still carry significant powers of political or judicial decision-making. We sit as a monitoring committee for an international covenant, and cannot settle broad rules in disregard of these local facts.

Communication No. 1024/2001

Submitted by: Manuela Sanlés Sanlés (represented by Mr. José Luis Mazón Costa)

Alleged victim: Ramón Sampedro Cameán

State party: Spain

Declared inadmissible: 30 March 2004 (eightieth session)

Subject matter: Prosecution for “assisted suicide” of disabled person

Procedural Issues: Notion of “victim” - *Actio popularis* - Non-substantiation of claim

Substantive Issues: Right to privacy without arbitrary interference - Inhuman and degrading treatment - Right to life - Right to die with dignity - Freedom of thought and conscience - Discrimination on ground of physical disability

Articles of the Covenant: 2, paragraph 1; 6; 7; 9; 14; 17; 18 and 26

Articles of the Optional Protocol: 1 and 2

1. The author of the communication, dated 28 March 2001, is Manuela Sanlés Sanlés, a Spanish national, who claims violations by Spain of article 2, paragraph 1, and articles 7, 9, 14, 17, 18 and 26 of the Covenant in respect of Ramón Sampedro Cameán, who declared her his legal heir. The author is represented by counsel. The Optional Protocol to the Covenant entered into force for Spain on 25 January 1985.

The facts as submitted

2.1 On 23 August 1968, Ramón Sampedro Cameán, aged 25 at the time, had an accident which resulted in the fracture of a cervical vertebra and irreversible tetraplegia. On 12 July 1995, he initiated an act of non-contentious jurisdiction in the Court of First Instance in Noia, La Coruña, pleading his right to die with dignity. Specifically, he requested that his doctor should, without having criminal proceedings brought against him, be authorized to supply him with the substances necessary to end his life. On 9 October 1995, the court dismissed his request, on the ground that it was punishable under article 143 of the Spanish Criminal Code as the offence of aiding and abetting suicide, carrying a penalty of 2 to 10 years’ imprisonment.

2.2 Ramón Sampedro lodged an appeal with the Provincial High Court in La Coruña, which rejected it on 19 November 1996, confirming the decision of the court of first instance.

2.3 On 16 December 1996, Ramón Sampedro lodged an application for *amparo* (constitutional protection) with the Constitutional Court, pleading a violation of his dignity and his rights to the free

development of his personality, to life, to physical and psychological integrity, and to a fair trial. The appeal was accepted for consideration on 27 January 1997, and the 20-day period for Mr. Sampedro to formulate his final arguments commenced on 10 March 1997.

2.4 In the early hours of 12 January 1998, Ramón Sampedro committed suicide, with the help of persons unknown. Criminal proceedings were instituted against the person or persons who may have aided and abetted his death. The case was dismissed, however, since no person could be identified as responsible.

2.5 The author of the communication was named as Ramón Sampedro’s heir in his will. On 4 May 1998, she sent a letter to the Constitutional Court, claiming the right to continue the proceedings brought by the alleged victim, and reworded the pleadings of the application for *amparo*. The new contention was that the Provincial High Court should have acknowledged Mr. Sampedro’s right to have his own doctor supply to him the medication necessary to help him to die with dignity.

2.6 On 11 November 1998, the Constitutional Court decided to dismiss the case, and to refuse the author the right to pursue the proceedings. Among its arguments the Court stated that, although the right of heirs to continue the proceedings of their deceased relatives in cases of civil protection of the right to honour, personal and family privacy and image was acknowledged in the Spanish legal system, in the case of Mr. Sampedro there were no specific or sufficient legal conditions which justified the author’s continuing the proceedings. The Court also stated that the matter could not be identified with the rights cited by her, in view of the eminently personal nature, inextricably linked to the person concerned, of the claimed right to die with dignity. It further considered that the voluntary act in question concerned the victim alone and that the appellant’s claim had lapsed from the moment of his death. It went on to point out that this conclusion was reinforced by the nature of the remedy of *amparo*, which was established to remedy specific and effective violations of fundamental rights.

2.7 On 20 April 1999, the author applied to the European Court of Human Rights pleading violation of the right to a life of dignity and a dignified death in respect of Ramón Sampedro, the right to non-

interference by the State in the exercise of his freedom, and his right to equal treatment. The European Court pronounced the application inadmissible *ratione personae*, on the ground that the heir of Ramón Sampedro was not entitled to continue his complaints. With reference to the alleged excessive duration of the proceedings, the European Court stated that, even if the author could be considered a victim, in the circumstances the duration of proceedings had not been so great as to lead to the conclusion of a clear violation of the Convention; it accordingly declared the complaint manifestly ill-founded.

The complaint

3.1 The author argues that in, considering the intervention of a doctor to help Mr. Ramón Sampedro to die as an offence, the State party was in breach of the latter's right to privacy without arbitrary interference, as provided for in article 17 of the Covenant. The author contends that, as the alleged victim stated in his book, he requested euthanasia for himself alone and not for other persons, and that accordingly the interference of the State in his decision was unjustified.

3.2 The author contends that the State's "criminal interference" in Ramón Sampedro's decision constituted a violation of his right not to be subjected to inhuman or degrading treatment, as provided for in article 7 of the Covenant; the tetraplegia from which he suffered had considerable repercussions on his daily life as he was never able to get up. He required the assistance of other persons in order to eat, dress himself and attend to all his needs, including the most intimate; and the lack of mobility to which circumstances condemned him entailed accumulated and unbearable suffering for him. The author contends that, although in this case the suffering was not caused directly by the voluntary intervention of a State agent, the conduct of the State organs was not neutral, since a criminal provision prevented Mr. Sampedro from ending his life with the assistance that was essential in order to enable him to achieve his purpose. The author stresses that the situation created by the State party's legislation constituted ill-treatment for Ramón Sampedro and caused him to lead a degrading life.

3.3 The author asserts that there has been a violation of article 6 of the Covenant, arguing that life as protected by the Covenant refers not only to biological life, under any circumstances, but to a life of dignity, in contrast to the humiliating situation Mr. Sampedro suffered for over 29 years. She maintains that the right to life does not mean the obligation to bear torment indefinitely, and that the pain suffered by Ramón Sampedro was incompatible with the notion of human dignity.

3.4 The author maintains that article 18, paragraph 1, of the Covenant has been violated, and asserts that Ramón Sampedro's decision was based on freedom of thought and conscience and the right to manifest his personal beliefs through practices or deeds. She claims that Mr. Sampedro was reduced to "*enslavement to a morality he did not share, imposed by the power of the State, and forced to exist in a state of constant suffering*".

3.5 The author maintains that article 9 of the Covenant has been violated in that the liberty of the individual may only be restricted if the law establishes such restrictions and only when they constitute necessary means of protecting public security, order, health or morals or the rights or fundamental freedoms of others. She asserts that State interference in Mr. Sampedro's decision cannot be equated with any of these hypotheses, and furthermore, the right to freedom must be envisaged as the right to do anything that does not impair the rights of others; the alleged victim requested euthanasia only for himself and not for others, for which reason the interference of the State in his decision was unjustified.

3.6 The author maintains that the right to equal protection of the law as set out in article 2, paragraph 1, and in article 26 of the Covenant has been violated. In her opinion, it is paradoxical that the State should respect the decision of a person committing suicide but not that of disabled persons. She argues that any self-sufficient person who is mobile and experiences extreme suffering is able to commit suicide and will not be prosecuted if he does not succeed, unlike a person whose range of action is severely restricted, as in the case of Ramón Sampedro, who was reduced to complete immobility and could not be assisted, on pain of criminal prosecution. In the author's opinion, this constitutes discrimination vis-à-vis the law. She considers that the State, as the embodiment of the community, has the obligation to be understanding and to act humanely with a sick person who does not wish to live, and must not punish any person who assists him in carrying out his determination to die; otherwise, it incurs the risk of an unjust difference of treatment with regard to a person who is capable of action and wishes to die.

3.7 The author states that article 14 of the Covenant was violated because the Constitutional Court refused to acknowledge her legitimacy in the proceedings regarding Mr. Sampedro. She claims compensation from the State for the violations of the Covenant perpetrated against Mr. Sampedro when he was alive.

The State party's admissibility and merits submission and author's comments

4.1 The State party, in its written submission dated 2 January 2002, maintains that the communication is

inadmissible under article 5, paragraph 2 (a), of the Optional Protocol, on the ground that the communication submitted to the Committee on this occasion concerns exactly the same matter as was submitted by the same person to the European Court of Human Rights. It adds that the inadmissibility decision by the European Court in this matter was not a mere formality, but was reached after a genuine examination of the merits, since the Court examined the nature of the right claimed by Mr. Sampedro when he was alive, i.e. the right to assisted suicide without criminal repercussions.

4.2 According to the State party, the author of the communication wishes the Committee to review the decision on the merits previously adopted by another international body, and to find, contrary to the decision of the European Court of Human Rights, that “the right to die with dignity” or “assisted suicide without criminal repercussions” requested by Mr. Sampedro before his voluntary death is not an eminently personal or non-transferable right. It adds that the Spanish Constitutional Court was unable to take a decision on the matter because of the voluntary death of Mr. Sampedro, which caused the abatement of the *amparo* proceedings.

4.3 The State party recalls that Ramón Sampedro’s heir has expressly asserted that he “died with dignity”, that no one has been or is currently being prosecuted or charged for assisting him to commit suicide, and that the criminal proceedings initiated have been dismissed. In the State party’s view, the author’s complaint is pointless since it is neither legally nor scientifically possible to recognize a dead person’s right to die.

4.4 In its observations dated 13 April 2002, the State party maintains that the author is exercising an *actio popularis* by claiming that the so-called right “to die with dignity” should be pronounced in respect not of herself but of a deceased person. It adds that the author’s claims distort the rights recognized in the Covenant. It affirms that, according to the judgement of the European Court in the *Pretty v. United Kingdom* case,¹ the right to life could not, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely, a right to die, whether at the hands of a third person or with the assistance of a public authority.

5.1 In her written statement dated 11 July 2002, the author maintains that the European Court did not examine the merits of the case but, on the contrary, emphasized that the prime complaint concerning the State’s interference in Ramón Sampedro’s decision to die in peace was not examined, since it considered that his heir and sister-in-law was exercising an *actio*

popularis. For that reason, it refused her the right to pursue the action, considering the complaint incompatible *ratione personae*.

5.2 The author is of the opinion that the European Court only examined the merits of the case in respect of the complaint concerning the undue length of the proceedings; with regard to her other arguments, she observes that, according to the Committee’s jurisprudence,² a matter declared inadmissible by the European Court on grounds of form is not a matter “examined” within the meaning of article 5, paragraph 2 (a), of the Optional Protocol. She adds that the European Court further did not examine the complaint concerning the right to freedom.

5.3 The author asserts that she is not exercising an *actio popularis* since she is the successor of the victim who died without reparation or response as to the merits of his case. She adds that she was denied the right to continue the case initiated by Ramón Sampedro during his lifetime by an arbitrary decision of the Constitutional Court.

5.4 The author maintains that article 9, paragraph 7, of the Civil Procedure Act permits, without exceptions, the continuation of proceedings on the death of the complainant if the heir comes to court with a new power of attorney, as happened in her case. Under article 661 of the Civil Code, “the heirs succeed the deceased solely as a result of his death in respect of all his rights and obligations”.

5.5 Article 4 of Organization Act No. 1/1982 clearly states: “*The exercise of actions for the civil protection of the honour, privacy or image of the deceased is incumbent on the person who has been designated by him for that purpose in his will*”. In the case of Mr. Sampedro, a violation of the right of privacy, in relation to his private life, has been argued.

5.6 The author asserts that the Constitutional Court is applying unequal jurisprudence as regards the authorization of the continuation *mortis causa* of her status as complainant, since while she as heir of Ramón Sampedro was denied continuity, in judgement No. 116/2001 of 21 May 2001 the same chamber of the Court granted procedural continuity to the heir of a complainant who died during proceedings concerning an appeal against a measure providing for suspension of union militancy. The chamber handed down the decision in this regard despite the “eminently personal” nature of the case.

5.7 The author points out that the Committee has accepted the continuation of the proceedings by the heir of a complainant who died in the course of the

¹ Judgement 2346/02 of 29 April 2002.

² She quotes communications Nos. 808/1998, *Georg Rogl v. Germany*, and 716/1996, *Dietmar Pauger v. Germany*.

proceedings, even during the phase prior to the consideration of the complaint by the Committee itself.³ With reference to the decision in the *Pretty v. United Kingdom* case, referred to by the State party, the author points out that what Sampedro was asking for was not a positive measure on the part of the State, but that it should abstain from action and allow matters to take their course, in other words, not interfere in his decision to die.

5.8 The author contends that Ramón Sampedro died without acknowledgement of the fact that his claim to die with dignity was backed by a human right. In her view, these constitute sufficient grounds to permit his heir to continue the case. She adds that she was not granted any compensation for the suffering she had to bear.

5.9 The author makes reference to a judgement by the Constitutional Court of Colombia in 1997, concerning euthanasia, which stated that article 326 of the Colombian Criminal Code, which refers to *compassionate homicide*, did not criminally implicate the doctor who assisted terminally-ill persons to die if the free will of the passive subject of the act was exercised. That Court linked the prohibition of the punishment of assisted suicide to the fundamental right to a life of dignity and to protection of the independence of the individual.⁴ The author asserts that the law makes progress through the search for a just and peaceful order, and that to assist someone suffering from an incurable and painful illness to die is a normal reaction of solidarity and compassion innate in human beings.

5.10 She asserts that the State party indirectly obliged Ramón Sampedro to experience the suffering entailed by immobility. A constitutional State should not be permitted to impose that burden on a disabled person, and subordinate his existence to the convictions of others. In her opinion, the interference of the State in Ramón Sampedro's right to die is incompatible with the Covenant, which in its preamble states that all the rights recognized in it derive from the inherent dignity of the human person.

5.11 As regards the alleged violation of the right not to be subjected to arbitrary interference provided for in article 17, the author asserts that, even in the *Pretty* case, the European Court acknowledged that the State's "criminal law prohibition" concerning the decision to die of a disabled person experiencing incurable suffering constituted interference in that

person's privacy. Although the European Court had added that such interference is justified "for the protection of the rights of others", this argument is in her view meaningless since no harm is done to anyone and even the family tries to assist the person taking the decision to die.

5.12 In written submissions dated 22 January and 20 March 2003, the author maintains that, contrary to the assertions of the State party, Mr. Sampedro was not able to die as he wished and that his death was neither peaceful, gentle nor painless. Rather, it was distressing since he had had to resort to potassium cyanide.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the International Covenant on Civil and Political Rights.

6.2 Although the State party appears to assert that the communication is inadmissible under article 1 of the Optional Protocol because the author is not a « victim » in the meaning of that provision, the Committee notes that the author seeks to act on behalf of Mr. Ramón Sampedro Cameán, who according to the author was a victim of a violation of the Covenant in that the authorities of the State party refused to allow his assisted suicide by granting protection from prosecution, to the doctor who would assist him in committing suicide. The Committee considers that the claims presented on behalf of Mr. Ramón Sampedro Cameán, had become moot prior to the submission of the communication, by the decision of Mr. Ramón Sampedro Cameán to commit, on 12 January 1998, suicide with the assistance of others, and the decision of the authorities not to pursue proceeding against those involved. Consequently, the Committee considers that at the time of submission on 28 March 2001, Mr. Ramón Sampedro Cameán could not be considered a victim of an alleged violation of his rights under the Covenant in the meaning of article 1 of the Optional Protocol. Consequently, his claims are inadmissible under this provision.

6.3 As to the author's claim that her rights under article 14 of the Covenant were violated by the denial of her right to continue the procedures initiated by Mr. Ramón Sampedro Cameán before the Constitutional Court, the Committee considers that the author not having been a party to the original amparo proceedings before the Constitutional Court, has not sufficiently substantiated for the purposes of admissibility the existing of a violation of article 14, paragraph 1 of the Covenant. Consequently, this part

³ Communications Nos. 164/1984, *Croess v. Netherlands*, and 774/1997, *Brok v. Czech Republic*. Also cited is the jurisprudence of the Committee against Torture in case No. 14/1994, *M'Barek Ben v. Tunisia*.

⁴ Judgement of 20 May 1997. Action for constitutional review brought by José Eurípides Parra Parra.

of the communication is inadmissible under article 2 of the Optional Protocol.

6.4 In the light of the conclusions reached above, the Committee need not address the State party's arguments related to article 5, paragraph 2 (a), of the Optional Protocol and the possible application of the State party's reservation to that provision.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 1 and 2 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author of the communication.

Communication No. 1138/2002

Submitted by: Arenz, Paul (deceased); Röder, Thomas and Dagmar (represented by William C. Walsh)

Alleged victim: The authors

State party: Germany

Declared inadmissible: 24 March 2004 (eightieth session)

Subject matter: Exclusion from a political party on grounds of religious beliefs

Procedural Issues: State party's reservation - *Locus standi* - Re-evaluation of findings of fact and application of domestic legislation - Non-substantiation of claim

Substantive Issues: Right to take part in the conduct of public affairs - Freedom of association - Freedom of expression - Freedom of thought, religion and belief - Discrimination on ground of religion - State party's obligation to ensure the rights recognised in the Covenant

Articles of the Covenant: 2, 18, 19, 22, 25, 26 and 27

Article of the Optional Protocol: 2

1. The authors of the communication are Paul Arenz (first author) and Thomas Röder (second author), as well as his wife Dagmar Röder (third author), all German citizens and members of the "Church of Scientology" (Scientology). They claim to be victims of violations by Germany¹ of articles 2,

18, 19, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights. They are represented by counsel. Mr. Arenz passed away in February 2004.

The facts as submitted by the authors

2.1 On 17 December 1991, the Christian Democratic Union (CDU), one of the major political parties in Germany, adopted resolution C 47 at its National Party Convention, declaring that affiliation with Scientology is not "compatible with CDU membership". This resolution still continues to operate.

2.2 By letter of 22 September 1994, the chairman of the municipal branch of the CDU at Mechernich (Northrhine-Westphalia), with the subsequent support of the Federal Minister of Labour and regional party leader of the CDU in Northrhine-Westphalia, asked the first author, a long standing CDU member, to terminate his membership in the CDU with immediate effect by signing a declaration of resignation, stating that he had learned of the first author's affiliation with Scientology. When the latter refused to sign the declaration, the Euskirchen CDU District Board decided, on 17 October 1994, to initiate exclusion proceedings against him, thereby stripping him of his rights as a party member until the delivery of a final decision by the CDU party courts.

¹ The Covenant and the Optional Protocol to the Covenant entered into force for the State Party on 23 March 1976 and 25 November 1993 respectively. Upon ratification of the Optional Protocol, the State Party entered the following reservation: "The Federal Republic of Germany formulates a reservation concerning article 5 paragraph 2 (a) to the effect that the competence of the Committee shall not apply to communications

(a) which have already been considered under another procedure of international investigation or settlement, or

(b) by means of which a violation of rights is reprimanded having its origin in events occurring prior to

the entry into force of the Optional Protocol for the Federal Republic of Germany

(c) by means of which a violation of article 26 of the [said Covenant] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant."

2.3 By letter of 24 October 1994, the President of the Euskirchen District Party Court informed the first author that the Board had decided to expel him from the CDU because of his membership in the Scientology Church and that it had requested the District Party Court to take a decision to that effect after providing him with an opportunity to be heard. After a hearing was held on 2 December 1994, the District Party Court, on 6 December 1994, informed the first author that it had confirmed the decision of the District Board to expel him from the party. On 2 October 1995, the Northrhine-Westphalia CDU State Party Court dismissed the first author's appeal. His further appeal was rejected by the CDU Federal Party Court on 18 December 1996.

2.4 In separate proceedings, the second author, a long standing member and later chairman of the Municipal Board of the CDU at Wetzlar-Mitte (Hessia), as well as the third author, who had also been a CDU member for many years, were expelled from the party by decision of 29 January 1992 of the CDU District Association of Lahn-Dill. This decision was preceded by a campaign against the second author's party membership, culminating in the organization of a public meeting attended by approximately 1.000 persons, in January 1992, during which the second author's reputation and professional integrity as a dentist were allegedly slandered because of his Scientology membership.

2.5 On 16 July 1994, the Middle Hestia District Party Court decided that the expulsion of the second and third authors from the party was in conformity with the relevant CDU statutes. The authors' appeals to the Hestia CDU State Party Court and to the Federal Party Court at Bonn were dismissed on 26 January 1996 and, respectively, on 24 September 1996.

3.1 On 9 July 1997, the Bonn Regional Court (*Landgericht Bonn*) dismissed the authors' legal action against the respective decisions of the CDU Federal Party Tribunal, holding that these decisions were based on an objective investigation of the facts, were provided by law, and complied with the procedural requirements set out in the CDU statutes. As to the substance of the complaint, the Court limited itself to a review of arbitrariness, owing to the fundamental principle of party autonomy set out in article 21, paragraph 1,² of the Basic Law.

3.2 The Court considered the decisions of the Federal Party Tribunal not to be arbitrary, given that

² Article 21, paragraph 1, of the Basic Law reads: "Political parties shall participate in the formation of the political will of the people. They may be freely established. Their internal organization must conform to democratic principles. They must publicly account for their assets and for the sources and use of their funds."

the authors had acted in a manner contrary to resolution C 47, which spelled out a party principle of the CDU, within the meaning of article 10, paragraph 4,³ of the Political Parties Act. The resolution itself was not arbitrary or inconsistent with the party's obligation to a democratic internal organization under article 21, paragraph 1, of the Basic Law, because numerous publications of Scientology and, in particular, its founder Ron Hubbard objectively indicated a conflict with the CDU's principles of free development of one's personality, tolerance and protection of the socially disadvantaged. This ideology could, moreover, be personally attributed to the authors, based on their self-identification with the Organization's principles and their considerable financial contributions to it.

3.3 Although the CDU was bound to respect the authors' basic rights to freedom of expression and religious freedom, by virtue of its obligation to a democratic internal organization, the restriction of these rights was justified by the need to protect the autonomy and proper functioning of political parties, which by definition could not represent all political and ideological tendencies and were thus entitled to exclude opponents from within the party. Taking into account that the authors had considerably damaged the public image of the CDU and thereby decreased its electoral support at the local level, the Court considered that their expulsion was not disproportionate since it was the only means to restore party unity, the authors being at liberty to found a new party. Lastly, the Court considered that the authors could not invoke their rights under the European Convention on the Protection of Human Rights and Fundamental Freedoms or under the International Covenant on Civil and Political Rights vis-à-vis the CDU, which was not bound by these treaties as a private association.

3.4 By judgement of 10 February 1998, the Cologne Court of Appeals dismissed the authors' appeal, endorsing the reasoning of the Bonn Regional Court and reiterating that political parties, by virtue of article 21, paragraph 1, of the Basic Law, had to balance their right to party autonomy against the competing rights of party members. In

³ Article 10, paragraphs 4 and 5, of the Political Parties Act read: "(4) A member may only be expelled from the party if he or she deliberately infringes the statutes or acts in a manner contrary to the principles or discipline of the party and thus seriously impairs its standing. (5) The arbitration court competent in accordance with the Code on Arbitration Procedure shall decide on expulsion from the party. The right to appeal to a higher court shall be granted. Reasons for the decisions shall be given in writing. In urgent and serious cases requiring immediate action, the executive committee of the party or a regional association may exclude a member from exercising his rights pending the arbitration court's decision."

addition, the Court found that political parties were entitled to adopt resolutions on the incompatibility of their membership with parallel membership in another organization, in order to distinguish themselves from competing parties or other associations pursuing opposite objectives, unless such decisions are arbitrary. However, Resolution C 47, as well as the decision of the Federal Party Tribunal that the teachings of Scientology were incompatible with basic CDU principles, was not considered arbitrary by the Court.

3.5 The Court emphasized that the authors had violated CDU principles, as defined in resolution C 47, not merely because of their convictions, but through the manifestation of these beliefs, as reflected by their membership in Scientology, their adherence to the Organization's principles, the first author's achievement of the status "clear" within Scientology, and the second and third authors' substantial donations to the Organization.

3.6 The authors' constitutional rights to protection of their dignity, free development of their personality, freedom of faith, conscience and creed, freedom of expression and freedom of association, read in conjunction with the constitutional principle of non-discrimination, as well as the requirement of a democratic internal organization within political parties, were superseded by the constitutionally protected interest of the party in its proper functioning and the principle of party autonomy. The authors' rights under the European Convention and the Covenant, both of which had been transformed into domestic law, could offer no higher level of protection.

3.7 In order to preserve its unity as well as its credibility, the CDU was entitled to expel the authors who had exercised their constitutional rights in a manner contrary to the party's principles and aims, thereby undermining its credibility and persuasiveness. The Court concluded that the authors had seriously impaired the public image of the CDU and that their expulsion was therefore covered by article 10, paragraph 4, of the Political Parties Act and was, moreover, proportionate to the aim pursued.

3.8 The authors' constitutional complaint was dismissed as manifestly ill-founded by the Federal Constitutional Court on 28 March 2002. The Court held that the lower courts were justified in limiting their review to the question of whether the authors' expulsion from the CDU was arbitrary or whether it violated their basic rights, as the autonomy of political parties required State courts to abstain from interpreting and applying party statutes or resolutions.

3.9 The Court was satisfied that the lower courts had struck an adequate balance between the

constitutionally guaranteed autonomy of the CDU and the authors' constitutional rights. In particular, it observed that the authors' rights to freedom of opinion and to political participation had been lawfully restricted by resolution C 47, which implemented the statutory limitation contained in section 10, paragraph 4, of the Political Parties Act. Similarly, the lower courts' decision to give the higher priority to the autonomy of the CDU than to the authors' right to freedom of faith, conscience and creed was not considered arbitrary by the Court.

The complaint

4.1 The authors allege violations of their rights under articles 2, paragraph 1, 18, 19, 22, 25, 26 and 27 of the Covenant, as a result of their expulsion from the CDU, based on their affiliation with Scientology, and as a result of the German courts' decisions confirming these actions. In the authors' view, they were deprived of their right to take part in their communities' political affairs, as article 25 of the Covenant protected the right of "every citizen", meaning that "[n]o distinctions are permitted between citizens in the enjoyment of these rights on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."⁴ Their expulsion from the CDU amounted to an unreasonable restriction of that right, in the absence of any reference to a right of party autonomy in article 25.

4.2 The authors recall the Committee's interpretation that the right to freedom of association under article 22 of the Covenant is an essential adjunct to the rights protected under article 25, since political parties and membership in parties play a significant role in the conduct of public affairs and the election process. This right and the authors' right to freedom of expression under article 19, paragraph 2, of the Covenant had been arbitrarily restricted by their expulsion from the CDU, given that the Church of Scientology had not been banned by the Federal Constitutional Court, and that none of its organs was subject to criminal proceedings or had ever been convicted of any crime in Germany. Consequently, the authors' activities as Scientologists were entirely lawful and, in fact, compatible with CDU standards of conduct.

4.3 The authors submit that their exclusion from the CDU, upheld by the German courts, also violated their rights under article 18 of the Covenant, which had to be interpreted widely as encompassing freedom of thought on all matters, personal

⁴ The authors quote the Committee's General Comment 25, at para. 3.

conviction and the commitment to religion or belief.⁵ According to the Committee, the right to freedom of religion or belief was not limited to traditional religions, but also protected newly established and minority religions and beliefs. The authors outline the teachings of the founder of the Church of Scientology, Ron Hubbard, and argue that the CDU declaration form requiring them to publicly denounce their affiliation with Scientology in order not to be excluded from the party operated as a restriction, based on their religion or belief, on their right under article 25 to participate in public affairs and, as such, constituted coercion designed to compel them to recant their beliefs, in violation of article 18, paragraph 2, of the Covenant.

4.4 By way of analogy, the authors refer to the Committee's concluding observations on the fourth periodic report of Germany, where the Committee expressed its concern "that membership in certain religious sects as such may in some Länder of the State party disqualify individuals from obtaining employment in the public service, which may in certain circumstances violate the rights guaranteed in articles 18 and 25 of the Covenant."⁶

4.5 The authors contend that their expulsion from the CDU amounts to discrimination within the meaning of articles 2, paragraph 1, and 26 of the Covenant, since no other religious group had been singled out for exclusion. Moreover, they submit that in a 1992 position paper justifying the adoption of resolution C 47, the CDU blatantly mischaracterized the Church of Scientology as being opposed to democracy and social outreach programmes, while in reality Scientology promoted such values.

4.6 The authors claim that their exclusion from the CDU caused them serious personal and economic injury. Thus, in the first author's case, the District Administration of Euskirchen had denied him a business license on the ground that he was a Scientologist and therefore "unreliable", whereas his bank had cancelled his business account without stating any reasons. As a consequence of the damage caused to his business, he had to sell his company to his son who was not affiliated to Scientology. In the case of the second author, the public campaign against him had severely injured his private dental practice, which had moreover been "S-marked" by the Federal Labour Office, thereby falsely identifying it as a "Scientology company".

4.7 The authors claim that they have exhausted all available domestic remedies and that the same

matter is not being and has not been examined under another procedure of international investigation or settlement.

State party's admissibility submission and authors' comments

5.1 By note verbale of 21 January 2003, the State party challenged the admissibility of the communication, arguing that it is inadmissible *ratione temporis*, on the basis of the German reservation concerning article 5, paragraph 2 (a), of the Optional Protocol, since the alleged violations of the authors' rights had their origin in events occurring prior to the entry into force of the Optional Protocol for the Federal Republic of Germany on 25 November 1993.

5.2 Although the decisions of the District Party Courts confirming the authors' expulsion from the CDU dated from July and, respectively, December 1994, these decisions were based on resolution C 47, which had been adopted by the National Party Convention on 17 December 1991. The State party argues that, pursuant to its reservation, the decisive point of time for determining the applicability of the Optional Protocol was not the alleged violation as such but rather its origin "within the meaning of material or perhaps also indirect cause(s)". This could be seen when comparing the German reservation with the different wording of reservations entered by other States parties to the Optional Protocol such as France, Malta and Slovenia, which explicitly referred to violations resulting from acts, omissions, developments or events which occurred after the entry into force of the Optional Protocol for these States or from related decisions. Furthermore, the authors' claims essentially focused on resolution C 47, in the absence of any additional objections regarding the individual decisions on their exclusion from the CDU, which merely implemented that resolution.

5.3 The State party submits that the communication is also inadmissible *ratione personae* under article 1 of the Optional Protocol, since it failed to address violations by a State party, and argues that it cannot be held responsible for expulsions of members from political parties, as these were freely organized associations under private law. By reference to the jurisprudence of the former European Commission of Human Rights,⁷ the State party submits that the only exception to this caveat would consist in a violation of its obligation to protect the authors' rights under the Covenant against unlawful interference by a third party.

⁵ The authors refer to the Committee's General Comment 22, at para. 1.

⁶ Concluding Observations on the fourth report of Germany, CCPR/C/79/Add.73, at para. 16.

⁷ See European Commission of Human Rights, Application No. 34614/1997, *Church of Scientology v. Germany*, decision of 7 April 1997.

However, the authors had failed to substantiate such a violation. In particular, the State party argues that it had complied with its obligation under article 25 to protect the authors' right to take part in the conduct of public affairs, through the enactment of article 10, paragraph 4, of the Political Parties Act, which significantly restricted the autonomy of political parties to expel members. The authors' rights under article 25 had not been unduly restricted by their expulsion from the CDU, taking into account the German courts' examination of whether the requirements set out in article 10, paragraph 4, of the Political Parties Act, had been met, as well as the authors' freedom to found a new party.

5.4 Lastly, the State party submits that the authors' claim under article 18 of the Covenant is inadmissible *ratione materiae*, because the "Scientology Organi[z]ation" cannot be considered a religious or a philosophical community, but an organization aimed at economic gains and acquisition of power.

6.1 On 7 April 2003, the authors responded to the State party's submissions on admissibility, submitting that the communication is admissible *ratione temporis*, *ratione personae* and *ratione materiae*. They argue that their claims relate to events which occurred after the entry into force of the Optional Protocol for the State party in 1993, namely their expulsion from the CDU, rather than to the adoption in 1991 of resolution C 47, which had not been applied to initiate exclusion proceedings against them until 1994. Subsidiarily, and by reference to the Committee's jurisprudence, the authors claim that, in any event, the adoption of that resolution had continued effects, resulting in their expulsion from the CDU in 1994.

6.2 The authors submit that the alleged violations are attributable to the State party, because the State party (1) had failed to comply with its obligation to ensure and to protect the authors rights under the Covenant; (2) had interfered with those rights through official statements and actions encouraging, directly or indirectly, the authors' expulsion from the CDU; and (3) was responsible for the failure of the German courts properly to interpret the extent of the authors' rights, as well as the State party's corresponding obligations, under the Covenant.

6.3 In particular, the authors argue that the State party's violation of its duty to protect their Covenant rights by failing to take any effective measures to prevent their exclusion from the CDU constitutes an omission attributable to the State party. In accordance with the Committee's interpretation of article 25 of the Covenant, the State party was under a duty to take positive steps to ensure that the CDU, in its internal management, respects the free exercise by the authors of their rights under the applicable

provisions of article 25. Similarly, under articles 18, 19 and 22, the State party was required to adopt positive and effective measures to protect the authors against discrimination by private persons or organizations such as the CDU, either because of the close link between those rights and the right under article 25 to take part in the conduct of public affairs, or based on the general applicability of the principle of non-discrimination contained in articles 2, paragraph 1, and 26 of the Covenant. The authors conclude that, despite the State party's broad discretion regarding the implementation of these obligations, the adoption of general legislation in form of the Political Parties Act, which failed to prohibit discrimination based on religion or belief, falls short of meeting these obligations.

6.4 In addition, the authors argue that the State party has supported and encouraged the adoption by the CDU of resolution C 47 through numerous statements and actions which were allegedly biased against Scientology, such as a letter by the Federal Minister of Labour supporting the first author's exclusion from the CDU, or by false statements and official publications regarding the Church of Scientology.

6.5 In the authors' view, the limited review by the German courts of the decisions of the CDU party courts failed to ensure respect for the authors' rights under the Covenant. Thus, it was obvious that, while manifestations of religion or beliefs, as well as the exercise of the right to freedom of expression, may be subject to limitations, the "core" right to hold beliefs or opinions was protected unconditionally and may not be restricted. Since the CDU, throughout the domestic proceedings, presented no evidence to the effect that the authors had made any statements or had engaged in any activities in violation of the law or the party's standards of conduct, the German courts had failed to apply these principles, thereby triggering the State party's responsibility under the Covenant, which applied to all State organs including the judiciary.

6.6 The authors stress the need to distinguish their case from the decision of the European Commission of Human Rights in *Church of Scientology v. Germany* (Application No. 34614/97), where the applicant had failed to exhaust domestic remedies and to demonstrate that it had received specific instructions from its members to act on their behalf. While conceding that the Commission found that it could not entertain claims regarding violations by private persons, including political parties, they emphasize that the application did not involve any decisions rendered in domestic proceedings and that certain rights, in particular the right to take part in public affairs, were not protected under the European Convention for the Protection of Human Rights and Fundamental Freedoms.

6.7 The authors dismiss the State party's argument that they could found a new party, stating that in most cases of discrimination a similar solution can be proposed by the State, e.g. the foundation of an own company or of a private school in cases of termination of employment or, respectively, of non-admission to a school based on prohibited grounds of discrimination. However, what the authors were seeking was not to engage in another party representing their personal and, indeed, apolitical beliefs, but to enjoy their right to join and participate in the political party of their choice on an equal footing with any other German citizen.

6.8 Lastly, the authors reiterate that, according to the Committee, article 18 of the Covenant also applies to newly established religious groups and to minority religions which may be the subject of hostility by a predominant religious community. Moreover, the European Commission of Human Rights had recognized the Church of Scientology as a religious community entitled to raise claims under article 9, paragraph 1, of the European Convention in its own capacity and as a representative of its members. In addition, Scientology was officially recognized as a religion in several countries⁸ and as a religious or philosophical community in numerous judicial and administrative decisions including decisions by German courts. Similarly, the Federal Constitutional Court had held that the authors' exclusion from the CDU was compatible with article 4, paragraph 1,⁹ of the Basic Law: "This holds true also when in favour of the plaintiffs it is assumed that the Church of Scientology is, in any event, a philosophical community (*Weltanschauungsgemeinschaft*) [...]."

7. On 15 March 2004, counsel informed the Committee that the first author, Mr. Paul Arenz, had died on 11 February 2004. However, it was his explicit will that his communication be pursued after his death. Counsel submits a document signed by the heirs authorizing him "to continue the representation of the pending communication on behalf of our late husband and father Mr. Paul Arenz with our knowledge and consent before the United Nations Human Rights Committee." In addition to the explicit intent of the deceased, his heirs declare their own interest in seeking rehabilitation and just satisfaction, since the entire family had to suffer from the climate of suspicion and intolerance among the population of their village resulting from the first author's expulsion from the CDU. By reference to

⁸ Australia, New Zealand, South Africa, Sweden, Taiwan and the United States of America.

⁹ Article 4, paragraph 1, of the Basic Law reads: "Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable."

the Committee's Views in *Henry and Douglas v. Jamaica*,¹⁰ counsel further submits that his original, broad authorization to act on behalf of the first author gives him standing to continue his representation in the present proceedings.

Issues and proceedings before the Committee

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

8.2 The Committee has noted the author's allegations, as well as the State party's challenge to the admissibility of the communication, namely that the events complained of by the authors had their origin in the adoption by the CDU National Party Convention of resolution C 47 on 17 December 1991, prior to the entry into force of the Optional Protocol for Germany on 25 November 1993, and that the Committee's competence to examine the communication was therefore precluded by virtue of the German reservation to article 5, paragraph 2 (a), of the Optional Protocol.

8.3 The Committee observes that the authors had not been personally and directly affected by resolution C 47 until that resolution was applied to them individually through the decisions to expel them from the party in 1994. The origin of the violations claimed by the authors cannot, in the Committee's view, be found in the adoption of a resolution generally declaring CDU membership incompatible with affiliation with Scientology, but must be linked to the concrete acts which allegedly infringed the authors' rights under the Covenant. The Committee therefore concludes that the State party's reservation does not apply, as the alleged violations had their origin in events occurring after the entry into force of the Optional Protocol for Germany.

8.4 The Committee notes that the heirs of Mr. Arenz have reaffirmed their interest in seeking rehabilitation and just satisfaction for the late first author as well as for themselves, and concludes that they have *locus standi*, under article 1 of the Optional Protocol, to proceed with the first author's communication.

8.5 With regard to the State party's argument that it cannot be held responsible for the authors' exclusion from the CDU, this being the decision not of one of its organs but of a private association, the Committee recalls that under article 2, paragraph 1,

¹⁰ See communication No. 571/1994, *Henry and Douglas v. Jamaica*, Views adopted on 25 July 1996, para. 6.2.

of the Covenant, the State party is under an obligation not only to respect but also to ensure to all individuals within its territory and subject to its jurisdiction all the rights recognized in the Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Where, as in the present case, the domestic law regulates political parties, such law must be applied without consideration. Furthermore, States parties are thus under an obligation to protect the practices of all religions or beliefs from infringement¹¹ and to ensure that political parties, in their internal management, respect the applicable provisions of article 25 of the Covenant.¹²

8.6 The Committee notes that although the authors have made some references to the hardship they have more generally experienced due to their membership in the Church of Scientology, and to the responsibility of the State party to ensure their rights under the Covenant, their actual claims before the Committee merely relate to their exclusion from the CDU, an issue in respect of which they also have exhausted domestic remedies in the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

¹¹ Cf. CCPR, 48th Sess. (1993), General Comment No. 22, at para. 9.

¹² See CCPR, 57th Sess. (1996), General Comment No. 25, at para. 26.

Consequently, the Committee need not address the broader issue of what legislative and administrative measures a State party must take in order to secure that all citizens may meaningfully exercise their right of political participation under article 25 of the Covenant. The issue before the Committee is whether the State party violated the authors' rights under the Covenant in that its courts gave priority to the principle of party autonomy, over their wish to be members in a political party that did not accept them due to their membership in another organization of ideological nature. The Committee recalls its constant jurisprudence that it is not a fourth instance competent to reevaluate findings of fact or reevaluate the application of domestic legislation, unless it can be ascertained that the proceedings before the domestic courts were arbitrary or amounted to a denial of justice. The Committee considers that the authors have failed to substantiate, for purposes of admissibility, that the conduct of the courts of the State party would have amounted to arbitrariness or a denial of justice. Therefore, the communication is inadmissible under article 2 of the Optional Protocol.

9. The Human Rights Committee therefore decides:

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

b) That this decision shall be communicated to the State Party and to the authors.

Communication No. 1220/2003

Submitted by: Walter Hoffman and Gwen Simpson

Alleged victim: The authors

State party: Canada

Declared inadmissible: 25 July 2005

Subject matter: Compatibility with Covenant of a statutory requirement for signs or advertisements in a State party province.

Procedural issues: Exhaustion of domestic remedies

Substantive issues: Discrimination on basis of language - Freedom of expression - Minority rights - Fair trial - Effective remedy

Articles of the Covenant: 2, paragraphs 1, 2 and 3; 14; 19, paragraph 2; 26 and 27

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

1.1 The authors of the communication, initially dated 4 October 2003, are Walter Hoffman and Gwen Simpson, born 24 March 1935 and 2

February 1945, respectively. They claim to be victims of violations by Canada of article 2, paragraphs 1, 2 and 3; article 14; article 19, paragraph 2; article 26 and article 27. They are represented by counsel.

1.2 On 26 April 2004, the Committee's (then) Special Rapporteur on New Communications decided to separate the consideration of the admissibility and merits of the communication.

Factual background

2.1 The authors, English speakers, are the two shareholders and directors of a corporation registered as "Les Entreprises W.F.H. Ltée", doing business in Ville de Lac Brome, Québec, under the firm names 'The Lyon and the Walrus' and 'La Lionne et Le

Morse'. On July 10 1997, the authors displayed a sign outside their business.

One side of the sign read:
“LA LIONNE ET LE MORSE
Antiquités
Hot Tubs & Saunas
Encadrement et cadeaux”

And on the other side:
“LYON AND THE WALRUS
Antiquities
Hot Tubs & Saunas
Gifts”

The sign was thus bilingual, except for the words “Hot Tubs” found on both sides. All the other words covered the same amount of space in each language and had equal size letters.

2.2 The authors' corporation was charged with non-compliance with sections 58¹ and 205² of the Charter of the French Language, which require the “marked predominance” of French on outdoor signs. Although admitting the facts constituting the offence, the authors claimed in their defence that these provisions were invalid, because they infringed their right to freedom of commercial expression and right to equality both under the Canadian Charter of Rights and Freedoms and the Québec Charter of Human Rights and Freedoms.

2.3 On 20 October 1999, the Court of Québec acquitted the authors' corporation, accepting their defence that the relevant provisions of the Charter of the French Language were invalid. The Court considered that the provisions violated the right to freedom of expression protected both in the Canadian Charter of Rights and Freedoms (section 2 (b)) and the Québec Charter of Rights and Freedoms (section 3), and that the Attorney-General of Québec had not demonstrated the restrictions to be reasonable.

¹ Section 58 provides: “Public signs and posters and commercial advertising must be in French. They may also be both in French and in another language provided that French is markedly predominant. However, the Government may determine, by regulation, the places, cases, conditions or circumstances where public signs must be in French only, where French need not be predominant or where such signs, posters and advertising may be in another language only.”

² Section 205 provides: “Every person who contravenes a provision of this Act or the regulations adopted by the Government thereunder commits an offence and is liable:

(a) for each offence, to a fine of \$250 to \$700 in the case of a natural person, and to \$500 to \$1,400 in the case of an artificial person;

(b) for any subsequent conviction, to a fine of \$500 to \$700 in the case of a natural person, and of \$1,000 to \$7,000 in the case of an artificial person.

2.4 On appeal, the Superior Court of the District of Bedford, on 13 April 2000, reversed the decision of the lower court. Through counsel, the authors' corporation, believing that the burden of justification lay with the Attorney-General, declined the Court's invitation to provide comprehensive evidence of why the restrictions of section 58 were not justified. The Superior Court considered, on its view of relevant Supreme Court precedent of 1988,³ that it was up to the challenging party to demonstrate that section 58's limitations on freedom of expression were not justified. Specifically, it would have to be shown that the factors shown by the Supreme Court in the 1988 cases to justify a “marked predominance” requirement for French no longer applied.⁴ The authors' corporation not having done so, it was accordingly convicted and fined \$500.

2.5 On 29 March 2001, the Court of Appeal rejected a motion of counsel for the authors' corporation to file new evidence as to the linguistic profile in Québec, considering that the evidence did not relate to the dispute as defined by the authors' corporation in the lower courts and on appeal. The Court recorded that the Superior Court had specifically invited the parties to submit new evidence, whose clear position was to proceed on the existing record. Furthermore, the Superior Court had considered the parties' positions unequivocal and considered its equitable obligation to ensure neither party was taken by surprise to be fulfilled.

2.6 On 24 October 2001, the Québec Court of Appeal dismissed the substantive appeals of the authors' corporation. The Court of Appeal considered that the formulation of section 58 in 1993 had reflected previous comments by the Supreme Court of Canada that requiring a “marked predominance” of French would be constitutionally acceptable in view of Québec's linguistic profile. The onus thus fell on the authors to show that there was no longer sufficient justification for what had at that point been considered acceptable restrictions. In the Court's view, the authors' arguments linguistic duality, multiculturalism, federalism, democracy, constitutionalism and the rule of law and the

³ *Ford v. Québec (Attorney-General)* [1988] 2 SCR 712 and *Devine v. Québec (Attorney-General)* [1988] 2 SCR 790.

⁴ The Supreme Court identified the following factors in the above cases by way of justification: (a) the declining birth rate of Québec francophone resulting in a decline in the Québec francophone proportion of the Canadian population as a whole, (b) the decline of the francophone population outside Québec as a result of assimilation, (c) the greater rate of assimilation of immigrants by the Anglophone community of Québec, and (d) the continuing dominance of English at the higher levels of the economic sector.

protection of minorities did not discharge that burden. The Court also distinguished the Committee's Views of violation in *Ballantyne et al. v. Canada*, noting that in that case a requirement for exclusive use of French had been at issue.

2.7 The application of the authors' corporation for special leave to appeal to the Supreme Court of Canada was dismissed on 12 December 2002.

The complaint

3.1 The authors note, at the outset, that Québec's language laws have been considered by the Committee in *Ballantyne et al. v. Canada*, *McIntyre v. Canada* and *Singer v. Canada*.⁵ In *Ballantyne et al.*, the Committee found that provisions of the Charter of the French Language which, at that time, prohibited advertising in English, violated article 19, paragraph 2, of the Covenant, but not articles 26 and 27. In *Singer*, the Committee found that amended provisions, which required external advertising to be in French, but which allowed inside advertising in other languages in some circumstances, constituted a violation of article 19, paragraph 2, in the case (concerning external signage). The present "marked predominance" provisions which the authors challenge came into effect after the *Singer* case was registered, but prior to the Committee's Views. The Committee there noted that it had not been asked to consider whether the present provisions complied with the Covenant, but concluded that they afforded the author an effective remedy in the particular circumstances of his case.

3.2 The authors contend that their right to freedom of expression under article 19, paragraph 2, is infringed by the prescription of any particular language in private commercial activity. They claim that restrictions on use of language are not warranted by the 'necessity' qualifier in article 19, paragraph 3, and that the Supreme Court of Canada was wrong to uphold any language restrictions as reasonable and warranted. They also claim that the requirement to use "markedly predominant" French in advertising violates their right to equality under article 2, paragraph 1; that it violates their right to freedom from discrimination on the basis of language under article 26; and that it violates their rights as members of a national minority (the English speaking minority in Québec) in accordance with article 27.

3.3 In relation to article 14, the authors claim that, on appeal, the court found the authors had the onus of proving that the special legislative measures to protect the French language were not warranted and justified under the Canadian Charter. The authors allege that they offered to adduce evidence to the

appeal court, in order to discharge this burden of proof (they had not adduced any below, because the trial judge found that the State carried this onus, and had not discharged it). The authors contend that the appeal court wrongly believed they did not want to adduce any evidence.

3.4 Finally, the authors argue that the State party has failed to implement its Covenant obligations, in breach of article 2, paragraphs 2 and 3, by the insufficient coverage in domestic law of Covenant obligations and the failure of the courts in the present case appropriately to assess the complaint from a Covenant perspective.

State party's submission on admissibility and authors' comments

4.1 By submissions of 6 April 2004, the State party contested the admissibility of the communication. Firstly, the State party argues that a corporation does not enjoy the rights protected by the Covenant. It contends that the corporation "Les Entreprises W.F.H. Ltée" was the entity prosecuted and convicted for breach of the Charter of the French Language. In Canadian law, a corporation is separate from its shareholders, with legal personality. Creditors of a corporation cannot recover debts from a shareholder. Corporations are also differently taxed from natural persons. The authors, therefore, cannot domestically claim to be separate persons and benefit from special rules applying to corporations but, before the Committee, lift the corporate veil and claim individual rights. The State party thus relies on the Committee's jurisprudence that where an author of the communication was a corporation,⁶ or where the victim of alleged violations was in fact the individual's corporation,⁷ the communication is inadmissible.

4.2 Secondly, the State party argues that even if the Committee were to regard a corporation as being able to enjoy some substantive Covenant rights, it would not follow that a corporation would be able to submit a communication. The Committee has repeatedly held that only individuals, personally, could submit a communication.⁸ In addition, the Committee has held that domestic remedies had been exhausted by the corporation, rather than the author's name. The same applies presently.

⁶ *A newspaper publishing company v. Trinidad and Tobago*. Case No. 360/1989, Decision adopted on 14 July 1989, and *A publication and a printing company v. Trinidad and Tobago*. Case No. 361/1989, Decision adopted on 14 July 1989.

⁷ *S.M. v. Barbados*. Case No. 502/1992, Decision adopted on 31 March 1994, and *Lamagna v. Australia*. Case No. 737/1997, Decision adopted on 7 April 1999.

⁸ *Ibid.*

⁵ 359/1989, 385/1989, 455/1991.

Moreover, the Committee has held that a corporation owned by a single person did not have Optional Protocol standing. Accordingly, the communication is inadmissible for, in fact, being an impermissible suit by a corporation.

4.3 Thirdly, the State party argues that domestic remedies were not exhausted. The State party argues that the Superior Court, on first appeal, held contrary to the trial court's view that it lay on the party challenging the Charter of the French Language to show by persuasive evidence that there was no justification for the restrictions (rather than lying on the Attorney-General to demonstrate justification). The Court then afforded the parties the opportunity to present new evidence, which they declined. It also gave counsel for the authors' corporation (also counsel before the Committee) the right to present further evidence, if wished, at a new trial. Counsel declined. After declining the Superior Court's invitation to supplement evidence, counsel for the corporation unsuccessfully attempted to do so in the Court of Appeal. The Court of Appeal considered that the new evidence had no bearing on the matter in issue as defined by the appellant itself both in the lower courts and in its appeal factum.

4.4 The State party emphasizes that counsel for the corporation was an experienced lawyer specializing in language law. Through counsel, the corporation chose to limit its evidence and define narrowly the legal question at issue before the national courts. This legal strategy failed, and the authors cannot now seek to revise the strategic decisions made by their counsel.⁹ Now that the issue of burden of proof has been resolved, there is ongoing litigation in the domestic courts concerning the constitutionality of section 58 of the Charter of the French Language. In almost all of several dozen cases, which were stayed pending the outcome of the litigation in the instant case, the same counsel is acting and has indicated to the Attorney-General of Québec that he will be filing the evidence not filed in the litigation on the instant case. On this question, then, all appeal instances are open and a decision of the Supreme Court will be necessary practically to determine the respective rights of the parties, as well as, in consequence, the rights of persons such as the authors and their corporation. The State party thus

⁹ The State party refers, by analogy, to the Committee's constant jurisprudence in the article 14 context: *Lewis v. Jamaica*, Case No. 708/1996, adopted on 15 August 1997, *Morrison v. Jamaica*, Case No. 635/1995, adopted on 16 September 1998, *Perera v. Australia*, Case No. 536/1993, adopted on 28 March 1995, *Leslie v. Jamaica*, Case No. 564/1993, adopted on 19 August 1998, *Morrison v. Jamaica*, Case No. 611/1995, adopted on 19 August 1998.

argues that the Committee would short-circuit the domestic process if it required Québec at the present time to satisfy the Committee as to the appropriateness of section 58 of the Charter of the French Language before it had had the opportunity to do so in the domestic courts.

4.5 Fourthly, the State party argues that the authors' claims are not supported by, or do not correspond to, rights protected under the Covenant. As to the article 14 claim, the State party emphasizes the Committee's deference to factual and evidentiary findings of domestic courts unless manifestly arbitrary, amounting to a denial of justice or revealing a clear breach of the judicial duty of impartiality. The authors' corporation never raised these issues, nor do the arguments advanced support the allegations, as the record demonstrates the courts' anxiety to respect fair process. This aspect is thus inadmissible under article 2 of the Optional Protocol, for having failed to establish a violation of article 14 of the Covenant, or under article 3 of the Optional Protocol, for incompatibility with article 14.

4.6 As to the claim under article 19, the current section 58 of the Charter of the French Language evolved in response to the Committee's earlier Views and was presented in the State party's fourth periodic report. In its concluding observations, the Committee offered no comment on this matter. The authors have thus not established a violation of article 19. As to the article 26 claim, the State party refers to the Committee's earlier Views finding no breach of this article with respect to stricter legislation and thus submits there can be no violation. On article 27, the State party refers to the Committee's earlier Views that minorities within a State, rather than a province of a State, are implicated by this article which is thus not presently applicable. Finally, article 2 is a corollary right linked to a substantive right, thus not giving rise to an individual claim. In any event, Canada's legislative and administrative measures, policies and programs fully give effect to Covenant rights.

5.1 By letter of 27 June 2004, the authors' responded disputing the State party's submissions. The authors, firstly, rely on the Committee's decision in *Singer* to reject any ground of inadmissibility on the grounds of corporate rights. In *Singer*, the Committee considered with reference to the personal nature of freedom of expression that author individually, and not only his company, was personally affected by the Bills concerned. The only domestic difference between the cases being that *Singer* concerned a declaratory proceeding brought by *Singer's* corporation, while the present case concerns a prosecution against the authors' corporation, the authors invite the Committee to apply *Singer*. The authors argue that they have the freedom to impart information concerning their

business in the language of their choice, and have been personally affected by the restrictions at issue. They refer to trial testimony identifying the personal aspect of the advertising in the present case. Finally, the authors argue that if this ground of inadmissibility were to be accepted, it would exclude almost all commercial expression from Covenant protection, as most people engaged in trade do so through the vehicle of a corporation.

5.2 Secondly, as to domestic remedies, the authors reject the State party's submissions. They argue that the remarks of the Supreme Court of Canada in *Ford and Devine* to the effect that that French "marked predominance" requirement was justified in Charter terms were entirely based on considerations relating to the vulnerability of the French language and the *visage linguistique* of Québec. In the authors' view, these considerations did not meet the cumulative requirements of article 19, paragraph 3, and are thus in violation of the Covenant.

5.3 The authors argue that they did not refuse to introduce new evidence on the vulnerability of the French language and the *visage linguistique* of Québec to the Superior Court, on first appeal. Before the Superior Court, they stated that they would prefer to introduce such new evidence before him, rather than at a new trial. They contend the Superior Court misinterpreted this statement to mean a renunciation to provide any evidence at all, even before him. They point out, moreover, that in *Ford and Devine*, the Québec Government supplied evidence on the vulnerability of the French language for the first time at the level of the Supreme Court of Canada.

5.4 The authors point out that they filed extensive evidence not before the Supreme Court in *Ford and Devine*, including documentation relating to Canada's Covenant obligations, the submissions of the parties and the Committee's decisions in *McIntyre and Singer* and State practice in the area. They argue that the Superior Court judgment, upheld on appeal, had the effect of imposing a burden on an accused (to supply certain evidence) without allowing the accused to meet that burden, in violation of article 14. The fact, moreover, that other proceedings are challenging the "marked predominance" requirement does not change the fact that the present authors have exhausted available domestic remedies for their convictions.

5.5 Thirdly, the authors argue that they have more than sufficiently supported their allegations, more than sufficiently identified the rights protected under the Covenant, and more than sufficiently described the conduct in violation of those rights. The communication should thus be declared admissible.

Supplementary State party's submissions

6.1 By Note of 24 August 2004, the State party reiterated its submissions of admissibility, pointing out in particular that the current authors were not involved in the domestic proceedings, their corporation being the only party. The Committee has consistently decided that only individuals can submit a communication, and the inadmissibility of the communication does not have an impact on the scope of article 19's protection of commercial speech.

6.2 The State party emphasizes that the Superior Court invited counsel for the corporation to add to his evidence if he wished to do so in the context of a new trial. He declined to do so, preferring instead to obtain a judgment that he could appeal. After having declined the Superior Court's invitation, he again sought to add evidence before the Court of Appeal, which denied the application on behalf as the new evidence was not related to the judicial debate framed by the corporation itself in the lower courts and on appeal. The authors cannot before the Committee seek to review the strategic decisions of counsel to limit evidence and narrowly define the issues in the domestic courts.

6.3 The State party argues that it is clear that the authors mainly seek to challenge before the Committee a question of burden of proof in Canadian law. That issue has already been resolved before the domestic courts, who are currently examining the separate question of the constitutionality of section 58 of the Charter of the French language with its "marked predominance" requirement.

Issues and proceedings before the Committee

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee observes, on the issue of exhaustion of domestic remedies, that the authors' corporation, at the level of the Superior Court, expressly declined the Court's invitation to tender evidence going to the alleged insufficiency of justification of section 58 of the Charter of the French Language, being evidence not before the Supreme Court of Canada at the time it had suggested that a "marked predominance" requirement for French was acceptable. Instead, the corporation was content to argue the issue on burden of proof only. The Court of Appeal, for its part, rejected the corporation's application to file additional evidence on the basis that it was beyond

the narrow question framed by the corporation in the lower courts and on appeal. In such circumstances, the authors, through their corporation, have expressly withdrawn from the domestic courts in their case the factual elements and their assessment by the domestic courts which the Committee is now presented with, namely whether the situation currently prevailing in Québec is sufficient to justify the restrictions on article 19 rights imposed by section 58 of the Charter of the French Language. That wider question, which the authors' seek to present to the Committee through the lens of the Covenant, is the subject of current litigation in the State party's courts by the same counsel who withdrew the issue in the present case. It follows that the authors, through their corporation, have failed to

exhaust domestic remedies, with the result that the communication is inadmissible pursuant to article 5, paragraph 2 (b), of the Optional Protocol.

7.3 In the light of the Committee's finding above, it need not address the remaining arguments of admissibility advanced by the State party.

8. The Human Rights Committee therefore decides:

a) That the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

b) That this decision shall be communicated to the author and to the State party.

B. Views under article 5 (4) of the Optional Protocol

Communication No. 757/1997

Submitted by: Mrs. Alzbeta Pezoldova (represented by Lord Lester of Herne Hill, QC)

Alleged victim: The author

State party: Czech Republic

Views: 25 October 2002

Subject matter: Impossibility to obtain access to evidence that could support a property restitution claim

Procedural issues: Incompatibility *ratione temporis* - Non-exhaustion of domestic remedies - Examination by another procedure of international investigation or settlement

Substantive issues: Discrimination/equality before the law - Right to an effective remedy

Articles of the Covenant: 2; 14; and 26

Articles of the Optional Protocol: 1, 2; 3; 5, paragraph 2 (a) and (b)

Finding: Violation (articles 2 and 26)

1. The author of the communication is Mrs. Alzbeta Pezoldova, a Czech citizen residing in Prague, Czech Republic. She claims to be a victim of violations of articles 26, 2 and 14, paragraph 1, of the International Covenant on Civil and Political Rights by the Czech Republic. She is represented by counsel. The Covenant entered into force for Czechoslovakia in March 1976, the Optional Protocol in June 1991.¹

The facts as submitted by the author

2.1 Mrs. Pezoldova was born on 1 October 1947 in Vienna as the daughter and lawful heiress of Dr. Jindrich Schwarzenberg. The author states that the Nazi German Government had confiscated all of her family's properties in Austria, Germany, and Czechoslovakia, including an estate in Czechoslovakia known as "the Stekl" in 1940. She states that the property was confiscated because her adoptive grandfather Dr. Adolph Schwarzenberg was an opponent of Nazi policies. He left Czechoslovakia

in September 1939 and died in Italy in 1950. The author's father, Jindrich, was arrested by the Germans in 1943 and imprisoned in Buchenwald from where he was released in 1944. He went into exile in the United States and did not return to Czechoslovakia after the war.

2.2 After the Second World War, the family properties were placed under National Administration by the Czechoslovak Government in 1945. Pursuant to the Decrees issued by the Czechoslovak President Edward Benes, No. 12 of 21 June 1945 and No. 108 of 25 October 1945, houses and agricultural property of persons of German and Hungarian ethnic origin were confiscated. These Decrees were applied to the Schwarzenberg estate, on the ground that Schwarzenberg was an ethnic German, notwithstanding the fact that he had always been a loyal Czechoslovak citizen and defended Czechoslovak interests.

2.3 On 13 August 1947, a general confiscation law No. 142/1947 was enacted, allowing the Government to nationalize, in return for compensation, agricultural land over 50 hectares and industrial enterprises employing more than 200 workers. This law was, however, not applied to the Schwarzenberg estate because on the same day a *lex specialis*, Law No. 143/1947 (the so-called "Lex Schwarzenberg"), was promulgated, providing for the transfer of ownership of the Schwarzenberg properties to the State without compensation, notwithstanding the fact that the properties had already been confiscated pursuant to Benes' Decrees 12 and 108.² The author contends that Law

² The law reads:

"1. (1) The ownership of the property of the so-called primogeniture branch of the Schwarzenberg family in Hluboká nad Vltavou - as far as it is situated in the Czechoslovak Republic - is transferred by law to the county of Bohemia ...

4. The annexation of the property rights as well as all other rights according to paragraph 1 in favor of the

¹ The Czech and Slovak Federal Republic ceased to exist on 31 December 1992. On 22 February 1993, the new Czech Republic notified its succession to the Covenant and the Optional Protocol.

No. 143/1947 was unconstitutional, discriminatory and arbitrary, perpetuating and formalizing the earlier persecution of the Schwarzenberg family by the Nazis. According to the author, the Law did not automatically affect the previous confiscation under the Benes' Decrees. However, on 30 January 1948, the confiscation of the Schwarzenberg agricultural lands under Decrees Nos. 12 and 108 was revoked. Schwarzenberg's representative was informed by letter of 12 February 1948, and the parties were given the possibility to appeal within 15 days. The author submits therefore that the revocation only took effect after 27 February 1948 (two days after the qualifying date 25 February 1948 for restitution under law 229/1991).

2.4 According to the author, the transfer of the property was not automatic upon the coming into force of Law No. 143/1947, but subject to the intabulation (writing into the register) in the public register of the transfer of the relevant rights of ownership. In this context, the author states that National Administration (see paragraph 2.2) remained in force until June 1948, and that intabulation of the properties by land offices and Courts shows that, at the time, Law No. 143/1947 was not considered as having immediately transferred title.

2.5 Following the collapse of communist administration in 1989, several restitution laws were enacted. Pursuant to Law No. 229/1991,³ the author applied for restitution to the regional land authorities, but her applications for restitution were

county of Bohemia will be dealt with by the courts and offices, which keep public records of immobile property or other rights, and that following an application by the National Committee in Prague.

5. (1) The property is transferred into the ownership of the county of Bohemia without compensation for the former owners ...”

³ Act no. 229/1991 enacted by the Federal Assembly of the Czech and Slovak Federal Republic came into force on 24 June 1991. The purpose of this Law was “to alleviate the consequences of some property injuries suffered by the owners of agrarian and forest property in the period from 1948 to 1989”. According to the Act persons who are citizens of the Czech and Slovak Federal Republic who reside permanently on its territory and whose land and buildings and structures belonging to their original farmstead devolved to the State or other legal entities between 25 February 1948 and 1 January 1990 are entitled to restitution of this former property inter alia if it devolved to the State by dispossession without compensation under Law No. 142/1947, and in general by expropriation without compensation. By judgment of 13 December 1995 the Constitutional Court held that the requirement of permanent residence in Act No. 229/1991 was unconstitutional.

rejected by decisions of 14 February, 20 May and 19 July 1994.

2.6 The Prague City Court, by decisions of 27 June 1994⁴ and 28 February 1995,⁵ refused the author's appeal and decided that the ownership of the properties had been lawfully and automatically transferred to the State by operation of Law No. 143/1947, on 13 August 1947. Since according to restitution Law No. 229/1991 the qualifying period for claims of restitution started on 25 February 1948, the Prague City Court decided that the author was not entitled to claim restitution.⁶ The Court refused the author's request to suspend the proceedings in order to request the Constitutional Court to rule on the alleged unconstitutionality and invalidity of Law No. 143/1947.

2.7 On 9 March 1995 the author's application before the Constitutional Court concerning the City Court's decision of 27 June 1994 was rejected. The Court upheld the City Court's decision that ownership had been transferred to the State automatically by operation of Law No. 143/1947 and refused to consider whether Law No. 143/1947 was unconstitutional and void. The author did not appeal the City Court's decision of 28 February 1995 to the Constitutional Court, as it would have been futile in light of the outcome of the first appeal.

2.8 According to the author, the interpretation by the Courts that the transfer of the properties was automatic and not subject to intabulation is in blatant contradiction with the contemporary records and with the text of the law itself, which show that intabulation was a necessary condition for the transfer of the property, which in the instant case took place after 25 February 1948.

2.9 The author's application to the European Commission of Human Rights on 24 August 1995 concerning her claim to restitution for the “Stekl” property and the manner in which her claim had

⁴ Concerning the “Stekl” property.

⁵ Concerning properties in Krumlov and Klatovy.

⁶ The Prague City Court decided that the author was not an “entitled person” under section 4 (1) of Act No. 229/1991 on the ground that the transfer of the Schwarzenberg property to Czechoslovakia occurred immediately upon the promulgation of Act No. 143/1947 on 13 August 1947, before the qualifying date of 25 February 1948 prescribed by section 4 (1) of Act No. 229/1991. However, before the judgment by the Prague City Court, the interpretation had been that the material date was the date of intabulation of the property, which in the instant case occurred after 25 February 1948. In this context, the author states that the Constitutional Court, by judgment of 14 June 1995, concerning Act No. 142/1947 recognized that until 1 January 1951 intabulation had been necessary for the transfer of property.

been dealt with by the Czech Courts was declared inadmissible on 11 April 1996. The author states that the Commission did not investigate the substance of her complaint, and adds that her communication to the Human Rights Committee is different and broader in scope than her complaint to the European Commission of Human Rights.

2.10 As far as the exhaustion of domestic remedies is concerned, the author states that there are no other effective domestic remedies available to her in respect of the denial and exclusion of her claim to a remedy, whether by way of restitution or compensation, for the unlawful, arbitrary and discriminatory taking of her property and for the denial of justice in relation to her claim for such a remedy.

2.11 It appears from the submissions that the author continues to apply for restitution of different parts of her family's property, under law No. 243/1992⁷ which provides for restitution of properties confiscated under the Benes' Decrees. Such a claim was rejected by the Prague City Court on 30 April 1997, on the ground that her family's property had not been confiscated under the Benes' Decrees, but rather under Law No. 143/1947. According to counsel, the Court ignored thereby that the property had in fact been confiscated by the State under the Benes' Decrees in 1945 and that it had never been returned to the lawful owners, so that Law No. 143/1947 could not and did not operate to transfer the property from the Schwarzenberg family to the State. The Court refused to refer the issue of the constitutionality of Law No. 143/1947 to the Constitutional Court, as it held that this would have no influence upon the outcome of the case. On 13 May 1997, the Constitutional Court did not address the author's argument that Law No. 143/1947 was unconstitutional, since the Court considered that she lacked standing to submit a proposal to annul this law.

The complaint

3.1 The author claims that the continuing refusal by the Czech authorities, including the Czech Constitutional Court, to recognize and declare that Law No. 143/1947 is a discriminatory *lex specialis*, and as such null and void, constitutes a continuing arbitrary, discriminatory and unconstitutional interference with the author's right to the peaceful enjoyment of her inheritance and property, including the right to obtain restitution and compensation.

⁷ Law No. 243/1992 provides for restitution of property which was expropriated under Benes Decrees Nos. 12/1945 and 108/1945, provided that the claimant is a Czech citizen and did not commit an offence against the Czechoslovak State.

Moreover, the restitution Law No. 229/1991 violates article 26 of the Covenant because it provides for arbitrary and unfair discrimination among the victims of prior confiscations of property.

3.2 In this context, the author explains that the effect of Law No. 143/1947 in conjunction with Law No. 229/1991 discriminates against her arbitrarily and unfairly by excluding her from access to a remedy for the confiscation of the property. She states that she is a victim of arbitrary differences of treatment compared with other victims of prior confiscation. In this context, she refers to the perverse interpretation of Law No. 143/1947 by the Czech courts as having effected the automatic transfer of the property to the Czech State, the refusal by the Constitutional Court to examine the constitutionality of Law No. 143/1947, the arbitrary and inconsistent interpretation of Law No. 142/1947 and Law No. 143/1947, the arbitrary choice of the qualifying date of 25 February 1948, and the confirmation by post-1991 Courts of the arbitrary distinction for the restitution of property between Law No. 142/1947 and Law No. 143/1947.

3.3 Counsel refers to a decision by the Constitutional Court, on 13 May 1997, in which it addressed the constitutionality of Law No. 229/1991 and held that there were reasonable and objective grounds for the exclusion of all other property claims simply by virtue of the fact that the law was a manifest expression of the legislator's political will to make restitution claims fundamentally conditional on the existence of the said decisive period and that the legislator intended clearly to define the time limit.

3.4 With regard to her claim that there is arbitrary and unfair discrimination between herself and the victims of confiscations of property under Law No. 142/1947, counsel explains that according to section 32 (1) of Law No. 229/1991, the taking of property under Law No. 142/1947 is invalidated, but the Czech legislator has failed to invalidate the taking of property under Law No. 143/1947. Moreover, it is said that, in respect to Law No. 142/1947, intabulation or effective taking of possession is considered by the Constitutional Court as the material date in order to establish eligibility for compensation, whereas in respect of Law No. 143/1947 the date of promulgation of the Law is taken as the material date. In this context, the author states that the county of Bohemia did not take possession of the properties before May 1948.

3.5 She also claims an arbitrary and unfair discrimination between herself and other victims of confiscations of property under the Benes' Decrees of 1945, because such victims are eligible for restitution under those Decrees and under Law No. 87/1991 and Law No. 229/1991, in conjunction

with Law No. 243/1992 in respect of property taken whether before or after 25 February 1948, if they can demonstrate their loyalty to the Czech Republic and their innocence of any wrong-doing against the Czechoslovak State, whereas the author is denied this opportunity, because according to the post-1991 judgements, the expropriation under the Benes' Decrees was superseded by the enactment of Law No. 143/1947.

3.6 It is submitted that the author's denial of and exclusion from an effective remedy for the arbitrary, illegal, unfair and discriminatory taking of her property under the Benes' Decrees and under Law No.143/1947, constitutes continuing, arbitrary, unfair and unconstitutional discriminatory treatment of the author by the public authorities of the Czech Republic - legislative, executive, and judicial - which is contrary to the obligations of the Czech Republic under articles 2 and 26 of the Covenant. In this connection, the author states that the Human Rights Committee's considerations in the Simunek⁸ case are directly relevant to her complaint.

3.7 As regards her claim under article 14, paragraph 1, of the Covenant, the author states that she has been denied the right to equality before the Czech Courts and to a fair hearing by an independent and impartial tribunal, including effective access thereto. In this context, she refers to the manner in which the Courts rejected her claim, to more favourable jurisprudence of the Constitutional Court in comparable cases, and to the Constitutional Court's refusal to decide on the constitutionality of Law No. 143/1947.

3.8 In this context, the author points out that it was inherently contradictory to logic and common sense for the Constitutional Court to have confirmed the legal effects of Law No. 143/1947 while at the same time declaring the question of the constitutional validity of the Law to be irrelevant to the determination of the author's rights. The Court's decision was moreover inconsistent with its own jurisprudence and constitutional functions in annulling discriminatory legislation.

State party's admissibility submission and author's comments

4.1 By submission of 4 December 1997, the State party argues that the communication is inadmissible *ratione temporis*, as manifestly ill-founded, and for failure to exhaust domestic remedies. In explaining the background of the restitution legislation, the State party emphasizes that it was designed to deal with the after-effects of the totalitarian communist

regime and that it was logically limited by the date when the communists took power, and that it is an *ex gratia* act which never intended to provide for global reparation.

4.2 According to the State party, the communication is manifestly ill-founded since it is clear from the text of Law No. 143/1947 that the property in question devolved from Dr. Adolf Schwarzenberg to the State by virtue of this Act, before the qualifying date of 25 February 1948 contained in Law No. 229/1991. The State party explains that intabulation was only required for property changes by way of transfer (requiring the consent of the former owner) and not for property changes by way of devolution (not requiring the owner's consent).

In the latter cases intabulation is but a formality, serving to safeguard the ownership of the State against third persons. Also, Law No. 243/1992 does not apply to the author's case, since it is explicitly limited to expropriations carried out under the Benes' Decrees.

4.3 The State party argues that the Committee is incompetent *ratione temporis* to examine the author's claim that Law No. 143/1947 was unlawful or discriminatory. The State party acknowledges that the Committee would be competent *ratione temporis* to assess cases covered by either Law No. 229/1991 or 243/1992, including cases which originated in the period preceding the date of entry into force of the Covenant for the Czech Republic. However, since neither Law applies to the author's case, the sphere of legal relations established by Law No. 143/1947 is *ratione temporis* outside the scope of the Covenant.

4.4 Finally, the State party argues that the communication to the Committee is wider in scope than the author's complaint to the Constitutional Court and is therefore inadmissible for non-exhaustion of domestic remedies. In this connection, the State party submits that 27 complaints presented by the author are still pending before the Constitutional Court.

5.1 In her comments to the State party's submission, the author does not challenge the State party's explanation that the legislation never intended to provide global reparation, but submits that the complaint in the present case concerns the way this legislation has been applied to the author's case, resulting in discriminatory denial and exclusion from an effective remedy of restitution or compensation for the unlawful taking of her family's property, in violation of her right to equality before the law and equal protection by the law. The complaint also concerns the denial of her right to equality before the Czech courts and of a fair hearing.

⁸ *Simunek et al. v. Czech Republic*, Case No. 516/1992. Views adopted on 17 July 1995.

5.2 As regards the State party's argument that the communication is manifestly ill-founded, counsel refers to the legal regime for restitution and compensation, which consists of different laws and lacks transparency. The author contests the version of the facts presented by the State party and maintains that her family's property was taken unlawfully by the State under Benes' Decrees Nos. 12/1945 and 108/1945, and that Law No. 143/1947 did not take property away from the family. If, however, which the author denies, the Law No. 143/1947 did deprive the author's family of their property as suggested by the State party, then the author challenges

“the State party's statement that the property was taken before the qualifying date of 25 February 1948. In this context, the author refers to her earlier submissions and argues that the Courts have failed to recognize the arbitrary, unfair and unconstitutional nature of the provision of the qualifying date of 25 February 1948.”

5.3 The author notes that the State party has not addressed the complaint that the Constitutional Court denied her a hearing concerning the constitutionality of Law No. 143/1947 by declaring her complaint inadmissible.

5.4 Concerning the State party's argument that the communication is inadmissible *ratione temporis*, the author points out that she does not complain that law No. 143/1947 was in violation of the Covenant, but that the acts and omissions of the State party's public authorities after the entry into force of the Covenant and Optional Protocol, denying her an effective remedy of restitution and compensation in a discriminatory manner, violate the Covenant.

5.5 With regard to the State party's argument that her communication is wider in scope than her appeal to the Constitutional Court, and that several constitutional complaints are still pending before the Constitutional Court, she states that this is due to the failure of the courts to deal with the substance of her case, and the lack of cooperation by the authorities to investigate and to assist the author to clarify the matters at issue.

5.6 In a further submission, dated 12 January 1999, the author informs the Committee about developments in her case. She refers to decisions taken by the Constitutional Court on 4 September 1998, in which the Court decided that her claims for restitution under Law No. 243/1992 were outside the time limit prescribed for claims under that Law. She explains that the time limit for filing complaints was 31 December 1992, and for entitled persons who as of 29 May 1992 were not residing in the Czech Republic, 15 July 1996. The author, having become a Czech citizen and resident in 1993, made her claim on 10 July 1996. The Court, however, rejected her claim

since she had not been a citizen on 29 May 1992, and therefore was not an entitled person as defined by the law.

5.7 The author claims that the requirement of Czech citizenship constitutes a violation of her rights under articles 2 and 26 of the Covenant. In this context, she refers to the Committee's Views in the *Simunek* case.

5.8 Counsel further submits that, in a decision of 26 May 1998, the Constitutional Court, concerning the Salm palace in Prague, decided that the author's restitution claim was inadmissible for being out of time and that it therefore need not decide whether or not the author had a title to the property. According to the author, in refusing to decide her title claim, the Court denied her justice in violation of article 14, paragraph 1, of the Covenant.

Admissibility considerations

6.1 At its sixty-sixth session in July 1999, the Committee considered the admissibility of the communication.

6.2 It held that the author's claims concerning Law No. 143/1947 were outside the Committee's competence *ratione temporis* and thus inadmissible under article 1 of the Optional Protocol.

6.3 With regard to the author's claim that she was denied a fair hearing because of the manner in which the courts interpreted the laws to be applied to her case, the Committee recalled that the interpretation of domestic law is essentially a matter for the courts and authorities of the State party concerned and declared this part of the communication inadmissible under article 3 of the Optional Protocol.

6.4 The Committee also considered inadmissible the author's claim that she is a victim of a violation of article 14, paragraph 1, of the Covenant, because the courts refused to determine whether she had a legal title to property. The Committee found that the author had not substantiated her claim, for purposes of admissibility, that the failure of the courts in this respect was arbitrary, or that the Government's failure to examine the constitutionality of Law No. 143/1947 constituted a violation of article 14 (1).

6.5 With regard to the State party's objection that the communication was inadmissible for non-exhaustion of domestic remedies, the Committee noted that all the issues raised in the present communication have been brought before the domestic courts of the State party in the several applications filed by the author, and have been considered by the State party's highest judicial authority. The Committee considered therefore that it was not precluded from considering the

communication by the requirement contained in article 5, paragraph 2 (b), of the Optional Protocol.

6.6 The Committee noted that a similar claim filed by the author had been declared inadmissible by the European Commission of Human Rights on 11 April 1996. However, article 5, paragraph 2 (a), of the Optional Protocol would not constitute an obstacle to the admissibility of the instant communication, since the matter was no longer pending before another procedure of international investigation or settlement, and the Czech Republic had not made a reservation under article 5 (2) (a) of the Optional Protocol.

6.7 On 9 July 1999, the Committee decided that the author's remaining claims, in that she had been excluded from access to a remedy in a discriminatory manner, were admissible as they may raise issues under articles 2 and 26 of the Covenant.

Submissions on the merits

7.1 By submission of 23 March 2002, the author refers to the Committee's Views in case No. 774/1997 (*Brok v. The Czech Republic*), and, with respect to the issue of equal access, within the limits of the admissibility granted for issues under articles 2 and 26 of the Covenant, alleges that the Ministry of Agriculture and various State archives, until the year 2001, consistently denied to the author and to all land authorities access to the complete file on the confiscation procedures against her grandfather Dr. Adolph Schwarzenberg and his appeals lodged in due course (see paragraph 5.5 above). In particular, it is stated that as late as 2001 author's counsel was denied the inspection of the Schwarzenberg file by the director for legal affairs in the Ministry, Dr. Jindrich Urfus, and only when the author had found other relevant documents in another archive, was counsel informed by the Ministry, on 11 May 2001, that the file indeed existed and he was allowed to inspect it. Moreover, it is stated that on 5 October 1993 the head of the State archive in Krumlov, Dr. Anna Kubikova, had denied the author the use of the archive in the presence of her assistant Ing. Zaloha, dismissing her with the words "All Czech citizens are entitled to use this archive but you are not entitled to do so." The author complains that such denials of access illustrate the inequality of treatment to which she has been subjected by the Czech authorities since 1992.

7.2 The documents suppressed prove that, in fact, the Schwarzenberg estate was confiscated pursuant to Presidential Decree No. 12/45. The authorities of the State party not only prevented the author from detecting and reporting the complete facts of her case to the land authorities and courts and to meet the deadlines for lodging claims according to laws 87/91 and 243/92, but also wilfully misled all land authorities and the Human Rights Committee.

7.3 On 29 November 2001, the Regional Court of Ceske Budejovice (15 Co 633/2001-115) as court of appeal confirmed that the Schwarzenberg estate was indeed confiscated pursuant to Section 1, par. 1, lit (a) of Decree No. 12/45, thus underlining the inapplicability of Law 143/47. However, the Court granted no redress to the author, because according to the author, there was no remedy available for anybody deemed to be of German or Hungarian stock.

7.4 The Ministry of Lands also rejected the author's appeals against the refusal by all land authorities to reopen various restitution procedures in the light of the crucial information that had been suppressed and which the author had finally been able to obtain. It is assumed that the uniform negative decrees from various land authorities were issued on instruction from the Ministry itself, as the Ministry has instructed the land authorities on other procedures concerning the author.

7.5 It is further stated that the Prague City Court ignored the relevant findings of the Czech Constitutional Court in not applying the restitution Law No. 243/92. It is alleged that this denial of justice constitutes unequal treatment because of the author's language, national and social origin and property.

8.1 By note verbale of 7 June 2002 the State party made the following observations on the merits. With regard to the author's challenge to the interpretation of Act No. 143/1947 by the Czech courts, the State party submits that "the interpretation of domestic law is essentially a matter for the courts and authorities of the State party concerned. It is not within the powers of the Committee to evaluate whether the competent authorities of the State party in question have interpreted and applied the domestic law correctly in the present case, unless it is established that they have not interpreted and applied it in good faith or it is evident that there has been an abuse of power. The proceedings of the courts of the Czech Republic in the case in question are described in detail in the Observation of the Czech Republic on the admissibility of the communication, which confirms the legality of the court proceedings. On the other hand, the author did not substantiate the allegation of the perverse interpretation of Act No. 143/1947."

8.2 With regard to the author's claim of discrimination between the interpretations of Act No. 142/1947 and Act No. 143/1947, the State party refers to its observation on the admissibility of the communication which contains the quotation of the relevant provisions of Act No. 143/1947 and explanation of their interpretation by administrative and judicial authorities of the Czech Republic.

8.3 With regard to the author's challenge of the choice of the qualifying date of 25 February 1948 as arbitrary, the State party observes that "the question of compliance of the qualifying date of 25 February

1948 in the restitution law of the Czech Republic with articles 2 and 26 of the Covenant were repeatedly considered by the Committee. In connection to this, the State party refers to the decisions of the Committee in cases *Ruediger Schlosser v. Czech Republic* (communication No. 670/1995) and *Gerhard Malik v. Czech Republic* (communication No. 669/1995). In both of these cases, the Committee concluded that ‘not every distinction or differentiation in treatment amounts to discrimination within the meaning of articles 2 and 26. The Committee considers that in the present case, legislation adopted after the fall of the Communist regime does not appear to be prima facie discriminatory within the meaning of article 26 merely because, as the author contends, it does not compensate the victims of injustices committed in the period before the Communist regime ...’ The purpose of the restitution legislation was to redress the property injustices caused by the Communist regime in the period 1948-1989. The stipulation of the qualifying date by the legislator was objective due to the fact that the Communist coup took place on 25 February 1948 and justified with regard to the economic possibilities of the State in transition from totalitarian to democratic regime. The non-existence of the recognition of the right to restitution in international law should be also taken into account in this respect.”

8.4 With respect to the author’s challenge of the distinction for the restitution of the property between Act No. 142/1947 and Act No. 143/1947 and the arbitrary and unfair discrimination between the author and other victims of confiscations of property under Presidential Decrees of 1945, the State party observes that “the restitution legislation is not related to transfer of the property carried out before 25 February 1948, in conformity with the laws implementing a new social and economic policy of the State. These laws were not instruments of Communist persecution. While the Act No. 229/1991 refers to Act No. 142/1947 (art. 6, paragraph 1 (b)) it also stipulates that the transfer of the property had to be made in the qualifying period from 25 February 1948 till 1 January 1990. Through this cumulative condition the Act No. 229/1991 observes the above-mentioned purpose and philosophy of the restitution legislation and represents the objective criteria for the entitlement to the restitution of property. The property of the grandfather of the author of the communication was transferred to the State before 25 February 1948 and therefore does not fall within the restitution of the property caused by the Communist regime. The restitution of property due to the injustices caused by the incorrect application of the Presidential Decrees is stipulated by Act No. 243/1992 and it relates to totally a different situation than that of the author’s grandfather and therefore is irrelevant in this case.”

9.1 In her comments of 24 June 2002, the author reiterates that the essence of the complaint is that the Czech authorities have violated her right to equal treatment by arbitrarily denying her right to restitution under Act No. 243/1992, which extended eligibility for restitution of property to a citizen of the Czech Republic (like the author) who descended from someone (Dr. Adolph Schwarzenberg) who lost his property as a result of Presidential Decree No. 12/1945 or Presidential Decree No. 108/1945. Provided that the property was taken under either of the Benes’ Decrees, there is no requirement under Czech law that it was taken within the qualifying period prescribed by Act No. 87/1991 and Act No. 229/1991, beginning on 25 February 1948.

9.2 It is stated that the Czech authorities have arbitrarily ignored the clear and unambiguous evidence produced by the author from the contemporary official records that the property was taken by the Czechoslovak State from Dr. Adolph Schwarzenberg under Decree No. 12/1945, and that they have denied her any remedy on the false basis that the property was taken under the so-called “Lex Schwarzenberg”, Act No. 143/1947, rather than under Benes’ Decree No. 12/1945. In their observations the Czech Government focuses only on justifying the “cut-off” date of 25 February 1948, provided for in restitution Acts Nos. 87/1991 and 229/1991. The State party fails to address the essence of the author’s case, that the relevant property was taken pursuant to the Benes’ Decrees, and that it is therefore entirely irrelevant that the taking occurred before 25 February 1948. The State party dismisses the author’s reference to her right to restitution pursuant to Act No. 243/1992 in one sentence, merely stating that “it relates to a totally different situation than that of the author’s grandfather and therefore is irrelevant in this case”. No evidence or reasoning is provided to substantiate this bare assertion, which is contradicted by the decision of the Regional Court in Ceske Budejovice, sitting as an appellate court, dated 29 November 2001. That decision found that Dr. Adolph Schwarzenberg’s property was transferred into the ownership of the State pursuant to Decree No. 12/1945. The court stated that it “has no doubts that the property of Adolph Schwarzenberg was transferred into the ownership of the State with immediate effect in full accordance with Decree No. 12/45”. Not only does the State party in its Observations ignore the Regional Court’s finding, but it also fails to address the other facts and arguments brought to the attention of the Committee by the author in its submission of 23 March 2002 (see above paragraphs 7.1-7.5).

9.3 The author refers to the evidence placed before the Committee showing that the Czech authorities have until 2001 systematically denied her

access to the documents that proved that the confiscations had taken place pursuant to Benes' Decree No. 12/1945. By suppressing this evidence, the authorities wrongly prevented the author from detecting and reporting the true facts of her case to the land authorities and courts.

9.4 Moreover, the author argues that for the purposes of this case, the Committee's obiter dicta in its decisions concerning the admissibility of cases Schlosser and Malik against the Czech Republic, on which the State party relies, are irrelevant. The author accepts that not every distinction in treatment amounts to discrimination, but the facts of her case are entirely different from the circumstances of the Schlosser and Malik cases. The author's case concerns the arbitrary denial of access to information crucial to exercising her rights to restitution, and the arbitrary denial of a remedy pursuant to Act 243/1992, which was enacted to redress injustices in the application of the Benes' Decrees, such as were endured by Dr. Adolph Schwarzenberg.

10. The author's submission was transmitted to the State party on 24 June 2002. No further comments have been received.

Examination of the merits

11.1 In conformity with article 5, paragraph 1, of the Optional Protocol, the Committee proceeds to an examination of the merits on the basis of all the information submitted by the parties.

11.2 The question before the Committee is whether the author was excluded from access to an effective remedy in a discriminatory manner. According to article 26 of the Covenant, all persons are equal before the law and every person has the right to equal protection of the law.

11.3 The Committee notes the statement of the author that the essence of her complaint is that the Czech authorities have violated her right to equal treatment by arbitrarily denying her right to restitution on the basis of Laws Nos. 229/1991 and 243/1992 with the argument that the properties of her adoptive grandfather were confiscated under Law No. 143/1947 and not under Benes' Decrees Nos. 12 and 108/1945 and therefore the restitution laws of 1991 and 1992 would not apply. The Committee notes further the author's argument that the State party constantly, until the year 2001, denied her access to the relevant files and archives, so that only then could documents be presented that would prove that, in fact, the confiscation occurred on the basis of the Benes' Decrees of 1945 and not of Law No. 143/1947, with the consequence that the author would be entitled to restitution under the laws of 1991 and 1992.

11.4 The Committee recalls its jurisprudence that the interpretation and application of domestic law is essentially a matter for the courts and authorities of the State party concerned. However, in pursuing a claim under domestic law, the individual must have equal access to remedies, which includes the opportunity to ascertain and present the true facts, without which the courts would be misled. The Committee notes that the State party has not addressed the allegation of the author that she was denied access to documents which were crucial for the correct decision of her case. In the absence of any explanation by the State party, due weight must be given to the author's allegations.

11.5 In this context, the Committee also notes that by decision of 29 November 2001, the Regional Court of Ceske Budejovice recognized that the taking of Dr. Adolph Schwarzenberg's property had been effected pursuant to Benes' Decree 12/1945. The Committee further notes that on 30 January 1948 the confiscation of the Schwarzenberg agricultural lands under Benes' Decrees Nos. 12 and 108/1945 was revoked, apparently in order to give way for the application of Law 143/1947. The point in time when the revocation became effective seems not to have been clarified, because the courts proceeded from the premise that Law No. 143 was the only applicable legal basis.

11.6 It is not the task of the Committee but of the courts of the State party to decide on questions of Czech Law. The Committee finds, however, that the author was repeatedly discriminated against in being denied access to relevant documents which could have proved her restitution claims. The Committee is, therefore, of the view that the author's rights under article 26 in conjunction with article 2 of the Covenant were violated.

12.1 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it reveal a violation of article 26, in conjunction with article 2 of the Covenant.

12.2 In accordance with article 2, paragraph 3 (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including an opportunity to file a new claim for restitution or compensation. The State party should review its legislation and administrative practices to ensure that all persons enjoy both equality before the law as well as the equal protection of the law.

12.3 The Committee recalls that the Czech Republic, by becoming a State party to the Optional Protocol, 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 or 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. Furthermore, the Committee urges the State party to put in place procedures to deal with Views under the Optional Protocol.

12.4 In this connection the Committee wishes to receive from the State party, within 90 days following the transmittal of these Views to the State party, information about the measures taken to give effect to the Views. The State party is also requested to publish the Committee's Views.

APPENDIX

Individual opinion (partly concurring) by Committee member Mr. Nisuke Ando

As for my own view on the restitution laws enacted after 1991, reference is made to my individual opinion appended to the Committee's Views in Communication No. 774/1997, *Brok v. The Czech Republic*.

As for the Committee's Views in the instant case, I must first point out that the Views contradicts the Committee's own admissibility decision. In its admissibility decision of 9 July 1999, the Committee clearly held that the author's claim concerning Law No. 143/1947 were outside the Committee's competence *ratione temporis* and thus inadmissible under article 1 of the Optional Protocol (6.2). And yet, in its examination of the merits, the Committee goes into the details of the author's claims and states that on 30 January 1948 the confiscation of the properties in question under Benes' Decrees Nos. 12 and 108/1945 were revoked in order to give way for the application of Law 143/1947 (11.5), that on 29 November 2001 the Regional Court of Ceske Budejovice recognized the confiscation as effected pursuant to Benes' Decree No. 12/1945 (11.5), that the author was denied access to the relevant documents which were crucial for the correct decision of her case (11.4), and that only those documents could prove that the confiscation occurred on the basis of the Benes' Decrees of 1945 and not of Law No. 143/1947 (11.3).

Secondly, I must point out that, in these statements as well as in its conclusion that the State party violated the author's right to the equal protection of the law under articles 26 and 2 by denying the author's access to the relevant documents (11.6), the Committee has deviated from its established jurisprudence that it should not act as the court of fourth instance to any domestic court. True, the Committee indicates that the interpretation and application of domestic law is essentially a matter for the courts and the authorities of the State party concerned (11.4 and 11.6). However, while the Czech courts have decided that the properties in question were transferred to the State before 25 February 1948 and thus do not fall within the restitution of the property caused by the Communist regime (8.4), the Committee concludes that the author was denied access to the relevant documents in

violation of articles 26 and 2 of the Covenant (11.6) and that the State party is under an obligation to provide the author with an opportunity to file a new claim for restitution on the basis of the relevant documents (12.2).

Thirdly, I must point out that, on 11 May 2001, the author's counsel was not only informed by the Czech Ministry of Agriculture of the existence of the relevant documents but also was allowed to inspect them (7.1). From this date onward, in my opinion, it seems impossible to maintain that the State party continued to violate the author's rights under articles 26 and 2 by excluding her from access to the documents in question.

Individual opinion (Partly concurring) by Committee member Prafullachandra Natwarlal Bhagwati

I agree with the Committee's conclusion that the facts before it reveal a violation of articles 26 and 2 of the Covenant. However, I am persuaded that there is also a violation of article 14, paragraph 1, of the Covenant, which stipulates that all persons shall be equal before the courts and tribunals and be entitled to a fair and public hearing of their rights and obligations in a suit at law. As a prerequisite to have a fair and meaningful hearing of a claim, a person should be afforded full and equal access to public sources of information, including land registries and archives, so as to obtain the elements necessary to establish a claim. The author has demonstrated that she was denied such equal access, and the State party has failed to explain or refute the author's allegations. Moreover, the protracted legal proceedings in this case, now lasting over 10 years, have not yet been completed. In the context of this particular case and in the light of previous Czech restitution cases already adjudicated by the Committee, the apparent reluctance of the Czech authorities and of the Czech courts to process restitution claims fairly and expeditiously also entails a violation of the spirit, if not the letter of article 14. It should also be remembered that, subsequent to the entry into force of the Optional Protocol for the Czech Republic, the State party has continued to apply Law No. 143/1947 (the "law Schwarzenberg") which targeted exclusively the property of the author's family. Such *ad hominem* legislation is incompatible with the Covenant, as a general denial of the right to equality. In the light of the above, I believe that the appropriate remedy should have been restitution and not just the opportunity of resubmitting a claim to the Czech courts.

In 1999 the Committee had declared this communication admissible, insofar as it might raise issues under articles 26 and 2 of the Covenant. I do not think that this necessarily precluded the Committee from making a finding of a violation of article 14, since the State party was aware of all elements of the communication and could have addressed the article 14 issues raised by the author. Of course, the Committee could have revised its admissibility decision so as to include the claims under article 14 of the Covenant, and requested relevant observations from the State party. This, however, would have further delayed disposition of a case which has been before the Courts of the State party since 1992 and before the Committee since 1997.

Communication No. 778/1997

Submitted by: José Antonio Coronel et al. (represented by Federico Andreu Guzmán)

Alleged victim: Gustavo Coronel Navarro, Nahún Elías Sánchez Vega, Ramón Emilio Sánchez, Ramón Emilio Quintero Ropero, Luis Honorio Quintero Ropero, Ramón Villegas Tellez and Ernesto Ascanio Ascanio

State party: Colombia

Date of adoption of Views: 24 October 2002

Subject matter: Unlawful arrest and deprivation of life by State officials

Procedural issues: Undue delay in exhaustion of domestic remedies

Substantive issues: Right to life - Torture - Unlawful arrest - Unlawful interference with victims' homes

Articles of the Covenant: 2, paragraph 3; 6, paragraph 1; 7; 9 and 17

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

1. The authors of the communication are José Antonio Coronel, José de la Cruz Sánchez, Lucenid Villegas, José del Carmen Sánchez, Jesus Aurelio Quintero and Nidia Linores Ascanio Ascanio, acting on behalf of seven deceased family members: Gustavo Coronel Navarro, Nahún Elías Sánchez Vega, Ramón Emilio Sánchez, Ramón Emilio Quintero Ropero, Luis Honorio Quintero Ropero, Ramón Villegas Tellez and Ernesto Ascanio Ascanio, all Colombian nationals who died in January 1993.¹ The authors of the communication claim that their relatives were victims of violations by Colombia of article 2, paragraph 3, article 6, paragraph 1, and articles 7, 9 and 17 of the International Covenant on Civil and Political Rights. The authors are represented by counsel.

The facts as submitted by the authors

2.1 Between 12 and 14 January 1993, troops of the "Motilones" Anti-Guerrilla Battalion (No. 17), attached to the Second Mobile Brigade of the Colombian National Army, conducted a military operation in the indigenous community of San José del Tarra (municipality of Hacari, department of Norte Santander) and launched a search operation in

¹ The authors' relationship with the victims is as follows: José Antonio Coronel, father of Gustavo Coronel Navarro; José de la Cruz Sánchez, father of Nahún Elías Sánchez Vega; Lucenid Villegas, sister of Ramón Villegas Tellez; José del Carmen Sánchez, father of Ramón Emilio Sánchez; Jesus Aurelio Quintero, father of Ramón Emilio and Luis Honorio Quintero Ropero; Nidia Linores Ascanio Ascanio, sister of Luis Ernesto Ascanio Ascanio.

the region, making incursions into a number of neighbouring settlements and villages. During these operations, the soldiers raided several houses and arrested a number of people, including Ramón Villegas Tellez, Gustavo Coronel Navarro, Nahún Elías Sánchez Vega, Ramón Emilio Sánchez, Ramón Emilio Quintero Ropero and Luis Honorio Quintero Ropero. Both the raids and the arrests were carried out illegally, since the soldiers did not have the judicial warrants prescribed by Colombian law on criminal procedure to conduct searches or make arrests.

2.2 Ramón Villegas Tellez, Gustavo Coronel Navarro, Nahún Elías Sánchez Vega, Ramón Emilio Sánchez, Ramón Emilio Quintero Ropero, Luis Honorio Quintero Ropero and others were tortured by the soldiers, and some of them were forced to put on military uniforms and go on patrol with the members of the "Motilones" Anti-Guerrilla Battalion (No. 17). All of them were "disappeared" between 13 and 14 January 1993.

2.3 On 26 January 1993, Luis Ernesto Ascanio Ascanio, aged 16, disappeared while on his way home, abducted by soldiers who, a few days before, had raided the home of the Ascanio Ascanio family, ill-treating and harassing the family members, who included six minors and also a 22-year-old mentally deficient young man, whom they attempted to hang. The soldiers remained in the house until 31 January, holding its inhabitants hostage. Luis Ernesto Ascanio Ascanio was seen for the last time some 15 minutes away from the family home. On the same day, members of the Ascanio family heard shouts and shots coming from outside the house. On 27 January, two of the brothers of Luis Ernesto Ascanio Ascanio succeeded in evading the military guards and fled to Ocaña, where they advised the local authorities and submitted a complaint to the Provincial Office of the Attorney-General. Once the military patrol had withdrawn, the search for Luis Ernesto Ascanio Ascanio began; the outcome was the discovery of a pocket knife belonging to him some 300 metres away from the house.

2.4 The Second Mobile Brigade reported various alleged armed clashes with guerrillas of the Revolutionary Armed Forces of Colombia (FARC) - the first on 13 January 1993, the second on

18 January 1993 and two incidents on 27 January 1993. The version given by the military authorities was that during the clashes the regular troops had killed a number of guerrillas. On 13 January 1993, three bodies were removed by the judicial police (SIJIN) in Ocaña, one of which was identified as the body of Gustavo Coronel Navarro. On 18 January, the soldiers deposited at the hospital the bodies of four alleged guerrillas “killed in combat”. The SIJIN removed these corpses and confirmed the deaths of Luis Honorio Quintero Roperero, Ramón Emilio Quintero Roperero, Nahún Elías Sánchez Vega and Ramón Emilio Sánchez. On 29 January 1993, the Second Mobile Brigade brought in the bodies of four persons killed in the alleged clashes of 27 January 1993; again the SIJIN removed the bodies. On 21 May 1993, the bodies of the last four dead were exhumed in the cemetery of Ocaña; one of these was the body of Luis Ernesto Ascanio Ascanio, which was recognized by his relatives. The forensic report stated that one of the bodies brought to the hospital on 18 January contained a number of bullet entry holes with powder burns. In the records relating to the removal of the bodies on 21 May 1993, SIJIN officials stated that the bodies were clothed in uniforms used exclusively by the National Police.

2.5 The members of the victims’ families and the non-governmental organizations (NGOs) assisting them have brought the facts to the attention of the judicial authorities in the criminal, administrative litigation, disciplinary and administrative departments at the local, provincial and national levels. Between 15 January and 1 February 1993, the relatives reported the disappearance of their family members to the Ocaña Provincial Office of the Attorney-General. They also lodged a complaint with the same authority concerning abuse of power by the Second Mobile Brigade and made various representations to the Ocaña Provincial Procurator’s Office, the National Office for Examination and Processing of Complaints (Office of the Ombudsman) and the Regional Office of the Public Prosecutor in Cúcuta. The mayor of Hacari sent an official letter to the commander of the brigade requesting him to investigate the facts and order the release of the peasants. The mayor of the municipality of La Playa lodged complaints with the competent authorities concerning the incidents perpetrated by the Second Mobile Brigade within his municipality: namely acts of violence against the Ascanio Ascanio family and the disappearance of Luis Ernesto Ascanio Ascanio. After reporting the incidents, the Ascanio, Sánchez and Quintero families were subjected to a great deal of harassment; as a consequence, they had to leave the region and move to various places within the country.

2.6 On 15 July 1993, the municipal official in Hacari in charge of the case, after receiving information from the relatives, submitted a report in

which he concluded that it was impossible to “identify individually” those responsible for the abduction of Gustavo Coronel Navarro and Ramón Villegas Téllez, but that they were members of the Second Mobile Brigade.

2.7 Only the family of Luis Ernesto Ascanio Ascanio submitted their complaint in person to the Ocaña Public Prosecutor’s Office in February 1993. The facts relating to the other victims were brought to the attention of the Public Prosecutor’s Office by one of the NGOs, since the other families were afraid to present themselves personally at the offices of the judiciary in Ocaña. The preliminary inquiries made were compiled in file No. 4239 and transmitted to the military jurisdiction, as the competent body, in April 1995. From 30 August 1995 onwards, the relatives attempted several times to convince the Human Rights Unit in the National Public Prosecutor’s Office to begin criminal proceedings; but the request was turned down on the grounds that the matter was one for the military courts.

2.8 The military criminal jurisdiction undertook various preliminary investigations into the facts as described. Judge No. 47 of the Military Criminal Investigation Unit, attached to the Second Mobile Brigade, opened preliminary inquiries Nos. 27, 30 and 28,² the findings of which are contained in file No. 979, throughout which the incidents are referred to as “deaths in combat”.

2.9 On 3 July 1996, the Second Mobile Brigade was stationed in the city of Fusagasuga (Cundinamarca), and the family of Luis Ernesto Ascanio Ascanio succeeded in submitting a petition to become a party to the proceedings. Up to the date of the initial communication, they had not been notified of any judicial decision on the subject.³

2.10 The authors state that the Special Investigations Unit in the National Office of the Attorney-General opened a file (No. 2291-93/DH) on the incidents in question following complaints submitted by the relatives to the Provincial Office of the Attorney-General in Ocaña, and officials were appointed to conduct the investigation. On 22 February 1993, a preliminary report from the officials in charge of the investigation drew attention to contradictions between the versions of the relatives and those of the military, and also to the way in which the judge in charge of Court No. 47 in the Military Criminal Investigation Department had hampered and obstructed them in their task. They suggested that further evidence should be sought and

² On 25 January, 2 February and 10 February 1993, respectively.

³ Indeed, there is still no evidence that any judicial decision has been notified to them.

that disciplinary investigation proceedings should be instituted against Judge No. 47 of the Military Criminal Investigation Department.

2.11 The director of the Special Investigations Unit ordered a new investigation, including an investigation into the conduct of Judge No. 47 of the Military Criminal Investigation Department. The investigating officials submitted several reports to the director; one of them, relating to Luis Honorio Quintero Ropero, Ramón Emilio Ropero Quintero, Nahún Elías Sánchez Vega and Ramón Emilio Sánchez, stated that “it is fully demonstrated that material responsibility lies with anti-guerrilla section C of battalion 17 (‘Motilones’) of the Second Mobile Brigade under the command of Captain Serna Arbelaez Mauricio”.

2.12 On 29 June 1994, in their final report, the officials confirmed that it was fully proved that the peasants had been detained by members of anti-guerrilla battalion No. 17 (‘Motilones’) of the Second Mobile Brigade, on the occasion of a military operation carried out in compliance with operation order No. 10 issued by the commander of that military unit; that the peasants were last seen alive when in the hands of the soldiers and appeared to have died later in the course of two alleged clashes with units of the military. They also established that Luis Ernesto Ascanio Ascanio, a minor, was last seen alive heading home some 15 minutes’ walk from home and that the boy was found dead after another alleged clash with the military. The officials identified the commanders, officers, non-commissioned officers and privates who formed part of the patrols that captured the peasants and occupied the dwelling of the Ascanio family. The report concluded that, “on the basis of the evidence advanced, the allegation of combats in which the victims could have taken part is discredited, since they were already being held by troops of the National Army, in a manner which was, moreover, irregular; some of them bear marks on the skin that demonstrate even more clearly the defenceless condition they were in ...”. The report recommended that the case should be referred to the Armed Forces Division in the Procurator’s Office.

2.13 On 25 October 1994, the Armed Forces Division in the Attorney-General’s Office referred the file to the Human Rights Division of the same office on jurisdictional grounds. The transmission document indicates that “the following has been established ... the state of complete defencelessness of the victims ..., the close range at which the bullets that killed them were fired and the fact that they had been detained before they died; the foregoing, together with other evidence, disproves the existence of an alleged combat that allegedly was the central circumstance causing the deaths recorded”.

2.14 On 28 November 1994, the Human Rights Division opened disciplinary proceedings file No. 008-153713 and began preliminary investigations. On 26 April 1996, it informed one of the NGOs that the proceedings were still at the preliminary inquiry stage.

2.15 On 13 January 1995, the families of the victims lodged a claim against Colombia in the administrative court for the deaths of Luis Honorio Quintero Ropero, Ramón Emilio Quintero Ropero, Ramón Emilio Sánchez, Luis Ernesto Ascanio Ascanio, Nahún Elías Sánchez Vega and Ramón Villegas Téllez; the claims were declared admissible between 31 January and 24 February 1995.

The complaint

3.1 The authors submit that the facts outlined above amount to violations by Colombia of article 6, paragraph 1, of the International Covenant on Civil and Political Rights in that the seven victims were arbitrarily deprived of life.

3.2 They also allege a violation of article 7 of the Covenant on account of the torture suffered by the victims after having been arbitrarily detained and before being murdered.

3.3 The authors maintain that the detention of the victims by the armed forces without any type of arrest warrant constitutes a violation of article 9 of the Covenant.

3.4 The authors also allege a violation of article 17 of the Covenant, inasmuch as the victims’ right to privacy and freedom from interference in family life were violated when they were arrested in their homes.

3.5 The authors allege a violation of article 2, paragraph 3, of the Covenant since the State party has not provided an effective remedy for cases where it fails in its obligation to safeguard the rights protected by the Covenant.

3.6 The authors submit that, in view of the nature of the rights infringed and the gravity of the incidents, only remedies of a judicial nature can be considered effective; that is not the case with disciplinary remedies, according to the Committee’s case law.⁴ The authors also consider that the military courts cannot be considered as offering an effective remedy within the meaning of article 2, paragraph 3, since in military justice the persons implicated are both judge and party. It is indeed an incongruous situation, since the judge of first instance in criminal

⁴ See Views adopted in cases Nos. 563/1993, *Nydia Bautista de Arellana v. Colombia*, on 27 October 1995, para. 8.2, and 612/1995, *Arhuacos v. Colombia*, 29 July 1997, para. 8.2.

military cases is the commander of the Second Mobile Brigade, who is precisely the person responsible for the military operation that gave rise to the incidents forming the subject of the complaint.

State party's admissibility submission and author's comments

4.1 In its communications dated 11 February and 9 June 1998, the State party requests that the complaint be declared inadmissible on the grounds that domestic judicial remedies have not been exhausted, as required under article 5, paragraph 2 (b), of the Optional Protocol to the International Covenant on Civil and Political Rights.

4.2 The State party maintains that the introduction of proceedings and the presentation of complaints before the investigating, supervisory and judicial authorities of the State, mentioned in the authors' communication with regard to the exhaustion of domestic remedies, form a basis for initiating the appropriate procedures but do not in themselves signify the exhaustion of those remedies.

4.3 The State party also reports that various proceedings are under way, from which it may be concluded that domestic judicial remedies have not been exhausted. The proceedings mentioned as under way are as follows:

– As regards criminal proceedings, investigation proceedings are being conducted by Court No. 47 of the Military Criminal Investigation Department. Progress is being made in one of the most important stages, namely that of investigation, in the course of which various steps have been taken, such as statements, identification of photographs, exhumations and special visits to the place where the incidents occurred and other neighbouring sites.

– In the light of Constitutional Court decision No. C-358, the Government has requested the Attorney-General's Office to study the possibility of transferring the criminal proceedings to the ordinary courts.

– As regards disciplinary proceedings, the Human Rights Division of the Attorney-General's Office has opened disciplinary proceeding file No. 008-153713 with a view to conducting a disciplinary inquiry concerning the members of the armed forces alleged to have been implicated.

– As regards administrative litigation, proceedings have been initiated (see para. 2.15) to obtain direct compensation and are at present under consideration in the administrative litigation courts, with a view to obtaining State compensation for damage that the State may have caused to an individual while performing its functions through one of its agents; this could lead to a declaration of

institutional liability of the State in relation to the incidents forming the subject of the complaint.

4.4 According to the State party, the authors conclude that "the families and NGOs have applied to every possible source of legal remedy and have exhausted all the legal paths open to them", but they do not state in what way those sources are carrying out their functions. The authors themselves refer to "the great mass of information collected by the investigating authorities"; this confirms the Government's contention that the judiciary has been working on the case and is continuing to do so.

4.5 The Government does not share the authors' view that "the case has sunk in a morass of impunity". The remedies in themselves cannot be described as ineffective, nor can generalizations be made about their alleged ineffectiveness because of the difficulties faced both by the authorities and by the families of the victims in the exercise of those remedies. For instance, the sister of one of the victims submitted a petition to the National Directorate of Public Prosecutors' Offices requesting it to rule that a conflict of jurisdiction existed, so that the proceedings could be transferred from the military criminal justice system to the ordinary courts. This request could not be met and was refused, simply because she had applied to an administrative, and not a judicial, authority that was not competent to deal with petitions of that type. This clearly does not signify a denial of justice, and the difficulties and delays in the handling of the remedies cannot be interpreted as "impunity" on the part of the State.

5.1 In communications dated 30 March and 19 October 1998, the authors maintain that the mere existence of a procedural means of addressing human rights violations is insufficient; such remedies must have the capacity to protect the right violated or, failing that, to compensate the damage done. They note that the Human Rights Committee, when dealing with particularly serious violations, has held that only domestic remedies in criminal justice can be deemed to constitute effective remedies within the meaning of article 2, paragraph 3, of the Covenant.⁵ They also note that, according to the Committee, purely administrative and disciplinary remedies cannot be deemed adequate or effective.

5.2 The authors maintain that the disciplinary procedure in question is a self-monitoring mechanism for the civil service, whose function is to ensure that the service is operating correctly.

5.3 According to the authors, administrative litigation deals with only one aspect of the right to

⁵ See note 4.

compensation: the damage done and the loss of income suffered by the victim as a result of abuse of authority by an agent of the State or an error on the part of the civil service. Other aspects of the right of victims of human rights violations to compensation, such as the right to protection of family members,⁶ are not covered by the decisions of administrative courts or the Council of State. From this standpoint, administrative litigation does not fully guarantee the right to compensation.

5.4 As regards the State party's contention that the Government has requested the Attorney-General's Office to consider the possibility of transferring the criminal proceedings to the ordinary courts in the light of Constitutional Court decision No. C-358, the authors make the following observations:

– Transfer of the criminal proceedings currently being conducted by the military authorities to the ordinary courts is not a certainty, but merely a possibility. In similar situations, the military courts have refused to comply with Constitutional Court decisions.

– Notwithstanding Constitutional Court decision No. 358/97, declaring a number of articles of the Code of Military Justice unconstitutional, the provisions of the Constitution governing military jurisdiction remain in force and their ambiguous wording makes it possible for violations of human rights by members of the armed forces to be prosecuted in the military courts.

– The Ascanio Ascanio family filed an appeal to have the case transferred to the ordinary courts in the light of Constitutional Court decision No. 358/97. Their appeal was turned down by the Office of the Public Prosecutor.

– It was in fact the Office of the Public Prosecutor that decided, without any legally valid grounds for doing so, to transfer the preliminary proceedings in the case to the military courts.

5.5 With regard to the State party's contention that the authorities to which the victims' relatives had turned have "carried out their functions", the authors state that this assertion is far from the truth, since the communications sent identify each of the State institutions to which an appeal was made and indicate the status of the proceedings in each.

5.6 The criminal proceedings have remained within the military criminal jurisdiction, yet the victims' families have been unable to become parties to the proceedings. On 27 February 1998, the Human Rights Division of the Attorney-General's Office ordered the discontinuance of the disciplinary

investigation being conducted against some of those responsible for the incidents in the case. The decision by the Attorney-General's Office was based on the fact that one of the officers involved had died and that disciplinary action was being taken against the others under article 34 of Act No. 200 of 1995, which set a statute of limitations of five years for disciplinary matters.

5.7 Lastly, the authors reiterate that the only appropriate domestic remedy is criminal proceedings, which in the present case are being conducted in the military courts. In accordance with the Committee's case law and that of other international human rights bodies, the military courts in Colombia cannot be considered an effective remedy for dealing with human rights violations committed by members of the army. Even if a military criminal trial might be considered an appropriate remedy, the military criminal court has been conducting its criminal investigation for more than five years without any apparent results. The Colombian Military Criminal Code stipulates a period of no more than 30 days within which to complete the initial investigation (art. 552) and no more than 60 days for completion of the proceedings when there are two or more offences or defendants (art. 562). The trial, in one of the various procedural formats, must be conducted within two months (arts. 652 to 681), by a summary court martial dealing with offences against life and the person (art. 683). The proceedings taking place in the military criminal court have exceeded these terms.

Decision on admissibility

6.1 At its seventieth session, the Committee considered the admissibility of the communication and ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter was not being examined under another procedure of international investigation or settlement.

6.2 With regard to article 5, paragraph 2 (b), of the Optional Protocol, the Committee considered that the length of time taken in the judicial proceedings relating to the investigation of the deaths and prosecution of the perpetrators was unjustified. In addition, it recalled that, if the violation that is the subject of the complaint is particularly serious, as is the case with violations of basic human rights, particularly the right to life, remedies of a purely disciplinary and administrative nature cannot be considered sufficient or effective. Furthermore, the compensation proceedings have been unreasonably prolonged.

6.3 On 13 October 2000, the Committee declared the communication admissible, considering that the facts presented gave rise to issues under articles 6, 7,

⁶ CCPR/C/D/563/1993, para. 10.

9 and 17 of the Covenant in conjunction with article 2, paragraph 3.

State party's merits submission and author's comments

7.1 In its comments of 3 May and 20 September 2001, the State party restates its arguments concerning admissibility and repeats that domestic remedies have not been exhausted and that the situation cannot be described as a denial of justice.

7.2 According to the State party, the Public Prosecutor's Office has provided information to the effect that the Office of the Special Prosecutor to the Special Criminal Courts, Terrorist Unit 51-3, has begun an investigation into the deaths of Gustavo Coronel Navarro and others (case No. 15,282). The results to date are as follows:

– On 19 February 1999, the Attorney-General's Office decided that the investigation should be conducted by the ordinary courts and ordered the immediate transfer of the case to said courts. On 18 September 2000, the National Directorate of Public Prosecutors' Offices ordered case No. 15,282 to be assigned to the National Unit of Human Rights Prosecutors with a view to continuing proceedings. The National Unit of Human Rights Prosecutors returned case No. 15,282 to the Public Prosecutors' Unit on the grounds that it fell outside its jurisdiction. Lastly, in a letter dated 15 February 2001, the Office of the Special Prosecutor announced that it had replied to the request for information submitted by the Association of Relatives of Detained and Disappeared Persons (ASFADDES).⁷

– On 22 March 2001, the Office of the Special Prosecutor ordered two of the accused, Captain Mauricio Serna Arbalaez and Francisco Chilito Walteros, to be given a free hearing, presided by Judge No. 47 of the Military Criminal Investigation Unit.

7.3 With regard to the merits of the case, the State party requests the Human Rights Committee to cease its consideration on the merits, since decisions are being taken in the domestic judicial system concerning the protection of the petitioners' rights.

7.4 The State party reiterates that the criminal investigation is currently in the preliminary inquiry stage and that at no time have the authorities closed

⁷ The written reply, a copy of which is in the possession of the Secretariat, explains that statements were taken during the preliminary investigation from all persons who were in any way familiar with the facts, and evidence was produced. It also states that consideration is currently being given to the question of which body is competent to deal with the case.

or suspended the investigation. It cannot therefore be said that the State party has violated international law, since it has deployed all domestic judicial resources in order to obtain results.

7.5 Lastly, the State party maintains that there is a contradiction in the arguments submitted by the authors in the Committee's decision on admissibility.

8.1 In their comments dated 13 July and 27 November 2001, the authors point out that the State party has given no response whatsoever concerning the merits of the communication. According to the authors, the State party has not denied that, of the seven victims, including a minor, six were illegally detained, tortured, disappeared and subsequently executed, or that another was disappeared, by members of anti-guerrilla battalion No. 17 ("Motilones"), attached to the Second Mobile Brigade of the Colombian National Army. Nor does the State party dispute that unlawful raids were carried out on the dwellings of the families of the murdered and disappeared victims or that several of the residents were illegally detained. Moreover, the State party says nothing about the murder of several members of the Ascanio family by alleged paramilitary forces or about the constant harassment of the family members and members of NGOs who reported the incidents.

8.2 According to the authors, the State party's comments demonstrate that the investigations have remained at a preliminary stage for eight years. In addition, the Office of the Criminal Procurator of the Attorney-General's Office requested on 19 February 1998 that the military criminal proceedings should be transferred to the ordinary courts. That request was received on 13 May 1998 by Judge No. 47 of the Military Criminal Investigation Unit, who ordered the preliminary proceedings to be transferred to the Ocaña Regional Attorney-General's Office. The criminal investigations into the incidents are currently being carried out by the Third Terrorism Sub-Unit of the Prosecutor's Office at the Criminal Court of the Attorney-General's Special Circuit.

8.3 The authors maintain that the decision to give Captain Mauricio Serna Arbalaez a free hearing makes no sense, since he died in August 1994, as mentioned in paragraph 5.6 above. The authors point out that it is strange that the other members of the military involved in the incidents not only have not been charged but were not even suspended from duty during the investigations and were even subsequently promoted.

8.4 With regard to the administrative litigation brought by the victims' families, the Santander Administrative Court rejected the claims for compensation on 29 September 2000.

8.5 Lastly, the authors reiterate that the fact that the State party has nothing to say about the incidents and violations referred to in the communication, or about the denial of effective remedy for such serious violations, can only be interpreted as an acceptance of the facts.

Issues and proceedings before the Committee

9.1 The Committee has considered the communication in the light of all the information provided by the parties in accordance with article 5, paragraph 1, of the Optional Protocol. The Committee notes that the State party continues to maintain that all domestic remedies have not been exhausted and that several procedures are still pending. The Committee considers that the application of domestic remedies has been unduly prolonged and that, consequently, the communication can be considered under article 5, paragraph 2 (b), of the Optional Protocol.

9.2 The Committee notes that the State party did not provide any more information concerning the facts of the case. In the absence of any reply from the State party, due consideration should be given to the authors' complaints to the extent that they are substantiated.

9.3 With regard to the authors' claim that there was a violation of article 6, paragraph 1, the Committee notes that, according to the authors, the Special Investigations Unit of the Attorney-General's office established, in its final report of 29 June 1994, that State officials were responsible for the victims' detention and disappearance. Moreover, in its decision of 27 February 1998, which the Committee had before it, the Human Rights Division of the Attorney-General's Office acknowledged that State security forces had detained and killed the victims. Considering, furthermore, that the State party has not refuted these facts and that it has not taken the necessary measures against the persons responsible for the murder of the victims, the Committee concludes that the State did not respect or guarantee the right to life of Gustavo Coronel Navarro, Nahún Elías Sánchez Vega, Ramón Emilio Sánchez, Ramón Emilio Quintero Roperero, Luis Honorio Quintero Roperero, Ramón Villegas Téllez and Luis Ernesto Ascanio Ascanio, in violation of article 6, paragraph 1, of the Covenant.

9.4 With regard to the claim under article 9, the Committee takes note of the authors' allegations that the detentions were illegal in the absence of any arrest warrants. Bearing in mind that the State party has not denied this fact, and since, in the Committee's opinion, the complaint is sufficiently substantiated by the documents mentioned in paragraph 9.3, the Committee concludes that there has been a violation of article 9 of the Covenant in respect of the seven victims.

9.5 With regard to the authors' allegations under article 7, the Committee notes that, in the decision of 27 February 1998 referred to in the preceding paragraphs, the Attorney-General's Office acknowledged that the victims Gustavo Coronel Navarro, Nahún Elías Sánchez Vega, Luis Ernesto Ascanio Ascanio and Luis Honorio Quintero Roperero had been subjected to treatment incompatible with article 7. Taking into account the circumstances of the disappearance of the four victims and that the State party has not denied that they were subjected to treatment incompatible with that article, the Committee concludes that the four victims were the object of a clear violation of article 7 of the Covenant.

9.6 However, with regard to the allegations concerning Ramón Emilio Sánchez, Ramón Emilio Quintero Roperero and Ramón Villegas Téllez, the Committee considers that it does not have sufficient information to determine whether there has been a violation of article 7 of the Covenant.

9.7 With regard to the claim under article 17, the Committee must determine whether the specific conditions in which the raid on the homes of the victims and their families took place constitute a violation of that article. The Committee takes note of the authors' allegations that both the raids and the detentions were carried out illegally, since the soldiers did not have search or arrest warrants. It also takes note of the corroborating testimony gathered from witnesses by the Attorney-General's Office showing that the procedures were carried out illegally in the private houses where the victims were staying. In addition, the Committee considers that the State party has not provided any explanation in this regard to justify the action described. Consequently, the Committee concludes that there has been a violation of article 17, paragraph 1, inasmuch as there was unlawful interference in the homes of the victims and their families or in the houses where the victims were present, including the home of the minor Luis Ernesto Ascanio Ascanio, even though he was not there at the time.

9.8 The Human Rights Committee, acting under article 5, paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts that have been set forth constitute violations of article 6, paragraph 1; article 7 in respect of Gustavo Coronel Navarro, Nahún Elías Sánchez Vega, Luis Ernesto Ascanio Ascanio and Luis Honorio Quintero Roperero; article 9; and article 17 of the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party has an obligation to provide the victims' relatives with effective remedy, including compensation. The Committee urges the State party to conclude without delay the investigations into the violation of articles 6 and 7

and to speed up the criminal proceedings against the perpetrators in the ordinary criminal courts. The State party is also obliged to take steps to prevent similar violations from occurring in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the Committee's competence to determine whether or not there has been a violation of the Covenant and that, under 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 when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 90 days, information on the measures it has taken to give effect to the Committee's decision. In addition, it requests the State party to publish the Committee's decision.

Communication No. 781/1997

Submitted by: Azer Garyverdy ogly Aliev

Alleged victim: The author

State party: Ukraine

Date of adoption of Views: 21 September 1997

Subject matter: Death sentence imposed after an unfair trial

Procedural issues: Level of substantiation of claim - "Victim" status - Incompatibility *ratione materiae*

Substantive issues: Right to life - Fair trial - Right to defence - Right to adequate legal representation

Articles of the Covenant: 6; 7; 10; 14, paras 1, 3 (d), (e) and (g), and 5; and 15

Articles of the Optional Protocol: 1, 2, 3

Finding: Violation (article 14, paragraph 1 and 3 (d)).

1.1 The author of the communication is Mr. Azer Garyverdy ogly Aliev, an Azerbaijani national, born on 30 August 1971. At the time of submission, the author was being held in the Donetsk remand centre (SIZO) in Ukraine, awaiting execution. He claims to be a victim of violations by Ukraine¹ of the International Covenant on Civil and Political Rights. Although the author does not invoke specific provisions of the Covenant, the communication appears to raise issues under articles 6; 7; 10; 14, paragraphs 1, 3 (d), (e) and (g), and 5; and 15, of the Covenant. He is unrepresented.

1.2 On 24 November 1997, in accordance with rule 86 of its rules of procedure, the Committee requested the State party to stay the execution of the author while his communication was under consideration. On 30 September 2002, the State

party informed the Committee that, on 26 June 2000, the author's death sentence had been commuted to life imprisonment.

The facts as submitted by the author

2.1 On 8 June 1996, in the town of Makeevka, Ukraine, having consumed a large quantity of alcohol, the author, Mr. Kroutovtsev and Mr. Kot had an altercation in an apartment. The altercation degenerated into a fight. A fourth person, Mr. Goncharenko, witnessed the incident. According to the author, Mr. Kot and Mr. Kroutovtsev beat him severely. Mr. Kroutovtsev also struck him with an empty bottle. While defending himself, the author seriously wounded Mr. Kot and Mr. Kroutovtsev with a knife, whereupon he fled.

2.2 The author states that he contacted Mr. Kroutovtsev's wife shortly afterwards in order to inform her of the incident and to ask her to call for assistance. On hearing this news, Mrs. Kroutovtseva began to hit him. The author states that he then slashed Mrs. Kroutovtseva's face with a knife and returned to his apartment, where his wife and some neighbours treated his wounds.

2.3 On 8 June 1996, the author reported the incident to a criminal investigation officer, Mr. Volkov, who ordered him to bring \$15,000 to bribe the police and the prosecutors. The author collected only \$5,600. The author gave official evidence in writing in Mr. Volkov's car. On hearing that one of the victims had died, the police officer told the author that, if he did not come up with the required sum by 2 p.m., he would be in trouble.

2.4 On the afternoon of 8 June 1996, the author and his wife left town and went into hiding in his

¹ The Covenant entered into force for the State party on 23 March 1976, and the Optional Protocol on 25 October 1991.

mother-in-law's village, while his father tried to raise the sum of money that had been demanded. When they returned, they were arrested by the police on 27 August 1996 and taken to a police station, where they were interrogated for four days. According to the author, they were not given anything to eat during their detention. Mr. Volkov and other officers subjected the author to physical pressure, which included depriving him of oxygen by forcing him to wear a gas mask, in order to force him to confess to a number of unsolved crimes. The author's wife, who was pregnant at the time, was also beaten and a cellophane bag was placed over her head, which caused her to lose consciousness. In order to obtain his wife's release, the author signed all the documents that were placed before him, without reading them.

2.5 The police officers released his wife after having obtained her promise not to divulge what had taken place during the detention, failing which her husband would be killed and she would be reincarcerated. After her miscarriage, the author's wife decided to collect medical evidence in order to lodge a complaint, whereupon she was again threatened by Mr. Volkov and another officer. The author states that he complained to a procurator on 31 January 1997, but that the procurator had advised him to make his allegations during the trial.

2.6 The author was held for five months without access to a lawyer; he states that he was not examined either by a forensic psychiatrist, in spite of his medical history, or by a physician. During the reconstruction of the crime, the author was unable to participate, except when Mr. Kroutovtsev and Mr. Kot were also concerned.

2.7 The case was tried by the Donetsk regional court. According to the author, the court heard only witnesses produced by Mrs. Kroutovtseva, who were all her neighbours and friends.

2.8 The author states that, although the public prosecutor had demanded that the author be sentenced to 15 years' imprisonment, on 11 April 1997 the court found him guilty of the murder of Mr. Kroutovtsev and Mr. Kot and of the attempted murder of Mrs. Kroutovtseva, and sentenced him to death. On 28 April 1997, the author filed an appeal with the Supreme Court. He claims that his appeal was not transmitted by the Donetsk regional court and was illegally annulled. In this regard, the author notes that the public prosecutor had requested the annulment of the judgement and the transfer of the case for non-compliance with certain provisions of article 334 of the Code of Criminal Procedure.

The complaint

3.1 The author claims that he was sentenced to death without account being taken of the fact that,

pursuant to articles 3 and 28 of the Constitution of Ukraine, capital punishment had been legally abolished, which rendered the sentence unconstitutional and inapplicable, contrary to the provisions of article 6 of the Covenant.

3.2 The author's allegations that he and his wife had been victims of torture and ill-treatment by the police for the purpose of extorting confessions during their detention, may violate article 14, paragraph 3 (g), article 7 and article 10, in combination with article 6 of the Covenant.

3.3 The author maintains that he was deprived of a fair trial for the following reasons. After his arrest, he was interrogated for four days by police officers at the police station where the chief was the brother of one of the deceased. He maintains that the charges against him were inconsistent, the presentation of the facts by the police and the public prosecutor was biased, and the court called only witnesses for the prosecution and the victims. The author states that, in examining his case record, he had discovered that the pages were not bound, numbered or attached, which made it possible to remove evidence in order to conceal illegal acts and procedural errors, and that his appeal to the Supreme Court had not been transmitted by the regional court. All this may constitute a violation of article 14, paragraph 1, paragraph 3 (e) and paragraph 5 of the Covenant.

3.4 The author claims that he did not have access to counsel during the five months following his arrest, from 27 August 1996 to 18 December 1996; on 17 July 1997, the Supreme Court took its decision in his absence and the absence of his counsel, in violation of article 14, paragraph 3 (d), of the Covenant.

3.5 According to the author, the Supreme Court confirmed an illegal decision, since the death sentence was incompatible with the Ukrainian Constitution of 1996. On 29 December 1999, the Constitutional Court had declared capital punishment unconstitutional; since that date, the penalty contained in article 93 of the Criminal Code was between 8 and 15 years' imprisonment. Rather than seeing his sentence modified and reduced "by a prompt review" of his conviction, the author was sentenced to life imprisonment, pursuant to the amendments to the Criminal Code of 22 February 2000. In his opinion, this constitutes a violation of his right to a lighter sentence because the penalty provided for under the "provisional law", following the decision of the Constitutional Court (of December 1999), was between 8 and 15 years' imprisonment while, following the reforms introduced in 2000, the author was imprisoned for life.

3.6 The author also claims that, in spite of his medical history, he was not examined by an expert

psychiatrist, nor had the wounds that he had sustained during the events of 8 June 1996 been examined.

State party's admissibility and merits submission and author's comments

4.1 In its notes verbales dated 26 May 1998 and 20 September 2002, the State party submitted its observations, claiming that the case did not entail any violation of the rights recognized under the Covenant, since the author had had a fair trial and had been sentenced in accordance with the law.

4.2 A criminal case for the murder of Mr. Kroutovtsev and Mr. Kot and the attack on Mrs. Kroutovtseva was opened on 9 June 1996 by the prosecution of the town of Makeevka. On 13 June 1996, a warrant for the arrest of Mr. Aliev and his wife was issued and those two persons were arrested on 28 August 1996. On 11 April 1997, the Donetsk regional court sentenced the author to death for intentional homicide with aggravating circumstances and for aggravated theft of personal effects. On 17 July 1997, the decision was confirmed by the Supreme Court. Pursuant to legislative amendments, on 26 June 2000 the Donetsk regional court commuted Mr. Aliev's death sentence to life imprisonment.

4.3 According to the State party, the court found the author guilty of having deliberately and vengefully murdered the victims with a knife during an altercation. The author later attempted to murder Mr. Kroutovtsev's wife out of greed, attacking and seriously wounding her, before stealing her jewellery. He returned to the scene of the crime the same day in order to remove a gold chain from Mr. Kroutovtsev's corpse.

4.4 The evidence concerning the crime was corroborated by the conclusions of the preliminary investigation and the forensic examination, and was confirmed by several witnesses, as well as by the inspection of the scene of the crime, physical evidence and the conclusions of experts.

4.5 The State party maintains that the courts correctly characterized the author's acts as constituting offences under the relevant articles of the Criminal Code. It considers that the author's allegations that he had wounded Mr. Kroutovtsev and Mr. Kot in self-defence were refuted by the procedural documents and the courts. In the light of the particular dangerousness of the crimes, the court was of the view that the author constituted an exceptional danger to society and imposed an exceptional sentence on him.

4.6 According to the State party, the author's allegation that he was subjected to unauthorized investigation methods was examined by the Supreme

Court, which consider the allegation unsubstantiated. The State party affirms that the case record does not contain any element that would lead to the conclusion that illegal methods were used during the preliminary investigation; the author did not file any complaint with the Donetsk regional court in this regard. The court records do not contain any complaint by Mr. Aliev concerning the use of illegal methods of investigation or other unlawful acts by the investigators. It was only after the regional court took its decision that the author, in his application for judicial review, maintained that the investigators had forced his wife and him to make false statements. The State party points out that the application for judicial review submitted by the author's lawyer did not contain such allegations.

4.7 In conclusion, the State party notes that there is no reason to challenge the judicial decisions against the author and that the author did not file any complaint with the Procurator-General concerning the alleged unlawfulness of his sentence.

5.1 The author submitted his comments on the State party's observations on 21 April 2003. He reiterates his previous allegations and disputes the characterization of his acts by the prosecution and the courts. He maintains that, on the night of 7 to 8 June 1996, he wounded, but did not kill, Mr. Kot and Mr. Kroutovtsev. He challenges the witnesses' statements, which he claims were "attached to the case record by police officers" and used by the court.

5.2 The author reiterates that the investigation and the courts were biased against him because, at the time of the crime, the brother of one of the victims was the chief of the Makeevka district police station, while the sister of the other victim was the chief of the central police station's identity card department and she was, moreover, married to a judge. The author claims that, in order to aggravate his sentence, the police officers described a different sequence of events.

5.3 With regard to the allegations of ill-treatment of which he claims to be a victim, the author explains that part of his criminal file was covered with his blood. He reiterates that the investigators had put a gas mask over his head and had blocked the flow of air in order to force him to testify against himself. His wife was also beaten and strangled. He maintains that he complained, without success, "to several authorities" of having been subjected to physical violence. A number of his co-detainees could attest that he had bruises and haematomas as a result of ill-treatment.

5.4 As proof of the investigators' bias, the author cites the fact that a criminal investigation into the murder of Mr. Kot and Mr. Kroutovtsev was opened on 9 June 1996, whereas Mr. Kot died of his wounds on 13 June 1996.

Issues and proceedings before the Committee

Decision on admissibility

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

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

6.3 The Committee notes that the author filed an appeal with the Supreme Court of Ukraine, which confirmed the decision of the inferior court, and that the State party has not argued that the author has not exhausted domestic remedies. The Committee therefore considers that the author has met the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

6.4 With regard to the author's allegation that during their detention he and his wife were subjected to inhuman treatment by police officers in order to force them to testify against themselves, the Committee notes that the author submitted the communication on his own behalf, without indicating that he had been authorized to act on his wife's behalf and without explaining whether or not his wife was able to submit her own complaint. Pursuant to paragraph 1 of the Optional Protocol and rule 90 (b) of its rules of procedure, the Committee decides that it will consider only the author's complaint.

6.5 With regard to the author's allegation that the court sentenced him to death without taking account of the fact that articles 3 and 28 of the Ukrainian Constitution of 1996 had abolished capital punishment, the Committee notes that it was only as a consequence of the Constitutional Court's decision of 29 December 1999 and the Parliament's amendment of the Criminal Code and the Code of Criminal Procedure on 22 February 2000 that the State party abolished capital punishment, that is, after a final decision had been taken in the case. The Committee therefore considers that, for the purposes of admissibility, the author has not substantiated his allegation that the imposition of the death sentence in 1997 took place after the State party had abolished capital punishment. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.6 The Committee notes that the author states, concerning his allegations of ill-treatment and torture, that on 31 January 1997 he complained to a procurator who advised him to make his allegations during the trial. The State party claims that this

allegation was not raised before the Donetsk regional court and that the author made the allegation only when he filed his application for judicial review. The Committee notes that, in its judgement, the Supreme Court considered the allegation and decided that it was unfounded. The Committee recalls that it is generally for the courts of State parties to the Covenant, and not for the Committee, to evaluate facts and evidence in a particular case, unless it is apparent that the courts' decisions are manifestly arbitrary or amount to a denial of justice. However, nothing in the information brought to the attention of the Committee concerning this matter shows that the decisions of the Ukrainian courts or the behaviour of the competent authorities were arbitrary or amounted to a denial of justice. This part of the communication is therefore inadmissible under article 3 of the Optional Protocol.

6.7 With regard to the author's allegations that he was denied a fair trial because the brother of one of the deceased was chief of the police station where he underwent his first interrogations, the Committee notes, first, that nothing in the documents before it leads it to conclude that these allegations were brought before the competent national authorities. Secondly, with regard to the author's claim that the charges against him were inconsistent, that the presentation of the facts by the police and the public prosecutor were biased, that the court only heard witnesses for the prosecution, and that the judges were obviously biased, the Committee considers that these allegations have not been sufficiently substantiated for the purposes of admissibility. Consequently, the Committee declares this part of the communication inadmissible under article 2 of the Optional Protocol.

6.8 The author has also alleged that his case record was tampered with in order to conceal procedural errors; the Committee notes that the author has not indicated whether or not he presented these allegations to the competent national authorities. Moreover, he has not maintained that his case record was falsified. The Committee is therefore of the view that this allegation has not been substantiated for the purposes of admissibility and is inadmissible under article 2 of the Optional Protocol.

6.9 With regard to the author's allegation that his application for judicial review had been illegally rejected by the regional court, the Committee notes that the Supreme Court of Ukraine considered his appeal and confirmed the decision of the regional court on 17 July 1997, and that a copy of the decision has been furnished by the State party. Without any other relevant information concerning the examination of the author's application for judicial review, the Committee is of the view that this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.10 The Committee has taken note of the author's claim that he was sentenced to a penalty heavier than the one provided by law. The State party refutes this allegation, considering that the courts correctly characterized the author's acts under the Criminal Code and sentenced him in conformity with the law. In the light of the copies of the relevant judicial decisions furnished by the State party and, in the absence of any information indicating that these judicial decisions violate in any way the author's rights under article 15 of the Covenant, the Committee is of the view that the facts before it have not been sufficiently substantiated to meet the criteria for admissibility under article 2 of the Optional Protocol.

6.11 As for the author's complaint that he was deprived of counsel for the first five months of the investigation and that, on 17 July 1997, the Supreme Court gave its ruling in his absence and the absence of his counsel, the Committee notes that the State party has not made any objection as to admissibility and therefore proceeds to an examination of the merits of this allegation, which may raise issues under article 14, paragraphs 1 and 3 (d) and article 6, of the Covenant.

6.12 The Committee therefore proceeds to the consideration of the complaints that were declared admissible under article 14, paragraphs 1 and 3 (d), and article 6 of the Covenant.

Examination of the merit

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

7.2 First, the author alleges that he did not have the services of a counsel during his first five months of detention. The Committee notes that the State party is silent in this regard; it also notes that the copies of the relevant judicial decisions do not address the author's allegation that he was not represented for five months, even though the author had mentioned this allegation in his complaint to the Supreme Court dated 29 April 1997. Considering the nature of the case and questions dealt with during this period, particularly the author's interrogation by police officers and the reconstruction of the crime, in which the author was not invited to participate, the Committee is of the view that the author should have had the possibility of consulting and being represented by a lawyer. Consequently, and in the absence of any relevant information from the State party, the Committee is of the view that the facts before it constitute a violation of article 14, paragraph 1, of the Covenant.

7.3 Secondly, the author alleges that, subsequently, on 17 July 1997, the Supreme Court heard his case in his absence and in the absence of his counsel. The Committee notes that the State party has not challenged this allegation and has not provided any reason for this absence. The Committee finds that the decision of 17 July 1997 does not mention that the author or his counsel was present, but mentions the presence of a procurator. Moreover it is uncontested that the author had no legal representation in the early stages of the investigations. Bearing in mind the facts before it, and in the absence of any relevant observation by the State party, the Committee considers that due weight must be given to the author's allegations. The Committee recalls its jurisprudence that legal representation must be available at all stages of criminal proceedings, particularly in cases in which the accused incurs capital punishment. Consequently, the Committee is of the view that the facts before it disclose a violation of article 14, paragraph 1, as well as a separate violation of article 14, paragraph 3 (d), of the Covenant.

7.4 The Committee is of the view that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant if no further appeal against the death sentence is possible. In the author's case, the final sentence of death was passed without having met the requirements for a fair trial as set out in article 14 of the Covenant and thus in breach of article 6. However, this breach was remedied by the commutation of the death sentence by the Donetsk regional court's decision of 26 June 2000.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, paragraphs 1 and 3 (d) of the Covenant.

9. Under article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy. The Committee is of the view that, since the author was not duly represented by a lawyer during the first months of his arrest and during part of his trial, even though he risked being sentenced to death, consideration should be given to his early release. The State party is under an obligation to take measures to prevent similar violations in the future.

10. 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 or 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 90 days, information about the measures taken to give effect to these Views. The State party is also requested to publish the Committee's Views.

Communication No. 811/1998

Submitted by: Ms. Rookmin Mulai (represented by Nigel Hughes of Hughes, Fields & Stoby)

Alleged victim: Mr. Lallman Mulai and Mr. Bharatraj Mulai

State party: Guyana

Date of adoption of Views: 20 July 2004

Subject matter: Death sentence imposed after unfair trial

Procedural issues: Level of substantiation of claim

Substantive issues: Right to life - Fair trial - Equality of arms - Right to have defence witnesses examined

Articles of the Covenant: 6, paragraph 2; and 14

Articles of the Optional Protocol: 2

1.1 The author of the communication is Ms. Rookmin Mulai. She submits the communication on behalf of her two brothers Bharatraj and Lallman Mulai, both Guyanese citizens, currently awaiting execution in Georgetown Prison in Guyana. She claims that her brothers are victims of human rights violations by Guyana.¹

¹ The Optional Protocol to the Covenant entered into force for the State party on accession on 10 August 1993. On 5 January 1999, the Government of Guyana notified the Secretary-General that it had decided to denounce the said Optional Protocol with effect from 5 April 1999, that is, subsequent to submission of the communication. On that same date, the Government of Guyana re-acceded to the Optional Protocol with the following reservation: "Guyana re-accedes to the Optional Protocol to the International Covenant on Civil and Political Rights with a Reservation to article 6 thereof with the result that the Human Rights Committee shall not be competent to receive and consider communications from any persons who is under sentence of death for the offences of murder and treason in respect of any matter relating to his prosecution, detention, trial, conviction, sentence or execution of the death sentence and any matter connected therewith. Accepting the principle that States cannot generally use the Optional Protocol as a vehicle to enter reservations to the International Covenant on Civil and Political Rights itself, the Government of Guyana stresses that its Reservation to the Optional Protocol in no way detracts from its obligations and engagements under the Covenant, including its undertaking to respect and ensure to all individuals within the territory of Guyana and subject to its jurisdiction the rights recognised in the

Although she does not invoke any specific articles of the Covenant, her communication appears to raise issues under articles 6, paragraph 2, and 14 of the Covenant. After the submission of the communication, the author has appointed counsel who, however, has not been in a position to make any substantive submissions in the absence of any response from the State party.

1.2 On 9 April 1998, the Special Rapporteur on New Communication issued a request under Rule 86 of the Committee's rules of procedure, that the State party do not carry out the death sentence against the authors while their communication is under consideration by the Committee.

The facts as submitted by the author

2.1 On 15 December 1992, Bharatraj and Lallman Mulai were charged with the murder of one Doodnauth Seeram that occurred between 29 and 31 August 1992. They were found guilty as charged and sentenced to death on 6 July 1994. The Court of Appeal set aside the death sentence and ordered a retrial on 10 January 1995. Upon conclusion of the re-trial, Bharatraj and Lallman Mulai were again convicted and sentenced to death on 1 March 1996. On 29 December 1997, their sentence was confirmed on appeal.

2.2 From the notes of evidence of the re-trial, it appears that the case for the prosecution was that Bharatraj and Lallman Mulai had an argument with one Mr. Seeram over cows grazing on the latter's land. In the course of the argument, Bharatraj and Lallman Mulai repeatedly chopped Seeram with a cutlass and a weapon similar to a spear. After Mr. Seeram fell to the ground, they beat him with sticks. On 1 September 1992, Mr. Seeram's corpse was found by his son, drowned in a small river in the proximity of Mr. Seeram's property. It disclosed

Covenant (in so far as not already reserved against) as set out in article 2 thereof, as well as its undertaking to report to the Human Rights Committee under the monitoring mechanism established by article 40 thereof."

injuries to the head, the right hand cut off above the wrist and a rope tied around the neck to keep the body submerged in water.

2.3 Evidence against Bharatraj and Lallman Mulai was given by one Nazim Baksh, alleged eyewitness to the incidents. The court also heard Mr. Seeram's son, who had found the body, and, among other, the investigating officer of the police and the doctor, who examined the victim's body on 29 October 1992.

2.4 In a statement from the dock, Bharatraj and Lallman Mulai claimed that they were innocent and had not been present at the scene on the day in question. They stated that they had been on good terms with Mr. Seeram, while they had not been "on speaking terms" with Mr. Baksh.

2.5 By letter of 19 May 2003, counsel advised that Bharatraj and Lallman Mulai remain on death row.

The complaint

3.1 The author claims that her brothers are innocent and that the trial against them was unfair. According to her, unknown persons tried to bribe the foreman of the jury. Two persons visited the foreman on 23 February 1996 at his house and offered to pay him an unspecified amount of money if he influenced the jury in favour of Bharatraj and Lallman Mulai. The foreman reported the matter to the prosecutor and the judge, but it was never disclosed to the defence. Unlike what had happened in other cases, the trial was not aborted due to the incident.² Furthermore, Mr. Baksh claimed during his testimony to have been approached by members of the Mulai family. The author argues that, as a result, the foreman and the jury were biased against her brothers.

3.2 The author claims that Mr. Baksh could not be considered a credible witness. She states that Mr. Baksh testified at the re-trial that he saw Bharatraj and Lallman Mulai at the scene attacking Mr. Seeram, while at the initial trial he had testified that he could not see the scene, because it was too dark. Furthermore, he testified that Bharatraj and Lallman Mulai had chopped Mr. Seeram several times with a cutlass, while the investigating officer stated that the injuries to the body had been caused by a blunt instrument. Finally, Mr. Baksh testified that Bharatraj and Lallman Mulai had beaten Mr. Seeram for several minutes, but the doctor could not find any broken bones on the corpse, which would have been a typical injury caused by such

² The file includes a copy of the Appeal Court's judgment where the incident is addressed as having been raised upon appeal as a matter of unfair trial. The Court of Appeal dismissed the appeal on the grounds that the integrity of the jury foreman had not been tainted.

beatings. Finally, the doctor estimated that Mr. Seeram's actual cause of death was drowning.

3.3 The author also contends that it would have been typical for the victim to try to fend off the beatings with hands and feet, but that Mr. Seeram's corpse did not show any injuries except the missing right hand. She notes that Mr. Bharatraj Mulai, who was identified by Mr. Baksh as having chopped Mr. Seeram with the cutlass, is right-handed. The author argues that Mr. Seeram's left hand should be missing if he used it to avert a hit with the cutlass by Bharatraj Mulai. The author concedes that the defence attorney did not argue these points on trial.

3.4 Finally, it is claimed that Mr. Baksh gave two different statements to the police. In his first statement on 8 September 1992, he stated that he did not observe anything of the incident, while on 10 December 1992, he gave the statement reflected above, paragraph 3.2. The statements of Mr. Baksh and of Mr. Seeram's son were not consistent either with regard to the existence of trees at the scene. Mr. Seeram's son had stated that there had been many trees close to the scene of the incident.

Issues and proceedings before the Committee

4. On 9 April 1998 and 30 December 1998, 14 December 2000, 13 August 2001, and on 11 March 2003 the State party was requested to submit to the Committee information on the merits of the communication. The Committee notes that this information has still not been received. The Committee regrets the State party's failure to provide any information with regard to admissibility or the substance of the author's claims. It recalls that it is implicit in the Optional Protocol that States parties make available to the Committee all information at their disposal. In the absence of a reply from the State party, due weight must be given to the author's allegations, to the extent that these have been properly substantiated.³

Consideration of admissibility

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

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

³ See, for example, *J.G.A. Diergaardt et al. v. Namibia*, Case No. 760/1997, Views adopted on 25 July 2000, paragraph 10.2.

5.3 With regard to the author's claim that Mr. Baksh lacked credibility and that testimony provided by the doctor and other witnesses had not been conclusive, the Committee recalls its constant jurisprudence that it is in general for the courts of States parties to the ICCPR, and not for the Committee, to evaluate the facts in a particular case. The information before the Committee and the arguments advanced by the author do not show that the Courts' evaluation of the facts and their interpretation of the law were manifestly arbitrary or amounted to a denial of justice. Accordingly, this part of the communication is inadmissible under article 2 of the Optional Protocol.

5.4 The Committee declares the remaining allegations related to the incident of jury tampering admissible insofar as they appear to raise issues under article 14, paragraph 1, and proceeds with its examination on the merits, in the light of all the information made available to it by the author, pursuant to article 5, paragraph 1, of the Optional Protocol.

Consideration of the merits

6.1 The Committee notes that the independence and impartiality of a tribunal are important aspects of the right to a fair trial within the meaning of article 14, paragraph 1, of the Covenant. In a trial by jury, the necessity to evaluate facts and evidence independently and impartially also applies to the jury; it is important that all the jurors be placed in a position in which they may assess the facts and the evidence in an objective manner, so as to be able to return a just verdict. On the other hand, the Committee recalls that where attempts at jury tampering come to the knowledge of either of the parties, these alleged improprieties should have been challenged before the court.⁴

6.2 In the present case, the author submits that the foreman of the jury at the re-trial informed the police and the Chief Justice, on 26 February 1996, that someone had sought to influence him. The author claims that it was the duty of the judge to conduct an inquiry into this matter to ascertain whether any injustice could have been caused to Bharatraj and Lallman Mulai, thus depriving them of a fair trial. In addition, the author complains that the incident was not disclosed to the defence although both the judge and the prosecution were made aware of it by the

foreman of the jury, and that unlike in some other trials the trial against the two brothers was not aborted as a consequence of the incident. The Committee notes that although it is not in the position to establish that the performance and the conclusions reached by the jury and the foreman in fact reflected partiality and bias against Bharatraj and Lallman Mulai, and although it appears from the material before it that the Court of Appeal dealt with the issue of possible bias, it did not address that part of the grounds of appeal that related to the right of Bharatraj and Lallman Mulai to equality before the courts, as enshrined in article 14, paragraph 1, of the Covenant and on the strength of which the defence might have moved for the trial to be aborted. Consequently, the Committee finds that there was a violation of article 14, paragraph 1, of the Covenant.

6.3 In accordance with its consistent practice the Committee takes the view that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected, constitutes a violation of article 6 of the Covenant. In the circumstances of the current case the State party has violated the rights of Bharatraj and Lallman Mulai under article 6 of the Covenant.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before reveal violations of article 14, paragraph 1, and article 6 of the International Covenant on Civil and Political Rights.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Bharatraj and Lallman Mulai with an effective remedy, including commutation of their death sentences. The State party is also under an obligation to avoid 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 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 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

⁴ See *Willard Collins v. Jamaica*, Case No. 240/1987, Views adopted on 1 November 1991, paragraph 8.4.

Communication No. 815/1998

Submitted by: Alexander Alexandrovitch Dugin (represented by A. Manov)

Alleged victim: The author

State party: Russian Federation

Date of adoption of Views: 5 July 2004

Subject matter: Impossibility to have a key witness in a criminal case interrogated

Procedural issues: Level of substantiation of claim - Examination under another procedure of international investigation or settlement (ECHR)

Substantive issues: Fair trial - Right to have defence witness examined in court

Articles of the Covenant: 9, paragraphs 2 and 3; 14, paragraphs 1, 2, 3 (a), (e) and (g), and 5

Articles of the Optional Protocol: 2; 5, paragraph 2 (a)

Finding: Violation (article 14, paragraphs 1 and 3 (e))

1. The author of the communication is Alexander Alexandrovitch Dugin, a Russian citizen, born in 1968, who at the time of submission of the communication was imprisoned in the Orel region of Russia. He claims to be a victim of a violation by the Russian Federation of articles 14, paragraphs 1, 2, 3 (a), (e) and (g), 5, and article 9, paragraphs 2 and 3 of the Covenant. He is represented by counsel.

The facts as submitted

2.1 On the evening of 21 October 1994, the author and his friend Yuri Egurnov were standing near a bus stop when two adolescents carrying beer bottles passed by. The author and his friend, both of whom were drunk, verbally provoked Aleksei Naumkin and Dimitrii Chikin in order to start a fight. When Naumkin tried to defend himself with a piece of glass and injured the author's hand, the author and his accomplice hit him on the head and, when he fell down, they kicked him in the head and on his body. Naumkin died half an hour later.

2.2 On 30 June 1995, Dugin and Egurnov were found guilty by the Orlov *oblastnoi* (regional) court of premeditated murder under aggravating circumstances. The judgment was based on the testimony of the author, his accomplice, several eyewitnesses and the victim, Chikin, several forensic reports and the crime scene report. Dugin and Egurnov were each sentenced to 12 years' imprisonment in a correctional labour colony.

2.3 During the Orlov court hearing, the author did not admit his guilt, while Egurnov did so partially. In his appeal to the Supreme Court of the Russian

Federation on 12 September 1995, Dugin requested that the judgment be overturned. He claimed that he hit Naumkin only a few times and only after Naumkin had struck him with a broken bottle. He also contended that he had approached Egurnov and Naumkin only to stop them from fighting. His sentence was disproportionate and his punishment particularly harsh, having been handed down without regard for his age, his positive character witnesses, the fact that he has a young child, and the lack of premeditation.

2.4 On 12 September 1995, the Supreme Court of the Russian Federation dismissed the author's appeal from his conviction, and on 6 August 1996 the same court denied the author's appeal against his sentence.

The complaint

3.1 It is alleged that the surviving victim, Chikin, was not present during the proceedings in the Orlov court, even though the Court took into account the statement he had made during the investigation. According to counsel, Chikin gave contradictory testimony in his statements, but as Chikin did not appear in Court, Dugin could not cross-examine him on these matters, and was thus deprived of his rights under article 14, paragraph 3 (e), of the Covenant.

3.2 Counsel further claims that the presumption of innocence under article 14, paragraph 2, of the Covenant was not respected in the author's case. He bases this statement on the forensic expert's reports and conclusions of 22 and 26 October, 9 November, 20 December 1994 and 7 February 1995, which were, in his opinion, vague and not objective. He states, without further explanation, that he had posed questions to which the court had had no answer. He therefore requested the court to have the forensic expert appear to provide clarification and comments, and to allow him to lead additional evidence. The court denied his request.

3.3 Counsel refers to serious irregularities in relation to the application of the Code of Criminal Procedure, since the preliminary inquiry and investigation were partial and incomplete, criminal law was improperly applied, and the court's conclusions did not correspond to the facts of the case as presented in Court. The court did not take all necessary measures to guarantee respect for the legal requirement that there should be an impartial, full and

objective examination of all of the circumstances of the case.

3.4 Counsel also claims that the author was notified of his indictment for murder only seven days after he was placed in detention and that article 14, paragraph 3 (a), and article 9, paragraphs 2 and 3, of the Covenant were thus violated.

3.5 Counsel alleges that while Dugin was in detention, he was subjected to pressure by the investigator on several occasions, in an attempt to force him to give false statements in exchange for a reduction in the charges against him. He claims that the investigator threatened that, if he did not do so, his indictment, which had originally been for premeditated murder, would be replaced by an indictment for a more serious offence, namely murder with aggravating circumstances. The author did not give in to the threats and, as had been threatened, the investigator changed the indictment. According to the author, that constituted a violation of article 14, paragraph 3 (g).

3.6 With regard to the allegation of a violation of article 14, paragraph 5, the author states, without further providing details, that his case was not properly reviewed.

3.7 The author also claims that the crime scene report should not have been taken into account during the proceedings because it contained neither the date nor the time of the completion of the investigation, and did not contain enough information about the investigation report. The prosecution witnesses said that there had been a metal pipe present during the fight, however the crime scene report did not refer to such a pipe. The investigator did not examine any such item and the file contains no further information on it.

State party's submission

4.1 In its submission of 28 December 1998, the State party states that the Office of the Procurator General of the Russian Federation had carried out an investigation into the matters raised in the communication. The prosecution's investigation had found that, on 21 October 1994, Dugin and Egunov, who were both drunk and behaving like 'hooligans', beat up Naumkin, a minor, kicking and punching him in the head and on his body. Naumkin tried to escape, but was caught by Dugin, who knocked him to the ground and beat his head against a metal pipe. He and Egunov then started beating the minor again, also kicking him in the head. Naumkin subsequently died of head and brain injuries.

4.2 According to the State party, the author's guilt was established by the fact that he did not deny having beaten up Naumkin, and by detailed statements given by eyewitnesses with no interest in

the outcome of the case, as well as the testimony of Chikin.

4.3 The cause of Naumkin's death and the nature of the injuries were established by the court on the basis of many forensic medical reports, according to which Naumkin's death was caused by skull and brain injuries resulting from blows to the head.

4.4 The State party maintains that the author's punishment was proportionate to the seriousness of the offence, information about his character and all the evidence in the case. The Office of the Procurator-General concluded that the present case did not involve any violations likely to lead to any change or overturning of the courts' decisions, and that the proceedings against Dugin had been lawful and well-founded.

Counsel's comments on the State party's submission

5.1 In his undated comments, counsel contends that the State party did not address the main allegations contained in the communication, particularly with regard to the violation of the right to request that witnesses able to provide information on behalf of the accused should be heard and summoned by the court. Secondly, the court heard the case in the absence of Chikin, who was both a victim and a witness in the case.

5.2 Counsel also refers to the fact that the court did not respect the principle that any doubt should be interpreted in favour of the accused. Nor had it responded to the author's claims that: the author had requested a forensic expert to be summoned to appear in court but that, without even meeting in chambers, the judges dismissed his request; and the author had had no opportunity to look at the records of the proceedings, (although he does not specify when, i.e. before the cassation appeal or during the initial proceedings.)

5.3 Finally, counsel maintains that the author was not informed of the content of article 51 of the Constitution of the Russian Federation, which states that "no one shall be obliged to give evidence against himself, his spouse or his close relatives".

Admissibility decision

6.1 During its seventy-second session, the Human Rights Committee examined the admissibility of the communication. It observed that the State party had not objected to the admissibility of the communication, and ascertained that the requirements of article 5, paragraph 2 (b), of the Optional Protocol had been satisfied.

6.2 The Committee ascertained that the same matter was not already being examined under another procedure of international investigation or

settlement. In this respect it had been established that, after the case had been submitted to the Committee in December 1997, an identical claim was submitted to the European Court of Human Rights in August 1999, however this claim was declared inadmissible *ratione temporis* on 6 April 2001. The Committee therefore concluded that it was not prevented from considering the communication under article 5, paragraph 2 (a), of the Optional Protocol.

6.3 With regard to the author's allegation under article 9, paragraph 2, of the Covenant, the Committee concluded that the author had been aware of the grounds for his arrest. As to the allegation under article 9, paragraph 3, of the Covenant, the Committee noted that the author had failed to substantiate his claim, and, in accordance with article 2 of the Optional Protocol, declared this part of the communication inadmissible.

6.4 However, the Committee considered that the author's allegations of violations of article 14 of the Covenant could raise issues under this provision. Accordingly, on 12 July 2001, the Committee declared the communication admissible in so far as it appeared to raise issues under article 14 of the Covenant.

State party's admissibility and merits submission and author's comments

7.1 On 10 December 2001, the State party submitted its comments on the merits of the communication. It stated that on 11 March 1998, the Presidium of the Supreme Court had reviewed the proceedings against the author in both the Orlov Court (30 June 1995) and the Supreme Court (12 September 1995). It reduced the sentence imposed on the author from 12 to 11 years' imprisonment, excluding from the consideration of aggravating circumstances the fact that the author had been intoxicated at the time of the offence. In all other respects the decisions were confirmed.

7.2 In relation to the author's claim that he had no opportunity to cross examine Chikin, the State party noted that the witness had been summonsed to Court from 23 to 26 June 1995, but had not appeared. A warrant was issued to have him brought before the Court, but the authorities could not locate him. Under articles 286 and 287 of the Code of Criminal Procedure, the evidence of witnesses is admissible even in their absence, in circumstances where their appearance in Court is not possible. The Court decided to admit the written statement of Chikin into evidence, after hearing argument from the parties as to whether this should occur. According to the transcript of proceedings, no questions were asked by counsel after the statement was read into evidence. The State party notes that the author did

not object to the trial starting in the absence of Chikin.

7.3 The State party denies that the evidence of the forensic expert was not objective, and states that, after the first forensic opinion was considered incomplete, four additional opinions from the same expert were obtained by the investigator. The conclusions of the expert were consistent with the testimony of other witnesses, namely that the author had punched and kicked the deceased, and hit him with a metal pipe. The Court refused the author's request to cross-examine the expert and to summon additional witnesses to support his opinion that the deceased had been involved in another fight shortly before his death. In this regard, Russian law did not require courts to summons expert witnesses. Further, the opinions of the expert had been examined and verified in the Republican Centre for Forensic Medical Examination.

7.4 As to the author's claims regarding his detention without charge for 7 days, the State party notes that the Code of Criminal Procedure allows a suspect to be detained without being charged for a period of up to 10 days in exceptional circumstances. In the author's case, criminal proceedings were initiated on 22 October 1994, the author was arrested the same day, and he was charged on 29 October 1994, within the 10 day limit imposed by law.

7.5 The State party refutes the author's claims that the investigator threatened to charge him with a more serious offence if he did not cooperate, and states that, in response to a question by the presiding judge during the proceedings, the author had confirmed that the investigators had not threatened him, but that he had given his statements 'without thinking.'

7.6 The State party rejects the author's claims that the crime scene report did not bear a date or refer to the metal pipe against which the deceased was said to have hit his head; on the contrary, the report states that it was compiled on 22 October 1994, and that there is a reference to the metal pipe, together with a photograph in which the pipe can actually be seen.

7.7 The State party contends that there is no basis to conclude that the proceedings against the author were biased or incomplete, and notes that the author made no such complaints to the Russian Courts or authorities. It states that the author was questioned in the presence of a lawyer of his choosing, and during the period of his arrest he stated that he did not require a lawyer. Finally, the State party notes that the reason why the author was not informed about his rights under article 51 of the Constitution, which provides that an accused is not required to testify against oneself, was because the Supreme Court only introduced such a requirement by judgment of 31 October 1995 – the author's trial was held in

June 1995. In any event, the author was informed about his rights under article 46 of the Code of Criminal Procedure, which states that an accused has the right to testify, or not to testify, on the charges against him.

8. In comments on the State party's observations dated 5 February 2002, the author contends that the witness Chikin could have been located and brought to court for cross examination, with a minimum of 'goodwill' from the State party. He states that the court's refusal to grant his request to adduce further medical evidence violated his rights under article 14, paragraph 3 (e), of the Covenant, and that the 7 day delay in his being charged was incompatible with article 14, paragraph 3 (a), which requires that an accused is promptly informed of the charges against him. The author reiterates his claims about the alleged threat made by the investigator, and about the trial not being objective. He also notes article 51 of the Constitution had had direct legal force and effect since 12 December 1993.

Issues and proceedings before the Committee

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol. The Committee is mindful that, although it has already considered the admissibility of the communication, it must take into account any information subsequently received from the parties which may bear on the issue of the admissibility of the author's outstanding claims.

9.2 Firstly, the Committee notes that the author's submission of 5 February 2002, regarding the alleged violations of article 14, paragraph 3 (a), is substantively identical to that advanced by the author under article 9, paragraph 2 (see paragraph 3.4 above), which was declared inadmissible. Further, the allegation, although invoking article 14, paragraph 3 (a), does not relate to this provision factually. In the circumstances, the Committee considers that the author has failed sufficiently to substantiate this particular claim, for the purposes of admissibility. Accordingly, the author's claim under article 14, paragraph 3 (a), of the Covenant is inadmissible under article 2 of the Optional Protocol.

9.3 The author claims that his rights under article 14 were violated because he did not have the opportunity to cross-examine Chikin on his evidence, summon the expert and call additional witnesses. While efforts to locate Chikin proved to be ineffective for reasons not explained by the State party, very considerable weight was given to his statement, although the author was unable to cross-examine this witness. Furthermore, the Orlov Court did not give any reasons as to why it refused the

author's request to summon the expert and call additional witnesses. These factors, taken together, lead the Committee to the conclusion that the courts did not respect the requirement of equality between prosecution and defence in producing evidence and that this amounted to a denial of justice. Consequently, the Committee concludes that the author's rights under article 14 have been violated.

9.4 In light of the Committee's views above, it is not necessary to consider the author's claims regarding the objectivity of the evidence produced in court.

9.5 On the basis of the material before it, the Committee cannot resolve the factual question of whether the investigator in fact threatened the author with a view to extracting statements from him. In any event, according to the State party, the author did not complain about the alleged threats, and in fact told the Court that he had not been threatened. In the circumstances, the Committee considers that the author did not exhaust domestic remedies in relation to these allegations, and declares this claim inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

9.6 As regards the author's claims that he was not advised of his rights under article 51 of the Constitution, the Committee notes the State party's submission that the author was informed of his rights under article 46 of the Code of Criminal Procedure, which guarantees the right of an accused to testify, or not to testify on the charges against him. In the circumstances, and in particular taking into account that the author did not challenge the State party's above argument, the Committee considers that the information before it does not disclose a violation of article 14, paragraph 3 (g).

9.7 As far as the claim under article 14, paragraph 5, is concerned, the Committee notes that it transpires from the documents before it that the author's sentence and conviction have been reviewed by the State party's Supreme Court. The Committee therefore concludes that the facts before it do not reveal a violation of the above article.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14 of the Covenant.

11. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the author is entitled to an appropriate remedy, including compensation and his immediate release.

12. By becoming a State 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 all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in cases where a

violation has been established. The Committee wishes to receive from the State party, within 90 day, information about the measures taken to give effect to the Committee's views. The State party is also requested to publish the Committee's views.

Communication No. 823/1998

Submitted by: Rudolf Czernin (deceased on 22 June 2004) and his son Karl-Eugen Czernin
(not represented by counsel)

Alleged victim: The authors

State party: Czech Republic

Date of adoption of Views: 29 March 2005 (eighty-third session)

Subject matter: Retention of citizenship

Procedural issues: Exhaustion of domestic remedies

Substantive issues: Equality before the law - Non-discrimination - Denial of justice

Articles of the Covenant: 14, paragraph 1; 26 and 2, paragraph 314, paragraph 1; 26 and 2, paragraph 3

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

Finding: Violation (article 14, paragraph 1)

1. The original author of the communication was Rudolf Czernin, a citizen of the Czech Republic born in 1924, permanently residing in Prague, Czech Republic. He was represented by his son, Karl-Eugen Czernin, born in 1956, permanently residing in Austria, and claimed to be a victim of a violation by the Czech Republic¹ of articles 14, paragraph 1 and 26 of the International Covenant on Civil and Political Rights (the Covenant). The author passed away on 22 June 2004. By letter of 16 December 2004, his son (hereafter referred to as second author) maintains the communication before the Committee. He is not represented.

Factual background

2.1 After the German occupation of the border area of Czechoslovakia in 1939, and the establishment of the "protectorate", Eugen and Josefa Czernin, the now deceased parents of the author, were automatically given German

citizenship, under a German decree of 20 April 1939. After the Second World War, their property was confiscated on the ground that they were German nationals, under the Benes decrees Nos. 12/1945 and 108/1945. Furthermore, Benes decree No. 33/1945 of 2 August 1945 deprived them of their Czechoslovak citizenship, on the same ground. However, this decree allowed persons who satisfied certain requirements of faithfulness to the Czechoslovak Republic² to apply for retention of Czechoslovak citizenship.

2.2 On 13 November 1945, Eugen and Josefa Czernin applied for retention of Czechoslovak citizenship, in accordance with Presidential Decree No. 33/1945, and within the stipulated timeframe. A "Committee of Inquiry" in the District National Committee of Jindřichův Hradec, which examined their application, found that Eugen Czernin had proven his "anti-Nazi attitude". The Committee then forwarded the application to the Ministry of the Interior for a final decision. In December 1945, after being released from prison where he was subjected to forced labour and interrogated by the Soviet secret services NKVD and GPÚ, he moved to Austria with his wife. The Ministry did not decide on their applications, nor did it reply to a letter sent by Eugen Czernin on 19 March 1946, urging the authorities to rule on his application. A note in each of their files from 1947 states that the application was to be regarded as irrelevant as the applicants had voluntarily left for Austria, and their files were closed.

2.3 After the regime change in Czechoslovakia in late 1989, the author, only son and heir of Eugen and

¹ The Covenant was ratified by Czechoslovakia in December 1975 and the Optional Protocol in March 1991. The Czech and Slovak Federal Republic ceased to exist on 31 December 1992. On 22 February 1993, the Czech Republic notified its succession to the Covenant and the Optional Protocol.

² Decree 33/1945, paragraph 2(1) stipulates that persons "who can prove that they remained true to the Republic of Czechoslovakia, never committed any acts against the Czech and Slovak peoples and were actively involved in the struggle for its liberation or suffered under the National Socialist or Fascist terror shall retain Czechoslovak citizenship."

Josefa Czernin, lodged a claim for restitution of their property under Act No. 87/1991 and Act No. 243/1992. According to him, the principal precondition for the restitution of his property is the Czechoslovak citizenship of his parents after the war.

2.4 On 19 January and 9 May 1995 respectively, the author applied for the resumption of proceedings relating to his father's and his mother's application for retention of Czechoslovak citizenship. In the case of Eugen Czernin, a reply dated 27 January 1995 from the Jindřichův Hradec District Office informed the author that the proceedings could not be resumed because the case had been definitely settled by Act 34/1953, conferring Czechoslovak citizenship on German nationals who had lost their Czechoslovak citizenship under Decree 33/1945 but who were domiciled in the Czechoslovak Republic.³ In a letter dated 13 February 1995, the author insisted that a determination on his application for resumption of proceedings be made. In a communication dated 22 February 1995, he was notified that it was not possible to proceed with the citizenship case of a deceased person and that the case was regarded as closed. On 3 March 1995, the author applied to the Ministry of Interior for a decision to be taken on his case. After the Ministry informed him that his letter had not arrived, he sent the same application again on 13 October 1995. On 24 and 31 January 1996, the author again wrote to the Minister of Interior. Meanwhile, in a meeting between the second author and the Minister of Interior, the latter indicated that there were not only legal but also political and personal reasons for not deciding on the case, and that "in any other case but [his], such an application for determination of nationality would have been decided favourably within two days". The Minister also promised that he would convene an ad hoc committee composed of independent lawyers, which would consult with the author's lawyers, but this committee never met.

2.5 On 22 February 1996, the Minister of Interior wrote to the author stating that "the decision on [his] application was not favourable to [him]". On 8 March 1996, the author appealed the Minister's letter to the Ministry of Interior. In a reply from the Ministry dated 24 April 1996, the author was informed that the Minister's letter was not a decision within the meaning of section 47 of Act No. 71/1967 on administrative proceedings and that it was not

³ Act 34/1953 of 24 April 1953 "Whereby certain persons acquire Czech citizenship rights", paragraph 1 (1) stipulates that "Persons of German nationality, who lost Czechoslovak citizenship rights under Decree 33/1945 and have on the day on which this law comes into effect domicile in the territory of the Czechoslovak Republic shall become Czech citizens, unless they have already acquired Czech citizenship rights".

possible to appeal against a non-existent decision. On the same day, the author appealed the letter of the Minister to the Supreme Court which on 16 July 1996 ruled that the letter was not a decision by an administrative body, that the absence of such a decision was an insurmountable procedural obstacle, and that domestic administrative law did not give the courts any power to intervene against any failure to act by an official body.

2.6 After yet another unsuccessful appeal to the Ministry of Interior, the author filed a complaint for denial of justice in the Constitutional Court which, by judgement of 25 September 1997, ordered the Ministry of Interior to cease its continuing inaction which violated the complainant's rights. Further to this decision, the author withdrew his communication before the Human Rights Committee.

2.7 According to the author, the Jindřichův Hradec District Office (District Office), by decision of 6 March 1998, re-interpreted the essence of the author's application and, arbitrarily characterized it as an application for *confirmation of citizenship*. The District Office denied the application on the ground that Eugen Czernin had not retained Czech citizenship after being deprived of it, in accordance with the Citizenship Act of 1993, which stipulates that a decision in favour of the plaintiff requires, as a prerequisite, the favourable conclusion of a citizenship procedure. The District Office did not process the author's initial application for resumption of proceedings on retention of citizenship. Further to this decision, the author resubmitted and updated his communication to the Committee in March 1998.

2.8 On 28 July 1998, the author informed the Committee that on 17 June 1998, the Ministry of Interior had confirmed the decision of the District Office of 6 March 1998. In August 1998, the author filed a motion for judicial review in the Prague High Court, as well as a complaint in the Constitutional Court. The latter was dismissed on 18 November 1998 for failure to exhaust available remedies, as the action was still pending in the Prague High Court.

2.9 On 29 September 1998, the author informed the Committee that on the same date, the District Office of Prague 1 had issued a negative decision on Josefa Czernin's application for retention of citizenship.

2.10 With regard to the requirement of exhaustion of domestic remedies, the author recalls that the application for retention of citizenship was filed in November 1945, and that efforts to have the proceedings completed were resumed in January 1995. He thus considers that they have been unreasonably prolonged. In the 1998 update of his communication, the author contends that the decision of the District Office is not a "decision on

his application". He argues that remaining remedies are futile, as the District Office decided against the spirit of the decision of the Constitutional Court, and that a judgement by the Supreme Court could only overturn a decision from the District Office, without making a final determination. Thus, available remedies would only cause the author repeatedly to appeal decisions to fulfil only formal requirements, without ever obtaining a decision on the merits of his case.

2.11 The author states that the same matter is not being examined under another procedure of international investigation or settlements.

The complaint

3.1 The author alleges a violation of his right to equal protection of the law without discrimination and of his right to due process of law.

3.2 The author claims to be a victim of a violation of article 26 of the Covenant. He recalls that his parents and he himself were victims of a violation of their right to equal protection of the law without discrimination, through unequal application of the law and inequality inherent in the law itself, which does not allow him to bring an action for negligence against the authorities. Discrimination arises from the authorities' failure to issue a decision on their case, although their application fulfilled the formal and substantial requirements of Decree No. 33/1945. The author further argues that domestic law does not afford him a remedy against the inaction of the authorities, and that he is being deprived of an opportunity to enforce his rights. He claims that those who had their case decided have a remedy available, whereas he has no such remedy; this is said to amount to discrimination contrary to article 26.

3.3 The author claims to be a victim of a violation of article 14, paragraph 1, as the inaction of the authorities on his application for resumption of citizenship proceedings amounts to a failure to give him a "fair hearing by a competent, independent and impartial tribunal established by law", and that he is a victim of undue delay in the administrative proceedings.

State party's admissibility and merits submission

4.1 On 3 February 1999, the State party commented on the admissibility of the communication and on 10 August 1999, it filed observations on the merits. It argues that the authors have not exhausted domestic remedies, and considers that their claims under articles 14, paragraph 1, and 26 are manifestly ill-founded.

4.2 The State party underlines that after the decision of the Constitutional Court of 25 September

1997 which upheld the author's claim and ordered the authorities to cease their continued inaction, the District Office in Jindřichův Hradec considered his case and issued a decision on 6 March 1998. The Ministry of Interior decided on his appeal on 17 June 1998. On 5 August 1998, the author appealed the decision of the Ministry to the Prague High Court. At the time of the State party's submission, these proceedings remained pending, and thus domestic remedies had not been exhausted. The State party argues that the exception to the rule of exhaustion of domestic remedies, i.e. unreasonable prolongation of remedies does not apply in the present case, since, given the dates of the above-mentioned decisions, and considering the complexity of the case and the necessary research, the application of domestic remedies has not been unreasonably prolonged. In addition, with regard to the effectiveness of these remedies, the State party argues that the author cannot forecast the outcome of his action, and that in practice, if a court concludes that the legal opinion of an administrative authority is incorrect, the impugned decision of the Ministry of Interior will be quashed. It underlines that under Section 250j, paragraph 3, of the Czech Code of Civil Procedure, an administrative authority is bound by the legal opinion of the court.

4.3 The State party contends that the claim under article 26 of the Covenant is manifestly ill-founded, as the author did not substantiate his claim nor has presented any specific evidence or facts illustrating discriminatory treatment covered by any of the grounds enumerated in article 26. It further argues that the author did not invoke the prohibition of discrimination and equality of rights in the domestic courts, and therefore did not exhaust domestic remedies in this respect.

4.4 As to the alleged violation of article 14, paragraph 1, the State party admits that the allegation of breach of the right to a fair trial was meritorious at the time of the initial submission of the author. However, it argues that after the decision of the Constitutional Court of 25 September 1997, an administrative decision was issued by the District Office on 6 March 1998, which was in conformity with the judgement of the Constitutional Court, and that the author's right to a fair trial was fully protected through this decision. Referring to the dates of the above-mentioned decisions, the State party further asserts that there was no undue delay. The State party therefore considers that the claim under article 14, paragraph 1, of the communication is manifestly ill-founded. It lists a number of remedies available to the authors if undue delay is argued. The author could have filed a complaint with the Ministry of Interior, or with the President of the High Court. Another remedy available to him would have been a constitutional complaint. The State party

indicates that a complaint must be replied to within two months following the date it is served on the government department competent to handle it. The State party recalls that the author did not avail himself of these remedies, and thus did not exhaust domestic remedies.

Further comments by the authors

5.1 On 19 November 1999, 25 June 2002, 29 January, 25 February, 16 and 22 December 2004, the authors commented on the State party's submissions and informed the Committee of the status of proceedings before the Czech courts. The author reiterates that the decision of the District Office of 6 March 1998 was taken to formally satisfy the requirements laid down by the Constitutional Court in its judgement of 25 September 1997. He argues that the authorities arbitrarily, and against his express will, re-interpreted his application for resumption of proceedings on retention of citizenship into an application for verification of citizenship, and treated it under the State party's current citizenship laws, rather than under Decree No. 33/1945 which should have been applied. The author claims that this decision was sustained by the appellate bodies without any further examination or reasoned decision. In his opinion, that an administrative agency arbitrarily and on its own initiative, and without giving prior notice to the applicant, re-interpreted his application and failed to decide on the initial application, constitutes a violation of his right to due process and his right to proceedings and to a decision, protected by article 14.

5.2 In the case of the author's mother, the Prague Municipal Authority decided, on 6 January 1999, that "at the time of her death, Josefa Czernin was a citizen of the Czechoslovak Republic". The author points out that the authorities granted the application without problems in his mother's case, as opposed to his father's, and on substantially scarcer evidence. The author suggests that this inequality of treatment between his parents may be explained by the fact that his father owned considerably more property than his mother, and that most of his father's property is state-owned today.

5.3 On 19 October 2000, the Prague High Court overturned the decision of the Ministry of Interior of 17 June 1998 and determined that the case should be decided by reference to Decree 33/1945, that the impugned decision was illegal, that it defied the legally binding judgement of the Constitutional Court, and had violated essential procedural rules.

5.4 The case was then returned to the Ministry of Interior for a second hearing. On 31 May 2002, the Ministry held that Eugen Czernin, member of the German ethnic group, had failed to furnish sufficient

"exculpatory grounds" in accordance with Decree 33/1945 and that "therefore, he lost Czechoslovak citizenship". The author appealed against this decision, which was confirmed by the Minister of Interior on 1 January 2003. He then filed an appeal in the Prague Town Court, which quashed this decision on 5 May 2004. It ruled that the Minister, in his decision of 1 January 2003, as well as the Ministry, in its decision of 31 May 2002, had issued these decisions "without the necessary argumentation", arbitrarily, and had ignored evidence provided by the author's father. The case, which was then returned for a third hearing by the Ministry of Interior, is currently pending before this organ.

5.5 In each of his further submissions, the author confirms that the authorities, which oblige him to go through the same stages of appeal again and again, theoretically *ad infinitum*, are unwilling to process his case and purposively drag out proceedings. He invokes the "undue prolongation" qualification in article 5, paragraph 2 (b), of the Optional Protocol.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

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

6.3 With respect to the requirement of exhaustion of domestic remedies, the Committee notes that the State party has challenged the admissibility of the communication in general terms. It also notes that the case of the author is currently pending before the Ministry of Interior, and that since the judgement of the Constitutional Court of September 1997 ordering the Ministry to cease its continuing inaction, the Ministry has heard the case of the author twice over a four year period. The two decisions issued by the Ministry of Interior in this case were quashed by the Prague High Court and the Prague Town Court, respectively, and referred back to the same Ministry for a rehearing. In the opinion of the Committee, and having regard to the absence of compliance of the Ministry of the Interior with the relevant decisions of the judiciary, the hearing of the author's case by the same organ for the third time would not offer him a reasonable chance of obtaining effective redress and therefore would not constitute an effective remedy which the author would have to exhaust for the

purposes of article 5, paragraph 2 (b), of the Optional Protocol.

6.4 The Committee further considers that the proceedings instituted by the second author and his late father have been considerably protracted, spanning a period of ten years, and thus may be considered to be “unreasonably prolonged” within the meaning of article 5, paragraph 2 (b), of the Optional Protocol. The Committee does not consider that the delays encountered are attributable to the second author or his late father.

6.5 As to the State party’s claim that the authors failed to exhaust domestic remedies in relation to his claim of prohibited discrimination, the Committee recalls that the authors did not invoke the specific issue of discrimination before the Czech courts; accordingly, they have not exhausted domestic remedies in this respect. The Committee concludes that this part of the claim is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

6.6 With regard to the claim that the author was a victim of unequal application of the law in violation of article 26, the Committee considers that this claim may raise issues on the merits.

6.7 Regarding the authors’ claim that they are victims of a violation of their right to a fair hearing under article 14, paragraph 1, the Committee notes that the authors do not contest the proceedings before the courts, but the non-implementation of the courts’ decisions by administrative authorities. The Committee recalls that the notion of “rights and obligations in a suit at law” in article 14, paragraph 1, applies to disputes related to the right to property. It considers that the author has sufficiently substantiated his claim, for the purposes of admissibility, that the way in which the Czech administrative authorities re-interpreted his application and the laws to be applied to it, the delay in reaching a final decision, and the authorities’ failure to implement the judicial decisions may raise issues under article 14, paragraph 1, in conjunction with article 2, paragraph 3. The Committee decides that this claim should be examined on its merits.

Consideration of the merits

7.1 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.

7.2 The main issue before the Committee is whether the administrative authorities (the District Office in Jindřichův Hradec and the Ministry of Interior) acted in a way that violated the authors’ right, under article 14, paragraph 1, to a fair hearing by a competent, independent and impartial tribunal,

in conjunction with the right to effective remedy as provided under article 2, paragraph 3.

7.3 The Committee notes the statement of the authors that the District Office and Ministry of Interior, in their decisions of 6 March and 17 June 1998, arbitrarily re-interpreted his application on resumption of proceedings on retention of citizenship and applied the State party’s current citizenship laws rather than Decree No. 33/1945, on which the initial application had been based. The Committee further notes that the latter decision was quashed by the Prague High Court and yet referred back for a rehearing. In its second assessment of the case, the Ministry of Interior applied Decree No. 33/1945, and denied the application.

7.4 The Committee recalls its jurisprudence that the interpretation and application of domestic law is essentially a matter for the courts and authorities of the State party concerned. However, in the pursuit of a claim under domestic law, the individual must have access to effective remedies, which implies that the administrative authorities must act in conformity with the binding decisions of national courts, as admitted by the State party itself. The Committee notes that the decision of the Ministry of Interior of 31 May 2002, as well as its confirmation by the Minister on 1 January 2003, were both quashed by the Prague Town Court on 5 May 2004. According to the authors, the Town Court ruled that the authorities had taken these decisions without the required reasoning and arbitrarily, and that they had ignored substantive evidence provided by the applicants, including the author’s father, Eugen Czernin. The Committee notes that the State party has not contested this part of the authors’ account.

7.5 The Committee further notes that since the authors’ application for resumption of proceedings in 1995, they have repeatedly been confronted with the frustration arising from the administrative authorities’ refusal to implement the relevant decisions of the courts. The Committee considers that the inaction of the administrative authorities and the excessive delays in implementing the relevant courts’ decisions are in violation of article 14, paragraph 1, in conjunction with article 2, paragraph 3, which provides for the right to an effective remedy.

8. 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 14, paragraph 1, of the Covenant. With regard to the above finding, the Committee considers that it is not necessary to examine the claim under article 26 of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective

remedy, including the requirement that its administrative authorities act in conformity with the decisions of the courts.

10. 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 or subject to its jurisdiction the rights recognised 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 90 days, information about the measures taken to give effect to the Committee's views.

APPENDIX

Individual Opinion (dissenting) by Committee member Ruth Wedgwood

Eastern Europe has enjoyed democracy for more than a decade. Over that period, the Human Rights Committee has been presented with a number of cases, asking whether refugees from a former communist regime are entitled to the restoration of their confiscated properties, and if so, under what conditions.

In four Views concerning the Czech Republic, the Committee has concluded that the right to private property, as such, is not protected under the Covenant on Civil and Political Rights, but that conditions for the restoration of property cannot be unfairly discriminatory.

In the first case of this series, *Simunek v. Czech Republic*, No. 516/1992, the Committee invoked the norm of "equal protection of the law" as recognized under article 26 of the Covenant. The Committee held that a State cannot impose arbitrary conditions for the restitution of confiscated property. In particular, the Committee held that restoration of private property must be available even to persons who no longer enjoy national citizenship and are no longer permanent residents – at least when the State party, under its prior communist regime, was "responsible for the departure" of the claimants. See Views of the Committee, No. 516/1992, paragraph 11.6.

The Committee has followed these views in subsequent cases, including *Adam v. Czech Republic*, No. 586/1994; *Blazek et al. v. Czech Republic*, No. 857/1999; and *Des Fours Walderode v. Czech Republic*, No. 747/1997.

Committee member Nisuke Ando, writing individually in *Adam v. Czech Republic*, No. 586/1994, properly pointed out that traditionally, private international law has permitted States to restrict the ownership of immovable properties to citizens. But a totalitarian regime that forces its political opponents to flee, presents special circumstances. And there is no showing that the Czech Republic has, in regard to new purchasers of real property, required either citizenship or permanent residence.

It is against this background that the Committee is brought to consider the case of *Czernin v. Czech Republic*, No. 823/1998. Here, the Committee has challenged the state party not on the grounds of denial of equal treatment, but on a question of process – finding that the administrative authorities of the state party had "refuse[d] to carry out the relevant decisions of the courts" of the state party concerning property restoration.

The author's father, accompanied by his wife, left for Austria in December 1945, after interrogation in prison by the Soviet secret services NKVD and GPU. In 1989, after the fall of the communist regime in former Czechoslovakia, the author, as sole heir, sought restitution of his father's property, and in 1995, sought to renew his parents' applications for restoration of Czech citizenship. Since that time, the Czech Constitutional Court, the Prague High Court, and the Prague Town Court have, respectively, chastised the Czech Interior Ministry for failure to act upon the author's application, erroneous reliance on a 1993 citizenship law, and the absence of "necessary argumentation" concerning his father's asserted anti-Nazi posture (required for retention of Czech citizenship, under the post-war decree no. 33/1945 of Czech president Eduard Benes, in the case of ethnic Germans).

In one sense, this case is simpler than the previous cases, since the issue is process, rather than the limits of permissible substantive grounds. Nonetheless, one should note that the courts of the Czech Republic have, ultimately, sought to provide an effective remedy to the authors, in the consideration of their claims. Many democracies have seen administrative agencies that are reluctant to reach certain results, and the question is whether there is a remedy within the system for a subordinate agency's failure to impartially handle a claim. One could not adopt any per se rule that three rounds of appellate litigation amounts to proof that an applicant has been deprived of a right to a fair hearing by a competent, independent and impartial tribunal, especially since here the appellate courts have acted to restrain the administrative agency in question on its various grounds of denial of the author's claims. The Committee has not held that administrative proceedings fall within the full compass of Article 14.

Equally, this case does not touch upon the post-war circumstances of the mandatory transfer of the Sudeten German population, a policy undertaken after the National Socialists' catastrophic misuse of the idea of German self-determination. Though population transfers, even as part of a peace settlement, would not be easily accepted under modern human rights law, the wreckage of post-war Europe brought a different conclusion. Nor has the author challenged, and the Committee does not question, the authority of the 1945 presidential decree, which required that ethnic Germans from the Sudetenland who wished to remain in Czechoslovakia, had to demonstrate their wartime opposition to Germany's fascist regime. A new democracy, with an emerging economy, may also face some practical difficulties in unraveling the violations of private ownership of property that lasted for fifty years. In all of these respects, the State party is bound to act with fidelity to the Covenant, yet the Committee must also act with a sense of its limits.

Communication No. 829/1998

Submitted by: Roger Judge (represented by Eric Sutton)

Alleged victim: The author

State party: Canada

Declared admissible: 17 July 2002 (seventy-fifth session)

Date of adoption of Views: 5 August 2003 (seventy-eighth session)

Subject matter: Extradition to a country where complainant faces execution

Procedural issues: Exhaustion of domestic remedies
- Non-substantiation of claim - Review of facts and evidence

Substantive issues: Cruel, inhuman and degrading treatment or punishment - Right to life - Right to have one's sentence reviewed by a higher tribunal - Effective remedy - Obligation to seek assurances that death sentence will not be carried out upon return to country of origin

Articles of the Covenant: 2, paragraph 3; 6, paragraph 1; 7; 10 and 14

Articles of the Optional Protocol: 2 and 3

Finding: Violation (article 6, paragraph 1, alone and, read together with article 2, paragraph 3)

1. The author of the communication, dated 7 August 1998, is Mr. Roger Judge, a citizen of the United States of America, at the time of the submission detained at Ste-Anne-des-Plaines, Québec, Canada, and deported to the United States on the day of submission, 7 August 1998. He claims to be a victim of violations by Canada of articles 6, 7, 10 and 14 of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as submitted by the author

2.1 On 15 April 1987, the author was convicted on two counts of first-degree murder and possession of an instrument of crime, by the Court of Common Pleas of Philadelphia, Pennsylvania. On 12 June 1987, he was sentenced to death, by electric chair. He escaped from prison on 14 June 1987 and fled to Canada.¹

2.2 On 13 July 1988, the author was convicted of two robberies committed in Vancouver, Canada. On 8 August 1988, he was sentenced to 10 years' imprisonment. The author appealed his convictions, but on 1 March 1991, his appeal was dismissed.

¹ The author states that the mode of execution was subsequently changed to execution by lethal injection.

2.3 On 15 June 1993, the author was ordered deported from Canada. The order was conditional as he had announced his intention to claim refugee status. On 8 June 1994, he withdrew his claim for refugee status, at which point the deportation order became effective.

2.4 On 26 January 1995, on recommendation of the Correctional Services of Canada, his case was reviewed by the National Parole Board which ordered him detained until expiry of his sentence, i.e. 8 August 1998.²

2.5 On 10 November 1997, the author wrote to the Minister of Citizenship and Immigration requesting ministerial intervention with a view to staying the deportation order against him, until such time as a request for extradition from the United States authorities might be sought and received in his case. If removed under the Extradition Treaty, Canada could have asked for assurances from the United States that he not be executed. In a letter, dated 18 February 1998, the Minister refused his request.³

2.6 The author applied to the Federal Court of Canada for leave to commence an application for judicial review of the Minister's refusal. In this application, the author requested a stay of the implementation of the deportation order until such time as he would be surrendered for extradition, and

² As later explained by the State party, pursuant to the Corrections and Conditional Release Act, a prisoner in Canada is entitled to be released after having served two thirds of his sentence (i.e. the statutory release date). However, the Correctional Services of Canada reviews each case, through the National Parole Board, to determine whether, if released on the statutory release date, there are reasonable grounds to believe that the released prisoner would commit an offence causing death or serious harm. Correctional Services of Canada did so find with respect to the author.

³ As later explained by the State party and evidenced in the documentation provided, the Minister informed the author that there was no provision under sections 49 and 50 of the Immigration Act to defer removal pending receipt of an extradition request or order. However, in the event that an extradition request was received by the Minister of Justice, the removal order would be deferred pursuant to paragraph 50 (1)(a) of the Immigration Act. An extradition request was never received.

a declaration that his detention in Canada and deportation to the United States violated his rights under the Canadian Charter. The author's application for leave was denied on 23 June 1998. No reasons were provided and no appeal is possible from the refusal to grant leave.

2.7 The author then petitioned the Superior Court of Québec, whose jurisdiction is concurrent with that of the Federal Court of Canada, for relief identical to that sought before the Federal Court. On 6 August 1998, the Superior Court declined jurisdiction given that proceedings had already been undertaken in the Federal Court, albeit unsuccessfully.

2.8 The author contends that, although the ruling of the Superior Court of Québec could be appealed to the Court of Appeal, it cannot be considered an effective remedy, as the issue would be limited to the jurisdiction of the court rather than the merits of the case.

The complaint

3.1 The author claims that Canada imposed mental suffering upon him that amounts to cruel, inhuman and degrading treatment or punishment, having detained him for ten years while the certainty of capital punishment was hanging over his head at the conclusion of his sentence, and this constitutes a breach of article 7 of the Covenant. He argues that he suffered from the "death row phenomenon", during his detention in Canada. This is explained as a state of mental or psychological anguish, and, according to him, it matters little that he would not be executed on Canadian soil. The author claims that the State party had no valid sentencing objective since he was sentenced to death in any event, even though in another State party, and therefore only served to prolong the agony of his confinement while he awaited deportation and execution. It is also submitted that in this respect, the author was not treated with humanity and respect for the inherent dignity of the human person, in violation of article 10 of the Covenant.

3.2 The author claims that "by detaining [him] for ten years despite the fact that he faced certain execution at the end of his sentence, and proposing now to remove him to the United States, Canada has violated [his] right to life, in violation of article 6 of the Covenant."

3.3 The author also claims that, because of his status as a fugitive he is denied a full appeal in the United States, under Pennsylvanian law, and therefore by returning him to the United States Canada participated in a violation of article 14, paragraph 5, of the Covenant. In this regard, the author states that the trial judge made errors in instructing the jury, which would have laid the

groundwork for appeals against both his conviction and sentence.

State party's admissibility submission

4.1 The State party contends that the author's claims are inadmissible for failure to exhaust domestic remedies, failure to raise issues under the Covenant, failure to substantiate his claims and incompatibility with the Covenant.

4.2 On the issue of non-exhaustion with respect to the author's detention in Canada, the State party argues firstly that the author failed to raise his claims before the competent courts in Canada at the material times. Both during his 1988 sentencing hearing and on appeal of his convictions of robbery the author failed to complain, as he now alleges, that a 10-year sentence, in light of his convictions and sentences in the United States, constituted cruel treatment or punishment in violation of section 12 of the Canadian Charter of Rights and Freedoms. These arguments were not made until 1998, when the author's removal from Canada was imminent.

4.3 Secondly, the State party argues that the author failed to appeal to the Appeal Division of the National Parole Board of Canada or to challenge before the courts both the National Parole Board's decision not to release him before the expiration of his full sentence and the annual reviews of that decision. If he had been successful with these appeal avenues, he might have been released prior to the expiration of his sentence. Failure to pursue such remedies is clearly inconsistent with the author's position that Canada violated his Covenant rights in detaining him in Canada rather than removing him to the United States.

4.4 Thirdly, the State party argues that if the author had wanted to be removed to the United States rather than continue to be detained in Canada, he could also have requested the Department of Citizenship and Immigration to intervene before the National Parole Board for the purposes of arguing that he be released and removed to the United States. Furthermore, he could have applied to have been transferred to Pennsylvania pursuant to the Transfer of Offenders Treaty between Canada and the United States of America on the Execution of Penal Sentences. In the State party's view, the author's failure diligently to pursue such avenues casts doubt on the genuineness of his assertion that he wanted to be removed to the United States, where he had been sentenced to death.

4.5 On the issue of non-exhaustion with respect to the author's request for a stay of the deportation order to the United States, the State party submits that the author failed to appeal the ruling of the Superior Court of Québec to the Court of Appeal.

Contrary to the author's view, that this remedy would not be useful as it would be limited to the jurisdiction of the court rather than the merits of the case, the State party argues that the author's petition was dismissed for both procedural and substantive reasons, and, therefore, the Court of Appeal could have reviewed the judgement on the merits.

4.6 The State party contends that the author has failed to show that his detention and subsequent removal to the United States raise any issues under articles 6, 7, 10 or 14, paragraph 5 of the Covenant. If the Committee is of the opinion that these articles do apply to the instant case, the State party argues that the author has failed to substantiate any of these claims for the purposes of admissibility.

4.7 With respect to the alleged violation of articles 7 and 10, the State party argues that the author has not cited any authority in support of his proposition that the "death row phenomenon" can apply to a prisoner detained in an abolitionist State for crimes committed in that State, where that person has been previously sentenced to capital punishment in another State. The author was sentenced to imprisonment for robberies he committed in Canada and was not on death row in Canada. It is submitted, therefore, that the "death row phenomenon" does not apply in the circumstances and he has no claim under articles 7 and 10.

4.8 On the author's argument that the sentencing in Canada had no valid objective as he had been sentenced to death in the United States, the State party submits that the sentencing principle of retribution, denunciation and deterrence require the imposition of a sentence in Canada for crimes committed in Canada.

4.9 According to the State party, if fugitives in Canada facing the death penalty were not prosecuted and sentenced for crimes in Canada, this would lead to potential abuses. First, it would create a double standard of justice. Such fugitives would be immune from prosecution while individuals not facing the death penalty would be prosecuted and sentenced, even though the crime committed in Canada was the same in both cases. Similarly, it would encourage lawlessness among such fugitives since in Canada they would be de facto immune from prosecution and imprisonment. In essence, fugitives sentenced to death for murder in the United States would be given a "carte blanche" to commit subsequent offences in Canada.

4.10 If the Committee were to find that the facts of this case do raise issues under articles 7 and 10, the State party submits that the author has not substantiated a violation of these articles for the purposes of admissibility. The State party argues that the Committee has on many occasions reiterated that lengthy detention on death row does not constitute a

violation of articles 7 and 10 in the absence of some further compelling circumstances.⁴ It states that the facts and circumstances of each case need to be examined, and that in the past the Committee has had regard to the relevant personal factors of the author, the specific conditions of detention on death row and whether the proposed method of execution is particularly abhorrent. No such circumstances apply in this case. Moreover, it states that, where the delay in awaiting execution is the fault of the accused, such as where he escapes custody, the accused cannot be allowed to take advantage of this delay. In this case, the delay arises from the author's own criminal acts, his escape and the robberies he committed in Canada.⁵

4.11 With respect to the alleged violation of article 6, the State party states that the author has provided no authority for his proposition that *detaining* an individual for crimes committed in that State despite the fact that the same person has been sentenced to death in another State raises an issue under article 6. The author was sentenced in Canada for robberies he committed there and is not facing the death penalty in Canada.

4.12 The State party contends that the author has failed to substantiate his claim that his *deportation* from Canada would violate article 6. It recalls the Committee's jurisprudence that "if a State party takes a decision relating to a person within its jurisdiction and the necessary and foreseeable consequences is that the person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant."⁶ The State party also invokes the Committee's decision in *Reid v. Jamaica*, when it decided that the requirement of article 6 that a sentence of death may be "imposed in accordance with the law" implied that the procedural guarantees prescribed in the Covenant were observed.⁷ According to the State party, if the procedural guarantees of the Covenant were observed, there is no violation of article 6. The only due process issue raised by the author was the narrower appeal of

⁴ The State party refers to the following cases *Pratt and Morgan v. Jamaica*, Communication Nos. 210/1986, 225/1987, *Barrett and Sutcliffe v. Jamaica*, Communication Nos. 270/1988, 271/1988, *Kindler v. Canada*, Communication No. 470/1990, Views adopted on 30 July 1993, *Johnson v. Jamaica*, Communication No. 588/1994 and *Francis v. Jamaica*, Communication No. 606/1994.

⁵ The State party refers to *Pratt and Morgan, supra*, *Wallen and Baptiste* (No. 2) (1994), 45 W.I.R. 405 at 436 (C.A., Trinidad and Tobago).

⁶ *Kindler, supra*.

⁷ *Reid v. Jamaica*, Communication No. 250/1987.

conviction and sentence allowed under Pennsylvania law. In this respect, the State party contends that the author has not substantiated his claim that he was deprived of his right to review by a higher tribunal and it refers *mutatis mutandis* to its submissions on article 14, paragraph 5, (below).

4.13 On article 14, paragraph 5, of the Covenant, the State party presents several arguments to demonstrate that an issue under this article does not arise. Firstly, it contends that the author's complaint has its basis in the law of the United States, State of Pennsylvania and not in Canadian law. Therefore, the author has no *prima facie* claim against Canada.

4.14 Secondly, the State party contends that the author's right to review by a higher tribunal should be treated under article 6 and not separately under article 14. It argues that, given that the Committee interprets article 6, paragraph 2, as requiring the maintenance of procedural guarantees in the Covenant, including the right to review by the higher tribunal stipulated in article 14, paragraph 5, to the extent that this case raises issues under article 6, this right to review should be treated under article 6 only.

4.15 Thirdly, the State party argues that the author's detention in and removal from Canada does not raise an issue under article 14, as his incarceration for robberies committed in Canada did not have any necessary and foreseeable consequence on his right to have his convictions and sentences reviewed in Pennsylvania. It is also submitted that the author's removal did not have any necessary and foreseeable consequence on his appeal rights since the author's appeal had already taken place in 1991, while he was imprisoned in Canada.

4.16 The State party argues that, although in the United States a prisoner's rights may be adversely affected in the event that he escapes from custody, the author has failed to substantiate his claim that his right to review by a higher tribunal was violated. It encloses the judgement of the Supreme Court of Pennsylvania on the author's appeal, indicating that the Supreme Court of Pennsylvania is statutorily mandated to review all death sentences, in particular the sufficiency of the evidence to sustain a conviction for first degree murder. This statutory review was undertaken with respect to the author's case, on 22 October 1991, at which he was legally represented. The Supreme Court affirmed both the conviction and sentence. On the allegation that the trial judge committed errors in instructing the jury and that those errors had not be reviewed by the Supreme Court, the State party submits that even if the judge so erred, upon a realistic view of the evidence, a properly instructed jury could not have come to any other conclusion than that reached by the jury in the author's trial.

4.17 The State party further submits that two additional review recourses are available to the author in the United States. The first is a petition filed in the Court of Common Pleas under Pennsylvania's Post-Conviction Relief Act (PCRA) in which constitutional issues may be raised. The State party claims that the author has already filed a petition under this Act. The second is a petition for writ of habeas corpus filed in the District Court for the Eastern District of Pennsylvania. This court has the power to overturn the judgements of the courts of the Commonwealth of Pennsylvania, if it concludes that the conviction was pronounced in violation of rights guaranteed to criminal defendants under federal law. If the author is unsuccessful in both of these petitions, he may appeal to the higher courts and ultimately to the United States Supreme Court.

4.18 In addition, the State party submits that the author could petition the Governor of Pennsylvania for clemency or to have his sentence commuted to a less severe one. Prior flight does not preclude such an application. According to the State party, in light of the recourses available to a prisoner on death row, only two executions were carried out in Pennsylvania over the past thirty years.

4.19 Finally, with a view to admissibility of the communication as a whole, the State party argues that it is incompatible with the provisions of the Covenant, under article 3 of the Optional Protocol, and article 5, paragraph 1 of the Covenant. It is submitted that the provisions of the Covenant should not be raised as a shield to criminal liability and the author should not be allowed to rely on the Covenant to support his argument that he should not have been prosecuted in Canada for crimes he committed there. Moreover, the Covenant should not be used by those who through their own criminal acts have voluntarily waived certain rights. The State party contends that the author's claims are contradictory. On the one hand, he claims that his removal from Canada to the United States violates articles 6 and 14, paragraph 5 of the Covenant, on the other, that his detention violates articles 7 and 10. Canada is alleged therefore, to violate the Covenant by removing him as well as not removing him.

State party's merits submission

5.1 With respect to the allegation of a violation of articles 7 and 10, the State party submits that contrary to what is implied in the author's submissions, the "death row phenomenon" is not solely the psychological stress experienced by inmates sentenced to death, but relates also to other conditions including, the periodic fixing of execution dates, followed by reprieves, physical abuse, inadequate food and isolation.

5.2 With respect to the author's request for a stay of his deportation until such time as Canada received an extradition request and an assurance that the death penalty would not be carried out, the State party submits that the United States has no obligation to seek extradition of a fugitive nor to give such assurances. The Government of Canada cannot be expected to wait for such a request or to wait for the granting of such assurances before removing fugitives to the United States. The danger of a fugitive going unpunished, the lack of authority to detain him while waiting for an extradition request and the importance of not providing a safe haven for those accused of or found guilty of murder, militate against the existence of such an obligation. Moreover, the Minister of Citizenship and Immigration has a statutory obligation to execute a removal order as soon as reasonably practicable.

5.3 On the alleged violation of article 6 and the author's contention that errors were committed during his trial in Pennsylvania, which would have provided the basis for an appeal, the State party states that it is not for the Committee to review the facts and evidence of a trial unless it could be shown to have been arbitrary or a denial of justice.⁸ It would be inappropriate to impose an obligation on it to review trial proceedings, particularly given that they occurred in the United States.

5.4 In relation to the allegation of a violation of article 14, paragraph 5, the State party submits that this article does not specify what type of review is required and refers to the Travaux Préparatoires of the Covenant, which it claims envisaged a broad provision that recognised the principle of a right to review while leaving the type of review procedure to be determined in accordance with their respective legal systems.⁹

5.5 The State party reiterates that the author's case was fully reviewed by the Supreme Court of Pennsylvania. It submits that, although originally in Pennsylvania a defendant who escaped custody was held to have forfeited his right to a full appellate review, the Supreme Court of this state has recently departed from this position, holding that a fugitive should be allowed to exercise his post-trial rights in the same manner as he would have done had he not become a fugitive. This is dependent, the State party clarifies, on whether the fugitive returns on time to file post-trial motions or an appeal. It also notes that

filing deadlines are subject to exceptions which allow for late filing.¹⁰

Author's comments on State party's admissibility and merits submission

6.1 In relation to the State party's arguments on non-exhaustion of domestic remedies with respect to the author's detention in Canada, the author submits that it was not until 1993, almost 5 years after his robbery convictions, that he was ordered deported. He argues that he could have been granted early parole for the purposes of deportation to the United States and as such could not have known in 1988 that Canada would see fit to detain him for the full 10 years of his sentence. Furthermore, the author could not have known in 1988 that although the United States was willing to seek extradition, it would not do so "as the eventual deportation of the author to the United States appeared less problematic."

6.2 On the question of an appeal to the National Parole Board, including appeals of the annual reviews, the author submits that appeals of this nature would have been ineffective as, based on the evidence, the Board could only find that "if released" the author would likely cause, inter alia, serious harm to another person prior to expiry of sentence. However, as in reality the author would not have been released on completion of two-thirds of his sentence, but would have been turned over to the Canadian immigration services to be deported, the prison authorities should not have submitted the author's case to the Parole Board for review in the first place. Once seized with the case, the Board could not refuse to rule on the risk of harm, were the author to be released.

6.3 On the issue of the possibility of applying for transfer to the United States pursuant to the Transfer of Offenders Treaty, the author argues that the consent of both States parties is necessary for such a transfer and that Canada would never have agreed considering its refusal to deport him before he had served his full term of imprisonment. Further, the author argues that the onus should not be on him to pursue legal remedies, all of which he considers would have been futile, to hasten his return to the jurisdiction where he was sentenced to death.

6.4 With respect to a possible appeal of the author's request for a stay of the deportation order from the Superior Court of Québec, the author submits that this decision was rendered orally on 6 August 1998, at approximately 20:00. The Government of Canada removed the author in the

⁸ *McTaggart v. Jamaica*, Communication No. 749/1997.

⁹ The State party refers to M. Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary (Strasbourg: N.P. Engel, Publisher, 1993) at 266.

¹⁰ The State party refers to *Commonwealth of Pennsylvania v. Deemer*, 705 A. 2d 627 (Pa. 1997).

early hours of 7 August 1998, before any appeal could be launched. Therefore, any appeal would have been moot and futile because the very subject of the proceedings was no longer within Canadian jurisdiction.

6.5 The author reiterates that the judge of the Superior Court declined jurisdiction to stay the deportation because the Federal Court had refused to intervene. He argues that although the judge went on to analyse the case on the merits he should not have done so, having declined jurisdiction and that an appeal, had it not been moot, would have been limited to the question of whether he ought to have declined jurisdiction and not whether he had made a case that his rights under the Canadian Charter of Rights and Freedoms had been violated.

6.6 The author contests the State party's argument on incompatibility and states that the theory that *if* the author's crimes in Canada had gone unpunished a precedent would have been set whereby those subject to execution in one State could commit crimes with impunity in another State, is inherently flawed. On the contrary, the author argues that if death row inmates knew that they would be prosecuted for crimes in Canada this would encourage them to commit such crimes there in order to serve a prison sentence in Canada and prolong their life or indeed commit murder in Canada and stave off execution in the United States indefinitely. If the author had been "removed by way of extradition following apprehension in Canada in 1988, he would have had little in the way of arguments to put forth."

6.7 The author contests the State party's arguments on the merits. He confirms that he has no authority for the proposition that detention in Canada for crimes committed in Canada can constitute death row confinement as there is no such recorded instance. The author submits that the mental anguish that characterises death row confinement began with his apprehension in Canada in 1988 and "will only end upon his execution in the United States."

6.8 The author rejects as misinterpretation, the State party's point that the decision in Pratt and Morgan¹¹ is authority for the proposition that a prisoner cannot complain where delay is due to his own fault such as an "escape from custody". He concedes that the period when he was at large is not computed as part of the delay but this period began from the point of apprehension by the Canadian authorities. He further submits that he was not detained in Canada because of his escape but rather because he was prosecuted and convicted of robbery.

6.9 On the State party's reference to the conditions of detention in the Special Handling Unit, the author submits that this is the only super-maximum facility of its kind in Canada, and that he was subjected to "abhorrent living conditions". He also submits that the National Parole Board's decision to hold him for the full 10 years of his sentence and the subsequent annual reviews maintaining this decision constituted a form of reprieve, albeit temporary, from his return to the United States where he was to be executed. In this regard, the author refers to the discussion of this issue in Pratt and Morgan (Privy Council), where Lord Griffith commented on the anguish attendant upon condemned prisoners who move from impending execution to reprieve.

6.10 The author argues that to remove him to a jurisdiction which limits his right to appeal violates article 14, paragraph 5, of the Covenant, and submits that article 6 of the Covenant should be read together with article 14, paragraph 5. On the issue of the Supreme Court of Pennsylvania's review of his case, the author maintains that the Court refused to entertain any claims of error at trial and, therefore, reviewed the evidence and decided to uphold the conviction and sentence. Issues such as the propriety of jury instructions are excluded from this type of review.

6.11 Without wishing the Committee to consider the transcripts of the murder trial, the author also refers to alleged errors that occurred during the course of his trial that could have changed the outcome of the case. He refers to a question from the jury which sought to clarify the difference between 1st and 3rd degree murder and manslaughter. The jury's request was not answered, as the author's attorney could not be located. When the attorney appeared the next day, the jury was ready to deliver a verdict without receiving an answer to the request for clarification. A verdict of 1st degree murder was then returned.

6.12 The author submits that while a mechanism allowing limited review might be viewed as acceptable in cases in which non-capital crimes have been committed, he contends that this is wholly unacceptable where the defendant's life hangs in the balance, and when he is barred from having any claim of error at trial reviewed.

6.13 On the possibility of seeking relief under the PCRA, the author confirms that he did indeed seek relief by filing such a motion after he was deported to the United States. This motion was dismissed on 21 July 1999, and by reference to the previous case of *Commonwealth v. Kindler*, it was argued that the author's fugitive status had disqualified him from seeking such relief. The author further submits that as his application for relief under the PCRA was

¹¹ *Pratt and Morgan v. Jamaica*, supra..

dismissed, he cannot seek federal habeas corpus relief, as PCRA relief was refused on the basis of the failure to respect a State statute.

6.14 On the possibility of a request to the Governor of Pennsylvania to seek commutation of his sentence to life, the author argues that the Governor is an elected politician who has no mandate to engage in an independent, neutral review of judicial decisions. It is submitted that his/her function in this respect “does not satisfy the requirements of articles 14 (5) and 6 of the Covenant”.

Committee’s consideration of admissibility

7.1 At its 75th session, the Committee considered the admissibility of the communication. It ascertained that the same matter was not being examined under another international procedure of international investigation or settlement.

[7.2] As regards the author’s complaint relating to prison conditions in Canada, the Committee found that the author had not substantiated this claim, for purposes of admissibility.

[7.3] On the issue of an alleged violation of articles 7 and 10 of the Covenant in connection with the author’s detention in Canada with the prospect of capital punishment awaiting him in the United States upon serving his term of imprisonment in Canada, the Committee noted that the author was not confined to death row in Canada, but serving a ten year sentence for robbery. Consequently, he had failed to raise an issue under articles 7 and 10 in this respect and this part of the communication was found to be inadmissible under articles 2 and 3 of the Optional Protocol.

[7.4] As to the alleged violation of article 6 for *detaining* the author in Canada for crimes committed therein, the Committee considered that he had not substantiated, for purposes of admissibility, how his right to life was violated by his *detention* in Canada for crimes committed there. This aspect of the communication was declared inadmissible under article 2 of the Optional Protocol.

[7.5] The State party had argued that the author could not avail himself of the Optional Protocol to complain about his *deportation to the United States*, as he had not appealed his request for a stay of the deportation order from the Superior Court of Québec to the Court of Appeal and therefore had not exhausted domestic remedies. The Committee observed the author’s response, that an appeal would have been ineffective as the Court of Appeal would only have dealt with the issue of jurisdiction and not with the merits of the case, and that the State party removed the author within hours of the Superior Court’s decision, thereby rendering an attempt to appeal this decision moot. The Committee noted that

the State party had not contested the speed with which the author was deported, after the decision of the Superior Court and, therefore, irrespective of whether the author could have appealed his case on the merits, found that it would be unreasonable to expect the author to appeal such a case after his deportation, the very act which was claimed to violate the Covenant. Accordingly, the Committee did not accept the State party’s argument that this part of the communication was inadmissible for failure to exhaust domestic remedies.

[7.6] As regards the author’s claim under article 14, paragraph 5, of the Covenant, and that Canada violated article 6 by deporting him, the Committee observed that the author had the *right* under Pennsylvanian law to a full appeal against his conviction and sentence. Furthermore, the Committee noted that, according to the documents provided by the parties, while the extent of the appeal was limited after the author had become a fugitive, his conviction and sentence were reviewed by the Supreme Court of Pennsylvania, which has a statutory obligation to review all death penalty cases. According to these documents, the author was represented by counsel and the Court reviewed the evidence and law as well as the elements required to sustain a first-degree murder conviction and capital punishment. In these particular circumstances, the Committee found that the author had not substantiated, for purposes of admissibility, his claim that his right under article 14, paragraph 5, was violated and that, therefore, his deportation from Canada entailed a violation by Canada of article 6 of the Covenant.

[7.7] Notwithstanding its decision that the claim based on article 14, paragraph 5, was inadmissible, the Committee considered that the facts before it raised two issues under the Covenant that were admissible and should be considered on the merits:

1. As Canada has abolished the death penalty, did it violate the author’s right to life under article 6, his right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment under article 7, or his right to an effective remedy under article 2, paragraph 3, of the Covenant by deporting him to a State in which he was under sentence of death without ensuring that that sentence would not be carried out?
2. The State party had conceded that the author was deported to the United States before he could exercise his right to appeal the rejection of his application for a stay of his deportation before the Québec Court of Appeal. As a consequence the author was not able to pursue any further remedies that might be available. By deporting the author

to a State in which he was under sentence of death before he could exercise all his rights to challenge that deportation, did the State party violate his rights under articles 6, 7 and 2 of the Covenant?

The Committee concluded that, given the seriousness of these questions, the parties should be afforded the opportunity to comment on them before the Committee expressed its Views on the merits. The parties were requested to provide information on the current procedural situation of the author in the United States and on any prospective appeals he might be able to pursue. The State party was requested to supplement its submissions in relation to the above questions and request for information as soon as possible, but in any event within three months of the date of transmittal of the admissibility decision. Any statements received from the State party were to be communicated to the author, who would be requested to respond within two months.

The State party's response on the merits, pursuant to the Committee's request

8.1 By note verbale of 15 November 2002, the State party responded to the questions and request for further information by the Committee.

1. *Whether Canada violated the Covenant by failing to seek assurances that the death penalty would not be carried out*

8.2 The State party refers to article 6, paragraph 1, which declares that every human being has the right to life and guarantees that no one shall be arbitrarily deprived of his or her life. It submits that with respect to the imposition of the death penalty, article 6, paragraph 2, specifically permits its application in those countries which have not abolished it, but requires that it be imposed in a manner that respects the conditions outlined in article 6.

8.3 Article 6 does not explicitly refer to the situation where someone is extradited or removed to another state where that person is subject to the imposition of the death penalty. However, the State party notes that the Committee has held that "if a State party takes a decision relating to a person within its jurisdiction and the necessary and foreseeable consequence is that that person's rights under the *Covenant* will be violated in another jurisdiction, the State party itself may be in violation of the *Covenant*."¹² The Committee has thus found

¹² *Kindler v. Canada*, supra, *Ng v. Canada*, Communication No. 469/1991, Views adopted on 5 November 1993, *Cox v. Canada*, Communication No. 539/1993, Views adopted on 31 October 1994, *G.T. v. Australia*, Communication No. 706/1996, Views adopted on 4 November 1997.

that article 6 applies to the situation where a State party seeks to extradite or remove an individual to a state where he/she faces the death penalty.

8.4 Article 6 allows States parties to extradite or remove an individual to a state where they face the death penalty as long as the conditions respecting the imposition of the death penalty in article 6 are met. The State party argues that the Committee, in the instant case, does not seem to question whether the imposition of the death penalty in the United States meets the conditions prescribed in article 6.¹³ Rather, the Committee asked whether Canada violated the *Covenant* by failing to seek assurances that the death penalty would not be carried out against the author.

8.5 According to the State party, article 6 and the Committee's General Comment 14 on article 6¹⁴ are silent on the issue of seeking assurances, and no legal authority supports the proposition that abolitionist states must seek assurances as a matter of international law. The State party submits that to subsume such a requirement under article 6 would represent a significant departure from accepted rules of treaty interpretation, including the principle that a treaty should be interpreted in light of the intention of the states parties as reflected in the terms of the treaty.¹⁵

8.6 The State party recalls that the Committee has considered several communications respecting the extradition or removal of individuals from Canada to states where they face the death penalty. In none of these cases did the Committee raise concerns about the absence of seeking assurances. Furthermore, the State party observes that, the Committee has on previous occasions rejected the proposition that an

¹³ According to the State party, with respect to the conditions under which the death penalty is applied in the State of Pennsylvania, the Committee found in paragraph 7.7 of its decision on admissibility that the author had the right under Pennsylvanian law to a full appeal against his conviction and sentence and that the conviction and sentence were reviewed by the Supreme Court of Pennsylvania. The Committee held that the author's claim based on article 14, paragraph 5 was inadmissible.

¹⁴ HRI/GEN/1/Rev.6.

¹⁵ The State party refers to Article 31 of the Vienna Convention on the Law of Treaties, U.N. Doc. A/Conf.39/27 (1969) which states that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose". Article 31 requires that the ordinary meaning of the terms of a provision of the treaty be the primary source for interpreting its meaning. The context of a treaty for the purposes of interpreting its provisions includes any subsequent agreement or practise of states parties that confer an additional meaning to the provision (art. 31, paragraphs 2 and 3).

abolitionist state that has ratified the Covenant is necessarily required to refuse extradition or to seek assurances that the death penalty would not be applied. In *Kindler v. Canada*,¹⁶ the Human Rights Committee asked, “Did the fact that Canada had abolished capital punishment...require Canada to refuse extradition or request assurances from the United States...that the death penalty would not be imposed against Mr. Kindler”. The State party notes the Committee’s statement in this regard that it “does not find that the terms of article 6 of the Covenant necessarily require Canada to refuse to extradite or to seek assurances.” These comments were repeated in the Committee’s views in *Ng v. Canada*¹⁷ and *Cox v. Canada*.¹⁸

8.7 As to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty pursuant to which States parties are required to take all necessary measures to abolish the death penalty within their jurisdictions, the State party refers to the Committee’s finding that for States parties to the Second Optional Protocol, its provisions are considered as additional provisions to the Covenant and in particular article 6.¹⁹ It submits that the instrument is silent on the issue of extradition or removal to face the death penalty, including whether assurances are required. The State party expresses no view on whether this instrument can be interpreted as imposing a requirement that assurances be sought, but emphasizes that it is not currently a party to the Second Optional Protocol. Therefore, its actions may only be scrutinized under the provisions of the Covenant.

8.8 The State party argues that at the time of the author’s removal, 7 August 1998, there was no domestic legal requirement, that Canada was required to seek assurances from the United States that the death penalty would not be carried out against him. While the Supreme Court of Canada had not ruled on this issue in the immigration context, they had dealt with it in relation to extradition, finding, in the cases of *Kindler v. Canada (Minister of Justice)*,²⁰ and *Reference Re Ng Extradition*,²¹ that providing the Minister with discretion as to whether to seek assurances that the death penalty would not be carried out and the decision to extradite Kindler and Ng without seeking

assurances did not violate the Canadian Constitution.²²

8.9 It further argues that a State party’s conduct must be assessed in light of the law applicable at the time when the alleged treaty violation took place: at the time of the author’s removal there was no international legal requirement requiring Canada to seek assurances that the death penalty would not be carried out against Roger Judge. It submits that this is evidenced by the Committee’s interpretation of the Covenant in *Kindler, Ng and Cox (supra)*. In addition, the United Nations Model Treaty on Extradition²³ does not list the absence of assurances that the death penalty will not be carried out as a “mandatory ground for refusal” to extradite an individual but it is listed as an “optional ground for refusal”. Finally, it submits that whether abolitionist states should be required to seek assurances in all cases when removing individuals to countries where they face the death penalty is a matter of state policy but not a legal requirement under the Covenant.

8.10 On the question of whether removing the author to a state where he was under a sentence of death without seeking assurances violates article 7 of the Covenant, the State party submits that the Committee has held that extradition or removal to face capital punishment, within the parameters of article 6, paragraph 2, does not *per se* violate article 7.²⁴ It also notes the Committee’s finding that there may be issues that arise under article 7 in connection with the death penalty depending on the “personal factors regarding the author, the specific conditions of detention on death row, and whether the proposed method of execution is particularly abhorrent”.²⁵

8.11 The State party argues that, in the instant case, the Committee rejected as inadmissible any claims respecting the author’s personal factors, conditions of detention on death row or the method of execution. The only issue that is raised is whether Canada’s failure to seek assurances that the death penalty will not be applied violates the author’s rights under article 7. The State party argues that if the imposition of the death penalty within the parameters of article 6, paragraph 2, does not violate article 7, then the failure of a State to seek assurances that the death penalty will not be applied cannot violate article 7. To hold otherwise would mean that the imposition of the death penalty within the parameters of article 6, paragraph 2, by State X, would not constitute torture, cruel, inhuman or degrading treatment or punishment, but that a state which extradites to State X without seeking

¹⁶ Supra.

¹⁷ Supra.

¹⁸ Supra.

¹⁹ *G. T. v. Australia*, supra.

²⁰ [1991] 2 S.C.R. 779.

²¹ [1991] 2 S.C.R. 858.

²² *Ibid.*, at page 840.

²³ General Assembly resolution 45/116.

²⁴ *Kindler v. Canada*, supra.

²⁵ *Kindler v. Canada*, supra.

assurances that the death penalty would not be applied, would be found to have placed the individual at a real risk of torture, cruel, inhuman or degrading treatment or punishment. In the State party's view, this amounts to an untenable interpretation of article 7. For these reasons, the State party asserts that it is not in violation of article 7 for having removed Roger Judge to the United States without seeking assurances.

8.12 The State party submits that article 2, paragraph 3, of the Covenant requires States parties to ensure that any person whose rights or freedoms have been violated under the Covenant, have an effective remedy, that claims of rights violations can be heard before competent authorities and that any remedies be enforced. The State party relies on its submissions on articles 6 and 7 and asserts in light of those arguments, that it did not violate the author's rights or freedoms under the Covenant. Canada's obligations under article 2, paragraphs 3 (a) and (c), thus do not arise in this case.

8.13 Furthermore, the State party submits that individuals who claim violations of their rights and freedoms, can have such claims determined by competent judicial authorities and if such claims are substantiated, be provided an effective remedy. More particularly, it argues, that the issue of whether it was required to seek assurances that the death penalty not be applied to the author could have been raised before domestic courts.²⁶

2. *Did the removal of the author to a state in which he was under sentence of death before he could exercise all his rights to challenge that removal violate the author's rights under articles 6, 7 and 2 of the Covenant*

8.14 The State party relies, *mutatis mutandis*, on its previous submissions with respect to the first question posed by the Committee. In particular, its argument that article 6 and the Committee's relevant General Comment²⁷ are silent on the issue of whether a state is required to allow an individual to exercise all rights of appeal prior to removing them to a state where they have been sentenced to death. No legal authority has been found for this proposition and finding such a

²⁶ The State party refers to Canadian Charter of Rights and Freedoms, s. 24 (1) which, in a similar manner to the Covenant, protects individuals' right to "life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" (s. 7) and the right "not to be subjected to any cruel and unusual treatment or punishment" (s.12). Anyone who claims that his or her rights or freedoms have been infringed may apply to a competent court to obtain such remedy as the court considers just and appropriate in the circumstances.

²⁷ *Supra*.

requirement under article 6 would represent a significant departure from accepted rules of treaty interpretation. In the State party's view, articles 6, paragraph 4, and 14, paragraph 5, provide important safeguards for the State party seeking to impose the death penalty²⁸ but do not apply to a State Party that removes or extradites an individual to a State where they have been sentenced to death.

8.15 The State party explains that Section 48 of the Immigration Act²⁹ stipulates that a removal order must be executed as soon as reasonably practicable subject to statutory or judicial stays. That is, where there are no stays on its execution, a removal order is a mandatory one which the Minister is legally bound to execute as soon as reasonably practicable, having little discretion in this regard. In the present case, the State party submits that, none of the statutory stays available under sections 49 and 50 of the Immigration Act applied to the author, and his requests for a judicial stay were dismissed by the reviewing courts.

8.16 The State party argues that the application for leave to commence an application for judicial review of the Minister's response that he was unable to defer removal including a lengthy memorandum of argument was considered by the Federal Court and denied. Similarly, the Superior Court of Québec considered the author's petition for the same relief dismissing it for both procedural and substantive reasons. Neither court found sufficient reason to stay removal. If the State party were to grant stays on removal orders until all levels of appeal could be exhausted, it argues that this would mean that individuals, such as the author, who committed serious crimes, would remain in Canada for significantly longer periods, which would result in lengthy delays on removals with no guarantee that serious criminals, such as the author, could be held in detention throughout the appeal process.³⁰

²⁸ In the instant case, the Committee found that the author's claim of a violation of a right to an appeal under Article 14, paragraph 5, of the Covenant was not substantiated for the purposes of the admissibility of the communication (at para. 7.7).

²⁹ This provision has been repealed and replaced by a similar provision in the Immigration and Refugee Protection Act.

³⁰ The State party further explains that under the former Immigration Act and the new Immigration and Refugee Protection Act, the Minister could argue in favour of detention during the appeal process based on the grounds that the person was likely to pose a danger to the public, or unlikely to appear for removal. The reasons for detention would be reviewed by an independent decision-maker. The Minister however, would not be able to guarantee the continued detention of the person and the longer the period of detention, the more likely that the individual would be released into the public.

8.17 On whether there has been a violation of article 7 in this regard, the State party relies, *mutatis mutandis*, on its previous submissions with respect to the first question posed by the Committee. In particular, if the imposition of the death penalty within the parameters of article 6, paragraph 2, does not violate article 7, then the failure of a state to allow an individual the possibility of exercising all judicial recourses prior to removal to the state imposing the death penalty cannot be a violation of article 7. The State party argues that the crucial issue is whether a State party imposing the death penalty has met the standards set out in article 6 and other relevant provisions of the Covenant and not whether the State party removing an individual to a State where he is under sentence of death has provided that individual with sufficient opportunity for judicial review of the decision to remove.

8.18 With respect to article 2, paragraph 3 of the Covenant, the State party submits that it has not violated any of the author's Covenant rights as he enjoyed sufficient judicial review of his removal order, prior to his removal to the United States, including review of whether the removal would violate his human rights.

8.19 On the author's current situation in the United States, the State party submits that it has been informed by the Philadelphia District Attorney's Office, State of Pennsylvania that the author is currently incarcerated in a state penitentiary, and that no execution date has been set for him.

8.20 On 23 May 2002, the Supreme Court of Pennsylvania denied the author's application for post conviction relief. The author has recently filed a petition for habeas corpus in the Federal District Court. An adverse decision rendered by the District Court can be appealed to the Federal Court of Appeals for the Third Circuit. This may be followed by an appeal to the U.S. Supreme Court. If the author's federal appeals are denied, an application for clemency can be filed with the State Governor. In addition, the State party reiterates that, according to the state of Pennsylvania, there have only been three persons executed since the reintroduction of the death penalty in 1976.

8.21 Without prejudice to any of the preceding submissions, the State party apprises the Committee of domestic developments that have occurred since the events at issue in this case. On 15 February 2001, the Supreme Court of Canada held, in *United States v. Burns*,³¹ that the government must seek assurances, in all but exceptional cases, that the death penalty would not be applied prior to extraditing an individual to a state where they face capital punishment. The State party submits that

Citizenship and Immigration Canada is considering the potential impact of this decision on immigration removals.

Author's response on the merits, pursuant to the Committee's request

9.1 By letter of 24 January 2003, the author responded to the request for information by the Committee and commented on the State party's submission. He submits that by relying on the decision in *Kindler v. Canada*,³² in its argument that in matters of extradition or removal, the Covenant is not necessarily breached by an abolitionist state where assurances that the death penalty not be carried out are not requested, the State party has misconstrued not only the facts of *Kindler* but the effect of the Committee's decision therein.

9.2 Firstly, the author argues that *Kindler* dealt with extradition as opposed to deportation. He recalls the Committee's statement that there would have been a violation of the Covenant "if the decision to extradite without assurances would have been taken arbitrarily or summarily". However, since the Minister of Justice considered Mr. Kindler's arguments prior to ordering his surrender without assurances, the Committee could not find that the decision was made "arbitrarily or summarily". The case currently under consideration concerns deportation, which lacks any legal process under which the deportee may request assurances that the death penalty not be carried out.

9.3 Secondly, the author reiterates that he petitioned the Canadian courts to declare that his removal by deportation would violate his rights under the Canadian Charter of Rights and Freedoms, so as to suspend his removal from Canada and "force" the United States to request his extradition, at which point he could have requested the Minister of Justice to seek assurances that the death penalty not be carried out. As the Minister of Justice has no such power under the deportation process, the State party was able to exclude the author from the protections afforded by the extradition treaty and no review of the appropriateness of requesting assurances was ever carried out. The author submits that the United States would have requested his extradition and encloses a letter, dated 3 February 1994, from the Philadelphia District Attorney's Office, exhibited with the author's proceedings in Canada, indicating that it will initiate extradition proceedings if necessary. Any refusal by the Minister to require assurances could then have been reviewed through the domestic court system. In "sidestepping" the extradition process and returning the author to face the death penalty, the State party is

³¹ Neutral citation 2001 SCC 7. [2001] S.C.J. No. 8.

³² *Supra*.

said to have violated the author's rights under articles 6, 7, and 2 (3) of the Covenant, as unlike Kindler, it did not consider the merits of assurances.

9.4 As to whether the State party violated his rights by deporting him before he could exercise all his rights to challenge his deportation, the author submits that the State party's interpretation of its obligations are too restrictive and that death penalty cases require special consideration. By removing him within hours after the Superior Court of Québec's decision (handed down late evening), it is argued that the State party ensured that the civil rights issues raised by the author could not benefit from any appellate review.

9.5 The author argues that this restrictive approach is contrary to the wording of the General Comment on article 2 which States "...The Committee considers it necessary to draw the attention of State parties to the fact that the obligation under the Covenant is not confined to the respect of human rights, but that State parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction." By deporting the author to ensure that he could not avail himself of his right of appeal, not only did the State party violate article 2, paragraph 3, of the Covenant, but the spirit of this general comment.

9.6 The author submits that the Minister has some discretion, under section 48 of the Immigration Act and is not under an obligation to remove him "immediately". Also, domestic jurisprudence recognises that the Minister has a duty to exercise this discretion on a case-by-case basis. He refers to the case of *Wang v. The Minister of Citizenship and Immigration*,³³ where it was held that "the discretion to be exercised is whether or not to defer to another process which may render the removal order ineffective or unenforceable, the object of that process being to determine whether removal of that person would expose him to a risk of death or other extreme sanction". According to this principle, the author believes that he should not have been deported until he had had an opportunity to avail himself of appellate review. It is submitted that had his right to appeal not been curtailed by his deportation, his case would still have been in the Canadian judicial system when the Supreme Court of Canada determined, in *United States of America v. Burns*,³⁴ that except in exceptional cases, assurances must be requested in all cases in which the death penalty could otherwise be imposed, and he would have benefited from it.

9.7 On the State party's argument (paragraph 8.13) that "the issue of whether Canada was required to seek assurances that the death penalty not be applied to Roger Judge could have been raised before domestic courts", the author submits that the State party misconstrued his legal position. The author's proceedings in Canada were intended to result in a stay of his deportation, so as to compel the United States to seek extradition, and only at this point could the issue of assurances have been raised.

9.8 On the author's current legal position, it is contested that no execution date has been set. It is submitted that a Death Warrant was signed by the Governor on 22 October 2002, and his execution scheduled for 10 December 2002. However, his execution has since been stayed, pending habeas corpus proceedings before the Federal District Court.

Issues and proceedings before the Committee

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

Question 1. As Canada has abolished the death penalty, did it violate the author's right to life under article 6, his right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment under article 7, or his right to an effective remedy under article 2, paragraph 3, of the Covenant by deporting him to a State in which he was under sentence of death without ensuring that that sentence would not be carried out?

10.2 In considering Canada's obligations, as a State party which has abolished the death penalty, in removing persons to another country where they are under sentence of death, the Committee recalls its previous jurisprudence in *Kindler v. Canada*,³⁵ that it does not consider that the deportation of a person from a country which has abolished the death penalty to a country where he/she is under sentence of death amounts *per se* to a violation of article 6 of the Covenant. The Committee's rationale in this decision was based on an interpretation of the Covenant which read article 6, paragraph 1, together with article 6, paragraph 2, which does not prohibit the imposition of the death penalty for the most serious crimes. It considered that as Canada itself had not imposed the death penalty but had extradited the author to the United States to face capital punishment, a state which had not abolished the death penalty, the extradition itself would not amount to a violation by Canada unless there was a real risk that the author's rights under the Covenant

³³ [2001] FCT 148 (March 6, 2001).

³⁴ *Supra*.

³⁵ *Supra*.

would be violated in the United States. On the issue of assurances, the Committee found that the terms of article 6 did not necessarily require Canada to refuse to extradite or to seek assurances but that such a request should at least be considered by the removing state.

10.3 While recognizing that the Committee should ensure both consistency and coherence of its jurisprudence, it notes that there may be exceptional situations in which a review of the scope of application of the rights protected in the Covenant is required, such as where an alleged violation involves that most fundamental of rights – the right to life – and in particular if there have been notable factual and legal developments and changes in international opinion in respect of the issue raised. The Committee is mindful of the fact that the abovementioned jurisprudence was established some 10 years ago, and that since that time there has been a broadening international consensus in favour of abolition of the death penalty, and in states which have retained the death penalty, a broadening consensus not to carry it out. Significantly, the Committee notes that since *Kindler* the State party itself has recognized the need to amend its own domestic law to secure the protection of those extradited from Canada under sentence of death in the receiving state, in the case of *United States v. Burns*. There, the Supreme Court of Canada held that the government *must* seek assurances, in all but exceptional cases, that the death penalty will not be applied prior to extraditing an individual to a state where he/she faces capital punishment. It is pertinent to note that under the terms of this judgement, “Other abolitionist countries do not, in general, extradite without assurances.”³⁶ The Committee considers that the Covenant should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present-day conditions.

10.4 In reviewing its application of article 6, the Committee notes that, as required by the Vienna Convention on the Law of Treaties, a treaty should be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Paragraph 1 of article 6, which states that “Every human being has the inherent right to life...”, is a general rule: its purpose is to protect life. States parties that have abolished the death penalty have an obligation under this paragraph to so protect in all circumstances. Paragraphs 2 to 6 of article 6 are evidently included to avoid a reading of the first paragraph of article 6, according to which that paragraph could be understood as abolishing the

death penalty as such. This construction of the article is reinforced by the opening words of paragraph 2 (“In countries which have not abolished the death penalty...”) and by paragraph 6 (“Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.”). In effect, paragraphs 2 to 6 have the dual function of creating an exception to the right to life in respect of the death penalty and laying down limits on the scope of that exception. Only the death penalty pronounced when certain elements are present can benefit from the exception. Among these limitations are that found in the opening words of paragraph 2, namely, that only States parties that “have not abolished the death penalty” can avail themselves of the exceptions created in paragraphs 2 to 6. For countries that *have* abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out.

10.5 The Committee acknowledges that by interpreting paragraphs 1 and 2 of article 6 in this way, abolitionist and retentionist States parties are treated differently. But it considers that this is an inevitable consequence of the wording of the provision itself, which, as becomes clear from the Travaux Préparatoires, sought to appease very divergent views on the issue of the death penalty, in an effort at compromise among the drafters of the provision. The Committee notes that it was expressed in the Travaux that, on the one hand, one of the main principles of the Covenant should be abolition, but on the other, it was pointed out that capital punishment existed in certain countries and that abolition would create difficulties for such countries. The death penalty was seen by many delegates and bodies participating in the drafting process as an “anomaly” or a “necessary evil”. It would appear logical, therefore, to interpret the rule in article 6, paragraph 1, in a wide sense, whereas paragraph 2, which addresses the death penalty, should be interpreted narrowly.

10.6 For these reasons, the Committee considers that Canada, as a State party which has abolished the death penalty, irrespective of whether it has not yet ratified the Second Optional Protocol to the Covenant Aiming at the Abolition of the Death Penalty, violated the author’s right to life under article 6, paragraph 1, by deporting him to the United States, where he is under sentence of death, without ensuring that the death penalty would not be carried out. The Committee recognizes that Canada did not itself impose the death penalty on the author. But by deporting him to a country where he was

³⁶ Supra.

under sentence of death, Canada established the crucial link in the causal chain that would make possible the execution of the author.

10.7 As to the State party's claim that its conduct must be assessed in the light of the law applicable at the time when the alleged treaty violation took place, the Committee considers that the protection of human rights evolves and that the meaning of Covenant rights should in principle be interpreted by reference to the time of examination and not, as the State party has submitted, by reference to the time the alleged violation took place. The Committee also notes that prior to the author's deportation to the United States the Committee's position was evolving in respect of a State party that had abolished capital punishment (and was a State party to the Second Optional Protocol to the International Covenant on Human Rights, aiming at the abolition of the death penalty), from whether capital punishment would subsequent to removal to another State be applied in violation of the Covenant to whether there was a real risk of capital punishment as such (Communication No. 692/1996, *A.R.J. v. Australia*, Views adopted on 28 July 1997 and Communication No. 706/1996, *G.T. v. Australia*, Views adopted on 4 November 1997). Furthermore, the State party's concern regarding possible retroactivity involved in the present approach has no bearing on the separate issues to be addressed under question 2 below.

Question 2. The State party had conceded that the author was deported to the United States before he could exercise his right to appeal the rejection of his application for a stay of his deportation before the Québec Court of Appeal. As a consequence the author was not able to pursue any further remedies that might be available. By deporting the author to a State in which he was under sentence of death before he could exercise all his rights to challenge that deportation, did the State party violate his rights under articles 6, 7 and 2, paragraph 3 of the Covenant?

10.8 As to whether the State party violated the author's rights under articles 6, and 2, paragraph 3, by deporting him to the United States where he is under sentence of death, before he could exercise his right to appeal the rejection of his application for a stay of deportation before the Québec Court of Appeal and, accordingly, could not pursue further available remedies, the Committee notes that the State party removed the author from its jurisdiction within hours after the decision of the Superior Court of Québec, in what appears to have been an attempt to prevent him from exercising his right of appeal to the Court of Appeal. It is unclear from the submissions before the Committee to what extent the Court of Appeal could have examined the author's case, but the State party itself concedes that as the

author's petition was dismissed by the Superior Court for procedural and substantive reasons (see para. 4.5 above), the Court of Appeal could have reviewed the judgement on the merits.

10.9 The Committee recalls its decision in *A. R. J. v. Australia*,³⁷ a deportation case where it did not find a violation of article 6 by the returning state as it was not foreseeable that he would be sentenced to death and "because the judicial and immigration instances seized of the case heard extensive arguments" as to a possible violation of article 6. In the instant case, the Committee finds that, by preventing the author from exercising an appeal available to him under domestic law, the State party failed to demonstrate that the author's contention that his deportation to a country where he faces execution would violate his right to life, was sufficiently considered. The State party makes available an appellate system designed to safeguard any petitioner's, including the author's, rights and in particular the most fundamental of rights – the right to life. Bearing in mind that the State party has abolished capital punishment, the decision to deport the author to a state where he is under sentence of death without affording him the opportunity to avail himself of an available appeal, was taken arbitrarily and in violation of article 6, together with article 2, paragraph 3, of the Covenant.

10.10 Having found a violation of article 6, paragraph 1 alone and, read together with article 2, paragraph 3 of the Covenant, the Committee does not consider it necessary to address whether the same facts amount to a violation of article 7 of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal a violation by Canada of articles 6, paragraph 1 alone and, read together with 2, paragraph 3, of the International Covenant on Civil and Political Rights.

12. Pursuant to article 2, paragraph 3 (a) of the Covenant, the Committee concludes that the author is entitled to an appropriate remedy which would include making such representations as are possible to the receiving state to prevent the carrying out of the death penalty on the author.

13. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognised 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

³⁷ *Supra*.

all individuals within its territory and subject to its jurisdiction the rights recognised 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 90 days, information about the measures taken to give effect to its Views. The Committee is also requested to publish the Committee's Views.

APPENDIX

Individual opinion by Committee member Nisuko Ando concerning Committee's admissibility decision on communication No. 829/1998 (Judge v. Canada)

With regret, I must point out that I am unable to share the Committee's conclusion set forth in paragraph 7.8 in which it draws attention of both the author and the State party and requests them to address the two issues mentioned therein which relate to articles 6, 7 and 2 of the Covenant.

In its decision on admissibility of the communication the Committee makes clear that the communication is inadmissible as far as it relates to issues under articles 7, 10 (para. 7.4), article 6 (para. 7.5) and article 14 (5) (para. 7.7), and yet the Committee concludes that the facts presented by the author raise the two issues mentioned above. It is my understanding that in the present communication both the author and the State party have presented their cases in view of the Committee's earlier jurisprudence on Case No. 470/1991 (*J. Kindler v. Canada*), because in those two communications the relevant facts are very similar or almost identical. The Committee's line of argument in the present communication also suggests this. Under the circumstances I consider it illogical for the Committee to state that the communication is inadmissible in matters relating to articles 7, 10, 6 and 14 (5), on the one hand, but that it raises issues under articles 6, 7 and 2, on the other, unless it specifies how these apparent contradictions are to be solved. A mere reference to "the seriousness of these questions" (para. 7.8) does not suffice: Hence, this individual opinion!

Individual opinion submitted by Committee member Christine Chanet concerning Committee's admissibility decision on communication No. 829/1998 (Judge v. Canada) adopted on 17 July 2002

Unlike its position in the case of *Kindler v. Canada*, in this case the Committee directly addresses the fundamental question of whether Canada, having abolished the death penalty, violated the author's right to life under article 6 of the Covenant by extraditing him to a State where he faced capital punishment, without ascertaining that that sentence would not in fact be carried out.

I can only subscribe to this approach, which I advocated and had wished to see applied in the *Kindler* case; indeed, that was the basis of the individual opinion I submitted in that case.

In my view, asking that question obviates the need for a response such as the Committee gives in this case concerning a violation by Canada of article 14, paragraph 5, of the Covenant.

The position adopted by the Committee on this point implies that it declares itself competent to consider the author's arguments concerning a possible violation of article 14, paragraph 5, of the Covenant, as a result of irregularities in the proceedings taken against the author in the United States, a position identical to that adopted in the *Kindler* case (para. 14.3).

In my view, while the Committee can declare itself competent to assess the degree of risk to life (death sentence) or to physical integrity (torture), it is less obvious that it can base an opinion that a violation has occurred in a State party to the Covenant on a third State's failure to observe a provision of the Covenant.

Taking the opposite position would amount to requiring a State party that called into question respect for human rights in its relations with a third State to be answerable for respect by that third State for all rights guaranteed by the Covenant vis-à-vis the person concerned.

And why not? It would certainly be a step forward in the realization of human rights, but legal and practical problems would immediately arise.

What is a third State, for example? What of States non-parties to the Covenant? What of a State that is party to the Covenant but does not participate in the procedure? Does the obligation of a State party to the Covenant in its relations with third States cover all the rights in the Covenant or only some of them? Could a State party to the Covenant enter a reservation to exclude implementation of the Covenant from its bilateral relations with another State?

Even setting aside the complex nature of the answers to these questions, applying the "maximalist" solution in practice is fraught with problems.

For while the Committee can ascertain that a State party has not taken any undue risks, and may perhaps give an opinion on the precautions taken by the State party to that end, it can never really be sure whether a third State has violated the rights guaranteed by the Covenant if that State is not a party to the procedure.

In my view, therefore, the Committee should in this case have refrained from giving an opinion with respect to article 14, paragraph 5, and should have awaited a reply from the State party on the fundamental issue of expulsion by an abolitionist State to a State where the expelled individual runs the risk of capital punishment, since the terms in which the problem of article 14, paragraph 5, is couched will vary depending whether the answer to the first question is affirmative or negative.

For if an abolitionist State cannot expel or extradite a person to a State where that person could be executed, the issue of the regularity of the procedure followed in that State becomes irrelevant.

If, on the other hand, the Committee maintains the position adopted in the *Kindler* case, it will need to make a thorough study of the problem of States parties' obligations under the Covenant in their relations with third States.

Individual opinion (dissenting) by Committee member Hipólito Solari-Yrigoyen concerning Committee's admissibility decision on communication No. 829/1998 (Judge v. Canada)

I disagree with regard to the present communication on the grounds set forth below:

The Committee is of the view that the author's counsel has substantiated for the purposes of admissibility, his allegation that the State party has violated his right to life under article 6 and article 14, paragraph 5, of the Covenant by deporting him to the United States, where he has been sentenced to death, and that his claim is compatible with the Covenant. The Committee therefore declares that this part of the communication is admissible and should be considered on the merits.

With regard to a potential violation by Canada of article 6 of the Covenant for having deported the author to face the imposition of the death penalty in the United States, the Committee refers to the criteria set forth in its prior jurisprudence. Namely, for States that have abolished capital punishment and that extradite a person to a country where that person may face the imposition of a death penalty, the extraditing State must ensure itself that the person is not exposed to a real risk of a violation of his rights under article 6 of the Covenant.³⁸

The Committee notes that the State party's argument in the present communication, that several additional review recourses were available to the author, such as filing a petition in the Court of Common Pleas under Pennsylvania's Post-Conviction Relief Act, filing a writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania, making a request to the Governor of Pennsylvania for clemency, and appealing to the Pennsylvania Supreme Court. The Committee observes that the automatic review of the author's sentence by the Pennsylvania Supreme Court took place in absentia, when the author was in prison in Canada. Although the author was represented by counsel, the Supreme Court did not undertake a full review of the case, nor did it review the sufficiency of evidence, possible errors at trial, or propriety of sentence. A review of this nature is not compatible with the right protected under article 14, paragraph 5, of the Covenant, which calls for a full evaluation of the evidence and the court proceedings. The Committee considers that such limitations in a capital case amount to a denial of a fair trial, which is not compatible with the right protected under article 14, paragraph 5, of the Covenant, and that the author's flight from the United States to avoid the death penalty does not absolve Canada from its obligations under the Covenant. In the light of the foregoing, the Committee considers the State party accountable for the violation of article 6 of the Covenant as a consequence of the violation of article 14, paragraph 5.

The Committee has noted the State party's argument that there was no law under which it could have detained

the author on expiry of his sentence and therefore had to deport him. The Committee takes the view that this response is unsatisfactory for three reasons, namely: (1) Canada deported the author knowing that he would not have the right to appeal in a capital case; (2) the speed with which Canada deported the author did not allow him the opportunity to appeal the decision to remove him; and (3) in the present case, Canada took a unilateral decision and therefore cannot invoke its obligations under the Extradition Treaty with the United States, since at no time did the United States request the extradition.

The Committee, acting under article 5, paragraph 4, of the Optional Protocol finds that Canada has violated its obligations under article 2 of the Covenant to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant because, when it deported the author to the United States, it did not take sufficient precautions to ensure that his rights under article 6 and to article 14, paragraph 5, of the Covenant would be fully observed.

The Human Rights Committee requests the State party to do everything possible, as a matter of urgency to avoid the imposition of the death penalty or to provide the author with a full review of his conviction and sentence. The State party has the obligation to ensure that similar violations do not occur in the future.

Bearing in mind that by signing 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 to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish these Views.

Individual Opinion (concurring) by Committee member Rajssoomer Lallah

I entirely agree with the Committee's revision of the approach which it had adopted in *Kindler v. Canada* in relation to the correct interpretation to be given to the "inherent right to life" guaranteed under article 6 (1) of the Covenant. This revised interpretation is well explicated in paragraphs 10.4 and 10.5 of the present Views of the Committee. I wish, however, to add three observations.

First, while it is encouraging to note, as the Committee does in paragraph 10.3 of the present Views, that there is a broadening international consensus in favour of the abolition of the death penalty, it is appropriate to recall that, even at the time when the Committee was considering its views in *Kindler* some 10 years ago, the Committee was quite divided as to the obligations which a State party undertakes under article 6 (1) of the Covenant, when faced with a decision as to whether to remove an individual from its territory to another State where that individual had been sentenced to

³⁸ Communication No. 692/1996, *A.R.J. v. Australia*; No. 706/1996, *T. v. Australia*; No. 470/1991, *Kindler v. Canada*; No. 469/1991, *Chitat Ng v. Canada* and No. 486/1992, *Cox v. Canada*.

death. No less than five members of the Committee dissented from the Committee's Views, precisely on the nature, operation and interpretation of article 6 (1) of the Covenant. The reasons which led those five members to dissent were individually expressed in separate individual opinions which are appended to this separate opinion as A, B, C, D and E. In the case of the separate opinion at E, only the fact that appears most relevant is reproduced (paragraph 19 to 25).

My second observation is that other provisions of the Covenant, in particular, articles 5 (2) and 26, may be

relevant in interpreting article 6 (1), as noted in some of the individual opinions.

It is also encouraging that the Supreme Court of Canada has held that in similar cases assurances must, as the Committee notes, be obtained, subject to exceptions. I wonder to what extent these exceptions could conceptually be envisaged given the autonomy of article 6 (1) and the possible impact of article 5 (2) and also article 26 which governs the legislative, executive and judicial behaviour of States parties. That, however, is a bridge to be crossed by the Committee in an appropriate case.

Communication No. 836/1998

Submitted by: Kestutis Gelazauskas (represented by K. Stungys)

Alleged victim: The author

State party: Lithuania

Views: 17 March 2003

Subject matter: Impossibility for a convicted to file a cassation appeal against his/her sentence/conviction

Procedural issues: Incompatibility *ratione materiae* with provisions of the Covenant

Substantive issues: Right to a fair trial -Right to have his/her sentence reviewed by a higher tribunal
- Right not to be compelled to testify against oneself

Articles of the Covenant: 14, paragraphs 1, 3 (g), and 5

Articles of the Optional Protocol: 3; 5, paragraph 2 (a)

Finding: Violation (article 14, paragraph 5)

1. The author of the communication, dated 14 April 1997, is Mr. Kestutis Gelazauskas, a citizen of Lithuania and currently serving a prison term of 13 years in Pravieniskes penitentiary No. 2, Lithuania. He claims to be a victim of a violation by Lithuania of article 14, paragraphs 1, 3 (g) and 5 of the International Covenant on Civil and Political Rights (the Covenant). He is represented by counsel.

The facts as submitted by the author

2.1 On 4 May 1994, the author was sentenced, together with a co-defendant, to 13 years' imprisonment for the murder, on 20 March 1993, of Mr. Michailas Litvinenka. According to the judgement, the victim was murdered in his home by both defendants after they had been drinking together. The victim was found hidden in his sofa and had died, in the opinion of medical experts, by a

combination of blows to his body and stabs to his eyes, heart and lungs. There were 27 injuries on the victim's body and an attempt to saw off his leg. Several witnesses alleged that they had been told by the defendants that both of them had killed the victim. Both defendants were found guilty as charged and were sentenced to the same period of imprisonment.

2.2 Applications for cassation motions were made on behalf of the author on four occasions but a review of the author's case was always denied. On 28 September 1995, the author's mother made an application for cassation motion.¹ On the same day, the author's counsel made a similar application for cassation motion, which was rejected by the chairman of the Division of Criminal Cases of the Supreme Court on 8 December 1995. On 2 April 1996, the author's counsel made another application for cassation motion, which was also rejected by the chairman of the Supreme Court. Finally, on 15 April 1996, the author's counsel made a last application for cassation motion which was rejected on 12 June 1996.

The complaint

3.1 The author alleges a violation of article 14, paragraph 5, of the Covenant on the grounds that he had no possibility to make an appeal against the judgement of 4 May 1994. In this case, the court of first instance was the Supreme Court and, under the State party's legislation, its judgements are not subject to appeal. Such a judgement may be reviewed by an application for cassation motion to

¹ The author claims that he has not received any answer on this application.

the Supreme Court but a review of the judgement is dependent on the discretion of the chairman of the Supreme Court or of the Division of Criminal Cases of the Supreme Court. All attempts to bring such an application have failed.

3.2 The author alleges a violation of article 14, paragraph 1, of the Covenant because the prosecution allegedly failed to prove that the author had a motive and an intention to commit the offence and the Court failed to refer to this aspect of the offence in the written judgement. According to the author, it was therefore unlawful to convict him of "premeditated murder".² The author also contends that the prosecution failed to prove a causal link between the blows allegedly struck by the author and the death of the victim. According to the author, the court failed to ascertain the actual cause of death. His conviction and the hearing would therefore be unfair.

3.3 Finally, the author alleges a violation of article 14, paragraph 3 (g), of the Covenant because he was forced to admit, during the preliminary investigation, that he had struck the victim twice. The author later testified that he had not struck the victim, that it was the co-defendant who stabbed him and that he had helped the co-defendant to dispose of the body. The author alleges that he was threatened, beaten and deceived into giving a confession by the investigator, Mr. Degsnys, and that his mother, who had an intimate relationship with the latter, was used as a means to secure this confession. According to the author, the investigator deceived his mother, by persuading her to write to the author and encourage him to admit to having struck the victim so as to avoid the death penalty.

State party's admissibility and merits submission

4.1 By submissions of 21 December 1998, the State party made its observations on the admissibility and merits of the communication.

4.2 On the alleged violation of article 14, paragraph 5, of the Covenant, the State party gives an explanation on the possibilities of appeal in the domestic procedure, because the system was reformed a few months after the author was convicted.

² According to the judgement of the Supreme Court of 4 May 1994, the "injuries [inflicted on the victim caused intense] pain and the defendants could understand it. The defendants [inflicted] the injuries deliberately and they wanted to do it. They did the crime of malice prepense and thus their actions are qualified justly pursuant to Lithuanian Republic [Criminal Code] article 105 (5) - cruel premeditated murder".

4.3 At the time of the sentence, a two-tier court system - local courts and the Supreme Court - was in force in the State party. Both courts could function as first instance courts and, in accordance with the Code of Criminal Procedure valid at that time, there were two types of appeal possible:

- Court sentences that were not yet in force could be appealed in cassation to the Supreme Court within seven days after the announcement of the sentence. Nevertheless, sentences of the Supreme Court taken in first instance were final and not susceptible to appeal in cassation.

- Sentences of local courts and of the Supreme Court could, after having come into force, be challenged by "supervisory protest" within one year of the coming into force. Only the Chairperson of the Supreme Court, the Prosecutor-General and their deputies had a right of submission of this "supervisory protest". A sentenced person or his counsel only had the right to address these persons with a request that they submit a "supervisory protest". If such a request was made, the "Presidium" of the Supreme Court would hear the case and decide whether to dismiss the protest, dismiss the criminal case and acquit the person, return the case to the first instance, or take another decision.

4.4 This procedure was applicable until 1 January 1995. Nevertheless, in the present case, neither the author, nor his counsel made a request for the submission of a "supervisory protest" after the sentence came into force for the author.

4.5 On 1 January 1995, several new laws reforming the domestic procedure came into force:

- The law of 31 May 1994 ("the new Law on Courts"), which came into force on 1 January 1995, replaced the two-tier court system by a four-tier court system (district and county courts, Court of appeals, Supreme Court).

- The law of 15 June 1994, which came into force on 1 July 1994, provided for the order of entering into force of the new "Law on Courts" and determined the "transitional" competence of the Lithuanian Courts.

- The law of 17 November 1994 provided for new orders of appeals for sentences not yet in force and of cassation for sentences which came into force.

4.6 According to the law of 15 June 1994, the Supreme Court, as of 1 January 1995, hears cassation motions of all decisions taken by the Supreme Court in first instance. A sentenced person or his counsel have thus the right to address the Chairperson of the Supreme Court, the Chairpersons of the county courts or the chairpersons of the division of criminal cases of the above courts to

submit cassation motions to the Supreme Court. According to article 419 of the Code of Criminal Procedure, the term for such application was one year.

4.7 In the present case, the author could have made an application for cassation motion until 4 May 1995, one year after the sentence came into force, but no such application was made.

4.8 The application for cassation motion of the author's counsel was made on 28 September 1995 when the term of one year had already expired. The Chairman of the Division of Criminal Cases of the Supreme Court therefore decided on 8 December 1995 that, in accordance with article 3, paragraph 6, of the Law of 15 June 1994, there was no ground for submission of the cassation motion. The same reasoning holds true with respect to the application made by counsel on 2 April 1996.

4.9 The State party also wishes to stress that the author had the right to ask for "restitution of the term for the cassation motion" but did not use it.

4.10 In conclusion, when the sentence was pronounced on 4 May 1994, there was, under the Code of Criminal Procedure then in force, no possibility of a cassation motion. However, between the sentence becoming executory and 1 January 1995, the author and his counsel had the right to request from the Chairperson of the Supreme Court, the Prosecutor-General or their deputies that they submit a "supervisory protest". Moreover, between 1 July 1994, the entry into force of the law of 15 June 1994, and 4 May 1995, the author and his counsel had the right to request from the Chairperson of the Supreme Court, the Chairpersons of the county courts or the chairpersons of the division of criminal cases of the above courts that they submit a cassation motion. None of these possibilities were used by the author. The applications of author's counsel to submit a cassation motion of 28 September 1995 and 2 April 1996 were submitted outside the time limit of one year.

4.11 With respect to article 14, paragraph 5, of the Covenant, the State party notes that the Supreme Court was the highest judicial instance of the State party at the time of the judgement in the present case but that the right of the author to request for a "supervisory protest" between 4 May 1994 and 1 January 1995 and to request a cassation motion between 1 July 1994 and 4 May 1995 should be considered as a review within the meaning of this provision.

4.12 As a result, the author did not exhaust domestic remedies and this part of the communication should be declared inadmissible under article 5, paragraph 2 (b) of the Optional Protocol.

4.13 On article 14, paragraph 1, the State party, referring to a number of provisions of its Constitution and Code of Criminal Procedure, stresses that, during the proceedings of the author's case, principles such as the independence of the judiciary, equality before the law, the right to legal counsel, or the publicity of the trial, were operating and in conformity with the requirements of article 14, paragraph 1, of the Covenant.

4.14 With respect to the other factual circumstances of the case, the State party states that it is neither able to evaluate the evidence of the criminal case nor to assess their weight among the complexity of evidence contained in this case, which is a discretionary right belonging to the courts.

4.15 The State party is thus of the opinion that the allegations concerning a violation of article 14, paragraph 1, of the Covenant are incompatible with the provision of the Covenant, and this part of the communication should therefore be declared inadmissible under article 3 of the Optional Protocol.

4.16 The State party draws the attention of the Committee to the provisions of its Code of Criminal Procedure according to which it is forbidden to strive to obtain testimonies of the accused or of other persons taking part in the criminal proceedings using violence, threatening or by any other illegal methods.

4.17 The State party notes that despite allegations of such illegal actions, the author has not used his right under article 52 of the Code of Criminal Procedure to appeal actions and decisions of the interrogator, investigator, prosecutor or the court. Moreover, the author could have submitted these facts to the prosecutor who had then a duty to investigate officially.

4.18 The State party also notes that the testimony given by the author during the trial was not followed by a concrete request addressed to the Court pursuant to article 267 of the Code of Criminal Procedure. The court did not, therefore, take a decision in this regard. Moreover, all testimonies of the accused during the trial have the value of evidence and are assessed by the court when taking its decision.

4.19 The State party is thus of the opinion that the author did not exhaust domestic remedies in this respect and that this part of the communication should be declared inadmissible.

Author's comments

5.1 By submission of 30 June 1999, the author made his comments on the State party's submission.

5.2 With regard to the alleged violation of article 14, paragraph 5, the author considers that the right to address the Chairperson of the Supreme Court, the Prosecutor-General or their deputies with

a request to submit a "supervisory protest" or a cassation motion does not constitute a review within the meaning of article 14, paragraph 5, of the Covenant because the submission of a "supervisory protest" or cassation motion is an exceptional right, depending on the discretion of those authorities and is not a duty.

5.3 The possibility to submit a cassation motion in accordance with the requirement of article 14, paragraph 5, of the Covenant exists only since 1 January 1995.

5.4 With regard to the term of one year to submit a cassation motion, that was allegedly overlapped in the present case, the author claims that the one-year time limit of article 419 of the Code of Criminal Procedure could only be applicable to cassation motions which aim to worsen the situation of a convicted person. According to this provision, "*it is permitted to lodge a cassation complaint about a sentence for applying the law that provides for more major crime [...] or for other aims, which worsen the situation of a convicted person [...]*".³ The applications for cassation motion of 28 September 1995 and 2 April 1996 were made with the purpose to acquit the author, thus to improve his situation. The requests were thus regular and the time limit of one year could not apply.

5.5 The author, pointing to an apparent contradiction between the State party's argumentation and the content of the letters rejecting the cassation motion, further explains that the decision of 8 December 1995 rejecting the application for a cassation motion was not based on the fact that it exceeded the one-year time limit, but because "*the motives of your cassation complaint [...] are denied by evidence, which were examined in court and considered in the sentence*".

5.6 On the second application for a cassation motion of 2 April 1996, the Chairman of the Supreme Court wrote on 5 April 1996 that the law does not provide that the Supreme Court "*is a cassation instance for [sentences that have] been adopted by itself*". It added that sentences of the Supreme Court "*are final and [cannot be appealed, so that retrying] the case is impossible*". The Chairman of the Supreme Court did not refer to the one-year time limit. The claim under article 14, paragraph 5, is thus sufficiently substantiated.

5.7 With regard to the alleged violation of article 14, paragraph 1, the author reiterates that the principles of criminal procedure were not complied with and that the conclusions of the Court do not therefore follow the merits of the case.

5.8 With regard to the violation of article 14, paragraph 3 (g), the author reiterates that he confessed during the preliminary investigation because he was misled by the investigator and because he had been the victim of violence during investigation. In support of this claim, the author refers to a letter written by the co-defendant to the author's parents, testimonies of Mr. Saulius Peldzius who was in custody with the author, and audio-records of conversation between the author and the investigator. Moreover, the author states that he made a complaint against the investigator to the General Prosecutor of Lithuania on 15 and 30 May 1996 and that the General Prosecutor decided on 12 June 1996 not to investigate.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

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

6.3 With regard to the alleged violation of article 14, paragraph 1 and 3 (g), the Committee notes the author's claims that the judgement of the Supreme Court of 4 May 1994 does not reflect the merits of the case and that, during the investigation, he was forced to confess to the murder for which he was later convicted. In this respect, the Committee has taken note of the undated statement made by the author's co-defendant as well as the testimony given on 15 June 1995 by a cellmate, Saulius Peldzius.

6.4 Recalling that it is in general for the courts of States parties, and not for the Committee, to evaluate the facts in a particular case, the Committee notes that these allegations were raised during the trial and addressed by the Supreme Court in its judgement. Moreover, the information before the Committee and the arguments advanced by the author do not show that the Courts' evaluation of the facts was manifestly arbitrary or amounted to a denial of justice. The Committee is thus of the opinion that the author has not substantiated his claim under article 14, paragraph 1 and 3 (g), of the Covenant and that this claim is therefore inadmissible under article 2 of the Optional Protocol.

6.5 With regard to the alleged violation of article 14, paragraph 5, of the Covenant, the Committee notes the State party's contention that this part of the

³ As translated by the author.

communication should be declared inadmissible for failure to exhaust domestic remedies. The Committee also notes that the author has four times attempted to obtain a cassation motion on the decision of the Supreme Court but that his requests were either rejected or unanswered. Considering that the parties concede that no domestic remedies are still available, and that the author's claim is based on the alleged absence of a possibility of review of the judgement of 4 May 1994, the Committee is of the opinion that the admissibility of this claim should be considered together with its merits.

Consideration of the merits

7.1 Regarding the submission of a "supervisory protest", the Committee notes the State party's contention that the author had, between 4 May 1994 and 1 January 1995, a "right to address the Chairperson of the Supreme Court of Lithuania, the Prosecutor-General and their deputies with a request to submit a supervisory protest", that this possibility constitutes a right to review in the sense of article 14, paragraph 5, of the Covenant, and that the author did not use this right. The Committee also notes the author's contention that the decision to submit a "supervisory protest" is an exceptional right depending on the discretion of the authority who receives the request and does therefore not constitute an obligation to review a case decided by the Supreme Court in first instance.

7.2 In the present case, the Committee notes that, according to the wording of the last sentence of the judgement of 4 May 1994, "[t]he verdict is final and could not be protested or cassation appealed". It also notes that it is not contested by the State party that the submission of a "supervisory protest" constitutes an extraordinary remedy depending on the discretionary powers of the Chairperson of the Supreme Court, the Prosecutor-General or their deputies. The Committee is therefore of the opinion that, in the circumstances, such a possibility is not a remedy that has to be exhausted for purposes of article 5, paragraph 2 (b), of the Covenant. Moreover, recalling its decision in case No. 701/1996,⁴ the Committee observes that article 14, paragraph 5, implies the right to a review of law and facts by a higher tribunal. The Committee considers that the request for the submission of a "supervisory protest" does not constitute a right to have one's sentence and conviction reviewed by a higher tribunal under article 14, paragraph 5, of the Covenant.

⁴ *Cesario Gómez Vásquez v. Spain*, Communication No. 701/1996, Views adopted on 20 July 2000, paragraph 11.1.

7.3 Regarding the submission of a cassation motion, the Committee notes the State party's contention that, between 1 July 1994 and 4 May 1995, it was possible for the Chairperson of the Supreme Court, the Chairpersons of the county courts or the chairpersons of the division of criminal cases of the above courts to entertain a cassation motion at the request of the author, that this possibility constitutes a right to review in the sense of article 14, paragraph 5, of the Covenant, and that the author did not use this right within the time limit of one year from the date the judgement entered into force, that is before 4 May 1995, in accordance with article 419 of the State party's Code of Criminal Procedure. The Committee on the other hand also notes the author's contention that the decision to submit a cassation motion, similarly to that of submitting a "supervisory protest", is an extraordinary right at the discretion of the authority who receives the request and does therefore not constitute an obligation to review a case decided by the Supreme Court at first instance. The Committee further notes the author's contention that the delay of one year referred to by the State party only concerns cassation motions aiming at worsening the situation of the accused.

7.4 The Committee notes that the State party has not provided any comment on the author's arguments related to the prerogatives of the Chairperson of the Supreme Court, the Chairpersons of the county courts or the chairpersons of the division of criminal cases of the above courts on the submission of a cassation motion and the time limit to submit an application for a cassation motion. In this regard, the Committee refers to two letters, transmitted by the author, dated 28 December 1998 (from the Chairman of the Division of the Criminal Cases of the Supreme Court) and 5 April 1996 (from the Chairman of the Supreme Court), both rejecting the application for a cassation motion on the grounds, respectively, that "the motives of [the] cassation complaint [...] are denied by evidence, [which] were examined in court and considered in the verdict" and that "[the State party's legislation] does not provide [that the Supreme Court] is a cassation instance for verdicts [...] adopted by itself. Verdicts of [the Supreme Court] are final and are not appealable." The Committee notes that these letters do not refer to a time limit.

7.5 The Committee, taking into account the author's observations with regard to the extraordinary character and the discretionary nature of the submission of a cassation motion, the absence of response from the State party thereupon, and the form and content of the letters rejecting the applications for a cassation motion, considers that the material before it sufficiently demonstrates that, in the circumstances of the case, the applications made by the author for a cassation motion, even if they had been made before 4

May 1995 as argued by the State party, do not constitute a remedy that has to be exhausted for purposes of article 5, paragraph 2 (b), of the Covenant.

7.6 Moreover, the Committee, recalling its reasoning under paragraph 7.2 above, is of the opinion that this remedy does not constitute a right of review in the sense of article 14, paragraph 5, of the Covenant because the cassation motion cannot be submitted to a higher tribunal as it is required under the said provision.

8. 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 14, paragraph 5, of the International Covenant on Civil and Political Rights.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author(s) with an effective

remedy, including the opportunity to lodge a new appeal, or should this no longer be possible, to give due consideration of granting him release. The State party is also under an obligation to prevent similar violations in the future.

10. 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 or 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 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

Communication No. 848/1999

Submitted by: Mr. Miguel Ángel Rodríguez Orejuela (represented by Pedro Pablo Camargo)

Alleged victim: The author

State party: Colombia

Views: 23 July 2002

Subject matter: Criminal proceedings held before authorities and jurisdictions established subsequently to the moment when the offences in question were committed

Procedural issues: Exhaustion of domestic remedies

Substantive issues: Fair trial - Right to be tried by a competent tribunal - Right to a hearing

Articles of the Covenant: 14

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

Finding: Violation (article 14, paragraph 5)

1. The author of the communication is Mr. Miguel Ángel Rodríguez Orejuela, a Colombian citizen currently held at La Picota General Penitentiary in Colombia for the offence of drug trafficking. He claims to be a victim of the violation by Colombia of article 14 of the International Covenant on Civil and Political Rights. He author is represented by counsel.

The facts as submitted by the author

2.1 Miguel Ángel Rodríguez Orejuela was charged with, among other activities, the offence of engaging in drug trafficking on 13 May 1990. The

Bogotá Prosecution Commission, which was established by resolution of the Office of the Public Prosecutor, adopted in accordance with article 250 of the 1991 Constitution of Colombia,¹ was given responsibility for conducting the proceedings as from 1993 and bringing the charge against him.

2.2 In a judgement handed down by the Bogota Regional Court on 21 February 1997, the author was sentenced to 23 years' imprisonment and a fine. He appealed against the sentence before the National Court, which, in a judgement of 4 July 1997, upheld the conviction at first instance but reduced the sentence to 21 years' imprisonment and a lower fine. An appeal was lodged on 20 October 1997 before the Colombian Supreme Court of Justice, which upheld the conviction on 18 January 2001.

2.3 Both the Bogotá Regional Court and the National Court were established by Emergency Government Decree No. 2790 of 20 November 1990 (Defence of Justice Statute), and were incorporated in the new Code of Criminal Procedure enacted by Decree No. 2700 of 30 November 1991, which entered into force on 1 July 1992, and which was repealed by Law No. 600 of 2000 which is currently

¹ Adopted by Decree No. 2700 of 30 November 1991, which entered into force on 1 July 1992.

in force. Article 457 on the confidentiality of proceedings held in closed court was repealed by Law No. 504 of 1999. Article 9 of Decree No. 2790 established the public order judges and granted them competence to hear offences provided for in the “Drugs Statute”.² This article was given permanent legal character by means of Decree No. 2271 of 1991. The above-mentioned Decree No. 2790 withdrew competence to try offences provided for in the “Drugs Statute” from “district criminal courts and district courts exercising mixed jurisdiction” as specialized jurisdictions and established the “public order, faceless or emergency jurisdiction”, which was converted into secret “regional justice” after its entry into force on 1 July 1992.

The complaint

3.1 The author claims to be a victim of a violation of the Covenant because Decrees No. 2790 of 20 November 1990 and No. 2700 of 30 November 1991 were applied ex post facto against him. In particular, he claims a violation of article 14, paragraph 1, of the Covenant because neither the Bogotá Prosecution Commission, which conducted the investigation and brought the charges against the author, nor the Bogotá Regional Court, which handed down the judgement against the author, nor the National Court existed at the time the offences were committed, i.e. on 13 May 1990. The author maintains that the Prosecution Commission began the investigation in 1993 and brought charges against him before the Bogotá Regional Court for an offence allegedly committed on 13 May 1990. He states that the court is therefore an unlawful ad hoc body or special commission.

3.2 The author maintains that the court competent to try this case would have been the Cali Circuit Court of Criminal and Mixed Jurisdiction as a specialized court, since it was courts in that category that were competent in drug-trafficking matters at the time the offence was committed. However, since this court was abolished on 15 July 1991, the competent court would have been the Cali Circuit Criminal Court, which is a court of ordinary jurisdiction. The competent court at second instance, at the appeal stage, would have been the Cali Higher Judicial District Court. The author states that the guarantee of a competent, independent and impartial judge or court has been ignored as he was tried by

² This article stipulates that the competence of the public order courts responsible for hearing cases shall include ongoing actions and proceedings for punishable acts assigned to them under the article, regardless of the time when they were perpetrated, and related offences. It further stipulates that in every case favourable substantive law or procedural law having substantive effects of the same character shall have primacy over unfavourable law.

members of an institution established subsequent to the commission of the offence. He likewise claims that the right to be tried in conformity with laws that predated the act of which he was accused and the guarantee enshrined in article 14 of the Covenant that all persons shall be equal before the courts has been breached, as he has been tried under the restrictive emergency provisions introduced subsequent to the offence.

3.3 The author further claims that he was deprived of the right to a public trial, with a public hearing and obligatory attendance by defence counsel and a representative of the public prosecutor’s office, as provided for in the Code of Criminal Procedure which entered into force on 1 July 1992. He recalls the decision of the Human Rights Committee in the *Elsa Cubas v. Uruguay* and *Alberta Altesor v. Uruguay* cases,³ where it found that in both cases there had been a violation of article 14, paragraph 1, of the Covenant because the trial had been conducted in camera, in the absence of the defendant, and the judgement had not been rendered in public.

3.4 According to the author, the Regional Court judgement of 21 February 1997 shows that he was convicted on the basis of in camera proceedings conducted in his absence, exclusively in writing and without a public hearing which would have enabled him to confront prosecution witnesses and challenge evidence against him. He never attended the Regional Court or had any personal contact with the judges who convicted him, nor did he meet the faceless National Court judges who rendered judgement at second instance. He maintains that he was denied the guarantee of an independent and impartial trial because he was presumed to be the head of the “Cali cartel”, an alleged criminal organization.

State party’s admissibility statements and author’s comments

4.1 In its observations of 8 April 1999, 2 May 2000, 28 June 2001 and 26 February 2002, the State party refers to the admissibility requirements for the communication and argues that Miguel Angel Rodriguez Orejuela has not exhausted domestic remedies, since the remedy of judicial review is still pending,⁴ and there are other remedies available, such as the application for review of the facts before the Supreme Court of Justice, which is an

³ *Elsa Cubas v. Uruguay*, Views No. 70/1980 of 1 April 1982, and *Alberta Altesor v. Uruguay*, Views No. 10/1977 of 23 March 1982.

⁴ When the State party sent its observations of 8 April 1999 and 2 May 2000, no decision had yet been handed down on the remedy of judicial review.

autonomous remedy that is exercised outside the criminal process or, in extreme cases, the application for protection (*amparo*), which has been granted by the Constitutional Court exceptionally in the face of irremediable injury when there is no other means of judicial defence.

4.2 As regards the question of the exhaustion of domestic remedies, the State party considers that the procedural time limits set in Colombian legislation for a criminal proceeding are not, *prima facie*, unreasonable or arbitrary and do not nullify the right to be heard within a reasonable period.

4.3 As to the merits, the State party argues that Law No. 2 was enacted in 1984 in view of the urgent need to incorporate into the justice system appropriate provisions for addressing new forms of crime, including offences related to drug trafficking. The Law conferred on the specialized judges jurisdiction over cases of this kind. Subsequently, Decree No. 2790 of 1990, issued under the Constitution of 1886, assigned jurisdiction to the courts of public order. However, pursuant to the constitutional reform and to the new Constitution of 1991, a special commission was established to review existing legislation. On finding that the legislation was in conformity with the new constitutional order, the commission decided to incorporate it permanently into the criminal legislation through Decree No. 2266 of 1991. This Decree assigned to the regional courts, known as “faceless” courts, jurisdiction for drug-trafficking offences, which included the offence committed by the author.

4.4 The State party notes that article 250 of the Constitution established the Office of the Public Prosecutor and invested it with power to investigate punishable acts committed in Colombia. The purpose of these provisions, insofar as criminal activities such as drug trafficking were concerned, was to ensure the proper administration of justice, which at that time was seriously threatened by practices such as corruption and intimidation of officials. The State party likewise maintains that these provisions have been adapted to the Colombian constitutional order from the legislation of other countries, which have used it in extreme situations such as those they have experienced in recent times. This does not imply a limitation of the principles and procedural rights mentioned below.

4.5 The State party argues that, consequently, claims concerning a violation of principles such as due process or legality are not valid, since throughout the proceedings against the author judicial officials have observed all applicable substantive and procedural norms, in particular those relating to defence rights and the adversarial and public nature of the proceedings. The author was at

all times represented by his counsel, was shown all the evidence, and was given the opportunity to challenge the evidence and the judgements rendered.

4.6 Concerning the author’s argument that the most favourable criminal law in Colombia’s procedural law was not applied, the State party considers that this argument falls outside the scope of the Covenant and is therefore inadmissible.

5.1 In his comments of 13 December 1999, 21 August 2001, and 23 April 2002, the author responds to the State party on the question of admissibility and the merits, and states that with the decision on the application for judicial review of 18 January 2001, the problem of the exhaustion of domestic remedies has been resolved, but presses the point that the Supreme Court took 39 months to reach a decision on the application and that there had thus been unwarranted delay in the remedies available domestically. On the application for review, the author maintains that this is not admissible since it is an autonomous action and not a remedy that is in conformity with article 5, paragraph 2 (b) of the Optional Protocol. He argues that in criminal law, “Action is not the same as remedy: the *actio* is an abstract right to take procedural action of a public nature in order to trigger jurisdictional activity, while the remedy is the means of challenging a decision in an ongoing trial. In this case, the ordinary remedies and the special remedy of appeal, provided for during the trial and the criminal proceedings under Colombian criminal law, have been exhausted, so that no other remedy remains to be exhausted.”

5.2 The author likewise maintains that the application for protection or *amparo* laid down in article 86 of the Constitution was also inadmissible since the Constitutional Court had declared unconstitutional, in a decision of 1 October 1992, the articles that allowed this action against judgements and other judicial decisions in criminal matters. Moreover, the application for protection would only be admissible if the person concerned had no other means of judicial defence, such as the remedy of judicial review.

5.3 The author refers to the decision of 26 April 2001 of the Supreme Council of the Judiciary, which found that the application for protection “is inadmissible when the applicant has other means of judicial defence. The application for protection is not, therefore, an alternative, additional or complementary means to achieve the proposed end. Neither can it be claimed that it is the last resort available to the actor, because by its very nature, according to the Constitution, it is the only means of protection specifically incorporated into the Constitution to fill the lacunae that could arise in the legal system so as to provide full protection of

individuals' rights. Consequently, it is understood that when an ordinary judicial remedy has been applicable, no claim can be made to supplement the proceedings with an application for protection, given that under article 86 of the Constitution, such a mechanism is inadmissible as long as there is another legal option for protection".

5.4 As regards the merits, the author argues that the State party's explanations concerning "faceless" justice, established "to ensure the proper administration of justice despite the devastating effects of organized crime", and also the conversion of the transitional emergency criminal legislation into permanent legislation, simply confirm the fact that the Colombian State has violated article 14, paragraph 1, of the Covenant relating to trial by a competent, independent and impartial tribunal, due criminal guarantees and the guarantee of equality for all persons before the courts.

Issues and proceedings before the Committee

Admissibility considerations

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

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

6.3 As regards the requirement of the exhaustion of domestic remedies, the Committee notes that the State party is contesting the communication on the ground of failure to exhaust those remedies, further stating that, in addition to the remedy of judicial review (*casación*), there are other available remedies such as the application for review (*revisión*) and protection. The Committee further notes the State party's explanations that the application for protection is a subsidiary procedure that has been allowed only in exceptional circumstances and that its protection is only temporary until the judge hands down his decision. In this connection, bearing in mind that in the present case there has been a decision of the Supreme Court of Justice against which there is no remedy, the Committee considers that the State party has not demonstrated that other effective domestic remedies exist in the case of Mr. Rodríguez Orejuela.

6.4 Consequently, the Committee has determined, in accordance with article 5, paragraph 2 (b), of the Optional Protocol, that there is nothing to prevent

the communication being declared admissible, and proceeds to examine the merits of the case.

Examination of the merits

7.1 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 for in article 5, paragraph 1, of the Optional Protocol.

7.2 The author claims a violation of article 14, paragraph 1, of the Covenant because he was deprived of his right to be tried by the court that would have been competent at the time that the alleged offence was committed, and was charged in, and tried at first and second instance by, courts whose jurisdiction was established subsequent to the events in question. In this respect, the Committee notes the State party's explanations to the effect that the law in question was established in order to ensure the proper administration of justice, which was under threat at the time. The Committee considers that the author has not demonstrated how the entry into force of new procedural rules and the fact that these are applicable from the time of their entry into force constitute in themselves a violation of the principle of a competent court and the principle of the equality of all persons before the courts, as established in article 14, paragraph 1.

7.3 The author maintains that the proceedings against him were conducted only in writing, excluding any hearing, either oral or public. The Committee notes that the State party has not refuted these allegations but has merely indicated that the decisions were made public. The Committee observes that in order to guarantee the rights of the defence enshrined in article 14, paragraph 3, of the Covenant, in particular those contained in subparagraphs (d) and (e), all criminal proceedings must provide the person charged with the criminal offence the right to an oral hearing, at which he or she may appear in person or be represented by counsel and may bring evidence and examine the witnesses. Taking into account the fact that the author did not have such a hearing during the proceedings that culminated in his conviction and sentencing, the Committee finds that there was a violation of the right of the author to a fair trial in accordance with article 14 of the Covenant.

7.4 In view of its conclusion that the right of the author to a fair trial in accordance with article 14 of the Covenant was violated for the reasons set out in paragraph 7.3, the Committee is of the opinion that it is not necessary to consider other arguments relating to violations of his right to a fair trial.

8. The Human Rights Committee, acting under article 5, paragraph 2 of the Optional Protocol to the

International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Miguel Angel Rodríguez Orejuela with an effective remedy.

10. 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 if it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party should also publish these Views.

Communication No. 854/1999

Submitted by: Manuel Wackenheim (represented by Serge Pautot)

Alleged victim: The author

State party: France

Date of adoption of Views: 15 July 2002 (seventy-fifth session)

Subject matter: Prohibition of "dwarf tossing"

Procedural issues: Incompatibility *ratione materiae*
- Exhaustion of domestic remedies

Substantive issues: Discrimination on ground of "other status" - Objective and reasonable criteria for differentiation

Articles of the Covenant: 2, paragraph 1; 5, paragraph 2; 17, paragraph 1; and 26

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

Finding: No violation

1. The author of the communication is Manuel Wackenheim, a French citizen born on 12 February 1967 in Sarreguemines, France. He claims to be a victim of violations by France of article 2, paragraph 1; article 5, paragraph 2; article 9, paragraph 1; article 16; article 17, paragraph 1; and article 26 of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as submitted by the author

2.1 The author, who suffers from dwarfism, in July 1991 began to appear in "dwarf tossing" events organized by a company called Société Fun-Productions. Wearing suitable protective gear, he would allow himself to be thrown short distances onto an air bed by clients of the establishment staging the event (a discotheque).

2.2 On 27 November 1991, the French Ministry of the Interior issued a circular on the policing of public events, in particular dwarf tossing, which instructed prefects to use their policing powers to

instruct mayors to keep a close eye on spectacles staged in their communes. The circular said that dwarf tossing should be banned on the basis of, among other things, article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

2.3 On 30 October 1991 the author applied to the administrative court in Versailles to annul an order dated 25 October 1991 by the mayor of Morsang-sur-Orge banning a dwarf tossing event scheduled to take place in a local discotheque. The court annulled the mayor's order in a ruling on 25 February 1992, on the grounds that:

The evidence on file does not show that the banned event was of a nature to disturb the public order, peace or health in the town of Morsang-sur-Orge; the mere fact that certain notable individuals may have voiced public disapproval of such an event being held could not be taken to suggest that a disturbance of public order might ensue; even supposing, as the mayor maintains, that the event might have represented a degrading affront to human dignity, a ban could not be legally ordered in the absence of particular local circumstances; the order under challenge is thus vitiated by an overstepping of authority [...]

2.4 On 24 April 1992, the commune of Morsang-sur-Orge, represented by its then mayor, appealed against the ruling of 25 February 1992.

2.5 By an order dated 27 October 1995 the Council of State overturned the ruling on the grounds, first, that dwarf tossing was an attraction that affronted human dignity, respect for human dignity being part of public order and the authority vested in the municipal police being the means of ensuring it, and second, that respect for the principle

of freedom of employment and trade was no impediment to the banning of an activity, licit or otherwise, in exercise of that authority if the activity was of a nature to disrupt public order. The Council of State went on to say that the attraction could be banned even in the absence of particular local circumstances.

2.6 On 20 March 1992 the author made another application for annulment of an order by the mayor of Aix-en-Provence banning a dwarf tossing event planned to take place in his commune. In a ruling on 8 October 1992 the administrative court of Marseille annulled the mayor's decision on the grounds that the activity in question was not of a nature to affront human dignity. Aix-en-Provence, represented by its mayor, appealed against this ruling in an application dated 16 December 1992. By order dated 27 October 1995 the Council of State overturned the ruling on the same grounds as given above. Since that order, Société Fun-Productions has decided no longer to engage in activities of this kind. In spite of his desire to continue, the author has since been without a job for want of anyone to organize dwarf tossing events.

The complaint

3. The author affirms that banning him from working has had an adverse effect on his life and represents an affront to his dignity. He claims to be the victim of a violation by France of his right to freedom, employment, respect for private life and an adequate standard of living, and of an act of discrimination. He further states that there is no work for dwarves in France and that his job does not constitute an affront to human dignity since dignity consists in having a job. He invokes article 2, paragraph 1; article 5, paragraph 2;¹ article 9, paragraph 1; article 16;² article 17, paragraph 1; and article 26 of the International Covenant on Civil and Political Rights.

State party's submission

4.1 In observations dated 13 July 1999, the State party argues, first, that the alleged violations of article 9, paragraph 1, and article 16 should be set aside at once inasmuch as they are unrelated to the facts at issue. The complaint of a violation of article 9, paragraph 1, it continues, is in substance identical to a claimed violation of article 5 of the European Convention which the author has already brought

before the European Commission,³ and should be rejected for the same reasons as the Commission puts forward. In the view of the State party the author has not been subjected to any deprivation of liberty. As regards the claimed violation of article 16 of the Covenant, the State party points out that the author does not put forward any arguments to show that banning dwarf tossing events has in any way affected his legal personality. It affirms, moreover, that the bans do not affect his legal personality at all, and thus leave his position as the beneficiary of rights unassailed. On the other hand the bans do, the State party considers, acknowledge the author's right to respect for his dignity as a human being, and ensure that that right is indeed respected.

4.2 As regards the alleged violation of article 17, paragraph 1, of the Covenant, the State party says that the author has not exhausted the available domestic remedies. The author's communication being based on the same facts and proceedings as were brought to the attention of the European Commission, his failure to bring before the French courts a complaint of a violation of the right to respect for his private and family life effectively renders the communication inadmissible in the present case, too. On a related point to do with the author's right to respect for his private life, the State party explains that the contested ban entailed no violation of article 17, paragraph 1, of the Covenant. To begin with, the right invoked by the author to allow himself to be "tossed" in public for a living does not appear to belong within the orbit of private and family life. Nor is it clear whether it extends beyond the realm of private life. The State party argues that dwarf tossing is a public practice and, as far as the author is concerned, a genuine professional activity. In that case it can hardly be protected, the State party concludes, on the strength of arguments deriving from the respect due to private life. It is more a matter, as the reasoning followed by the Council of State makes clear, of freedom of employment or freedom of trade and industry. Next, the State party goes on, even assuming that under a particularly wide-ranging interpretation of the notion the possibility of being "tossed" for a living does stem from the author's right to respect for his private

¹ The author does not elaborate on the alleged violation of this article.

² The author does not elaborate on the alleged violation of this article.

³ The material on file shows that on 4 February 1994 the European Commission on Human Rights took up a complaint by Mr. Wackenheim against France. On 16 October 1996 it declared that complaint inadmissible on the grounds that, first, the author had not exhausted the domestic remedies available against the alleged violations of articles 8 and 14 (alleged discrimination in the exercise of the right to employment) of the European Convention for the Protection of Human Rights and Fundamental Freedoms and, second, the author's complaints regarding article 5, paragraph 1, and article 14 of the Convention were inconsistent *ratione materiae*.

life, the limit that has been imposed on that right is not contrary to article 17, paragraph 1, of the Covenant. That limit, the State party considers, is justified by higher considerations deriving from the respect due to the dignity of the human person. Hence it is rooted in a fundamental principle and thus constitutes neither an illegal nor an arbitrary encroachment upon individuals' right to respect for their private and family lives.

4.3 Regarding the alleged violation of article 2, paragraph 1, of the Covenant, the State party believes that the article is similar in content to article 14 of the European Convention; the European Commission found that that article, which the author cited in his application to the Commission, was not in fact applicable since the author did not elsewhere invoke any right which the Convention protected. The State party asserts that the same is true of the present communication, since the author again fails to show that his claimed right to be tossed professionally is recognized in the Covenant or could be derived from one of the rights the Covenant does cover. It adds that, if the author's intention is to avail himself of such rights, it must be remembered that freedom of employment and freedom of trade and industry are not among the rights protected by the International Covenant on Civil and Political Rights.

4.4 On the alleged violation of article 26 of the Covenant, the State party stresses that the Council of State regards the non-discrimination clause in that article as the counterpart to article 2, paragraph 1, and as with article 2, the scope of application of article 26 is limited to the rights protected by the Covenant.⁴ From that interpretation it follows, the State party argues, that as already stated in reference to the alleged violation of article 2, paragraph 1, a dwarf's right to be tossed for a living derives from none of the rights protected by the Covenant and the question of non-discrimination therefore does not arise. If for the sake of argument, the State party goes on, the non-discrimination language in article 26 were to be held valid for all rights enshrined both in the Covenant and in the domestic legal order, the question would arise of whether the contested ban is discriminatory. Self-evidently, the State party argues, it is not. By definition it applies only to individuals suffering from dwarfism since they are the only ones who might be involved in the banned activity; the indignity of the activity stems very specifically from those individuals' particular physical characteristics. The State party says it cannot be upbraided for treating dwarves differently from those who are not since they are two separate categories of individuals and for one of them "tossing", for obvious physical reasons,

⁴ Council of State, *Vve Doukoure*, Opinion handed down on 15 April 1996, No. 176399.

cannot be of any concern. It also says that any discussion of whether an activity involving the tossing of people of normal size, i.e. unaffected by a specific handicap, was undignified would take a very different form.⁵ It concludes that the difference in treatment is based on an objective difference in status between those suffering from dwarfism and those that are not and hence, given the underlying aim of upholding human dignity, is legitimate and, in any event, consistent with article 26 of the Covenant.

4.5 Concerning the alleged violation of article 5, paragraph 2, of the Covenant, the State party declares that the author presents no arguments showing why banning dwarf tossing should be contrary to that provision. It is difficult to see, in the State party's view, in what way the State authorities might have unduly restricted rights recognized under French law on the basis of the Covenant. The author may perhaps consider that the authorities have evinced an over-extended notion of human dignity which has prevented him from asserting his rights to employment and to pursue the occupation of his choosing, but the State party argues that an individual's right to respect as a human being is not one of those covered by the Covenant even if some of the wording in the Covenant - such as the ban on inhuman and degrading treatment - is in fact inspired by that notion. For that reason it concludes that article 5, paragraph 2, is not applicable in the present case. It adds that, even supposing for the sake of argument that the article were held to apply, it would not have been infringed: the action taken by the authorities was not prompted by a desire to restrict freedom of employment, trade and industry unduly on the grounds of due respect for the individual; it is a classic instance in administrative police practice of reconciling the exercise of economic freedoms with the desire to uphold public order, one element of which is public morals. Such a construction is not excessive since on the one hand, as Government Commissioner⁶ Frydman said in his findings, public order has long incorporated notions of public morals and, on the other hand, it would be shocking were the basic principle of due respect for the individual

⁵ Findings of Government Commissioner Patrick Frydman, RTDH 1996, p. 664.

⁶ The Government Commissioner is not a representative of the administration. He is a member of the Council of State whose presence is required when the Council sits as a judicial body and whose role is to offer a completely independent opinion "on the factual circumstances and the applicable rules of law, and his view of the solutions which, his conscience tells him, the dispute under consideration calls for". This definition, given in one of its judgements by the Council of State itself (CE Sect. 10 July 1957, *Gervaise*, Leb. P.467), has been incorporated into article L7 of the Code of Administrative Justice.

to be abandoned for the sake of material considerations specific to the author (and otherwise scarcely commonplace), to the detriment of the overall community to which the author belongs.

4.6 For the above reasons, the State party concludes that the communication should be rejected as there is no basis for any of the complaints it contains.

Counsel's comments on the State party's submission

5.1 In comments dated 19 June 2000, counsel for the author argues that the State party is taking refuge in the first instance behind two identical orders handed down on 27 October 1995 by the Council of State, granting mayors the right to ban dwarf tossing events in their communes on the grounds that "human dignity is a part of public order" even in the absence of particular local circumstances and despite the consent of the individual concerned. Counsel rehearses the facts on which the communication is based, including the annulment by the administrative courts of the mayors' orders banning dwarf tossing events and the circular from the Ministry of the Interior.

5.2 Counsel says that the important decisions on points of principle taken in Mr. Wackenheim's case are disappointing. To the tripartite structure of public order in France as normally portrayed - order (tranquillity), safety (security) and public health - a fourth component - public morals, embracing respect for human dignity - has been added. Case law of this kind at the dawn of the twenty-first century revives the notion of moral order, counsel argues, directed against an activity that is both marginal and inoffensive when compared with the many forms of truly violent, aggressive behaviour that are tolerated in modern French society. The effect, counsel goes on, is to enshrine a new policing authority that threatens to open the door to all kinds of abuse: are mayors to become censors of public morality and defenders of human dignity? Are the courts to rule on citizens' happiness? Hitherto, counsel says, the courts have been able to take the protection of public morals into account insofar as it has repercussions on public tranquillity. In the case of dwarf tossing events, however, counsel affirms that that requirement has not been met.

5.3 Counsel stands by the substance of the complaint and emphasizes that employment is an element of human dignity: depriving an individual of his employment is tantamount to diminishing his dignity.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure,

decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 Although France has entered a reservation to article 5, paragraph 2 (a), the Committee notes that it has not invoked that reservation which does not, therefore, impede consideration of the communication by the Committee.

6.3 In the case of the claimed violations of article 9, paragraph 1, and article 16 of the Covenant, the Committee takes note of the State party's arguments about the inconsistency of the complaints with the Covenant *ratione materiae*. It finds that the information furnished by the author does not provide grounds for claiming that these articles have been violated or for holding the complaints to be admissible under article 2 of the Optional Protocol.

6.4 Regarding the author's claims of a violation of article 17, paragraph 1, of the Covenant, the Committee points out that the author has at no point complained to the French courts of a violation of the right to respect for private and family life. In this respect, therefore, the author has not exhausted all the remedies that were at his disposal. The Committee thus declares this element of the communication to be inadmissible in the light of article 5, paragraph 2 (b), of the Optional Protocol.

6.5 As regards the alleged violation of article 5, paragraph 2, of the Covenant, the Committee notes that article 5 of the Covenant relates to general undertakings by States parties and cannot be invoked by individuals as a self-standing ground for a communication under the Optional Protocol. This complaint is thus not admissible under article 3 of the Optional Protocol. However, this conclusion does not prevent the Committee from taking article 5 into account when interpreting and applying other provisions of the Covenant.

6.6 As regards the author's complaint of discrimination under article 26 of the Covenant, the Committee takes note of the State party's observation that the Council of State holds the scope of application of article 26 to be limited to the rights protected by the Covenant. The Committee nevertheless wishes to draw attention to its jurisprudence establishing that article 26 does not simply duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. The application of the principle of non-discrimination contained in article 26 is therefore not limited to those rights which are provided for in the Covenant. As the State party has not put forward any other arguments against finding the communication admissible, the Committee finds the communication admissible inasmuch as it appears to raise questions pertaining to article 26 of the Covenant, and thus proceeds to examine the complaint on its merits, in accordance with article 5, paragraph 2, of the Optional Protocol.

Consideration of the merits

7.1 The Human Rights Committee has considered the communication in the light of all the information provided by the parties, in accordance with article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee must decide whether the authorities' ban on dwarf tossing constitutes discrimination within the meaning of article 26 of the Covenant, as the author asserts.

7.3 The Committee recalls its jurisprudence whereby not every differentiation of treatment of persons will necessarily constitute discrimination, which is prohibited under article 26 of the Covenant. Differentiation constitutes discrimination when it is not based on objective and reasonable grounds. The question, in the present case, is whether the differentiation between the persons covered by the ban ordered by the State party and persons to whom this ban does not apply may be validly justified.

7.4 The ban on throwing ordered by the State party in the present case applies only to dwarves (see paragraph 2.1). However, if these persons are covered to the exclusion of others, the reason is that they are the only persons capable of being thrown. Thus, the differentiation between the persons covered by the ban, namely dwarves, and those to whom it does not apply, namely persons not suffering from dwarfism, is based on an objective reason and is not discriminatory in its purpose. The Committee considers that the State party has

demonstrated, in the present case, that the ban on dwarf tossing as practised by the author did not constitute an abusive measure but was necessary in order to protect public order, which brings into play considerations of human dignity that are compatible with the objectives of the Covenant. The Committee accordingly concludes that the differentiation between the author and the persons to whom the ban ordered by the State party does not apply was based on objective and reasonable grounds.

7.5 The Committee is aware of the fact that there are other activities which are not banned but which might possibly be banned on the basis of grounds similar to those which justify the ban on dwarf tossing. However, the Committee is of the opinion that, given that the ban on dwarf tossing is based on objective and reasonable criteria and the author has not established that this measure was discriminatory in purpose, the mere fact that there may be other activities liable to be banned is not in itself sufficient to confer a discriminatory character on the ban on dwarf tossing. For these reasons, the Committee considers that, in ordering the above-mentioned ban, the State party has not, in the present case, violated the rights of the author as contained in article 26 of the Covenant.

7.6 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal any violation of the Covenant.

Communication No. 868/1999

Submitted by: Albert Wilson (represented by Gabriela Echeverria)

Alleged victim: The author

State party: Philippines

Date of adoption of Views: 30 October 2003 (Seventy-ninth session)

Subject matter: Imposition of death sentence following conviction of child abuse

Procedural issues: Available and effective remedies
- Examination of a complaint after a remedy has been granted to the victim - Non-substantiation of claim - Inadmissibility *ratione materiae*

Substantive issues: Mandatory imposition of death penalty - Right to be treated with humanity and with respect for prisoner's inherent dignity - Inhuman conditions of detention - Segregation of pre-trial and convicted prisoners - Mental stress on death row - Right to be informed, at the time of arrest, of reasons of arrest and charges - Right to be brought promptly before a judge

Articles of the Covenant: 2, paragraphs 2 and 3; 6; 7; 9; 10, paragraphs 1 and 2; 14, paragraphs 1, 2, 3 and 6

Articles of the Optional Protocol: 2 and 3

Finding: Violation (articles 7; 9, paragraphs 1, 2 and 3; and 10, paragraphs 1 and 2)

1. The author of the communication, dated 15 June 1999, is Albert Wilson, a British national resident in the Philippines from 1990 until 2000 and thereafter in the United Kingdom. He claims to be a victim of violations by the Philippines of articles 2, paragraphs 2 and 3, 6, 7, 9, 10, paragraphs 1 and 2, 14, paragraphs 1, 2, 3 and 6. He is represented by counsel.

The facts as presented by the author

2.1 On 16 September 1996, the author was forcibly arrested without warrant as a result of a complaint of rape filed by the biological father of the author's twelve year old step-daughter and transferred to a police station. He was not advised of his rights, and, not speaking the local language, was unaware as to the reasons for what was occurring. At the police station, he was held in a 4 by 4 foot cage with three others, and charged on the second day with attempted rape of his step-daughter. He was then transferred to Valenzuela municipal jail, where the charge was changed to rape. There he was beaten and ill-treated in a "concrete coffin". This sixteen by sixteen foot cell held 40 prisoners with a six inch air gap some 10 foot from the floor. One inmate was shot by a drunken guard, and the author had a gun placed to his head on several occasions by guards. The bottoms of his feet were struck by a guard's baton, and other inmates struck him on the guards' orders. He was ordered to strike other prisoners and was beaten when he refused to do so. He was also constantly subjected to extortion by other inmates with the acquiescence and in some instances on the direct instruction of the prison authorities, and beaten when he refused to pay or perform the directed act(s). There was no running water, insufficient sanitary conditions (a single non-flush bowl in the cell for all detainees), no visiting facility, and severe food rationing. Nor was he segregated from convicted prisoners.

2.2 Between 6 November 1996 to 15 July 1998, the author was tried for rape. From the outset, he maintained that the allegation was fabricated and pleaded not guilty. The step-daughter's mother and brother testified in support of the author, stating that both had been at home when the alleged incident took place, and that it could not have occurred without their knowledge. The police medical examiner, who examined the girl within 24 hours of the alleged incident, made internal and external findings which, according to the author, were wholly inconsistent with alleged forcible rape. Medical evidence procured during the trial also contradicted the allegation, and, according to the author, in fact demonstrated that the act could not have taken place as alleged. There was also evidence of several other witnesses that the story of rape had been fabricated by the step-daughter's natural father, in order to extort money from the author.

2.3 On 30 September 1998 the author was convicted of rape and sentenced to death, as well as to P50,000 indemnity, by the Regional Trial Court of Valenzuela. According to the author, the conviction was based solely on the testimony of the girl, who admitted she was lying when she first made the allegation of attempted rape, and there were numerous inconsistencies in her trial testimony.

2.4 The author was then placed on death row in Muntinlupa prison, where a thousand death row prisoners were kept in three dormitories. Foreign inmates were continually extorted by other inmates with the acquiescence, and sometimes at the direction of, prison authorities. The author refers to media reports that the prison was controlled by gangs and corrupt officials, at whose mercy the author remained throughout his confinement on death row. Several high-ranking prison officials were sentenced for extortion of prisoners, and large amounts of weapons were found in cells. The author was pressured and tortured to provide gangs and officials with money. There were no guards in the dormitory or cells, which contained over 200 inmates and remained unlocked at all times. His money and personal effects had been removed from him en route to the prison, and for three weeks he had no visitors, and therefore no basic necessities such as soap or bedding. Food comprised unwashed rice and other inappropriate substances. Sanitation consisted of two non-flushing toilet bowls in an area which was also a 200-person communal shower.

2.5 The author was forced to pay for the eight by eight foot area in which he slept and financially to support the eight others with him. He was forced to sleep alongside drug-deranged individuals and persons who deliberately and constantly deprived him of sleep. He was forcibly tattooed with a permanent gang mark. Inmates were stretched out on a bench on public display and beaten with wood across the thighs, or otherwise "taught a lesson". The author states he lived in constant fear coming close to death and suicidal depression, watching six inmates walk to their execution while five others died violent deaths. Fearing death after a "brutally unfair and biased" trial, he suffered severe physical and psychological distress and felt "total helplessness and hopelessness". As a result, he is "destroyed both financially and in many ways emotionally".

2.6 On 21 December 1999, i.e. subsequent to the submission of the communication under the Optional Protocol, the Supreme Court, considering the case on automatic review, set aside the conviction, finding it based on allegations "not worthy of credence", and ordered the author's immediate release. The Solicitor-General had filed a brief with the Court recommending acquittal on the basis that material contradictions in witness testimony, as well as the physical evidence to the contrary, justified the conclusion that the author's guilt had not been shown beyond reasonable doubt.

2.7 On 22 December 1999, on his release from death row, the Bureau of Immigration lifted a Hold Departure Order, on condition that the author paid fees and fines amounting to P22,740.- for overstaying his tourist visa. The order covered the

entirety of his detention, and if he had not paid, he would not have been allowed to leave the country for the United Kingdom. The ruling was confirmed after an appeal by the British Ambassador to the Philippines, and subsequent efforts directed from the United Kingdom to the Bureau of Immigration and the Supreme Court in order to recover these fees proved similarly unavailing.

2.8 Upon his return to the United Kingdom, the author sought compensation pursuant to Philippine Republic Act 7309. The Act creates a Board of Claims under the Department of Justice for victims of unjust imprisonment or detention, compensation being calculable by month. Upon inquiry, he was informed on 21 February 2001 that on 1 January 2001, he had been awarded P14,000, but that he would be required to claim it in person in the Philippines. On 12 March 2001, he wrote to the Board of Claims seeking reconsideration of quantum, on the basis that according to the legal scale 40 months in prison should result in a sum of P40,000. On 23 April 2001, he was informed that the amount claimed was ‘subject to availability of funds’ and that the person liable for the author’s misfortune was the complainant accusing him of rape. No further clarification on the discrepancy of the award was received.

2.9 On 9 August 2001, after applying for a tourist visa to visit his family, the author was informed that as a result of having overstayed his tourist visa and having been convicted of a crime involving moral turpitude, he had been placed on a Bureau of Immigration watchlist. When he inquired why the conviction should have such effect after it had been quashed, he was informed that to secure travel certification he would have to attend the Bureau of Immigration in the Philippines itself.

2.10 The author also sought to lodge a civil suit for reparation, on the basis that the administrative remedy for compensation outline above would not take into account the extent of physical and psychological suffering involved. He was not eligible for legal aid in the Philippines, and from outside the country was unable to secure pro-bono legal assistance.

The complaint

3.1 The author alleges a violation of articles 6 and 7 by virtue of the mandatory imposition of the death penalty under s.11 of *Republic Act No. 7659* for the rape of a minor to whom the offender stands in parental relationship.¹ Such a crime is not necessarily

¹ S.11 *Republic Act 7659* provides that: “...the death penalty shall also be imposed if the crime of rape is committed with any of the following attendant

a “most serious crime” as it does not involve loss of life, and the circumstances of the offence may vary greatly. For the same reasons, the mandatory death penalty is disproportionate to the gravity of the alleged crime and contrary to article 7. It is further disproportionate and inhuman, as no allowance is made for the circumstances of the individual crime and the individual offender in mitigation.

3.2 The author contends that the time spent on death row constituted a violation of article 7, particularly in the light of the massive procedural deficiencies of the trial. It is argued that there is, in this instance, a violation of article 7 because of the patently unfair proceedings at trial and the manifestly unsound verdict which resulted in the helplessness and anxiety placed on the author given he was wrongly convicted. This was aggravated by the specific treatment and conditions he was subjected to on death row.

3.3 In terms of article 9, the author argues his initial arrest took place without warrant and in violation of domestic law governing arrests. Nor was he informed at the time of his arrest of the reasons therefore in a language he could understand, or promptly brought before a judge.

3.4 As to the claim of a violation of articles 14, paragraphs 1, 2 and 3, the author contends, firstly, that his trial was unfair. He contends that in emotive cases such as rape of children, a single judge is not necessarily immune to pressures on his or her independence and impartiality, and should not be allowed to impose the death penalty; rather, a judge and jury or bench constituted of several judges should determine capital cases. It is alleged that the trial judge was subjected to “enormous pressure” from local individuals who packed the courtroom and desired the author’s conviction. According to the author, some of these persons were brought in from other areas.

3.5 Secondly, the author contends that the trial court’s analysis was manifestly unsound and violated his right to presumption of innocence, when it observed that the author’s defence of denial that the alleged act took place “cannot prevail over the positive assertions of the minor-victim”. In the light of the irreversible nature of the death penalty, the author argues capital trials must scrupulously observe all international standards. Referring to the United Nations Safeguards on the Rights of Those Facing the Death Penalty, the author observes that a capital conviction must be “based upon clear and convincing evidence leaving no room for an alternative explanation of the facts”.

circumstances: 1. When the victim is under eighteen (18) years of age and the offender is a parent, ascendant, step parent, guardian...”.

3.6 Under article 14, paragraph 6, the author observes that particularly in the light of the compensation procedure provided under domestic law, that the State party was under an obligation to provide fair and adequate compensation for the miscarriage of justice. In this case, the actual award was some one-quarter of his entitlement under that scheme, and this was almost wholly negated by the requirement to pay immigration fines and fees. In a related claim of violation of article 2, paragraph 3, the author contends that instead of being properly compensated for the violations at issue, he was forced himself to pay for the time unjustly held in prison, and remains on the list of excludable aliens, despite having been fully cleared of all charges against him. This violates his right to an effective remedy, amounts to double jeopardy in the form of an additional punishment and contravenes his family rights.

3.7 As to admissibility issues, the author states that he has not submitted his claim to another international procedure, and, concerning the conditions of detention in prison, that he unsuccessfully attempted to raise concerns regarding his treatment and the conditions of detention. This remedy was ineffective as he only had access to the individuals themselves responsible for the incidents in question.

State party's admissibility and merits submission

4.1 By submission of 5 August 2002, the State party contests the admissibility and merits of the case, arguing that numerous judicial, quasi-judicial or administrative remedies would be available to the author. Article 32 of the Civil Code makes any public officer or private individual liable for damages for infringement of the rights and liberties of another individual, including rights to be free from arbitrary detention, from cruel punishment, and so on. The author may also file a claim of damages for malicious prosecution, and/or a case alleging violations of the revised penal code on crimes against liberty and security or crimes against honour. He may also lodge a complaint to the Philippine Commission on Human Rights, but has not done so. The Supreme Court's decision to vacate the lower court's judgement, which was the result of automatic review on death penalty cases, shows that due process guarantees and adequate remedies are available in the judicial system.

4.2 As to the article 7 claims, the State party contends that it cannot adequately respond to the allegations made, as they require further investigation. In any event, the author should have submitted his claim to a proper forum such as the Philippine Commission on Human Rights.

4.3 On the article 14 claims, the State party states that the case was tried before a competent court, that the author was able to present and cross-examine evidence and witnesses, and that he enjoyed a

(successful) right of appeal. Nor is there anything to suggest the trial judge promulgated his decision based on anything other than a good faith appreciation of the evidence.

4.4 As to the inadequate sum of compensation paid, the State party points out that on 24 August 2001, the Board of Claims granted the author an additional amount of P26,000 bringing the compensation to the total P40,000 claimed. Although advised that the check was ready for pick-up, the author has not yet done so and it is therefore no longer valid, although it can readily be replaced. As to the contention that the author was denied civil remedies, the State party points out that he was advised by the Board of Claims to consult a practising lawyer, but that he has failed to pursue redress through the courts.

Author's comments

5.1 By letter of 6 April 2002, the author responds to further aspects of the State party's submissions. On the fair trial issues, he points out that even the Solicitor-General regarded the charge against him as deeply flawed, and that thus, especially in capital cases, the trial judge's good faith "honest belief" is not sufficient to legitimize a wrongful conviction. The Supreme Court's decision makes clear that the proceedings failed to comply with what the author regards as the minimum standards set out in article 14. The author contends that the trial judge's approach was biased against him on account of his gender, substituted his own evaluation of the medical evidence for that of the expert involved, and failed to respect the presumption of innocence.

5.2 Moreover, the author's application to exclude the media from trial was denied and full access to the press was granted even before arraignment. Police parading of suspects before the media in the Philippines is well-documented, and in this case the presence of media from the moment the author was first brought before a prosecutor undermined the fairness of the trial. During trial, the court was packed with people from "children, feminist and anti-crime organizations" that were pressing for conviction. Public and media access enhances the fear of partial proceedings in highly emotive cases.

5.3 The author also argues, with reference to the Committee's decision in *Mbenge v. Zaire*,² that the violation of his article 14 rights led to an imposition of the death sentence contrary to the provisions of the Covenant, and thus in violation of article 6. The author also argues, with reference to the decision in

² Case No. 16/1977, Views adopted on 25 March 1983.

Johnson v. Jamaica,³ that as the imposition of the death sentence was in violation of the Covenant, his resulting detention, particularly in the light of the treatment and conditions suffered, was cruel and inhuman punishment, contrary to article 7.

5.4 The author argues generally, with reference to the Committee's General Comment on article 6, that the re-imposition of the death penalty in a State party is contrary to the object and purpose of the Covenant and violates article 6, paragraphs 1 to 3. In any event, the manner in which the Philippines has re-introduced the death penalty violates article 6, paragraph 2, as well as the obligation contained in article 2, paragraph 2, to give effect to Covenant rights. The Republic Act 7659, providing for the death sentence for 46 offences (of which 23 mandatorily), is flawed and affords no protection of Covenant rights.

5.5 At the time of the author's trial, the applicable criminal procedure required a rape charge to be brought by the victim or her parents or guardian, who have not expressly pardoned the offender. The author argues that to provide for a mandatory death penalty for an offence which cannot even be prosecuted *ex officio* by the State is a standing invitation for extortion – fabricating an allegation and seeking money for an express pardon. The author repeatedly asserted at trial that the claimant had sought US\$25,000 in exchange for an "affidavit of desistance". The author's suffering is a direct result of the State's failure to guarantee the most strict legal procedures and safeguards in capital cases generally, and, in particular, in his case.

5.6 As to the descriptions of conditions of detention suffered before conviction in Valenzuela jail, the author refers to the Committee's jurisprudence which has consistently found similar treatment inhumane and in violation of articles 7 and 10.⁴ The conditions in Valenzuela are well-documented in reports of Amnesty International and media sources, and plainly fall beneath what the Covenant requires of all States parties, regardless of their budgetary situation. He also advances a specific

³ Case No. 592/1994, Views adopted on 20 October 1998.

⁴ The author refers, by way of example, to *Carballal v. Uruguay*, Case No. 33/1978, Views adopted on 27 March 1981; *Massiotti v. Uruguay*, Case No. 25/1978, Views adopted on 26 July 1982; *Marais v. Madagascar*, Case No. 115/1982, Views adopted on 1 April 1985; *Antonaccio v. Uruguay*, Case No. 63/1979, Views adopted on 28 October 1971; *Estrella v. Uruguay*, Case No. 74/1989, Views adopted on 29 March 1983; *Wight v. Madagascar*, Case No. 115/1981, Views adopted on 1 April 1985; and *Tshisekedi v. Zaire*, Case No. 242/1987, Views adopted on 2 November 1989.

violation of article 10, paragraph 2, in that he was not separated from convicted prisoners.

5.7 The author argues that there is no obligation to report or complain about conditions of detention when to do so would foreseeably result in victimization.⁵ The author provides copies of three letters he *did* write to the Philippine Commission on Human Rights in 1997, which resulted in him being beaten up and locked in his cell for several days. In 1999, while on death row, the Department of Justice was alerted of threats to the author's life and asked to take steps to protect him. The response was a serious threat to his life, with a gun being placed against his head by a guard (when he had already seen another inmate shot). The author submits that the State party's inability to respond to these claims in their submissions only underlines the lack of an effective domestic 'machinery of control' and the need for investigation and compensation for the violations of article 7 he suffered.

5.8 As to the conditions of detention on death row, it is submitted that they caused serious additional detriment to the author's mental health and constituted a separate violation of article 7. The author suffered extreme anxiety and severe suffering as a result of the detention, with a General Psychiatric Assessment finding the author "very depressed and suffering from severe longstanding [Post Traumatic Stress Disorder] that can lead to severe and sudden self-destructive behaviour". The author refers to the Committee's jurisprudence that while in principle mental strain following conviction does not violate article 7, "the situation could be different in cases involving capital punishment"⁶ and that "each case must be considered on its own merits, bearing in mind the imputability ... on the State party, the specific conditions of imprisonment in the particular penitentiary and their psychological impact on the person concerned".⁷

5.9 In this case, the author's conviction and the conditions of detention fell well below minimum standards and were plainly imputable to the State party. In addition, death row inmates on appeal were not separated from those whose convictions had become final. During the author's detention, six prisoners were executed (three convicted of rape). In one case, a communications failure prevented a presidential reprieve from stopping an execution. In another, three prisoners were executed despite the Human Rights Committee's request for interim

⁵ The author refers to *Philip v. Jamaica* Case No. 594/1992, Views adopted on 20 October 1998.

⁶ *Pratt & Morgan v. Jamaica*, Case Nos. 210/1986 and 225/1987, Views adopted on 6 April 1989.

⁷ *Francis v. Jamaica*, Case No. 606/1994, Views adopted on 25 July 1995.

measures of protection.⁸ Such events, which took place while the author was on death row, heightened the mental anxiety and helplessness suffered, with detrimental effect on his mental health and thus violated article 7.

5.10 Concerning the State party's contention that adequate remedies are in place, the author submits that the system lacks effective remedies for accused persons in detention, and that the Supreme Court decision represents only partial reparation, providing no redress for the violations of his rights to be free, for example, from torture or unlawful detention. The Supreme Court decision itself cannot be considered as a form of compensation since it only ended an imminent violation of his right to life, for which no compensation would have been possible. The Court did not order compensation, restitution of legal fees, reparation nor an investigation. The author's mental injury and suffering, as well as damage to reputation and way of life, including stigmatism as a child rapist/paedophile in the United Kingdom, remain without remedy.

5.11 Far from receiving appropriate reparation for the violation suffered, the author was in fact doubly punished by having to pay immigration fees and by being excluded from entering the Philippines, both issues subsequently unresolved despite representations to the Philippine authorities. The exclusion also prevents the author from effectively using any remedies available in the Philippines, even if they were appropriate, which he denies. In particular, the civil remedies the State party invokes are neither "available" nor "effective" if he cannot enter the country, and therefore need not be exhausted.

5.12 In any event, according to the author, the State party's domestic law denies remedies in his author's case. The Constitution requires the State's consent to be sued,⁹ which has neither expressly nor implicitly been given in this case. Under statutory law, the State is only responsible for the wrongful conduct of 'special agents' (a person specially commissioned to perform a particular task). Public officials acting within the scope of their duties are personally liable for damage caused (but may invoke immunity if the suit affects the property, rights or interests of the State). Thus, the State is not liable for illegal acts that are ultra vires and committed in violation of an individual's rights and liberties.¹⁰ The author thus submits there are no available civil remedies to redress adequately the wrongs caused, and that the State party has failed to adopt adequate

⁸ *Piandiong et al. v. The Philippines* Case No. 869/1999, Views adopted on 19 October 2000.

⁹ Article XVI, Section 3.

¹⁰ C. Sangco: *Philippine Law on Torts and Damages* (1994).

measures of compensation, especially for damage resulting from fundamental rights protected under articles 6, 7 and 14. Accordingly, it has breached its obligation to provide effective remedies in article 2, paragraph 3.

5.13 Finally, the author argues that such non-judicial remedies as may be available are not effective because of the extremely serious nature of the violations, and inappropriate in terms of quantum. In the first place, if, as the State party contends, there is no record of the author's complaints to the Philippine Human Rights Commission, this underscores the ineffectiveness and inadequacy of this mechanism, especially in terms of protecting rights under articles 6 and 7 of the Covenant. In any case, the Commission simply provides financial assistance, rather than compensation, and such a non-judicial and non-compensatory remedy cannot be considered an effective and adequate remedy for violations of articles 6 and 7.

5.14 Secondly, the administrative compensation mechanism awarding the author some compensation cannot be considered a substitute for a judicial civil remedy. The Committee has observed that "administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of article 2 (3) of the Covenant, in the event of particular serious violations of human rights";¹¹ rather, access to court is required. In any event, the compensation provided is inadequate in terms of article 14, paragraph 6, and the inability to enter the country renders the remedy ineffective in practice. Even though the P40,000 amount awarded was the maximum amount permissible, it is a token and symbolic amount, even allowing for differences between countries in levels of compensation. After deducting the immigration fees charged, some P18,260 (US\$343) remained.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 As to the exhaustion of domestic remedies, the State party contends that the author could lodge a complaint with the Philippine Human Rights Commission and a civil claim before the courts. The Committee observes that the author did in fact

¹¹ *Bautista Arellana v. Colombia* Case No. 563/1993, Views adopted on 27 October 1995.

complain to the Commission while in prison, but received no response to these replies, and that the Commission is empowered to grant “financial assistance” rather than compensation. It further observes that a civil action may not be advanced against the State without its consent, and that there are, under domestic law, extensive limitations on the ability to achieve an award against individual officers of the State. Viewing these elements against the backdrop of the author’s exclusion from entry to the Philippines, the Committee considers that the State party has failed to demonstrate that the remedies advanced are both available and effective, and that it is not precluded, under article 5, paragraph 2 (b) of the Optional Protocol, from considering the communication.

6.3 The State party suggests that the Supreme Court’s decision and subsequent compensation raise issues of admissibility concerning some or all of the author’s claims. The Committee observes that the communication was initially submitted well prior to the Supreme Court’s decision in his case. In cases where a violation of the Covenant is remedied at the domestic plane prior to submission of the communication, the Committee may consider a communication inadmissible on grounds of, for example, lack of ‘victim’ status or want of a ‘claim’. Where the alleged remedy occurs subsequent to submission of a communication, however, the Committee may nevertheless address the issue whether there was a violation of the Covenant and then go to the sufficiency of the afforded remedy (see, for example, *Dergachev v. Belarus*).¹² It follows that the Committee regards the events referred to the State party by way of remedy, as relevant to the issues of determination of the merits of a communication and an adequacy of the remedy to be granted to the author for any violations of his Covenant rights, rather than amounting to an obstacle to the admissibility of claims already submitted.

6.4 As to the claim under article 14, paragraphs 1 and 3, of the Covenant, concerning an unfair trial, the Committee observes that these claims have not been substantiated by relevant facts or arguments. Contrary to what is suggested by the author, the Supreme Court did not find the author’s trial unfair, but rather reversed his conviction after reassessment of the evidence. Consequently, this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.5 As to the author’s claims under article 14, paragraph 2, of the Covenant concerning the presumption of innocence, the Committee observes

¹² Case No. 921/2000, Views adopted on 2 April 2002, paragraph 8.

that events occurring after the point that the author no longer faced a criminal charge, subsequent events fall outside the scope of article 14, paragraph 2. This claim is accordingly inadmissible *ratione materiae* under article 3 of the Optional Protocol.

6.6 Concerning the claim under article 14, paragraph 6, of the Covenant, the Committee, the Committee notes that the author’s conviction was reversed in the ordinary course of appellate review and not on the basis of a new or newly-discovered fact. In these circumstances, this claim falls outside the scope of article 14, paragraph 6 and is inadmissible *ratione materiae* under article 3 of the Optional Protocol.

6.7 In the absence of any further obstacles to admissibility, the Committee regards the author’s remaining claims as sufficiently substantiated, for purposes of admissibility, and proceeds to their examination on the merits.

Consideration of the merits

7.1 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.

7.2 As to the author’s claims relating to the imposition of the death penalty, including passing of sentence of death for an offence that under the law of the State party, enacted subsequent to capital punishment having once been removed from the criminal code, carried mandatory capital punishment, without allowing the sentencing court to pay due regard to the specific circumstances of the particular offence and offender, the Committee observes that the author is no longer subject to capital punishment, as his conviction and hence the imposition of capital punishment was annulled by the Supreme Court in late December 1999, after the author had spent almost 15 months in imprisonment following sentence of death. In these circumstances, the Committee considers it appropriate to address the remaining issues related to capital punishment in the context of the author’s claims under article 7 of the Covenant instead of separately determining them under article 6.

7.3 As to the author’s claims under articles 7 and 10 regarding his treatment in detention and the conditions of detention, both before and after conviction, the Committee observes that the State party, rather than responding to the specific allegations made, has indicated that they require further investigation. In the circumstances, therefore, the Committee is obliged to give due weight to the author’s allegations, which are detailed and particularized. The Committee considers that the

conditions of detention described, as well as the violent and abusive behaviour both of certain prison guards and of other inmates, as apparently acquiesced in by the prison authorities, are seriously in violation of the author's right, as a prisoner, to be treated with humanity and with respect for his inherent dignity, in violation of article 10, paragraph 1. As at least some of the acts of violence against the author were committed either by the prison guards, upon their instigation or with their acquiescence, there was also a violation of article 7. There is also a specific violation of article 10, paragraph 2, arising from the failure to segregate the author, pre-trial, from convicted prisoners.

7.4 As to the claims concerning the author's mental suffering and anguish as a consequence of being sentenced to death, the Committee observes that the authors' mental condition was exacerbated by his treatment in, as well as the conditions of, his detention, and resulted in documented long-term psychological damage to him. In view of these aggravating factors constituting further compelling circumstances beyond the mere length of time spent by the author in imprisonment under a sentence of death,¹³ the Committee concludes that the author's suffering under a sentence of death amounted to an additional violation of article 7. None of these violations were remedied by the Supreme Court's decision to annul the author's conviction and death sentence after he had spent almost fifteen months of imprisonment under a sentence of death.

7.5 As to the author's claims under article 9 the Committee notes that the State party has not contested the factual submissions of the author. Hence, due weight must be given to the information submitted by the author. The Committee concludes that the author was not informed, at the time of arrest, of the reasons for his arrest and was not promptly informed of the charges against him; that the author was arrested without a warrant and hence in violation of domestic law; and that after the arrest the author was not brought promptly before a judge. Consequently, there was a violation of article 9, paragraphs 1, 2 and 3, of the Covenant.

¹³ *Johnson v. Jamaica*, Case No. 588/1994, Views adopted on 22 March 1996; *Francis v. Jamaica*, Case No. 606/1994, Views adopted on 25 June 1995.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal violations by the Philippines of article 7, article 9, paragraphs 1, 2 and 3, and article 10, paragraphs 1 and 2, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. In respect of the violations of article 9 the State party should compensate the author. As to the violations of articles 7 and 10 suffered while in detention, including subsequent to sentence of death, the Committee observes that the compensation provided by the State party under its domestic law was not directed at these violations, and that compensation due to the author should take due account both of the seriousness of the violations and the damage to the author caused. In this context, the Committee recalls the duty upon the State party to undertake a comprehensive and impartial investigation of the issues raised in the course of the author's detention, and to draw the appropriate penal and disciplinary consequences for the individuals found responsible. As to the imposition of immigration fees and visa exclusion, the Committee takes the view that in order to remedy the violations of the Covenant the State party should refund to the author the moneys claimed from him. All monetary compensation thus due to the author by the State party should be made available for payment to the author at the venue of his choice, be it within the State party's territory or abroad. The State party is also under an obligation to avoid similar violations in the future.

10. 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 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

Communication No. 875/1999

Submitted by: Jan Filipovich (represented by counsel)

Alleged victim: The author

State party: Lithuania

Views: 4 August 2002

Subject matter: Unjustified duration of criminal proceedings before conviction (4 years and 4 months)

Procedural issues: Level of substantiation of claim

Substantive issues: Undue delay - Sentence within the limits of the penalty provided by previous law

Articles of the Covenant: 14, paragraphs 1 and 3 (c); and article 15, paragraph 1

Articles of the Optional Protocol: 2

Finding: Views (violation of article 14, paragraph 3 c)).

1. The author of the communication, dated 25 January 1997, is Jan Filipovich, a Lithuanian citizen convicted of premeditated murder. He claims to be a victim of a violation by Lithuania of article 14, paragraphs 1 and 3 (c), and article 15, paragraph 1, of the Covenant. He is represented by counsel. The Covenant and the Protocol entered into force for Lithuania on 20 February 1992.

The facts as submitted by the author

2.1 On 3 September 1991, the author and Mr. N. Zhuk got into a fight, following which Mr. Zhuk was found unconscious and taken to the hospital, where he was not operated on until 5 September and died that same day. According to the author, the causes of death were trauma to the abdominal cavity and peritonitis, which developed because of the delay in operating on Mr. Zhuk.

2.2 The preliminary investigation began in September 1991. The author was convicted of premeditated murder by the Vilnius District Court on 16 January 1996.¹ The author appealed the decision in the same Court, which dismissed the appeal on 13 March 1996. On 2 May 1996, the Criminal Division of the Lithuanian Supreme Court rejected the author's application for judicial review. Subsequently, on 1 July 1996, the Vice-President of the Supreme Court and the Attorney-General of Lithuania refused to submit an application for judicial review.

¹ Article 104 of the Criminal Code.

The complaint

3.1 The author alleges that he is a victim of a violation of the right to a fair trial, as provided for in article 14, paragraph 1, because neither the preliminary investigation nor the oral proceedings were unbiased, since no importance was attached to the results of an investigation conducted by a commission set up to determine the reason for the delay in the surgical operation and the diagnostic error. The author states that, if the investigation's version of events was correct, the only possible charge that could have been brought was grievous bodily harm, not premeditated murder.

3.2 The author alleges a violation of article 14, paragraph 3 (c), of the Covenant because, although the investigation began in September 1991, he was not sentenced until 16 January 1996 and the final decision was handed down only on 2 May 1996, i.e. four years and eight months after the start of the proceedings. In his view, this constitutes undue delay.

3.3 The author alleges that there was a violation of article 15, paragraph 1, because the penalty imposed was heavier than the one that should have been imposed at the time the offence was committed. He states that, in 1991, the penalty for premeditated murder imposed by article 104 of the Lithuanian Criminal Code was 3 to 12 years' deprivation of liberty. He was, however, sentenced under the new article 104 of the Criminal Code, which provides for 5 to 12 years' deprivation of liberty, and he was given a term of 6 years. He also alleges that the court never stated either in its ruling or in subsequent decisions that he was convicted under the version of article 104 of the Criminal Code in force since 10 June 1993.²

The State party's observations on admissibility and the merit

(a) Alleged violation of article 14, paragraph 1, of the Covenant

4.1 With regard to article 14, paragraph 1, the State party draws attention to the Committee's case

² The new Lithuanian Criminal Code entered into force in June 1993.

law and, in particular, the Views of 28 September 1999 relating to communication No. 710/1996 (*Hankle v. Jamaica*) and the Views of 9 April 1981 relating to communication No. 58/1979 (*Maroufidou v. Sweden*), which stated that it is generally for the domestic courts to review the facts and evidence in a particular case, unless it can be determined that the evaluation was clearly biased or arbitrary or amounted to a denial of justice.

4.2 The State party argues that the Lithuanian courts, i.e. both the court of first instance and the appeal court, as well as the Supreme Court, referred explicitly to the conclusions of the investigating commission. In particular, the Supreme Court held that the court of first instance had exhaustively investigated all the material circumstances of the case and had properly evaluated the evidence, according to the requirements of articles 18 and 76 of the Code of Criminal Procedure.³ The Supreme Court also reviewed the characterization of the offence under domestic law and determined that it had correctly been categorized as premeditated murder within the meaning of article 104 of the Lithuanian Criminal Code.

4.3 In the light of the foregoing, the case does not reveal any irregularity on the basis of which it may be concluded that there was an improper evaluation of the evidence or a denial of justice during the author's trial. Consequently, this part of the communication must be declared inadmissible under article 3 of the Optional Protocol because it is incompatible with the provisions of the Covenant.

(b) Alleged violation of article 14, paragraph 3 (c), of the Covenant

4.4 According to the State party, the author based his allegations only on the duration of the proceedings and did not put forward any other argument in support of his complaint. The duration of the proceedings cannot itself give rise to a violation of article 14, paragraph 3 (c), since the Covenant already explicitly provides for the right to be tried without undue delay. In addition to putting forward arguments in support of his complaint, the

³ Article 18 of the Code of Criminal Procedure provides that the court, the prosecutor, the investigator and the interrogator must take all of the measures provided for by law to investigate seriously and exhaustively all circumstances of a particular case and determine aggravating and mitigating circumstances, as well as incriminating and exculpatory circumstances. Article 76 of the Code of Criminal Procedure provides that the court, the prosecutor, the investigator and the interrogator must evaluate the evidence according to their own beliefs and on the basis of a serious and exhaustive examination of all the circumstances of the case, in accordance with the law and legal ethics.

author must not only indicate exactly how long the proceedings lasted, but must also refer to the delays attributable to the State party and provide specific evidence.

4.5 The State party also argues that the author's calculations concerning the duration of the proceedings are not correct. Specifically, the start of the relevant period was not in September 1991, but on 20 February 1992, when the Covenant and the Optional Protocol entered into force for Lithuania.

4.6 Since the author has not provided information on undue delays during the criminal proceedings, the State party holds that the author has not substantiated his complaint and that, consequently, this part of the communication should be declared inadmissible under article 2 of the Optional Protocol.

(c) Alleged violation of article 15, paragraph 1, of the Covenant

4.7 The State challenges the author's contention that the lack of any specific reference to the relevant version of article 104 of the Penal Code in the sentence of the court of first instance indicates a violation of article 15, paragraph 1, of the Covenant. It recalls that the legality of the sentence was reviewed by the Lithuanian Supreme Court, which rejected the author's arguments that the court of first instance had imposed the wrong penalty, stating that the penalty was imposed in accordance with article 39 of the Criminal Code.⁴ This article is in keeping with the principle that a law introducing heavier penalties is not retroactive. In recognizing the legality of the penalty imposed in accordance with article 39, the Supreme Court thus also confirmed that this penalty is in conformity with the principle of non-retroactivity provided for in article 7 of the Criminal Code.

4.8 The State party makes it clear that the Supreme Court also ascertained that there were no other reasons why the penalty imposed might have been regarded as heavier than the one which might legitimately have been imposed for this type of criminal offence in the specific circumstances of the case. In the present case, there was the aggravating circumstance that the author was drunk, but there were no mitigating circumstances. Article 104 of the Criminal Code, which was in force when the author committed the offence, provided for between 3 and 12 years' deprivation of liberty. The author was

⁴ Article 39 of this Code explicitly states that the court in question must apply the penalty within the limits set by the article, specifying responsibility for the crime committed. The court must also take account of the nature and gravity of the offence and of aggravating or mitigating circumstances.

sentenced to a penalty of six years, well within the limits set in that article.

4.9 In view of the fact that the Supreme Court considered that the penalty imposed on the author was in keeping with article 39 of the Lithuanian Criminal Code and bearing in mind the Committee's case law stating that it is generally for the domestic courts to review the facts and evidence in a particular case, the State party maintains that the penalty imposed is in keeping with the prohibition on the imposition of a penalty that is heavier than the one that was applicable at the time when the offence was committed, as stated in article 15, paragraph 1, of the Covenant.

Author's comments

5.1 In his comments of 20 August 2000, the author argues that, throughout the proceedings, his right to a defence and to be heard by a court were mere formalities, as clearly reflected in the court's decision.

5.2 The author's conviction by the Vilnius District Court on 16 January 1996 was based on the fact that the only reasons for Mr. Zhuk's death were the blows to his head and stomach which the author inflicted, thereby causing his death. According to the author, the court adopted these conclusions without any reliable evidence and without having examined the main evidence,⁵ since the forensic report stated that the cause of Mr. Zhuk's death was a trauma to the stomach resulting in peritonitis. The medical report also stated that Mr. Zhuk was operated on too late, that the injuries which caused his death were not diagnosed until 30 hours after his arrival at the hospital and that the doctor, who suspected that there might be injuries to Mr. Zhuk's stomach, did not take the necessary measures to make a final diagnosis so that he might be operated on immediately.

5.3 With regard to article 14, paragraph 3 (c), the author agrees with the State party that the duration of the proceedings should be counted as from the entry into force of the Covenant, i.e. 20 February 1992, but, even then, the period would be too long because there were four years and two months between the entry into force of the Covenant and the date of 2 May 1996.

5.4 Bearing in mind that the evidence was collected during the initial stages of the investigation and that the forensic medical report was prepared on

6 September 1991 and, respectively, 1 December 1992, the only reason for such lengthy proceedings was the unjustified delay by the investigators in the case in bringing the author before the court.

5.5 Lastly, the author refers to article 15, paragraph 1, of the Covenant and states once again that he should have been tried in accordance with the law in force at the time when the offence was committed, whereas, in fact, the offences for which he was tried were not defined by the law in force when they were committed. The Vilnius District Court, which heard the case, took the view that the definition of the offence was in keeping with article 104 of the Criminal Code (premeditated murder), without taking account of the fact that article 111, paragraph 2, providing for the offence of grievous bodily harm resulting in death, existed at the time. The author also maintains that the penalty applicable for that type of offence was heavier than the penalty applicable at the time the offence was committed. He states that he disagrees with the State party's observation that, in its decision of 2 May 1996, the Supreme Court confirmed that the penalty was applied in accordance with the law in force at the time the offence was committed.

Issues and proceedings before the Committee

Admissibility considerations

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the complaint is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a) of the Optional Protocol. It has further ascertained that the victim has exhausted domestic remedies for the purposes of article 5, paragraph 2 (b) of the Optional Protocol. The Committee also notes that the State party has not contested the admissibility of the communication under article 5, paragraphs 2 (a) and (b) of the Optional Protocol.

6.3 With regard to the author's allegations in respect of the violation of article 14, paragraph 1, the Committee recalls that it is generally for the courts of States parties, not for the Committee, to review the facts in a particular case. The Committee takes note of the State party's allegations that all of the evidence was examined by the Supreme Court. Moreover, the information available to the Committee and the author's arguments do not show that the evaluation of the facts by the courts was clearly arbitrary or amounted to a denial of justice. The Committee therefore takes the view that the

⁵ According to the author, a forensic medical examination is compulsory in criminal proceedings, in accordance with article 86, paragraph 1, of the Code of Criminal Procedure, and is one of the main pieces of evidence (art. 74, para. 2, and art. 85, para. 3).

complaint is inadmissible for lack of substantiation under article 2 of the Optional Protocol.

6.4 With regard to the author's allegations concerning articles 14, paragraph 3 (c), and 15, paragraph 1, of the Covenant, the Committee considers that these complaints have been sufficiently substantiated for purposes of admissibility. Accordingly, it will consider this part of the communication on the merits in the light of the information furnished by the parties, in conformity with the provisions of article 5, paragraph 1, of the Optional Protocol.

Consideration of the merits

7.1 As to the author's allegations that the trial went on for too long, since the investigation began in September 1991 and the court of first instance convicted him on 1 January 1996, the Committee takes note of the State party's arguments that the duration of the proceedings should be calculated as from the entry into force of the Covenant and the Protocol for Lithuania on 20 February 1992. The Committee nevertheless notes that, although the investigation began before the entry into force, the proceedings continued until 1996. The Committee also takes note of the fact that the State party has not given any explanation of the reason why four years and four months elapsed between the start of the investigation and the conviction in first instance. Considering that the investigation ended, according to the information available to the Committee, following the report by the forensic medical commission and that the case was not so complex as to justify a delay of four years and four months, or three years and 2 months after the preparation of the forensic medical report, the Committee concludes that there was a violation of article 14, paragraph 3 (c).

7.2 With regard to the author's allegations that he was sentenced to a heavier penalty than the one that should have been imposed at the time the offence was committed, the Committee takes note of the

author's allegations that none of the sentences against him explained which version of article 104 of the Criminal Code had been applied in imposing six years' deprivation of liberty. However, the Committee also notes that the author's sentence of six years was well within the latitude provided by the earlier law (3 to 12 years), and that the State party has referred to the existence of certain aggravating circumstances. In the circumstances of the case, the Committee cannot, on the basis of the material before it, conclude that the author's penalty was not meted out according to the law that was in force at the time when the offence was committed. Consequently, there was no violation of article 15, paragraph 1, of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee constitutes a violation of article 14, paragraph 3 (c), of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the covenant, the State party is under an obligation to provide the author with an effective remedy, including compensation. The State party is also under an obligation to ensure that similar violations do not occur in future.

10. 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 or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

Communication No. 879/1999

Submitted by: George Howard (represented by counsel, Peter Hutchins of Hutchins, Soroka & Dionne)

Alleged victim: The author

State party: Canada

Date of adoption of Views: 26 July 2005

Subject matter: Right of an indigenous group to practice and enjoy its traditional culture

Procedural issues: Non-exhaustion of domestic remedies - Absence of authorization to act - "Victim" requirement

Substantive issues: Right for indigenous groups to enjoy their own culture

Articles of the Covenant: 2, paragraph 2, and 27

Articles of the Optional Protocol: 1; 5, paragraph 2 (b)

Finding: No violation

1. The author of the communication, dated 9 October 1998, is Mr. George Howard, born 5 June 1946, a member of the Hiawatha First Nation which is recognized under the law of the State party as an Aboriginal people of Canada. He claims to be a victim of a violation by Canada of his rights under articles 2, paragraph 2, and 27 of the Covenant. He is represented by counsel. The Optional Protocol entered into force for Canada on 19 August 1976.

The facts as presented

2.1 The author's Hiawatha community forms part of the Mississauga First Nations. These First Nations, among others, are parties to treaties concluded with the Crown, including a 1923 treaty ("the 1923 Williams treaty") dealing, *inter alia*, with indigenous hunting and fishing rights. It provided, in return for compensation of \$500,000, that the Mississauga First Nations "cede, release, surrender, and yield up" their interests in specific described lands, and further, "all the right, title interest, claim demand and privileges whatsoever of the said Indians in, to, upon or in respect of all other lands situated in the Province of Ontario to which they ever had, now have, or now claim to have any right, title, interest, demand or privileges, except such reserves as have been set apart for them by His Majesty the King."¹

¹ In the first preambular paragraph to the treaty, it reads: "WHEREAS, the Mississauga Tribe above described, having claimed to be entitled to certain interests in the lands of the Province of Ontario, hereinafter described, such interests being the Indian Title of the said

2.2 On 18 January 1985, the author took some fish from a river close to, but not on, his First Nation's reserve. He was fined after having been summarily convicted in the Ontario Provincial Court for unlawfully fishing out of season. The court rejected arguments of a constitutional right to fish based on the protection in section 35 of the Constitution Act 1982 concerning "existing aboriginal and treaty rights of the aboriginal peoples of Canada". It held that the author's First Nations ancestors had surrendered fishing rights in the 1923 treaties and that no such rights subsisted thereafter. On 9 March 1987, the Ontario District Court rejected the author's appeal.

2.3 On 13 March 1992, the Ontario Court of Appeal dismissed the author's appeal from the District Court, holding that the 1923 treaty had extinguished the fishing rights previously held by the author's First Nation, and that the First Nation's representatives had known and understood the treaty and its terms. On 12 May 1994, the Supreme Court rejected the author's further appeal, holding that by "clear terms" the First Nations surrendered any remaining special right to fish.

2.4 In 1990, the Canadian Supreme Court held in another case that "existing rights" within the meaning of section 35 of the Constitution Act were satisfied by evidence of continuity of the exercise of a right, even if scanty at times, unless there was evidence of a clear and plain intention by the Crown to extinguish the right.² Thereafter, the Ontario government committed itself to negotiate arrangements with indigenous people as soon as possible on the issue of hunting, fishing, gathering and trapping.

2.5 On 7 March 1995, the so-called "Community Harvest Conservation Agreements" (CHCAs) were signed by the Ontario Government and the Williams Treaties First Nations, allowing for the exercise of certain hunting and fishing rights. Under these agreements, which were renewable yearly, First Nations were permitted to hunt and fish outside the reserves, for subsistence, as well as for ceremonial and spiritual purposes, and barter in kind.

Tribe to fishing, hunting and trapping rights over the said lands, of which said rights His Majesty, through His said Commissioners, is desirous of obtaining a surrender...."

² *R v. Sparrow* [1990] 1 SCR 1075 (SCC).

2.6 On 30 August 1995, the newly elected Ontario government exercised its right to terminate the CHCAs, wishing “to act in a manner consistent with” the Supreme Court’s decision in the author’s case.

2.7 In September 1995, the First Nations affected by the termination sought interim and permanent injunctions against the Ontario government. The Ontario Court of Justice rejected the claims, holding that the government had properly exercised its right, under the agreements, to terminate them with notice of 30 days. The author contends that the Court made it “very clear” that the outcome of further proceedings would go against the applicants, and that it was therefore pointless to pursue further costly remedies.

2.8 On 16 January 1997, the Supreme Court rejected the author’s motion for a rehearing of his case. The author had argued that developments in the Supreme Court’s jurisprudence to the effect that a clear intent to extinguish fishing rights had to accompany a surrender of interest in land in order to be valid³ warranted a re-examination of his case.

The complaint

3.1 The author complains generally that he and all other members of his First Nation are being deprived of the ability to exercise their aboriginal fishing rights individually and in community with each other and that this threatens their cultural, spiritual and social survival. He contends that hunting, fishing, gathering and trapping are essential components of his culture, and that denial of the ability to exercise it imperils transmission of the culture to other persons and to later generations.

3.2 Specifically, the author considers that the Supreme Court judgement in his case is incompatible with article 27 of the Covenant. Referring to the Committee’s General Comment 23, he argues that the federal government of Canada failed in its duty to take positive measures of protection by not intervening in his favour in the judicial proceedings. Neither the Covenant nor other applicable international law were referred to or considered in the proceedings. The decision, moreover, has resulted in the denial of essential elements of culture, spiritual welfare, health, social survival and development, and education of children. The author argues that the Williams Treaties are the only treaties that fail to protect indigenous hunting and fishing rights, but instead aim at explicitly extinguishing them, and that the Supreme Court’s decision in this case is an anomaly in its case law. Referring to the Committee’s decision in *Kitok v.*

Sweden,⁴ the author argues that, far from being “necessary for the continued visibility and welfare of the minority as a whole”, the restrictions in question imperil the very cultural and spiritual survival of the minority.

3.3 The author contends that the unilateral abrogation of the CHCAs violates article 27 of the Covenant. The author submits that article 27 imposes “an obligation to restore fundamental rights on which cultural and spiritual survival of a First Nations depends, to a sufficient degree to ensure the survival and the development of the First Nation’s culture through the survival and development of the rights of its individual members”. Although providing some relief, the contractual nature of the CHCAs, and the facility for unilateral termination, failed to provide adequate measures of protection for the author and the precarious culture of the minority of which he is a member.

3.4 The author also alleges violations of article 27 and article 2, paragraph 2, of the Covenant in that the federal and provincial governments are only prepared to consider monetary compensation for loss of the aboriginal rights, rather than restore the rights themselves. Payment of money is not an appropriate “positive measure” of protection, deemed to be required by article 2, paragraph 2.

3.5 The author adds that his claim as described above should be interpreted in the light of article 1, paragraph 2, of the Covenant, as the status of First Nations as “peoples” has been recognized at the domestic level. He contends that article 5, paragraph 2, of the Covenant precludes the State party from contending that First Nations do not, in international law, have such status, for it has been conferred on them by domestic law.

3.6 As a consequence of the above, the author requests the Committee to urge the State party to take effective steps to implement the appropriate measures to recognize and ensure the exercise of their hunting, fishing, trapping and gathering rights, through a new treaty process.

3.7 The author states that the same matter has not been submitted for examination under any other procedure of international investigation or settlement.

Videotape submission by the author

4. In his original communication of 9 October 1998, the author, referring to the oral tradition of the Mississauga First Nations, requested the Committee to take into account, in addition to written materials submitted by the parties, oral evidence reproduced in

³ *R v. Adams* [1996] 3 SCR 101 (SCC).

⁴ Case No. 197/1985, Views adopted on 27 July 1988.

the form of a videotape containing an interview with the author and two other members of the Mississauga First Nations on the importance of fishing for their identity, culture and way of life. On 12 January 2000 the Committee, acting through its Special Rapporteur on New Communications, decided not to accept videotape evidence, with reference to the Optional Protocol's provision for a written procedure only (article 5, paragraph 1, of the Optional Protocol). By letter dated 7 February 2000, the author furnished the Committee with a transcript of the videotaped testimony in question. The Committee expresses its appreciation for the author's willingness to assist the Committee by submitting the transcript.

The State party's admissibility submission and author's comments

5.1 By submission of 28 July 2000, the State party argues that the communication is inadmissible for failure to exhaust domestic remedies. The State party points out that current laws regulate, but do not prohibit, hunting and fishing activities. The regulations, dealing with licensing requirements, catch and hunting limits, and seasonal restrictions, are intended to advance objectives of conservation, safety and ethical hunting practices. The author, as anyone else, is able to exercise his traditional practices within these confines.

5.2 The State party observes that the Williams Treaties First Nations have an action currently pending in the Federal Court, alleging a breach of fiduciary duty by the federal and Ontario governments. They seek, *inter alia*, a remedy that would restore their hunting and fishing rights outside the reserves. The parties have currently stayed this action by agreement, while negotiations are continuing.

5.3 The State party further observes that the Williams Treaties First Nations did not avail themselves of the possibilities to challenge the termination of the CHCAs. While the initial action was dismissed on grounds of procedural defect, the Court made clear that it was open to them to bring a fresh application. They did not do so. The State party notes that, while the author contends that to do so would have been "pointless", it has been the Committee's constant approach that doubts about the effectiveness of remedies is not sufficient reason not to exhaust them.

5.4 Thirdly, the State party observes that it would be open to the Williams Treaties First Nations to seek the assistance of the independent advisory Indian Claims Commission in resolving a dispute in their claims negotiations with the federal government. This settlement procedure has not been exercised.

6.1 By submission of 21 December 2000, the author rejects the State party's observations, arguing that domestic remedies have been exhausted, for the Supreme Court's binding decision in his case confirmed the extinguishment of his aboriginal rights.

6.2 The author argues that the current proceedings before the Federal Court raise different issues and cannot grant him the remedy he seeks. The current proceedings concern breach of fiduciary duty, rather than the restoration of aboriginal harvesting rights, and seek (in current form) a corresponding declaration with "a remedy in fulfilment of the Defendant Crown's obligation to set aside reserves, or damages in lieu thereof". In any event, the Federal Court is bound to follow the Supreme Court's decision to the extent that it held that the aboriginal rights in question had been extinguished by the Williams Treaties. The author notes that while the Federal Court proceedings may allow his community to acquire additional lands and fair compensation for the 1923 surrender, they will not restore his harvesting rights, since the Supreme Court's decision has held they were extinguished at that time.

6.3 As to the proceedings to challenge the abrogation of the CHCAs, the author argues that the outcome of further proceedings was "clearly predictable". The judge stated that he had "determined that on the factual merits there is no support for the granting of any declaratory or injunctive relief". Referring to the Committee's jurisprudence,⁵ the author notes that the Supreme Court in his case had already "substantially decided the same question in issue" and that therefore there was no need for recourse to further litigation. Moreover, the Supreme Court had denied his own application to revisit its decision in his case, which therefore remained binding on the lower courts.

6.4 To the extent that the State party suggests that negotiations should be pursued, the author argues that these are not "remedies" in terms of the Optional Protocol, and, in any event, that the State party has not shown they would effectively restore the harvesting rights. On 16 May 2000, the First Nations were informed that negotiations would not resume without the presence of the Ontario government as a party. Moreover, the Indian Claims Commission is an advisory body whose recommendations are not binding upon the federal government. Additionally, the Commission may only facilitate certain categories of dispute, and the federal government has already characterized the

⁵ *Lovelace v. Canada*, Case No. 24/1977, Views adopted on 19 September 1979.

issue of restoration of harvesting rights as falling outside those categories.

Subsequent submissions of the parties

7.1 By submission of 12 July 2001, the State party responded to the author's comments, arguing that while the author claims not to be acting as a representative of the Williams Treaties, but on his own behalf, he is in fact clearly acting on their behalf⁶ and requesting a collective remedy.

7.2 In terms of current Federal Court proceedings, the State party argues that it is highly relevant that the First Nations are seeking a remedy for breach of fiduciary duty arising from the surrender of their aboriginal rights, including hunting and fishing rights. While they currently seek compensation, they sought a remedy of restoration at an earlier point and of their own accord modified those pleadings to omit this aspect of remedy. The State party points out that it would be open to seek a remedy of restoration of hunting and fishing rights in the appropriate provincial jurisdiction. Indeed, the First Nations have initiated an action in the Ontario Superior Court of Justice.

7.3 The State party points out that the Supreme Court's decision in the author's case was essentially limited to the factual question of whether he had an existing right to fish in the area where he was caught fishing and charged. It did not address questions of breach of fiduciary duties, and remedies available for such a breach, and accordingly these questions remain open before the courts.

7.4 On 5 September 2001, the author further responded, arguing that he satisfies all conditions of admissibility: in particular, he is a victim within the meaning of article 1 of the Optional Protocol, being denied the ability by highest judicial decision to practice fishing as a member of a "minority" within the meaning of article 27. Referring to previous cases decided by the Committee,⁷ he argues that it is of no relevance that a remedy he might obtain under the Optional Protocol might benefit others in his community. He alleges specific violations of his rights under the Covenant. Finally, he has exhausted all *legal* remedies open to him. He submits that it would be unjust to be deprived of his right to present an individual petition based on the Covenant to the Committee simply because his First Nation is pursuing other remedies before Canadian courts

⁶ The State party provides documentation in the form of an application for funding identifying work on "United Nations petition" as part of a First Nations' workplan.

⁷ *Davidson v. Canada*, Case No. 359/1989, Views adopted 31 March 1993, and *Länsman v. Finland*, Case No. 671/1995, Views adopted on 30 October 1996.

under domestic law, along with other First Nation parties to the Williams Treaties.

7.5 The author argues that, under the current state of Canadian law, it is not possible for courts to restore extinguished aboriginal rights.⁸ All the courts, including the Supreme Court of Canada, are bound by the constitutional recognition in 1982 of "existing" aboriginal rights only. He contends that it is irrelevant that the Supreme Court in his case did not address the fiduciary breach question - even if it had, the outcome would have remained unaltered. Similarly, in terms of further action on the abrogation of the CHCAs, the courts would have been bound by the Supreme Court's determination that no aboriginal right existed in the author's case.

7.6 On 15 January 2003, the State party made further submissions, disputing that the current state of its law makes restoration of extinguished rights impossible. The State party points out that in the Supreme Court decision cited to this effect, the Court did *not* rule on what, if any, would be the Crown's fiduciary obligations to the First Nation in the process of surrender/extinguishment of the First Nation's rights, whether there had been a breach of any such obligations, and, if so, what remedies might be available. However, precisely these issues are either raised in the proceedings pending in the Federal Court by the Williams Treaties First Nations, or could be raised in the action before the Ontario Superior Court of Justice.

7.7 The State party further states that the federal government has not refused to negotiate hunting, fishing, trapping and gathering rights with the Williams Treaties First Nations. The federal government however considers that the restoration of such rights would require the participation of the Ontario State government, as Ontario alone possesses constitutional jurisdiction over provincial Crown lands and the right to pursue harvesting thereon. The Ontario government is reviewing the First Nations' claims and has not yet made a determination as to whether to accept the claim for negotiations.

Admissibility decision

8.1 At its 77th session, the Committee considered the admissibility of the communication.

8.2 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.

⁸ The author refers to *Ontario (Attorney-General) v. Bear Island Foundation* [1991] 2 SCR 570 (SCC).

8.3 As to the State party's argument that the author is acting on behalf of third parties, the Committee noted that the author claimed personally to be a victim, within the meaning of article 1 of the Optional Protocol, of an alleged violation of his rights under the Covenant, by virtue of the Supreme Court's decision affirming his conviction for unlawful fishing. As to the position of further individuals, the Committee recalled its jurisprudence that there is, in principle, no objection to a group of individuals, who claim to be similarly affected, collectively to submit a communication about alleged breaches of their rights.⁹ In the present case, however, to the extent that the communication could be understood to have been brought on behalf of other individuals or groups of individuals, the Committee noted that the author had provided neither authorization by such persons nor any arguments to the effect that he would be in the position to represent before the Committee other persons without their authorization. Consequently, the Committee found the communication inadmissible under article 1 of the Optional Protocol, to the extent it could be understood to have been submitted on behalf of other persons than the author personally.

8.4 Concerning the State party's arguments that on-going negotiations might provide an effective remedy, the Committee referred to its jurisprudence that remedies that must be exhausted for the purposes of the Optional Protocol are, primarily, judicial remedies. Negotiations proceeding on the basis of, *inter alia*, extralegal considerations including political factors cannot generally be regarded as being of analogous nature to these remedies. Even if such negotiations were to be regarded as an additional effective remedy to be exhausted in specific circumstances,¹⁰ the Committee recalled, with reference to article 50 of the Covenant, that the State party is responsible, in terms of the Covenant, for the acts of provincial authorities as much as federal authorities. In the light of the absence of a decision, to date, by the provincial authorities, on whether to accept the First Nations' claim for negotiations, the Committee would in any event regard this remedy as being unreasonably prolonged. Accordingly, on the current state of negotiations, the Committee did not, on either view, regard its competence to consider the communication excluded by virtue of article 5, paragraph 2 (b), of the Optional Protocol.

8.5 The same applied in relation to the argument that actions are pending in the Federal Court and in the Ontario Superior Court of Justice. Besides the

fact that these actions were brought by First Nations parties rather than the author and that their outcome would have no bearing on the author's conviction in 1985 for unlawful fishing, the Committee considered that insofar as the author might individually benefit from such a remedy, the remedy was unreasonably prolonged in relation to him. The Committee was therefore satisfied that the author, in pursuing his own case through to the Supreme Court, exhausted domestic remedies in respect of the claimed aboriginal rights to fish, which are an integral part of his culture.

8.6 On 1 April 2003, the Committee therefore decided that the communication was admissible to the extent that the author was being deprived, under the sanction of criminal law, of the ability to exercise, individually and in community with other members of his aboriginal community, his aboriginal fishing rights which are an integral part of his culture.

State party's merits submission

9.1 By submission of 23 March 2004, the State party comments on the merits of the communication. Contesting the author's claims of violations of articles 2 (2) and 27 of the Covenant in his case, the State party submits that the author is able to enjoy, individually and in community with the other members of the Hiawatha First Nation, the aspects of his culture related to fishing.

9.2 The State party recalls that in the 1923 Williams Treaty, the author's First Nation agreed to give up its aboriginal rights to fish, except for a treaty right to fish in the reserves set aside for them. The Ontario Court has held that this treaty right to fish extends to the waters that are adjacent to the reserves and the Government has interpreted this to mean up to 100 yards from shore in waters fronting the reserve boundaries. In these waters the members of the Hiawatha First Nation do not have to comply with Ontario's normal fishing restrictions, such as closed seasons and catch limits and have a right to fish year-round for food, ceremonial and social purposes. In this context, the State party points out that neither the author nor the Hiawatha First Nation depends on fishing for their livelihood. It is said that the members of the Hiawatha First Nation (of whom 184 members live on the reserve and 232 outside) have tourism as their main source of income and that recreational fishing is a significant attraction for tourists to the area. The fish of Rice Lake, on the shores of which the Hiawatha First Nation lives, are said to be among the most abundant in the area.

9.3 The State party states that in addition the author can obtain a recreational fishing licence enabling him to fish in the lakes and rivers of the Kawartha Lakes region surrounding the Hiawatha First Nation reserve from May to November. The

⁹ See *Ominayak et al. v. Canada*, Case No. 167/1984, Views adopted on 26 March 1990, at paragraph 32.1.

¹⁰ See *Jonassen et al. v. Norway*, Case No. 942/2000, Decision adopted on 25 October 2002.

limited restrictions placed on the fishery are targeted and specific to particular fish species and are intended to ensure that the particular vulnerability of each species is duly considered, and that all persons using the resource, including the author and the other members of the Hiawatha First Nation, benefit there from. Limits are imposed on what species of fish may be caught, when each species may be caught and how many may be caught.¹¹ When the waters bordering the Hiawatha Reserve are closed from 16 November to late April for conservation purposes, the author can fish for most species in other lakes and rivers further away from January to March and from May to December.

9.4 The State party thus argues that, since the author is able to fish all year round, share his catch with his family and show his children and grandchildren how to fish, his right to enjoy the fishing rights belonging to his culture has not been denied to him. The State party submits that the author's assertion that there is not enough fish where he is allowed to fish cannot be reconciled with the fact that he can fish adjacent to the Hiawatha First Nation reserve in the Otonabee river, a short distance downstream from where he was fishing on 18 January 1985 and is also inconsistent with fishery surveys and with public statements made by the Hiawatha First Nation in order to attract tourists. Lawful fishing opportunities exist for the author also in the winter season when the waters next to the Hiawatha reserve are closed for fishing.

9.5 As to the author's argument that the Supreme Court's decision in his case is inconsistent with the State party's obligations under article 27 of the Covenant, the State party recalls the issues and arguments presented to the courts and their decisions. The author was charged for unlawfully fishing during a closed period, because he had taken some pickerel fish from the Otonabee river near but not on the Hiawatha First Nation reserve. At trial before the Provincial Court of Ontario, the author pleaded not guilty and argued that he had a right to fish as a member of the Hiawatha First Nation, that this right was not extinguished by the 1923 Williams Treaty and that this right should not be abrogated by the fishing regulations. The trial judge, having been provided with hundreds of pages of documentary evidence, concluded that the lands where the offence was alleged to have occurred were in fact ceded by the 1923 Treaty, and that any special rights as to fishing were included in that. On appeal in the District Court of Ontario, the judge found that he

¹¹ The State party indicates that with a resident sport fishing licence, the author can daily catch and possess : 6 walleye, 6 mouth bass, 6 northern pike, 5 trout or salmon, 1 muskellunge, 25 whitefish and unlimited yellow perch, crappie, carp and catfish.

could not conclude that the Indians were misled at the time of the 1923 Treaty, and that section 35 of the Constitution Act 1982, recognizing and confirming the existence of aboriginal treaty rights of the aboriginal people of Canada, did not create new rights or reconstitute the rights that had been contracted away. In the Ontario Court of Appeal, the central issue was whether the rights of the Hiawatha First Nation members to fish on the Otonabee river had been surrendered by the 1923 Williams Treaty. The author argued that the Treaty should not be interpreted so as to extinguish the rights, or alternatively that the Rice Lake Band (as the Hiawatha First Nation was then called) did not have sufficient knowledge and understanding of the Treaty's terms to bind the Band to it. The Court found that the language of the 1923 Treaty clearly and without ambiguity showed that the Band surrendered its fishing rights throughout Ontario when it entered into that Treaty and concluded that the Crown had satisfied its onus of establishing that the representatives of the Band knew and understood the treaty and its terms. On appeal to the Supreme Court, the central issue was whether the signatories to the 1923 Williams Treaty had surrendered their treaty right to fish. The Supreme Court after having carefully reviewed the lower courts' assessment of the evidence, endorsed their findings and concluded that the historical context did not provide any basis for concluding that the terms of the 1923 Treaty were ambiguous or that they would not have been understood by the Hiawatha signatories. In this context, the Court pointed out that the Hiawatha signatories were businessmen and a civil servant and that they all were literate and active participants of the economy and society of their province.

9.6 The State party argues that the author's attempt to undermine the courts' findings of fact goes against the Committee's principle that it is for the courts of the States parties and not for the Committee to evaluate facts and evidence in a particular case. The State party also takes issue with the author's suggestion that the Supreme Court's decision in his case reversed a long held understanding of the Hiawatha First Nation that after 1923 they maintained their aboriginal right to fish and were not subject to Ontario's fishing laws. According to the State party this proposition was not supported by any evidence during the court hearings and in fact, the evidence was to the contrary.

9.7 Finally, the State party argues that article 27 must allow for a minority to make a choice to agree to the limitation of its rights to pursue its traditional means of livelihood over a certain territory in exchange for other rights and benefits. This choice was made by the Hiawatha First Nation in 1923 and, in the State party's opinion, article 27 does not permit the author to undo his community's choice

over 80 years later. The State party notes that the author did not raise any argument related to Canada's international obligations, including article 27 of the Covenant, during the court proceedings.

Author's comments:

10.1 On 30 August 2004, the author comments on the State party's submission and reiterates that the Williams Treaties are the only treaties in Canada which do not protect Aboriginal hunting, fishing, trapping and gathering rights, but rather are held to have explicitly extinguished these rights. As a consequence, the author claims that he does not enjoy the same special legal and constitutional status as all other Aboriginal peoples of Canada enjoying Aboriginal or treaty rights. The author considers that monetary compensation for these rights is no substitute for the necessary measures of protection of the minority's culture within the meaning of article 27 of the Covenant.

10.2 The author argues that as a member of a minority group, he is entitled to the protection of economic activities that comprise an essential element of his culture.¹² The exercise of cultural rights by members of indigenous communities is closely associated with territory and the use of its resources.¹³ The author notes that the State party does not deny that fishing is an essential element of the culture of the minority to which he belongs, but rather focuses on its assertion that the author is in a position to exercise this right to fish. The author states, however, that the State party does not identify whether he is able to exercise his cultural right to fish as distinct from, and additional to, any statutory privileges to fish that are available to all persons, indigenous and non-indigenous, upon obtaining through payment a licence from the Government.

10.3 The author further challenges the State party's focus on fishing only and submits that this is based on an excessively narrow reading of the Committee's admissibility decision. According to the author, his communication also includes his rights to hunting, trapping and gathering since these are an equally integral part of his culture which is being denied.

10.4 The author emphasizes that it is the cultural and societal importance of the right to fish, hunt, trap and gather which are at the heart of his communication, not its economic aspect. The fact that the members of the Hiawatha First Nation

participate in the general Canadian economy cannot and should not diminish the importance of their cultural and societal traditions and way of life.

10.5 Referring to the size of the Hiawatha First Nation reserve (790.4 hectares) and the reserve shared with two other First Nations (a number of islands), the author argues that it is unreasonable to suggest that he is able to meaningfully exercise together with members of his community his inherent rights to fish and hunt within the confines of the reserves and the waters immediately adjacent to them. These rights are meaningless without sufficient land over which to exercise them. In this context, the author reiterates that with the exception of the First Nations parties to the Williams Treaties, all other First Nations in Canada who have concluded treaties with the Crown have had their harvesting rights recognized far beyond the limits of their reserves – throughout their traditional territories.

10.6 As to the State party's argument that he can fish with a recreational licence, the author asserts that he is *not* a recreational fisher. In his opinion, the regulations governing recreational fishing are designed to enhance sports fishing and make clear that all fishing is done as a privilege and not a right. The general rule is prohibition of fishing activities, except as provided for in the regulations and pursuant to a licence. The regulations make exceptions to the general rule for persons in possession of a licence issued under the Aboriginal Communal Fishing Licence Regulations, but the author states that he has been denied the benefit of this provision because of the Court's decision that his aboriginal rights had been extinguished by the Williams Treaty.

10.7 The author observes that by equating his fishing activities with those of a recreational fisher, the State party deems his access to fishing a privilege not a right. His fishing activities are thus not granted priority over the activities of sport fishers and can be unilaterally curtailed by the State without any obligation to consult the author or the leaders of his First Nation. According to the author, this treatment is contrary to that afforded to other aboriginal persons in Canada for whom the Constitution Act 1982 provides that aboriginal and treaty rights have priority over all other uses except for conservation.

10.8 The author argues that the State party has an obligation to take positive measures to protect his fishing and hunting rights, and that to allow him to fish under recreational regulations is not a positive measure of protection required by article 2 (2) of the Covenant.

10.9 He further submits that he is prohibited from fishing in the traditional territory of the Hiawatha

¹² *Kitok v. Sweden*, communication No. 197/1985, Views adopted on 27 July 1998.

¹³ See the Human Rights Committee's General Comment No. 23, The rights of minorities to enjoy, profess and practise their own culture, 1994.

First Nation from 16 November to late April every year. According to the author, the State party's argument that he can fish in lakes and rivers further away from the Hiawatha reserve fails to take into account the concepts of aboriginal territory as these lakes are not within the traditional territory of the Hiawatha First Nation. The author further argues that the Regulations give priority to fishing by way of angling and that traditional fishing methods (gill netting, spearing, bait-fish traps, seines, dip-nets etc) are restricted. As a result, many of the fish traditionally caught by Mississauga people cannot be fished by traditional netting and trapping methods. The author also mentions that he cannot ice-fish in the traditional grounds of his First Nation. He refers to a judgement of the Supreme Court (*R. v. Sparrow*, 1990) where the court directed that prohibiting aboriginal peoples from exercising their aboriginal rights by traditional methods constitutes an infringement of those rights, since it is impossible to distinguish clearly between the right to fish and the method of fishing. Finally, the author argues that the catch limits imposed by the Regulations effectively restrict him to fishing for personal consumption only.

10.10 For the above reasons, the author maintains that his rights under article 27 and 2 (2) of the Covenant have been violated and requests the Committee to urge the State party to take effective steps to implement the necessary measures to recognize and ensure the exercise of constitutionally protected hunting, fishing, trapping and gathering rights through a treaty process.

*Further submissions*¹⁴

11.1 By submission of 15 December 2004, the State party takes issue with the author's assertion that the scope of the Committee's admissibility decision includes hunting, trapping and gathering rights. It states that the text of the admissibility decision is clear and that the issue before the Committee only concerns "fishing rights which are integral to" the author's culture. If the author does not agree to this limitation, he is free to request the Committee to review its decision on admissibility, in which case the State party reserves its right to make further submissions on this issue.

11.2 The State party also submits that the 1923 Williams Treaty was negotiated upon request by the First Nations themselves, who were looking for recognition of their claims to rights in the traditional hunting territories in Ontario lying north of the 45th

¹⁴ A further State party's submission dated 2 June 2005 was received by the Committee. This submission, however, was considered by the Committee to contain no new elements.

parallel. After inquiring into the claims, treaties were concluded by which the First Nations gave up their rights over the territories in Ontario in exchange for compensation. The Rice Lake Band was familiar with the treaty process and as examined by the Court of Appeal in the author's case, the minutes of the meeting of the Band in Council show that the draft treaty was read, interpreted and explained before it was unanimously approved.

11.3 As to the author's claims with respect to the restrictions on what species he can fish, and by what method, the State party argues that these claims under article 27 should have been raised before. The State party notes in this respect that the author's original communication focused on the seasonal restrictions of his ability to fish and raised further arguments concerning his ability to transmit his knowledge to his children, participate with his community and fish for subsistence. He raised no claims in respect to being prevented from fishing for traditional fish or with traditional methods and the State party has thus not been requested to make submissions in respect of the admissibility and merits of these claims. The State party further notes that the evidence presented by the author in respect to these claims is very general and not specific to the Hiawatha First Nation, calling into question its reliability. For these reasons, the State party requests the Committee not to address these claims.

11.4 With regard to the author's assertion that the State party has an obligation to take positive measures to protect his fishing rights and that it has failed to do so, the State party submits that the author has a constitutionally protected treaty right to fish within his Nations' reserve and the waters adjacent to it. In the reserve that the author's First Nation shares with the Mississaugas of Curve Lake and of Scugog Island (Trent Reserve No. 36A) the author's treaty right to fish is also protected. The State party points out that the shared reserve is made up of over one hundred islands spread throughout twelve lakes and rivers in the Kawarthas and that the waters adjacent to these islands provide significant fishing opportunities to the author and members of the Hiawatha First Nation. In these waters, the author may fish at any time of the year, using his community's traditional techniques. The State party submits that the above constitutional protection does constitute a positive measure.

11.5 The State party further explains that under the major land cession treaties of Canada, including the Williams treaties, what were once aboriginal rights to hunt and fish were redefined and reshaped through the treaties. The terms of the treaties varied depending on the purpose of the treaty and the circumstances of the parties. According to the State party, treaties in remote areas with sparse population and little urban development protect the pursuit of fish and wildlife

for subsistence as appropriate in the context. The Williams treaties concerned however lands in close proximity of urbanization and protection of these rights for subsistence were not an issue.

11.6 As to the author's argument that a recreational fishing licence is a mere privilege and not a right, the State party observes that article 27 does not require that a cultural activity be protected by way of right.¹⁵ In the State party's opinion, licensing in and of itself does not violate article 27. The State party further explains that under an Ontario recreational fishing licence, a person may choose to fish not for recreational purposes but for food, social, educational or ceremonial purposes.

11.7 The State party contests the author's argument that the catch limits under the regulations limit him to fishing for personal consumption only. It explains that there are no limits on the number of fish he can catch in the waters on and adjacent to the reserves, and that in the waters beyond this area in open season he can catch unlimited yellow perch and panfish, as well as daily 6 walleye, 6 bass, 6 northern pike, 5 trout or salmon, 1 muskellunge and 25 whitefish. The State party concludes that it is thus untenable to suggest that the author can fish for personal consumption only. It further notes that the author has not presented any evidence as to the needs of his extended family and why they cannot be met.

11.8 The State party also contests the author's statement that he is prohibited from fishing in the traditional territory of the Hiawatha First Nation from 16 November to late April every year and reiterates that the author can fish year round in the waters of Rice Lake and the Otonabee river adjacent to the Hiawatha First Nation reserve, as well as in the waters adjacent to the islands in the Trent reserve. With a recreational licence, he can also fish in Scugog Lake in January and February, as well as in lakes and rivers of neighbouring fishing divisions. In this context, the State party notes that the author has presented no evidence that would support his assertion that these waters are outside the traditional territory and fishing grounds of the Hiawatha Nation. According to the State party evidence shows on the contrary that the seven Williams Treaties First Nations shared their traditional territory.

11.9 Finally, the State party reiterates that the author's requests for findings and remedies on behalf of others than himself are beyond the scope of the admissibility decision in the present case. The State party recalls that the Hiawatha First Nation and the other Williams Treaties First Nations are in the midst of litigation with the Crown on behalf of their

members, as they are seeking a judicial remedy for an alleged breach of the Crown's fiduciary duty with respect of the surrender of certain hunting, fishing and trapping rights in the Williams Treaties. It would therefore be inappropriate for the author to seek findings and remedies on behalf of the First Nations when they are not properly before the Committee, and these findings would presuppose the result in the Williams Treaties First Nations' domestic litigation. If the Committee, contrary to the State party, were to find that the author's article 27 rights as they relate to fishing had been infringed, legislative and regulatory mechanisms exist by which the State could provide increased fishing opportunities to the author and his community.

11.10 In his reply to the State party's further submission, the author, in a submission dated 5 April 2005, submits that the islands in the shared Trent Waters Reserve, although numerous, are extremely small, many constituting groups of bare rocks and that the fishing opportunities are thus insignificant. The average size of the islands is said to be 1.68 acre or 0.68 hectare.

11.11 The author further reiterates that the comparison with modern treaties is useful and shows that notwithstanding urban and economic development and non reliance by some Aboriginal persons on traditional activities for subsistence, all treaties except for the Williams treaties recognize and protect hunting, fishing and trapping rights as well as their exercise over a reasonable part of the indigenous' community's traditional territory.

11.12 In reply to the State party's assertion that the author has not provided evidence that Lake Scugog and other lakes and rivers of neighbouring fishing divisions are outside the traditional fishing grounds of the Hiawatha First Nation, the author refers to a map indicating Mississauga family hunting territories, based on the description of these territories made during testimony to the Williams Treaty Commissioners in 1923. According to the author the map shows that Hiawatha traditional hunting territory was located near Rice Lake and did not include Lake Scugog.

11.13 The author also takes issue with the State party's statement that the Williams treaty was properly negotiated with the author's First Nation, and argues that there was only one day of hearing in the community and that the communities' legal counsel was not allowed to participate. No attention was paid to the cultural and religious significance of fishing for the Mississauga and traditional non-commercial fishing rights were almost extinguished. Accordingly, the author reiterates his argument that the State party has not implemented the Williams Treaties in a way to ensure that the author is able to enjoy his culture.

¹⁵ The State party refers to the Committee's Views in *Kitok v. Sweden*, communication No. 197/1985, Views adopted on 27 July 1988, para. 9.8.

11.14 In reply to the State party's argument that the article 27 does not require that a cultural activity be protected by way of right, the author argues that his situation is distinguishable from the situation of the author in the case referred to by the State party. In that case, the Committee found that the legislation affecting the author's rights had a reasonable and objective justification and was necessary for the continued viability and welfare of the minority as a whole. The same cannot be said of the fishing regulations applied to the author in the present case.

11.15 The author rejects the State party's argument that he has raised new claims by bringing up the issue of fishing methods as it would be artificial to distinguish between his right to fish and the particular manner in which that right is exercised. He emphasizes that this is not a new claim but that it is the same claim that he has brought under article 27 before the admissibility decision of the Committee.

11.16 The author rejects the State party's argument that he is requesting an inappropriate remedy. He states that no substantive negotiations have taken place between the First Nations and Ontario, but only preparatory meetings. The author further argues that during these meetings it had been agreed that the fact that discussions were occurring would not be interpreted or put forward as an admission of fact, law or other acknowledgement contrary to the position of the parties in the present communication, and that the State party's argument thus breaches this agreement. The author reiterates that the only sufficient remedy is the negotiation in good faith on a timely basis of an agreement that would, on a secure and long-term basis, enable the author to enjoy his culture, and that the tools best suited for this task in Canadian domestic law are treaty protected rights.

Consideration of the merits

12.1 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.

12.2 In relation to the scope of the decision on admissibility in the present case, the Committee observes that at the time of the admissibility decision, the author had presented no elements in substantiation of his claim concerning the right to hunt, trap and gather or concerning the exhaustion of domestic remedies in this respect. The Committee also notes that the author has raised claims concerning the denial of the use of traditional fishing methods and catch limits only after the communication was declared admissible. In the Committee's opinion, nothing would have stopped the author from making these claims in due time, when submitting his communication, if he had so wished. Since the State party had not been requested

to make submissions on the admissibility of these aspects of the author's claim and the domestic remedies which the author exhausted only dealt with his conviction for fishing out of season, these aspects of the author's claim were not encompassed in the Committee's admissibility decision and the Committee will therefore not consider these issues.

12.3 Both the author and the State party have made frequent reference to the 1923 Williams treaty which was concluded between the Crown and the Hiawatha First Nation and which according to the Courts of the State party extinguished the author's Nation's right to fish outside their reserves or their adjacent waters. This matter, however, is not for the Committee to determine.

12.4 The Committee notes that it is undisputed that the author is a member of a minority enjoying the protection of article 27 of the Covenant and that he is thus entitled to the right, in community with the other members of his group, to enjoy his own culture. It is not disputed that fishing forms an integral part of the author's culture.

12.5 The question before the Committee, as determined by its admissibility decision, is thus whether Ontario's Fishing Regulations as applied to the author by the courts have deprived him, in violation of article 27 of the Covenant, of the ability to exercise, individually and in community with other members of his group, his aboriginal fishing rights which are an integral part of his culture.

12.6 The State party has submitted that the author has the right to fish throughout the year on and adjacent to his Nation's reserves and that, with a fishing licence, he can also fish in other areas in the region which are open for fishing when the area surrounding the reserves is closed. The author has argued that there is not enough fish on and adjacent to the reserves to render the right meaningful and that the other areas indicated by the State party do not belong to his Nation's traditional fishing grounds. He has moreover argued that fishing with a licence constitutes a privilege, whereas he claims to fish as of right.

12.7 Referring to its earlier jurisprudence, the Committee considers that States parties to the Covenant may regulate activities that constitute an essential element in the culture of a minority, provided that the regulation does not amount to a de facto denial of this right.¹⁶ The Committee must

¹⁶ See inter alia *Kitok v. Sweden*, communication No. 197/1985, Views adopted on 27 July 1988, and *Länsman v. Finland*, communication No. 511/1992, Views adopted on 26 October 1994, and communication No. 671/1995, Views adopted on 30 October 1996.

therefore reject the author's argument that the requirement of obtaining a fishing licence would in itself violate his rights under article 27.

12.8 The Committee notes that the evidence and arguments presented by the State party show that the author has the possibility to fish, either pursuant to a treaty right on and adjacent to the reserves or based on a licence outside the reserves. The question whether or not this right is sufficient to allow the author to enjoy this element of his culture in community with the other members of his group, depends on a number of factual considerations.

12.9 The Committee notes that, with regard to the potential catch of fish on and adjacent to the reserves, the State party and the author have given different views. The State party has provided detailed statistics purporting to show that the fish in the waters on and adjacent to the reserves are sufficiently abundant so as to make the author's right to fish meaningful and the author has denied this. Similarly, the parties disagree on the extent of the traditional fishing grounds of the Hiawatha First Nation.

12.10 The Committee notes in this respect that these questions of fact have not been brought before

the domestic courts of the State party. It recalls that the evaluation of facts and evidence is primarily a matter for the domestic courts of a State party, and in the absence of such evaluation in the present case the Committee's task is greatly impeded.

12.11 The Committee considers that it is not in a position to draw independent conclusions on the factual circumstances in which the author can exercise his right to fish and their consequences for his enjoyment of the right to his own culture. While the Committee understands the author's concerns, especially bearing in mind the relatively small size of the reserves in question and the limitations imposed on fishing outside the reserves, and without prejudice to any legal proceedings or negotiations between the Williams Treaties First Nations and the Government, the Committee is of the opinion that the information before it is not sufficient to justify the finding of a violation of article 27 of the Covenant.

13. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it do not disclose a violation of the International Covenant on Civil and Political Rights.

Communication No. 886/1999

Submitted by: Natalia Schedko (represented counsel)

Alleged victim: The author and her son Anton Bondarenko (deceased)

State party: Belarus

Date of adoption of Views: 3 April 2003

Subject matter: Failure of State authorities to reveal date of execution or burial place of an executed person to relative

Procedural issues: Level of substantiation of claim

Substantive issues: Right to life - Fair trial - Inhuman treatment/torture

Articles of the Covenant: 6, 7, 14

Articles of the Optional Protocol: 2

Finding: Violation (art. 7)

1.1 The author of the communication is Natalia Schedko, a Belarusian national. She acts on behalf of herself and of her deceased son, Anton Bondarenko, also a Belarusian national, who at the time of submission of the communication, 11 January 1999, was detained on death row, having been convicted of murder and sentenced to death. She claims that her deceased son is a victim by the Republic of Belarus¹

¹ The International Covenant on Civil and Political Rights entered into force for the State party on 23 March 1976 and the Optional Protocol on 30 December 1992.

of violations of articles 6 and 14 of the International Covenant on Civil and Political Rights. From her submissions, it transpires that the communication also raises issues under article 7 of the Covenant. The author is represented by counsel.

1.2 On 28 October 1999, in accordance with rule 86 of its rules of procedure, the Human Rights Committee, acting through its Special Rapporteur on New Communications, requested the State party not to execute the death sentence against Mr. Bondarenko, pending the determination of the case by the Committee. As it transpired from the State party's submission of 12 January 2000 that Mr. Bondarenko's death sentence had been executed on an unspecified previous date, the Committee addressed specific questions both to the author and to the State party.² From the answers, it transpired

² The Committee requested on 11 July 2002 the following information:

(a) From the State party:

1. "When exactly the execution took place, and

that Mr. Bondarenko was executed in July 1999,³ i.e. prior to the date of registration of the communication by the Committee.

1.3 The Committee notes with regret that, by the time it was in a position to submit its rule 86 request, the death sentence had already been carried out. The Committee understands and will ensure that cases susceptible of being subject of rule 86 requests will be processed with the expedition necessary to enable its requests to be complied with.

The facts as submitted by the author

2.1 Mr. Bondarenko was accused of murder and several other crimes, found guilty as charged and sentenced by the Minsk Regional Court on 22 June 1998 to death by firing squad. The decision was confirmed by the Supreme Court on 21 August 1998. According to the courts' assessment of the facts, Mr. Bondarenko broke into a private house on 25 July 1997, in the company of a minor named Voskoboynikov, and forced the owners at knifepoint to open their safe. After having taken the valuables out of the safe, Mr. Voskoboynikov had warned Mr. Bondarenko that one of the house occupants, Mr. Kourilenkov, would report them, and suggested that Mr. Bondarenko kill him. Bondarenko had stabbed Mr. Kourilenkov twice in the neck with a pocket knife and then stopped. Mr. Voskoboynikov had continued stabbing Mr. Kourilenkov in the neck and body with his own knife. Kourilenkov's grandmother, Mrs. Martinenko was also killed when she opened the front door; she was pushed down the cellar staircase by Mr. Voskoboynikov, and then stabbed several times.

2.2 According to the author, forensic evidence concluded that Kourilenkov died of multiple wounds to the neck and body, with damage to the left jugular vein and the larynx, complicated by massive external bleeding and acute traumatic shock. In the author's opinion, the trial proved that Mr. Bondarenko had stabbed Mr. Kourilenkov only twice, which in the author's view could not have caused his death. With regard to the homicide of Mrs. Martinenko, the author considers that there was irrefutable evidence that Mr. Bondarenko was not guilty. Mr. Voskoboynikov allegedly had confessed, on

24 August 1998, that he lied during the investigation and in court, falsely accusing Bondarenko. He had earlier refused to reveal the whereabouts of the murder weapon - his knife, with which he had committed both murders - but now pointed out where it was hidden so that the case could be reopened and a further inquiry initiated.

2.3 The author states that the President of the Supreme Court refused even to add the knife to the case file, holding it did not constitute sufficient evidence in support of the claim that Mr. Bondarenko had not been involved in the murders. Thus the Court is said to have refused to place on file evidence in defence of the author's son which would mitigate his guilt and prove that he had not been actively involved in the murders.

The complaint

3.1 The author claims that the domestic courts did not have clear and unambiguous evidence that would have proven that her son was guilty of the murders. In her opinion, the President of the Supreme Court ignored the testimony of her son's co-defendant (given after the trial) and refused to include evidence that would have mitigated the guilt of her son. That is said to underline the preconceived attitude of the court with regard to her son, and such a court cannot be considered to be independent and impartial. In her opinion this constitutes a violation of articles 6 and 14 of the Covenant.

3.2 From the file, and although the author has not directly invoked these provisions, it also transpires that the communication may raise issues under article 7 of the Covenant, in relation to the denial of information to the author concerning the date of her son's execution and the place of his burial.

3.3 Finally, the communication appears to raise issues relating to the respect by the State party of its obligations under the Optional Protocol to the Covenant, as it is alleged that the State party executed the author's son prior to the registration of the communication by the Committee, but after she informed the lawyer, the penitentiary administration and the Supreme Court of the submission of the communication.

State party's observations

4.1 By note of 12 January 2000, the State party submitted its observations, recalling that Mr. Bondarenko was tried and found guilty by the Minsk Regional Court on 22 June 1998 of all crimes specified under articles 89, 90, 96 and 100 of the Criminal Code of the Republic of Belarus.⁴ He was

2. At what time did the State party learn about the existence of the communication?"

(b) From the author:

1. "On what date the death sentence was carried out, and

2. Did you inform the State party of the submission of the communication to the Human Rights Committee before the registration of the case?"

³ According to the author, her son was executed on 24 July 1999; the State party gives the date 16 July 1999.

⁴ The State party did not, however, provide the text of the articles in question.

sentenced to death and confiscation of his property. In the same judgement, Mr. Voskoboynikov was sentenced on the same charges to 10 years' imprisonment and confiscation of property.⁵

4.2 To the State party, the evidence in the case clearly demonstrated that Mr. Bondarenko and Mr. Voskoboynikov were guilty of armed assault against and aggravated homicide of Mrs. Martinenko and Mr. Kourilenkov.

4.3 According to the State party, although Mr. Voskoboynikov had denied involvement in the murders, the evidence proved his guilt. The investigation and the courts were satisfied that Mr. Bondarenko and Mr. Voskoboynikov had jointly perpetrated the murders of Mrs. Martinenko and Mr. Kourilenkov, and that they had both stabbed them. Thus Mr. Voskoboynikov's statement that he had lied during the investigation and the trial and falsely accused Bondarenko is without foundation.

4.4 The State party asserts that the courts' evaluation of Mr. Bondarenko's and Mr. Voskoboynikov's actions was correct. Having considered the nature of the crimes committed by Mr. Bondarenko, the great danger they represented to the public, and his motives and methods, as well as previous information that reflected negatively on the accused's personality, the court came to the conclusion that Mr. Bondarenko constituted a particular menace to society and imposed the death penalty.

4.5 According to the State party, all aspects of the case were thoroughly considered during the preliminary investigation and the court proceedings. Accordingly, there are no grounds for challenging the judgements.

4.6 The State party closes with the information that Mr. Bondarenko's sentence has been carried out, but provides no date.

Author's comments

5.1 In her comments of 29 January 2001, counsel refers to the State party's contentions that the courts had correctly characterized Mr. Bondarenko's and Mr. Voskoboynikov's actions and that the investigation and the courts had established that they had jointly murdered Mrs. Martinenko and Mr. Kourilenkov. Counsel points out, however, that forensic evidence concluded that Mr. Kourilenkov had died of multiple wounds to the neck and to the body, the left cheek and the larynx, combined with

⁵ The Court took into account the fact that Mr. Voskoboynikov was a minor at the moment of the crime.

massive haemorrhage and acute traumatic shock. The courts had concluded that Mr. Bondarenko had stabbed Mr. Kourilenkov twice, which in counsel's opinion did not and could not have been the cause of death.

5.2 Counsel recalls that Mr. Voskoboynikov had admitted that he had acted alone in killing Mrs. Martinenko. The knife used to commit the murders had not been included in the file.

5.3 Counsel therefore concludes that the death sentence imposed on Mr. Bondarenko was in violation of article 6 of the Covenant. In any event, the sentence was carried out.

Additional observations from the parties

6.1 After the Committee had sent a letter to the parties on 11 July 2002 with a request to provide information on the execution of the death sentence,⁶ counsel submitted the following observations on 24 July 2002. She states that according to the author, the latter obtained a death certificate dated 26 July 1999, stating that her son was executed on 24 July 1999.⁷ Counsel further declares that the death sentences are executed in secret in Belarus. Neither the condemned prisoner nor his family are informed of the date of the execution.⁸ All those sentenced to capital punishment are transferred to the Minsk Detention Centre No. 1 (SIZO - 1), where they are confined to separate "death cells" and are given (striped) clothes, different from other detainees.

6.2 Counsel notes that executions take place in a special area by soldiers chosen from the "Committee for the execution of sentences". The method of execution is by firing with the executioner using a pistol. The pistol is handed by the chief of the Centre to the executioner. After the execution, a medical doctor establishes a record, certifying the death, in presence of a procurator and a representative of the prison administration.

⁶ See footnote No. 2

⁷ See footnote No. 3.

⁸ The author submits a copy of article 175 of the Belarusian Criminal Execution Code. It provides in particular that death sentences are executed by shooting. During the execution a procurator, a representative of the prison where the execution takes place and a medical doctor are present. In exceptional cases, with the procurator's permission, the presence of other persons can be admitted. The medical doctor certifies the death, and a record is established to that effect. The prison administration is obliged to inform the Court which passed the sentence, and that Court informs one of the relatives of the executed. The body of the executed is not released for burial, and the place of the burial is not communicated to the family or the relatives.

6.3 Counsel further notes that the body of the executed prisoner is transferred at night-time to one of the Minsk cemeteries and buried there by soldiers, without leaving any recognizable sign of the name of the prisoner or the exact location of his burial site.

6.4 Counsel states that once the court which pronounced the death sentence is informed of the execution, that court then informs a member of the family of the executed prisoner. The family is thereafter issued a death certificate by the municipal civil status service, where the court decision is referred to as the cause of death.

6.5 Counsel asserts, without giving any further detail, that Mrs. Schedko had informed her son's lawyer, the Supreme Court and the prison authorities that she had submitted a communication to the Human Rights Committee before her son's actual execution.

7.1 On 12 September 2002 the State party replied to the Committee's request⁹ concerning the date of the execution of the author's son, and the exact moment from which the State party was aware of the existence of the communication. It asserts that Mr. Bondarenko was executed on 16 July 1999, further to the decision of the Minsk Regional Court of 22 June 1998. It underlines that the Note of the Office of the United Nations High Commissioner for Human Rights concerning the registration of the communication was dated 28 October 1999, i.e. that the execution took place three months before the State party was informed about the registration of the communication under the Optional Protocol.

7.2 The State party did not offer further observations on the author's allegations.

Issues and proceedings before the Committee

Alleged breach of the Optional Protocol

8. The author has alleged that the State party breached its obligations under the Optional Protocol by executing her son despite the fact that a communication had been sent to the Committee and the author had informed her son's lawyer, the prison authorities and the Supreme Court of this measure, prior to her son's execution and the formal registration of her communication under the Optional Protocol. The State party does not explicitly refute the author's claim, stating rather that it was appraised of the registration of the author's communication under the Optional Protocol by note verbale of 28 October 1999, i.e., three months after the execution. In its earlier case law the Committee had addressed the issue of a State party acting in breach of its obligations under the Optional Protocol

by executing a person who has submitted a communication to the Committee, not only from the perspective whether the Committee had explicitly requested interim measures of protection but also on the basis of the irreversible nature of capital punishment. However, in the circumstances of the current communication and in light of the fact that the first case in which the Committee established a breach of the Optional Protocol for the execution of a person whose case was pending before the Committee¹⁰ was decided and published subsequent to the execution of Mr. Bondarenko, the Committee cannot hold the State party responsible for a breach of the Optional Protocol due to the execution of Mr. Bondarenko after the submission of the communication, but prior to its registration.¹¹

Admissibility considerations

9.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

9.2 The Committee notes that the same matter is not being examined under any other international procedure and that domestic remedies have been exhausted. The conditions set forth in paragraphs 2 (a) and (b) of article 5 of the Optional Protocol are therefore satisfied.

9.3 The Committee has noted the author's allegations that the courts did not have clear, convincing and unambiguous evidence, proving her son's guilt of the murders, and that the President of the Supreme Court ignored the testimony of her son's co-defendant given after the trial and refused to include evidence which could have mitigated her son's guilt. In the author's opinion, this shows conclusively that the court had a preordained attitude as far as her son's guilt was concerned, and displays the lack of independence and impartiality of the courts, in violation of articles 6 and 14 of the Covenant. These allegations therefore challenge the evaluation of facts and evidence by the State party's courts. The Committee recalls that it is generally for the courts of States parties to the Covenant to review facts and evidence in a particular case, unless it can be shown that the evaluation of evidence was clearly arbitrary or amounted to a denial of justice, or that

¹⁰ Communication No. 869/1999, *Piandiong et al. v. The Philippines*.

¹¹ Communications Nos. 839/1998, 840/1998, and 841/1998, *Mansaraj et al. v. Sierra Leone, Gborie et al. v. Sierra Leone*, and *Sesay et al. v. Sierra Leone*, paragraph 5.1 et seq.; communication No. 869/1999, *Piandiong et al. v. The Philippines*, paragraph 5.1 et seq.

⁹ See endnote No. 2.

the court otherwise violated its obligation of independence and impartiality. The information before the Committee does not provide substantiation for a claim that the decisions of the Minsk Regional Court and the Supreme Court suffered from such defects, even for purposes of admissibility. This part of the communication is accordingly inadmissible pursuant to article 2 of the Optional Protocol.

9.4 The Committee considers that the author's remaining allegation, namely that the authorities' failure to inform, either through the condemned prisoner or directly, his family of the date of execution, as well as the authorities' failure to inform her of the exact location of the burial site of her son, amounts to a violation of the Covenant, is admissible insofar as it appears to raise an issue under article 7 of the Covenant.

9.5 The Committee thus declares the communication admissible to the extent outlined in paragraph 9.4 above and proceeds to the examination on the merits of this claim.

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 Committee notes that the author's claim that her family was informed of neither the date, nor the hour, nor the place of her son's execution, nor of the exact place of her son's subsequent burial, has remained unchallenged. In the absence of any challenge to this claim by the State party, and any other pertinent information from the State party on the practice of execution of capital sentences, due weight must be given to the author's allegation. The Committee understands the continued anguish and mental stress caused to the author, as the mother of a

condemned prisoner, by the persisting uncertainty of the circumstances that led to his execution, as well as the location of his gravesite. The complete secrecy surrounding the date of execution, and the place of burial and the refusal to hand over the body for burial have the effect of intimidating or punishing families by intentionally leaving them in a state of uncertainty and mental distress. The Committee considers that the authorities' initial failure to notify the author of the scheduled date for the execution of her son, and their subsequent persistent failure to notify her of the location of her son's grave amounts to inhuman treatment of the author, in violation of article 7 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 7 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 author with an effective remedy, including information on the location where her son is buried, and compensation for the anguish suffered. The State party is also under an obligation to prevent similar violations in the future.

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 or 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 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

Communication No. 900/1999

Submitted by: Mr. C. [name withheld] (represented by Nicholas Poynder)

Alleged victim: The author

State party: Australia

Date of adoption of Views: 28 October 2002 (seventy-sixth session)

Subject matter: Complainant's deportation to country where he risks torture

Procedural issues: Exhaustion of domestic remedies - Effective and available remedy

Substantive issues: Arbitrary detention - Inability to challenge lawfulness of detention - Failure to treat mental condition - Cruel, inhuman and degrading treatment

Articles of the Covenant: 7 and 9, in conjunction with article 2, paragraph 1

Articles of the Optional Protocol and Rules of Procedure: 5, paragraph 2 (b), and rule 86

Finding: Violation (articles 7 and 9, paragraphs 1 and 4)

1. The author of the communication, initially dated 23 November 1999, is Mr. C.,¹ an Iranian national, born 15 January 1960, currently imprisoned at Port Phillip Prison, Melbourne. He claims to be a victim of violations by Australia of articles 7 and 9,² in conjunction with article 2, paragraph 1, of the Covenant. He is represented by counsel.

1.2 Following submission of the communication to the Human Rights Committee on 23 November 1999, a request for interim measures, pursuant to Rule 86 of the Committee's Rules of Procedure, was transmitted on 2 December 1999 requesting the State party to stay the author's deportation whilst his case was before the Committee.

The facts as presented

2.1 The author, who has close family ties in Australia³ but none in Iran, was lawfully in Australia from 2 February 1990 to 8 August 1990 and left thereafter. On 22 July 1992, the author returned to Australia with a Visitor's Visa but no return air

ticket, and was detained, as a "non-citizen" without an entry permit, in immigration detention under (then) s.89 *Migration Act* 1958 pending removal ("the first detention").

(a) First application for refugee status and subsequent proceedings

2.2 On 23 July 1992, he made an application for refugee status, on the basis of a well-founded fear of religious persecution in Iran as an Assyrian Christian. On 8 September 1992, a delegate for the Minister of Immigration and Multicultural Affairs refused the application. On 26 May 1993, the Refugee Status Review Committee upheld the refusal, and the author appealed against this refusal to the Federal Court.⁴

(b) Application to the Minister for interim release and subsequent proceedings

2.3 Meanwhile, in June 1993, the author applied to the Minister for Immigration for interim release from detention pending the decision of the Federal Court on his refugee application. On 23 August 1993, the Minister's delegate rejected the application, observing that there was no power under s.89 *Migration Act* to release a person unless the person was removed from Australia or granted an entry permit. On 10 November 1993, the Federal Court rejected the author's application for judicial review of the Minister's decision, confirming that no residual/discretionary power existed in s.89 *Migration Act*, either expressly or by implication, enabling release of a person detained thereunder. On 15 June 1994, the Full Court of the Federal Court dismissed the author's further appeal. It rejected inter alia an argument that article 9, paragraph 1, of the Covenant favoured an interpretation of s.89 which authorized only a minimum period of detention, and implied, where necessary, a power of release from custody pending the determination of an application for refugee status.

(c) Release on mental health grounds and second application for refugee status

2.4 On 18 August 1993, the author was psychologically assessed.⁵ The assessment followed

¹ Name withheld, at victim's request.

² While the author cited article 10 on the cover page of his communication, the subsequent substantive argument was directed to article 9 (see paragraph 3.3 *infra*), and the Committee accordingly takes the communication to proceed on the latter basis.

³ The author's mother, along with his brother and sister-in-law reside in Australia, while his father is deceased. Another brother resides in Canada.

⁴ It is unclear from the record whether the author's appeal to the Federal Court on the issue of the rejection of his first application for refugee status was ever heard.

⁵ "Psychological Report" of Forensic Psychologist Elizabeth Warren, dated 19 August 1993.

“some concern for his emotional and physical health following a lengthy incarceration”. The author, who had attempted to commit suicide by electrocution, repeated his intent to commit suicide and exhibited “extreme scores on all the depression scales”. He had been prescribed tranquilizers in August 1992 and from March to June 1993. The psychologist, observing “coarse tremor”, considered his paranoia “not unexpected”. She saw “many indications of the toll that twelve months of imprisonment has had upon him”, finding him “actively suicidal” and “a serious danger to himself”. He could not accept the visits of his family, having developed “a sense of persecution at the center and believ[ing] that they speak loudly to hurt him”. She considered “if he were free he would be able to regain a sense of sanity”.

2.5 On 15 February 1994, the author’s deteriorating psychiatric condition was again assessed.⁶ The expert recommended “further psychiatric assessment and treatment on an urgent basis”, which would unlikely be of benefit in continued detention. The author “need[ed] some respite from these conditions [of detention] urgently”, and an assessment of appropriate external arrangements “should be explored as a matter of urgency” to avoid “a risk of self harm or behavioural disturbance if urgent steps are not taken”. On 18 June 1994, at the request of detention center staff, the same expert reassessed the author.⁷ He found significant deterioration, with an increased sense of being watched and persecuted and “clear-cut delusional beliefs”. As previously, there was significant depression, with the expert considering that the author had deteriorated to “a frank delusional disorder with depressive symptoms in addition”. He clearly required anti-psychotic medication and possibly anti-depressants subsequently. As his condition was “substantially due to the prolonged stress of remaining in detention”, the expert recommended release and external treatment. He warned however that “there is no guarantee that his symptomatology will resolve rapidly even if he were released and he would

require expert psychiatric care in the wake of release to monitor this recovery process”.

2.6 On 10 August 1994, pursuant to s.11 *Migration Act*, the author was released from detention into his family’s custody on the basis of special (mental) health needs. At this point, the author was behaving delusionally and was undergoing psychiatric treatment. On 29 August 1994, the author again applied for refugee status, which was granted on 8 February 1995 in view of the author’s experiences in Iran as an Assyrian Christian, along with the deteriorating situation of that religious minority in Iran. Weight was also attached to “marked deterioration in his psychiatric status over the protracted period of his detention and diagnosis of delusional disorder, paranoid psychosis and depression requiring pharmaceutical and psychotherapeutic intervention”, which would heighten adverse reaction by the Iranian authorities and the extremity of the author’s reaction. On 16 March 1995, he was granted the corresponding protection visa in recognition of his refugee status.

(d) The criminal incidents and subsequent criminal proceedings

2.7 On 20 May 1995, the author, mentally deluded and armed with knives, broke into the home of a friend and relative by marriage, Ms. A, and hid in a cupboard. On 17 August 1995, he pleaded guilty to charges of being unlawfully on premises and intentionally damaging property, and received a non-custodial community-based order and psychiatric treatment. On 1 November 1995, the author returned to Ms. A’s home, damaging property and threatening to kill her, and was arrested. On 18 January 1996, the author made further threats to kill Ms. A by telephone, and was again arrested and detained in custody. As a result of the latter two incidents, on 10 May 1996, the author was convicted in the Victoria County Court of aggravated burglary and threats to kill, and was sentenced cumulatively to a term of 3½ years imprisonment (with 18 months before parole). The author did not appeal the sentence.

(e) Deportation order and subsequent substantive review proceedings

2.8 On 16 December 1996, the author was interviewed by a delegate of the Minister with a view to possible deportation as a non-citizen, being in Australia less than 10 years, who had committed a crime and been sentenced to at least a year in prison. On 21 October 1996, the author underwent a psychiatric assessment at the request of the Minister’s delegate.⁸ The assessment, noting that no

⁶ “Confidential Psychiatry Report” of Dr. Patrick McGorry MB BS, PhD, MRCP (UK), FRANZCP, dated 4 March 1994. In summary, the mental state examination revealed “a very distressed man”, on tranquilisers, describing “disturbed behaviour” and “persecutory ideation” with clearly impaired memory and concentration. His mood was of “anxiety tension and dysphoria”. The expert considered the author to be suffering from “a mixed anxiety and depressive state”, meeting the criteria for “major depressive disorder” with “severe anxiety symptoms”. A delusional disorder could not be ruled out.

⁷ “Confidential Psychiatry Report” of Dr. Patrick McGorry, dated 27 June 1994.

⁸ Psychiatric Report by Dr. Douglas R Bell, Senior Registrar Psychiatry, Department of Human Services.

previous illness was apparent and that his morbid-origin persecutory beliefs developed in detention, found “little doubt that there was a direct causal relationship between the offence for which he is currently incarcerated and the persecutory beliefs that he held on account of his [paranoid schizophrenic] illness”. It found, as a result of treatment, a decreasing risk of future acts based on his illness, but an ongoing need for careful psychiatric supervision. On 24 January 1997, the author underwent a further psychiatric assessment coming to similar conclusions.⁹ On 8 April 1997, the Minister ordered the author deported on this basis.

2.9 On 24 April 1997, the author appealed the deportation order to the Administrative Appeals Tribunal (AAT). On 28 July 1997¹⁰ and 1 August 1997,¹¹ the author underwent further psychiatric assessments. On 26 September 1997, the AAT dismissed the author’s appeal, while appearing to accept that the author’s mental ill health was caused

⁹ Confidential Psychiatric Report, dated 29 January 1997, by Prof. Patrick McGorry, Center for Young People’s Mental Health. He found: “Prior to his detention there had been no evidence of a psychiatric illness whatsoever and the stress of the detention centre experience and the uncertainty about his future which was extreme given the duration of his detention had precipitated a severe psychotic illness.” “[H]e would not have developed this serious psychiatric disorder had he not been placed in extended and indeterminate detention.” “[He] has come in contact with the criminal justice system purely as a result of developing a psychiatric illness which produced delusional beliefs upon which he acted.” In light of appropriate medication, his mental state was much improved.

¹⁰ Psychological Report, dated 5 August 1997, by Dr. Elizabeth Warren, Healey and Warren Psychologists. The report noted a willingness to comply with treatment regimes and concluded inter alia that “As the period of detention in [MDIC] increased, this man’s mental state changed from one of anxiety, depression, suicidal preoccupation and suspiciousness - to one of a frankly psychotic and delusional nature.”

¹¹ Confidential Psychiatric Report, dated 5 August 1997, by Prof. Patrick McGorry, University of Melbourne. While finding the author posed, in the light of treatment, a “minimal and acceptable” level of risk, it reiterated that his trauma and morbidity “was originally produced by his prolonged and at that time indeterminate incarceration ... [which] was the key factor to the triggering and onset of his severe mental illness for which he now suffers. This is particularly so since there appears to be no family history of any mental disorder and no other apparent source of vulnerability to such a disorder”. On 17 December 1998, the same expert submitted another report finding inter alia that “his original illness was precipitated by his initial detention following arrival in Australia”.

by his protracted immigration detention.¹² On 11 November 1997, the psychiatrist treating the author during his criminal sentence interceded *proprio motu* before the Minister on the author’s behalf.¹³ On 29 July 1998, the author succeeded on appeal to the Federal Court of Australia, on the basis that his mental disturbance and personal circumstances had not sufficiently been taken into account in assessing whether the author’s offence of threatening to kill was a “particularly serious crime”, which, under article 33 of the Convention on the Status of Refugees 1951 (“the Convention”), could justify refoulement. The case was accordingly remitted to the AAT. In March 1998, treatment of the author with a particular drug (Clorazil) was commenced, which contributed to dramatic improvements in the author’s condition.

2.10 On 26 October 1998, the AAT, differently constituted, again affirmed the deportation decision after rehearing. The AAT found that, while he could suffer a recurrence of his delusional behaviour in Iran which given his ethnicity and religion could lead to a loss of freedom, this would not be “on account of” his race or religion”. Accordingly, he fell outside the provisions of the Convention. It also found that, while the author remained under control when he took appropriate medication,¹⁴ he believed he was not ill and that there was a real chance he would cease his medication. While it found a “lack of certainty” that the author would be able to obtain Clorazil in Iran, it made no findings on the standard

¹² The Tribunal found: “The evidence is ... incontrovertible that the stress and anxiety of the detention and uncertainty about his future has precipitated the severe psychotic illness. During the protracted period of his immigration detention he suffered a marked deterioration in his mental health. There was no evidence of any mental illness prior to his detention in immigration custody ... [H]e spent more than two years in immigration detention and was released only, it seems, because of his deteriorating mental health.” *[C] v. Minister for Immigration and Ethnic Affairs* [citation deleted].

¹³ Consultant Psychiatrist Barrie Kenny stated: “The consensus of those of us who have been involved with this man, is that the period of detention itself may have precipitated this delusional disorder that he has obviously suffered from. (We make that assertion on the basis of the complete absence of any prior symptomatology, the fact that he had functioned well in Iran as an Accountant and that when his delusional material is under control, he functions and presents himself very well indeed).”

¹⁴ On this point, the AAT was satisfied “that the reason [the author] no longer has delusional thoughts and is thinking more clearly about the current place of people such as [his victim] in his life has been his treatment with the drug Clorazil” and that “the likelihood of [the author] reoffending and so endangering the community, are so small as to be negligible while he remains on Clorazil”; “The drug Clorazil has been successful”.

of Iranian health care facilities. However, it considered that the author was at grave risk of not seeking out appropriate treatment generally, and in particular Clorazil, without which his psychotic delusions would return. It considered that there was no evidence of back-up treatment in Iran should the author fail to take his medication, and that the likelihood of a recurrence of illness was greater in Iran than Australia. It made no finding on the cause of the author's mental illness.

2.11 On 23 November 1998, the author again appealed the AAT's decision to the Federal Court. On 4 December 1998, the author was granted parole from his criminal conviction under strict conditions,¹⁵ but remained in immigration detention pending the appeal against the AAT's decision. On 15 January 1999, the Federal Court, by expedited hearing, again allowed the author's appeal against the AAT's decision. It found that the AAT had improperly construed the protection of article 33 of the Convention,¹⁶ and moreover that it had again failed to properly consider the mitigating circumstances constituted by the author's state of mind at the time of commission of the offences. The Court remitted the case to the AAT for urgent hearing, and accordingly denied the author's accompanying motion for interim release. On

¹⁵ The author had actually become eligible for parole in July 1997, but the Parole Board deferred its decision due to the deportation proceedings set in train by the Minister. The Parole Board had before it a Psychiatric Report, dated 16 March 1998, it had requested from Consultant Psychiatrist Barrie Kenny stating inter alia "The fact that he developed this psychotic state, in detention, without a prior relevant history, strongly suggests that his psychotic state may well have been precipitated by the experience of prolonged detention."

¹⁶ On this issue, the Court found: "Given the findings of the AAT concerning what would be likely to happen to the applicant on return to Iran and its finding that a return to a psychotic state would be likely to bring him to the attention of the authorities and further, given that because of his ethnicity and religion he may lose his freedom, I find that the AAT's conclusion that the [author] does not have the protection of article 33 (1) of the Convention so unreasonable that no reasonable tribunal could so conclude. The AAT outlined circumstances where the [author], if returned to Iran, may, as a result of being ill, bring himself to the attention of the authorities and be incarcerated, at least in part as a result of those authorities discovering that he is an Assyrian Christian. It is absurd for the AAT to contend that the [author's] freedom would not thereby be threatened on account of his race and religion. Of course the trigger for the persecution may be his mental state, but once there exists the likelihood of persecution which is in part on account of a Convention based reason it matters little that the triggering of the persecution was a matter which is extraneous to a Convention based reason". *[C] v. Minister for Immigration and Multicultural Affairs* [citation deleted].

5 February 1999, the Minister appealed the Federal Court's decision to the Full Court of the Federal Court ("the Full Court"). On 20 July 1999, the Full Court allowed the Minister's appeal against the judgement of 15 February 1999, holding that the AAT's findings in "an extremely difficult case", while "debatable", had been open to it on the evidence and had properly balanced the competing factors.¹⁷ The Court noted that "while [his] illness can be controlled by medication available in Australia [Clorazil], the medication is probably not available in Iran". Accordingly, the effect of the decision was that the deportation order stood. On 5 August 1999, the author applied to the High Court for special leave to appeal against the Full Court decision. On 11 February 2000, the application for special leave was dismissed.

(f) The applications to the Minister and subsequent proceedings

2.12 On 19 January 1999, following the Federal Court's second decision in the author's favour against the AAT, and later in February and March, the author applied to the Minister for revocation of the deportation order and for release from immigration detention, supplying a substantial body of medical opinion in support.

2.13 On 11 and 18 March 1999, the Minister decided that he would not order the author's release and that he would remain in detention. On 29 March 1999, the author applied to the Federal Court for judicial review of the Minister's decision. On 8 April 1999, the author sought interim relief pending the decision of the Federal Court on the main 29 March application. On 20 April 1999, the Federal Court dismissed the application by the author for review of the Minister's decision not to release him. The Court considered that, while there was a serious question as to whether the Minister had taken into account an irrelevant consideration when making his decision, the balance of convenience favoured refusal of the order given the imminence of appeal to the Full Court on the AAT's decision. On 19 May 1999, the Minister supplied his reasons for declining the author's release. He assessed, relying in part upon the AAT decisions which had been vacated on appeal, the possibility of the author's reoffending as significantly high and concluded that the author constituted a continuing danger to the community and to his victim. On 15 October 1999, the Minister

¹⁷ The Court accepted, nonetheless, that the author's "illness developed as a result of his detention pending the determination of his application for a protection visa. That application was ultimately determined in his favour. The illness was a significant factor causing [the author] to commit the crimes which gave rise to his liability to deportation". *Minister for Immigration and Multicultural Affairs v. [C]* [citation deleted].

responded to requests of 6 and 22 September 1999, and 15 October 1999, for revocation of the deportation order and/or interim release pending final determination of his case. He refused the request for interim release, and stated that he was continuing to assess the request for revocation of the deportation order. In December 2000, the Minister declined, following further requests for intervention, to release the author.¹⁸

The complaint

3.1 The author contends that he has suffered a violation of his rights under article 7 in dual fashion. Firstly, he was detained in such a way and for such a prolonged period (from his arrival on 22 July 1992 until 10 August 1994) as to cause him mental illness, from which he did not earlier suffer. The medical evidence was unanimous in concluding that his severe psychiatric illness was brought about by his prolonged incarceration,¹⁹ and this had been accepted by the AAT and the courts. The author contends that he was initially imprisoned without any evidence of a risk of abscondment or other danger to the community. He could have been released into the community with commonly utilized bail conditions such as a bond or surety, or residential and/or reporting requirements. The author also alleges that his current detention is in breach of article 7.²⁰

3.2 Secondly, the author argues a violation of article 7 by Australia in that his proposed deportation to Iran would expose him to a real risk of a violation of his Covenant rights, at least of article 7 and possibly also article 9, by Iran. He refers in this connection to the Committee's jurisprudence that if a State party removes a person within its jurisdiction, and the necessary and foreseeable consequence is a violation of that person's rights under the Covenant in another jurisdiction, the State party itself may be in violation of the Covenant.²¹ He considers that the Minister's delegate found that the author had a well-founded fear of persecution in Iran because of his religion and because his psychological state may bring him to the notice of the authorities which could lead to the deprivation of his liberty under such conditions as to constitute persecution. Far from

¹⁸ It is not clear whether this was, or included, a decision on the request for revocation of the deportation order still pending from the Minister's deferral of that question on 15 October 1999.

¹⁹ See footnotes 5, 6, 7, 8, 9, 10, 11, 13 and 15, *supra*.

²⁰ This is clarified by his subsequent (final) submissions of 21 September 2001. See paragraph 5.3 (with footnote 57), paragraph 6.3 and paragraphs 6.5 to 6.8.

²¹ *ARJ v. Australia* (No. 692/1996) and *T. v. Australia* (No. 706/1996), coupled with General Comment 20 on article 7.

being overturned in subsequent proceedings, the AAT in fact affirmed this position. Moreover, the author argues that the pattern of conduct shown by Iran supports the conclusion that he will be exposed to a violation of his Covenant rights in the event of deportation.²²

3.3 The author further claims that his prolonged detention in Australia upon arrival breaches articles 9, paragraphs 1 and 4, of the Covenant, as he was detained upon arrival under the mandatory (non-discretionary) provisions of (then) s.89 *Migration Act*. Those provisions do not provide for any review of detention, either by judicial or administrative means. The author considers his case to fall within the principles laid down by the Committee in its Views in *A v. Australia*,²³ in which the Committee held that detention, even of an illegal immigrant, which was neither reviewed periodically nor otherwise justified in the particular case violated article 9, paragraph 1, and that the absence of real judicial review including the possibility of release violated article 9, paragraph 4. The author emphasizes that, as in *A's* case, there was no justification for his prolonged detention, and that the present legislation had the same effect of depriving him of the ability to make an effective judicial application for review of detention. For these violations of article 9, the author seeks adequate compensation for his detention under article 2, paragraph 3. The author also maintains that his current detention is in violation of article 9.²⁴

State party's admissibility and merits submission

4.1 By submissions of 1 March 2001, the State responded on the admissibility and the merits of the author's claims.

²² In this connection the author supplies reports, dated 14 December 1994, 1 August 1997, and 19 November 1999, by Dr. Colin Rubinstein, Senior Lecturer in Middle East Politics (Monash University) and member of Victorian Ethnic Affairs Commission, detailing "real and effective discrimination against Christians", "effective intimidation", "the fiercest campaign since 1979 against the small Christian minority", including killings of clerics and arrests of apostates and a "gradual eradication of existing churches under legal pretences". The situation for minorities, including Christians, is "clearly degenerating" and "deteriorating rapidly". Accordingly, the author could expect a "high probability of vindictive retaliation" and "real persecution" in the event of his return.

²³ No. 560/1993.

²⁴ This is clarified by his subsequent (final) submissions of 21 September 2001. While the initial complaint appears confined to the initial period of detention, the State party's main submissions also address the second detention from the perspective of article 9 (see especially paragraphs 4.22-4.24 and 4.32-4.35).

4.2 As to the admissibility of the claims made under article 7, the State party argues that most of the claims are inadmissible. In respect of the first claim that the prolonged detention violated article 7, the State party considers that the claim is unsubstantiated, that it is beyond the scope of article 7, and that domestic remedies have not been exhausted. The author has not advanced any evidence of acts or practices by the State party rising beyond the mere condition of detention that would have rendered his detention particularly harsh or reprehensible. The only evidence submitted is that the author developed paranoid schizophrenia while in detention, whereas no evidence is submitted that his mental illness was caused by being subjected to any maltreatment of the type prohibited by article 7. Secondly, as the complaint is, in truth, an attack on the author's detention *per se* rather than on a reprehensible treatment or aspect of detention, it falls outside the scope of article 7 as previously determined by the Committee. Thirdly, the State party considers that the author has not exhausted domestic remedies. He could either file a complaint with the Human Rights and Equal Opportunity Commission (HREOC), which tables reports in Parliament, or to the Commonwealth Ombudsman, who could recommend remedies, including compensation.

4.3 In respect of that part of the second portion of the claim under article 7 that invokes the State party's responsibility for a subsequent violation in Iran of the author's rights under article 9, the State party argues that this falls outside the scope of article 7. The State party contends that the prohibition on refoulement under article 7 is limited to risks of torture or cruel, inhuman or degrading treatment or punishment. This prohibition does not extend to violations of article 9 as detention *per se* is not a violation of article 7.²⁵ Further the Committee has never stated that article 9 has a comparable non-refoulement obligation attached to it. The State party interprets *ARJ v. Australia*²⁶ for the proposition that due process guarantees are not within the ambit of the prohibition on non-refoulement, and argues that by analogy, neither would potential violations of article 9.

4.4 As to the admissibility of the claims made under article 9, the State party does not contest the admissibility of the claim made under article 9, paragraph 1, but considers the claim under article 9, paragraph 4, inadmissible for failure to exhaust domestic remedies and want of substantiation. The State party contends that the author's initial period of detention was considered and declared lawful by

both a single judge, and on appeal, a Full Court, of the Federal Court. At no stage during his initial or subsequent detention did the author seek habeas corpus or invoke the High Court's original jurisdiction to seek a writ of mandamus or other remedy. The State party recalls that mere doubts about the effectiveness of remedies does not relieve the claimant from the requirement to pursue them.²⁷ The State party also argues that the author's claim is simply an allegation that there was no way that he could apply to be released from detention, either administratively or by a court. He has not advanced any evidence of how article 9, paragraph 4, had been violated, and, as stated above, he did in fact challenge the lawfulness of his detention on several occasions. The claim is accordingly unsubstantiated.

4.5 As to the merits of the claims, the State party considers all of them to be unfounded.

4.6 As to the first portion of the claim under article 7 (related to the author's detention), the State party notes that, while the Committee has not drawn sharp distinctions between the elements of article 7, it has nevertheless drawn broad categories. It observes that torture relates to deliberate treatment intended to cause suffering of a particularly high intensity and cruelty for a certain purpose.²⁸ Cruel or inhuman treatment or punishment refers to acts (primarily in detention) which must attain a minimum level of severity, but which do not constitute torture.²⁹ "Degrading" treatment or

²⁷ *N.S. v. Canada*, No. 29/1978.

²⁸ McGoldrick, G. (1991), *The Human Rights Committee: Its role in the development of the International Covenant on Civil and Political Rights*, Clarendon Press, Oxford; Nowak M. (1993), *United Nations Covenant on Civil and Political Rights: CCPR Commentary*, Engel, Kehl. Thus, acts previously found by the Committee to constitute torture include systematic beatings, electro-shocks, submersion in a mixture of water, blood and human waste, burns, and simulated executions or amputations. (*Grille Motta v. Uruguay* No. 11/1977; *Burgos v. Uruguay* No. 52/1979; *Sendic v. Uruguay* No. 63/1979; *Angel Estrella v. Uruguay* No. 74/1980; *Herrera Rubio v. Colombia* No. 161/1983; and *Lafuente v. Bolivia* No. 176/1984.)

²⁹ Violations have been found in the following categories of situations: direct assaults on persons, harsh conditions of detention, imposition of extended solitary confinement and inadequate medical and psychiatric treatment for detainees, with examples being administering severe corporal punishments (amputation, castration, sterilization, blinding and so forth), systematic beatings, electro shocks, burns, extended hanging from hand and/or leg chains, standing for great lengths of time, threats, detaining people bound and blindfolded, subjecting detainees to cold, giving detainees little to eat, detaining people *incommunicado*, as well as aggravated forms of carrying out a death sentence. See *Carballal v.*

²⁵ *Vuolanne v. Finland*, No. 265/1987.

²⁶ *Op. cit.*

punishment is the 'weakest' level of violation of article 7, in which the severity of suffering is less important than the level of humiliation or debasement to the victim.³⁰

4.7 Accordingly, it is clear that while particularly harsh conditions of detention may constitute a violation of article 7 (whether the suffering is physical or psychological), detention, in and of itself, is not a violation of article 7. In *Vuolanne v. Finland*, the Committee expressed the view that "for punishment to be degrading, the humiliation or debasement must exceed a particular level and must, in any event, entail other elements beyond the mere fact of deprivation of liberty".³¹ Similarly, the Committee has consistently expressed the view that, even prolonged periods of detention on "death row" do not violate article 7.³² For detention to violate article 7 there must be some element of reprehensibility in the treatment of detainees.

4.8 Assessing the general conditions of immigration detention in the light of these standards, the State party emphasizes that to ensure the well-being of all persons in immigration detention, it has instituted Immigration Detention Standards that govern the living conditions of detainees within its detention facilities and specify the distinctive nature of services that are required in an immigration detention environment. These standards address protection of the privacy of detainees; health care and safety; spiritual, social, educational and recreational activities; interpreters; and training of detention centre staff in cultural diversity and the like. The State party submits that conditions at the MIDC are humane and such as to ensure the comfort of residents while they are awaiting the outcome of their visa applications.

4.9 Turning to the author's particular situation, at no time during his detention did he make a complaint to DIMA, the Commonwealth Ombudsman, the Human Rights and Equal Opportunity Commission or the United Nations

Uruguay, No. 33/1978; *Massiotti v. Uruguay*, No. 25/1978; *Bequio v. Uruguay*, No. 88/1981; *Cariboni v. Uruguay*, No. 159/1983; and *Portorreal v. Dominican Republic*, No. 188/1984.

³⁰ Such acts include arbitrary detention practices aimed at humiliating prisoners and making them feel insecure (for example, repeated solitary confinement, submission to cold and persistent relocation to a new cell): *Conteris v. Uruguay*, No. 139/1983, and women prisoners hanging naked from handcuffs: *Isoriano de Bouton v. Uruguay* No. 37/1978 and *Arzuaga Gilbao v. Uruguay* No. 147/1983.

³¹ *Op. cit.*, at 9.2.

³² *Graham v. Jamaica*, No. 461/1991; *Kindler v. Canada*, No. 470/1991; *Johnson v. Jamaica*, No. 588/1994; *Chaplin v. Jamaica*, No. 596/1994.

High Commissioner for Refugees, the possibilities of which were well advertised. The author was at all times treated humanely at the MIDC, and his physical and mental integrity and well-being were afforded particularly high priority, over and above the level of ordinary care, by MIDC staff. For example, following his complaints about noise levels, MIDC staff reduced the volume level on the announcement system and reduced the number of times the system was used during the day. Further, when he complained of being unable to sleep because of noise in the dormitory area, alternative sleeping arrangements were offered to him. Similarly, prior to his actual release into family care, MIDC staff arranged for him to be taken out to his family on a fortnightly basis so that he could have a meal with them and get a break from the routine of the IDC. Eventually, on 10 August 1994, the author was released on an ongoing basis into the care of his family when it became apparent that his psychological state warranted this measure. Further, at all times he was provided with adequate and professional medical attention.

4.10 Turning to the development of the author's paranoid schizophrenia, the State party contends that there is a convincing body of literature indicating that a predisposition for schizophrenia is genetically determined.³³ Thus, while it is deeply unfortunate that the author's schizophrenic symptoms developed while in detention, he is likely to have been predisposed to develop the condition, and the development of this condition does not necessarily reflect the conditions under which he was detained. While acknowledging that any deprivation of liberty may cause some psychological stress, such emotional stress does not amount to cruel, inhuman or degrading treatment (and certainly does not constitute a punishment). In any case, medical evidence indicates that the development of schizophrenia is not linked to the experience of a "gross stressor".

³³ Davidson, G.C. and Neale, J.M. (1994), *Abnormal Psychology (6th ed.)*, John Wiley & Sons, Brisbane; Gottesman, I.I., McGuffin, P. and Farmer, A.E. (1987), Clinical genetics as "clues" to the real genetics of schizophrenia, *Schizophrenia Bulletin*, 13, 23-47; Dworking, R.H., Lenzenwenger, M.F. and Moldin, S.O. (1987), Genetics and the phenomenology of schizophrenia. In P.D. Harvey and E.F. Walker (Eds.), *Positive and negative symptoms of psychosis*, Elrbaum, Hillsdale, NJ; Gottesman, I.I. and Shields, J. (1972), *Schizophrenia and genetics: A twin study vantage point*, Academic Press, New York; Rosenthal, D. (1970), *Genetic theory and abnormal behaviour*, McGraw-Hill, New York; and Fischer, M. (1971), Psychosis in the offspring of schizophrenic monozygotic twins and their normal co-twins, *British Journal of Psychiatry*, 118, 43-52.

4.11 As to the second portion of claims under article 7 (concerning future violations of his rights in Iran in the case of a deportation), the State party accepts that it is under a limited obligation not to expose the author to violations of his rights under the Covenant by returning him to Iran.³⁴ It submits, however, that this obligation does not extend to all rights in the Covenant, but is limited to only the most fundamental rights relating to the physical and mental integrity of the person.³⁵ From the Committee's jurisprudence, the State party understands that this obligation has only been considered in relation to the threat of execution (art. 6)³⁶ and torture (art. 7) upon return, and accordingly it submits that this obligation is limited to these two rights under article 6 and article 7. In relation to article 7, the prohibition must plainly relate to the substance of that article, and can therefore only encompass the risk of torture and, possibly, cruel, inhuman or degrading treatment or punishment. The State party considers that the Committee has itself stated that the prohibition under article 7 does not extend, for example, to due process guarantees under article 14.³⁷ It adds that it is well established that the risk of a violation of article 7 must be real in the sense that the risk of a violation must be the necessary and foreseeable consequence of a person's return.³⁸

4.12 Turning to the case at hand, the State party rejects the author's contention that it is a necessary and foreseeable consequence of his return to Iran that he will be subjected to torture or cruel, inhuman or degrading treatment or punishment for three reasons.

4.13 Firstly, the recognition of the author's refugee status was based on many considerations other than the risk of an article 7 violation. The State party contends that the granting of refugee status was made on the basis that he might suffer "persecution" in the event of return. The State party submits that "persecution" may be understood as persistent harassment by, or with the knowledge of, authorities.³⁹ The core meaning of "persecution" readily includes the deprivation of life or physical freedom, but also encompasses such harassment as

denial of access to employment, to the professions or education, and restriction of the freedoms traditionally guaranteed in a democratic society, such as speech, assembly, worship or freedom of movement.⁴⁰ Factors such as discrimination experienced in employment, education and housing, difficulties in practising his religion and the deteriorating human rights situation in Iran at the time were considered in granting the author's application. Persecution is, thus, a much broader concept than that encompassed by article 7 of the ICCPR, and refugee recognition should not lead the Committee to the conclusion that it is a necessary and foreseeable consequence of the author's return to Iran that he would be subjected to article 7 violations.

4.14 Secondly, the State party contends that the reports of Dr. C. Rubinstein on the human rights situation in Iran,⁴¹ upon which the author relies, misrepresent the realities. The State party argues that the human rights situation in Iran has much improved in recent years following the election of a reformist president and government, and refers to the United Nations High Commissioner for Human Rights statement in April 2000 welcoming the report by the Special Representative of the Commission on the improving human rights situation in Iran.⁴² There are indications that relations between the Iranian Government and the Assyrian Christians are improving substantially.⁴³

4.15 The State party argues that it seems that official interference with Christian religious activities is limited to those Christian faiths that proselytize and Muslim individuals who abandon Islam to become Christians, asserting that Assyrian Christians do not actively engage in conversions and, in fact, tend to discourage Muslims from joining their faith. According to information from the State party's Mission in Iran, this means that they are subject to far less scrutiny and harassment than members of other Christian and minority faiths

³⁴ CCPR General Comment 20; 10/04/92, paragraph 9.

³⁵ *ARJ v. Australia* No. 692/1996.

³⁶ *Kindler v. Canada*, op. cit., *Cox v. Canada* No. 539/1993; CCPR General Comment 20, 10/04/92.

³⁷ Op. cit.

³⁸ *Ibid.*

³⁹ Hathaway, J.C. (1991), *The law of refugee status*, Butterworths, Toronto; Goodwin-Gill, G.S. (1996), *The refugee in international law (2nd ed.)*, Clarendon Paperbacks, Oxford.

⁴⁰ Goodwin-Gill, G.S. (1996), *The refugee in international law (2nd ed.)*, Clarendon Paperbacks, Oxford.

⁴¹ See *supra*, note 22.

⁴² E/CN.4/2000/35.

⁴³ The State party cites the 17 September 2000 visit of President Khatami to an Assyrian church, stating that he wished to work towards "resolving differences and working towards all Iranians, Muslims or non-Muslims, to live together hand in hand and to benefit from the joys of a decent honourable life" (IRNA, 17 September 2000), the recent praise of an Iranian Archbishop for Iranian officials for safeguarding religious freedoms for ethnic minorities (IRNA, 30 July 2000), and the fact that in 1998 President Khatami was guest of honour at the Assyrian Universal Alliance annual conference.

may be. To the State party's Government's knowledge, the arrests, attacks and killings of Christians referred to in Dr. Rubenstein's reports represent isolated incidents and are related not to Assyrians, but to evangelistic Christians and apostates.

4.16 The State party's Mission in Iran further advised that Assyrian Christians, if they abide by the laws of the land, are able to lead normal and undisturbed lives. They have not been singled out for discrimination by the Iranian Government for some time. Further, it is clear from the State party's information that Assyrian Christians have never been subjected to the same level of harassment as other minority religions. Assyrian Christians have largely been allowed to carry out their religious activities without interference. There are also strong indications that Assyrian Christians have recently been able to strengthen their political situation. President Khatami has met specifically with the Assyrian Christian Representative of the Majlis (Parliament), Mr. Shamshoon Maqsdpour, who has also been able to bring about changes to Iranian law so as to eliminate any statutory discrimination in the employment of Christians.

4.17 The State party also understands that in 1999 the Islamic Human Rights Commission, which is affiliated with Iran's judiciary, commenced work on upgrading the rights of religious minorities in Iran. This effort should be seen in conjunction with the commitment made recently by the Iranian Government to promote respect for the rule of laws, including the elimination of arbitrary arrest and detention, and to bring the legal and penitentiary system into line with international standards.⁴⁴

4.18 The State party concedes however that the author and his family were subjected to some harassment by the "pasdahs" (vigilante youths) in Iran. On one occasion, he was detained by pasdahs, questioned in relation to the contents of certain cassette tapes found in his car, and released within 48 hours after having suffered some blows to his face. On a second occasion, his family was detained by pasdahs for approximately 24 hours for having served alcohol at a party. They were released without any physical harm. The State party argues that these events occurred some years ago, and there is no indication that the pasdahs specifically targeted the author or his family. These two incidents do not represent a personal persecution of the author, who is not a high profile Assyrian Christian.

4.19 The Australian Government submits that the real situation of an Assyrian Christian in Iran is far more benign than that described by Dr. Rubenstein. In most cases, Assyrian Christians are able to

practise their religion and to live normal lives without harassment by Iranian authorities. Although they may be subject to some continuing discrimination in the field of housing, education and employment, there are strong signs of growing effort on the Iranian Government's behalf to settle differences with Assyrian Christians specifically, and to improve the human rights situation in Iran generally.

4.20 Thirdly, in relation to the potential effects of the author's psychiatric condition, the State party understands from its Mission in Iran that Iranian medical authorities have a good understanding of mental illnesses, that appropriate and comprehensive care is available in Iran both at home and in hospital for persons suffering from mental illnesses (including paranoid schizophrenia). Nor is there any requirement in the hospital admission process for a person to advise of their religion, or any evidence that Assyrian Christians have less than full access to psychiatric facilities. To the State party's knowledge, there is no precedent of persons being arbitrarily detained or subjected to article 7 violations simply on account of their mental illnesses.

4.21 The State party submits that it has taken all possible steps to educate the author about the nature of his condition, so as to promote his ongoing adherence to treatment, and would provide him with all necessary medical documentation for him to receive continued medical attention once he returns to Iran. The assertion that he would not pursue medical treatment upon return to Iran is conjecture, and the author has at all times cooperated with his treatment in Australia. As such, it cannot be stated with any certainty that it is a necessary consequence of his return to Iran that he will cease treatment. Even if he did choose to discontinue his medication, it is not a necessary consequence that he would act in such a way to risk torture or cruel, inhuman or degrading treatment or punishment. The nature of paranoid schizophrenia is such that any violent or bizarre behaviour is linked directly to the sufferer's delusions. Therefore, paranoid schizophrenics do not display globally and consistently aggressive or extraordinary behaviours. Any such behaviour is limited to the object of their delusional thoughts. In the author's case, such behaviour has been limited to very specific persons, and his records do not indicate a history of generalized aggressive or hysterical behaviour towards officials or in official settings. Therefore, the State party does not consider that it is a necessary consequence of the author returning to Iran that he will have an adverse reaction to Iranian authorities.

4.22 As to the author's claims under article 9, the State party also considers them unfounded. It clarifies at the outset that the "initial detention" ran, as a matter of law, from his detention on arrival until

⁴⁴ E/CN.4/2000/35.

the issuance of the protection visa in March 1995, even though as a practical matter he was exceptionally released into his family's care in August 1994, for a person remains by law detained until removed or granted permission to remain in Australia. As to the "current detention" pending execution of a deportation order, detention is not mandatory and an individual can be released at the Minister's discretion.

4.23 Concerning the complaint under article 9, paragraph 1, the State party argues that the prohibition against the deprivation of liberty is not absolute.⁴⁵ While a detention must be lawful in terms of the domestic legal order, it contends that in determining the further element of arbitrariness in a particular case key elements are whether the circumstances under which a person is detained are "reasonable" and "necessary" in all of the circumstances or otherwise arbitrary in that the detention is inappropriate, unjust or unpredictable. It emphasizes that the Committee's jurisprudence of the Committee does not suggest that detention of unauthorized arrivals or detention for a particular length of time could be considered arbitrary per se,⁴⁶ rather the determining factor is not the length of the detention but whether the grounds for the detention are reasonable, necessary, proportionate, appropriate and justifiable in the particular case.

4.24 Turning to the particular case, the State party argues that the author's detention was and is lawful, and reasonable and necessary in all of the circumstances. It is, according to the State party, also clearly distinguishable on the facts from the case of *A v. Australia*.

4.25 As to the initial detention, he was detained by law, under the s.89 Migration Act 1958. This detention was twice judicially confirmed. As to arbitrariness, both the provisions of the Migration Act under which the author was detained, as well as the individual circumstances of his case, justified his necessary and reasonable detention.

4.26 The State party underscores that mandatory immigration detention is an exceptional measure primarily reserved for people who arrive in Australia

without authorization.⁴⁷ It is necessary to ensure that persons entering Australia are entitled to do so, and to ensure that the integrity of the migration system is upheld. The detention of unauthorized arrivals ensures that they do not enter Australia before their claims have been properly assessed and found to justify entry. It also provides officials with effective access to those persons in order to investigate and process their claims without delay, and if those claims are unwarranted, to remove such persons as soon as possible. The State party argues that the detention of unauthorized arrivals is consistent with fundamental rights of sovereignty, including the right of States to control the entry of persons into its territory. As the State party has no system of identity cards or the like for access to social services, it is more difficult to detect, monitor and apprehend illegal immigrants in the community, compared with countries where such a system is in place.⁴⁸

4.27 The State party's experience has been that unless detention is strictly controlled, there is a strong likelihood that people will escape and abscond into the community. In some cases, some unauthorized arrivals who had been held in unfenced migrant hostels with a reporting requirement had absconded. It had also been difficult to gain the cooperation of the local ethnic communities to locate such persons.⁴⁹ As such, it was reasonably suspected that if people were not detained, but rather released in the interim into the community, there would be a strong incentive for them not to adhere to the conditions of release and to disappear into the community. The State party repeats that all applications to enter or remain are thoroughly considered, on a case-by-case basis, and that therefore its policy of detaining unauthorized arrivals is reasonable,⁵⁰ proportionate and necessary in all of the circumstances. As such, the provisions under which the author was detained, while requiring mandatory detention, were not arbitrary, as they were justifiable and proportionate on the grounds outlined above.

4.28 In addition, the individual factors of the author's detention also indicate the absence of arbitrariness. He arrived with a visitor's visa but no return airline ticket, and when questioned at the airport a number of false statements on his visa application form were detected. These included the assertion that his mother and father were living in

⁴⁵ This is confirmed by the *travaux préparatoires* for the drafting of article 9, paragraph 1, reveal that the drafters explicitly contemplated detention of non-citizens for immigration control as an exception to the general rule that no person shall be deprived of his or her liberty.

⁴⁶ In *A v. Australia*, op cit., the length of a period of immigration detention was a factor in assessing the detention as arbitrary, for "detention should not continue beyond the period for which the State can provide appropriate justification".

⁴⁷ Response of the Australian Government, at paragraph 5, to the Views of the Committee in *A v. Australia*.

⁴⁸ Ibid.

⁴⁹ Submission by the Australian Government on Merits of *A. v. Australia*.

⁵⁰ The High Court has also determined that the mandatory detentions provisions are reasonable in terms of the domestic constitutional order: *Lim v. Minister for Immigration and Ethnic Affairs* (1992) 176 CLR 1.

Iran, when in fact his father was dead and his mother was living in Australia and had applied for refugee status. He also stated that he had \$5,000 in funds for his visit, but arrived with no funds and lied in the interview about this matter. He had also purchased a return ticket for the purposes of gaining his visa, but had cashed it in when the visa was granted. As such, it was reasonably suspected that if allowed to enter Australia, he would become an illegal entrant. The detention was accordingly necessary to prevent abscondment, it was not disproportionate to the end sought, and it was not unpredictable, given that the relevant detention provisions had been in force for some time and were published.

4.29 The State party also considers that there were further reasons for the continued detention, pending the assessment of the refugee claim. It was not expected that the processing of the claim would be unduly prolonged so as to warrant his release from detention. The processing and review applications were dealt with expeditiously by both the primary decision maker and the review body, with the author held in detention for just over two years. The original application was processed in less than two months, and the first review of the decision took approximately six weeks. The total time taken from the filing of the first application on 23 July 1992 to the completion of the initial processing and several administrative reviews of the first application for refugee status was less than one year.

4.30 The State party argues that, once it became clear that continued detention was not conducive to the treatment of the author's mental illness, he was released into the care of his family. As such, while detention was mandatory, it was not arbitrary, with the policy underlying the detention provisions flexible enough to provide for release in exceptional circumstances. Therefore, it cannot be said that there were no grounds upon which a person could apply to be released from detention, either administratively, or by a court.

4.31 The State party, while disagreeing with the Committee's Views in *A v. Australia*, notes significant factual differences with that case. Firstly, the length of detention was significantly less (some 26 months rather than 4 years). Secondly, the time taken to process the initial application was significantly less (under 6 weeks rather than 77 weeks). Thirdly, in this case, there is no suggestion that the period and conditions of detention prevented the author from gaining access to legal representation or visits from his family. Finally, he was actually released from the usual places of detention into the care and custody of family members pursuant to an exercise of Executive discretion.

4.32 As to the current detention, the author has been lawfully held in immigration detention,

pursuant to ss.253 and 254 Migration Act 1958, since he was granted parole from his prison sentence on 4 December 1998. Rather than being arbitrary, it is necessary and reasonable in all of the circumstances, and proportionate to the end sought of ensuring he does not abscond pending his deportation and of protecting the Australian community. After appeals were exhausted, the State party stayed the deportation in response to the Committee's rule 86 request pending finalization of this matter. Moreover, the State party submits that it is reasonable to suspect that the author would breach his release conditions and abscond if released.

4.33 The State party notes that its Minister for Immigration personally considered the justification for continued detention on several occasions, and his 11 March 1999 decision not to release the author from detention was reviewed by the Federal Court and found justified. The Minister's reasons for decision clearly indicate that it was not arbitrary. All of the factors relevant to the case were considered in reaching the decision not to grant release, on the basis that there was a significantly high possibility that the author would reoffend and that he constituted a continuing danger to the community and in particular to his victim, Ms. A.

4.34 As to the claim under article 9, paragraph 4, the State party notes that this requires a person to be able to test the lawfulness of detention. The State party rejects the suggestion by the Committee in *A v. Australia* that "lawfulness" in this provision was not limited to compliance with domestic law and must be consistent with article 9, paragraph 1, and other provisions of the Covenant. It contends there is nothing in the terms or structure of the Covenant, or in the *travaux préparatoires* or the Committee's General Comments, that supports such an approach.

4.35 The State party identifies the various mechanisms in its law to test the legality of detention,⁵¹ and states that it was open to the author at all times to pursue these mechanisms. It repeats that, in relation to the first detention, the author never directly applied to the courts for review of his detention, but applied to the Minister for interim release pending the outcome of his appeal against the denial of refugee status. The Minister's rejection of the application was twice upheld in court. As to the current detention, while he has sought interim release, at no time has he directly challenged the lawfulness of his detention. As to the current detention, the State party notes that the author has on

⁵¹ S.75 (v) of the Constitution, and the writ of habeas corpus. It points to the High Court's consideration of the rationale of detention in coming to the conclusion that analogous mandatory detention provisions were constitutional in *Lim v. Minister for Immigration*, op.cit.

several occasions unsuccessfully sought release from the Minister and the Federal Court. The fact that the courts did not rule in his favour is not proof of a violation of article 9, paragraph 4. In any event, he did not seek to exercise avenues available to him to directly challenge the detention. The State party refers to *Stephens v. Jamaica*⁵² for the proposition that a failure to take advantage of an available remedy of, for example, habeas corpus is not evidence of a breach of article 9, paragraph 4.

Author's comments

5.1 By submission of 16 May 2001, the author responded to the State party's submissions.

5.2 As to the State party's submissions on available domestic remedies, the author points to the Committee's jurisprudence that such remedies may be taken to refer to judicial remedies, especially in cases of serious violations of human rights,⁵³ such as arbitrary and prolonged detention. In any case, there is no obligation to pursue remedies that are neither enforceable nor effective,⁵⁴ and neither a complaint to HREOC or the Ombudsman produces a binding order upon the State.⁵⁵ As to the ability to pursue a habeas corpus claim in the High Court, such an act would be futile given that the High Court has upheld the validity of mandatory detention laws.⁵⁶

5.3 In response to the State party's claim that there is no evidence that a breach of article 7 caused the author's mental illness, the author refers to the series of expert assessments of the author over an extended period, provided with the communication, along with a new assessment, unanimously drawing a specific causal link between detention and the psychiatric illness.⁵⁷ The author criticizes the State

⁵² No. 373/1989.

⁵³ *R.T. v. France* No. 262/1987, and *Vicente v. Colombia* No. 612/1995.

⁵⁴ *Ellis v. Jamaica* No. 276/1988.

⁵⁵ The author cites the rejection by the Executive of two recent reports by HREOC finding aspects of the State party's asylum policy in breach of international standards.

⁵⁶ *Lim v. Australia*, op.cit.

⁵⁷ See note 17 for references to the original reports. The additional psychiatric report, dated 7 May 2001, by Associate Professor Harry Minas, Centre for International Mental Health, found that "While genetic factors are important in conferring a predisposition to the development of such illness, it is very often the case that such an illness is precipitated by extreme stress. The stress of prolonged detention, drawn out legal proceedings, and uncertainty as to his fate would be sufficient to precipitate such an illness in a person with the necessary predisposition." The author was now considered to have been "clinically well for at least two, possibly three, years".

party's reliance on generalized psychiatric literature for the opposite proposition that the author's mental harm arose from predisposition rather than prolonged detention, and invites the Committee to prefer the specific assessments of the author. The author submits that the submissions by the State party on living standards at MIDC are not relevant, for the claim of breach of article 7 is the detention of the author for a prolonged period where it well knew that this was causing severe psychological trauma. From at least 19 August 1993, the State party's authorities knew of this trauma, and the act of continuing to hold him in light of that knowledge, provides the "element of reprehensibility" under article 7.

5.4 As to the claim of a violation of article 7 in the event of a return to Iran, the author notes that it was clear that the form of persecution the Minister's delegate had in mind on 8 February 1995 when approving the refugee claim involved article 7 rights.⁵⁸ She considered that there was a real chance that he would suffer deprivation of liberty "under such conditions as to constitute persecution under the [Refugee] Convention", which, according to the author, clearly goes beyond detention per se. The author also rejects the State party's supposition that the situation in Iran has improved to the extent that there is no foreseeable risk of a violation of his rights. The Special Representative's report referred to by the State party is far from conclusive on the "improving" human rights situation, noting that "human rights in Iran remains very much a work in progress" and "greater efforts are required". Moreover, the subsequent report of the Special Representative, found that minorities remain "neglected" and that "there is a long way to go in terms of achieving a more forthcoming approach to the concerns of the minorities, both ethnic and religious".⁵⁹ The author also asserts that the psychological evidence contradicts the State party's claim that he would not discontinue his medication in the event of a return, or, should he do so, react adversely to the Iranian authorities. The author notes that it is not known whether his medication is available in Iran.

5.5 As to the complaint under article 9, the author contends that *A v. Australia* conclusively established that the policy of mandatory detention violates article 9, paragraphs 1 and 4, and should be followed, for the present case is not factually distinguishable. The author clearly arrived to seek asylum, and did so within 24 hours of arrival. It is fanciful to suggest his detention in the initial period for two years was justified by false statements made

⁵⁸ *Supra*, at paragraph 2.6.

⁵⁹ E/CN.4/2001/39.

about his parents' location and funds he possessed. There was no administrative review of his detention during this period, and efforts at judicial review failed because there is no power to release him from detention. His release from custody on 10 August 1994 due to his deteriorating psychological condition came after two years of non-reviewable detention, as demonstrated by the futility of earlier applications to the Federal Court for review of the decision to detain. As to the continuing detention, there is no justification, for three separate psychiatric reports of March 2000 (provided to the Minister) indicated his risk would pose "no detectable risk", he "has to be regarded as not demonstrating a significant risk to anybody any more", and he poses "no risk to either his former victim or the Australian community".⁶⁰ The author also provides a further psychiatric report dated 7 May 2001 that found that he had made a complete recovery for several years, and constituted no threat to the community, either specifically or generally.⁶¹

Supplementary submissions by the parties

6.1 By submission of 16 August 2001, the State party reiterates certain earlier submissions and makes further arguments. As to admissibility, the State party rejects the author's interpretation of *RT v. France*⁶² that only judicial remedies need be exhausted, for the decision refers to judicial remedies "in the first place". Other administrative remedies are not excluded,⁶³ and therefore a complaint to HREOC, for example, is not excluded from the requirement of exhaustion of remedies. Similarly, *Vincente v. Colombia*,⁶⁴ according to the State party, only excludes administrative remedies that were not effective from the exhaustion requirement. Similarly, the State party contends that the Committee dispensed with the remedy argued in *Ellis v. Jamaica*⁶⁵ (a petition for mercy in a capital case) as being an ineffective remedy, rather than an "unenforceable" one as the author claims. In this case, by contrast, the State party argues its administrative remedies are effective, were not pursued by the author, and thus the requirements of

⁶⁰ Reports by Prof. McGorry, dated 17 March 2000, Dr. Kenny, 7 March 2000, and Dr. Kulkarni, 10 March 2000.

⁶¹ Associate Professor Harry Minas, Centre for International Health, 7 May 2001 (see footnote 57, supra).

⁶² Op. cit.

⁶³ In *Maille v. France* (689/1996), the communication was held inadmissible for failure to exhaust administrative remedies.

⁶⁴ Op. cit.

⁶⁵ Op. cit.

article 5, paragraph 2 (b), of the Optional Protocol have not been met.

6.2 The State party remarks, in response to the author's assertion that an "extra element of reprehensibility" under article 7 was provided in the failure to release him despite knowledge of psychological damage caused by continuing detention, that he was in fact released by the Minister who considered that his mental health needs would benefit from family care.

6.3 The State party further understood the original complaint in terms of article 7 to relate only to the initial detention, but reads the author's subsequent comments (and reference to the 7 May 2001 psychiatric report assessing the author's current condition) as appearing to imply a fresh allegation in respect of the *current* detention as well. The State party responds that there is nothing to suggest that the current detention is particularly harsh or reprehensible so as to constitute a violation of article 7. It observes that the 7 May 2001 report found the author in good mental health, and did not provide any evidence of acts or practices suggesting that the current detention, per se or through its conditions, raised issues under article 7. Any suggestion that the current detention is causing the author psychological harm and therefore violating article 7 is unsustainable and should be dismissed as unfounded or inadmissible *ratione materiae*.

6.4 Finally, as to the article 9 claim in relation to the original detention, the State party rejects as incorrect the author's characterization that *A v. Australia* "conclusively established that Australia's policy of mandatory detention was in breach of articles 9 (1) and 9 (4)". Rather than commenting on the policy *in abstracto*, it found that "arbitrariness" was to be determined by the existence of appropriate justification for continued detention in the individual circumstances of the case. Indeed, it stated that it was *not* per se arbitrary to detain persons seeking asylum.

6.5 By submission of 21 September 2001, the author responded to the State party's additional submissions, also clarifying that the claims under articles 7 and 9 relate to the current as well as the initial detention. As to admissibility, the author maintains that the administrative remedies raised by the State party are not "effective and enforceable" remedies. As any government decision to take action in response to a recommendation of either body is purely executive and discretionary in nature, exhaustion thereof should not be required.⁶⁶

6.6 As to the merits, the author rejects the State party's argument that, as the 7 May 2001 report

⁶⁶ The author again cites *Ellis v. Jamaica*, op. cit.

shows the author in good health, it cannot be said that the prolonged detention has caused him psychological damage. The author observes that the report was directed at determining whether his prior illness caused him to commit the crimes for which he is to be deported, and whether he currently poses any threat to anyone. The first issue was answered affirmatively, the second negatively. In any event, given that the State party accepts the author's current good health, there is no reason why he should be detained further or deported.

6.7 The author goes on to argue that the fact that he does not know whether or when he will be released, or whether or when he will be deported, on its own amounts to a violation of article 7. It is particularly cruel treatment or punishment as he has completed the prison sentence for his crimes, and because he previously suffered a psychiatric illness in immigration detention in circumstances that he did not know if or when he would be released or deported.

6.8 The author concludes, with reference to international jurisprudence, that mandatory detention of non-nationals for removal, without individual justification, is almost unanimously regarded as a breach of the right to be free from arbitrary and unlawful detention.⁶⁷

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

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

7.3 As to the question of exhaustion of domestic remedies, the Committee notes the State party's

⁶⁷ In *Dougoz v. Greece* (Appln. 40907/98, judgement of 6 March 2001), the European Court of Human Rights held that detention conditions of an asylum-seeker, including the inordinate length of detention, amounted to inhuman and degrading treatment. It also found the detention to be arbitrary, and that there was no effective remedy available by which the lawfulness of detention could be challenged. Similarly, in *Saasi v. Secretary of State (Home Department)* (High Court of the United Kingdom, judgement of 7 September 2001), mandatory detention of asylum-seekers without justification in each individual case was found to be arbitrary.

argument that the certain administrative remedies (the Commonwealth Ombudsman and HREOC) have not been pursued by the author. The Committee observes that any decision of these bodies, even if they had decided the author's claims in his favour, would only have had recommendatory rather than binding effect, by which the Executive would, at its discretion, have been free to disregard. As such, these remedies cannot be described as ones which would, in terms of the Optional Protocol, be effective.

7.4 As to the claims relating to the first period of detention, the Committee notes that the legislation pursuant to which the author was detained provides for mandatory detention until either a permit is granted or a person is removed. As confirmed by the courts, there remained no discretion for release in the particular case. The Committee observes that the sole review capacity for the courts is to make the formal determination that the individual is in fact an "unlawful non-citizen" to which the section applies, which is uncontested in this case, rather than to make a substantive assessment of whether there are substantive grounds justifying detention in the circumstances of the case. Thus, by direct operation of statute, substantive judicial review which could provide a remedy is extinguished. This conclusion is not altered by the exceptional provision in s.11 of the Act providing for alternative restraint and custody (in the author's case his family's), while remaining formally in detention. Moreover, the Committee notes that the High Court has confirmed the constitutionality of mandatory regimes on the basis of the policy factors advanced by the State party.⁶⁸ It follows that the State party has failed to demonstrate that there were available domestic remedies that the author could have exhausted with respect to his claims concerning the initial period of detention, and these claims are admissible.

7.5 As to the claims relating to the author's proposed deportation to Iran, the Committee notes that with the denial of leave to appeal by the High Court he has exhausted all available domestic remedies in respect of these claims, which are accordingly admissible.

7.6 As to the State party's further arguments that the claims related to the first period of detention and the author's proposed deportation are unsubstantiated, the Committee is of the view, on the material before it, that the author has sufficiently substantiated, for the purposes of admissibility, that these facts give rise to arguable issues under the Covenant.

7.7 As to the claims related to the second period of detention (detention pending deportation), the Committee notes that, unlike mandatory detention at

⁶⁸ *Lim v. Australia* (1992) 176 CLR 1 (HCA).

the border, it lies within the discretion of the Minister whether to direct a person be detained pending deportation. The Committee observes that such a decision, as well as any subsequent refusal by the Minister of a request for release, may be challenged in court by judicial review. Such judicial review proceedings may overturn a decision to detain (or to continue to detain) if manifestly unreasonable, or if relevant factors had not been considered, or if irrelevant factors had been considered, or if the decision was otherwise unlawful. The Committee notes that the Federal Court held, in its decision of 20 April 1999 on the author's urgent application for interim relief pending hearing of his application of 29 March 1999 against the Minister's decision not to release him, that there was a serious question to be tried as to whether the Minister had considered an irrelevant factor, but that in view of the imminent appeal to the Full Court in the deportation proceedings the balance of convenience was against release.

7.8 The Committee notes that the author has supplied no information whether he had (and if not, why he had not) pursued his review application of 29 March 1999 against the Minister's decision, or accepted the Court's invitation to reapply for relief after disposition of the Full Court appeal. Neither has the author explained his apparent failure to pursue review proceedings against the Minister's decisions later on 15 October 1999 and in December 2000 not to release the author. In the circumstances, the author has failed to exhaust domestic remedies in respect of any issues arising in the second period of detention, and his claims under articles 7 and 9 relating to this period are inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

Consideration of the merits

8.1 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.

8.2 As to the claims relating to the first period of detention, in terms of article 9, paragraph 1, the Committee recalls its jurisprudence that, in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification.⁶⁹ In the present case, the author's detention as a non-citizen without an entry permit continued, in mandatory terms, until he was removed or granted a permit. While the State party advances particular reasons to justify the individual detention (para. 4.28

et seq.), the Committee observes that the State party has failed to demonstrate that those reasons justify the author's continued detention in the light of the passage of time and intervening circumstances. In particular, the State party has not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party's immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions which would take account of the author's deteriorating condition. In these circumstances, whatever the reasons for the original detention, continuance of immigration detention for over two years without individual justification and without any chance of substantive judicial review was, in the Committee's view, arbitrary and constituted a violation of article 9, paragraph 1.

8.3 As to the author's further claim of a violation of article 9, paragraph 4, related to this period of detention, the Committee refers to its discussion of admissibility above and observes that the court review available to the author was confined purely to a formal assessment of the question whether the person in question was a "non-citizen" without an entry permit. The Committee observes that there was no discretion for a court, as indeed held by the Full Court itself in its judgement of 15 June 1994, to review the author's detention in substantive terms for its continued justification. The Committee considers that an inability judicially to challenge a detention that was, or had become, contrary to article 9, paragraph 1, constitutes a violation of article 9, paragraph 4.

8.4 As to the author's allegations that his first period of detention amounted to a breach of article 7, the Committee notes that the psychiatric evidence emerging from examinations of the author over an extended period, which was accepted by the State party's courts and tribunals, was essentially unanimous that the author's psychiatric illness developed as a result of the protracted period of immigration detention. The Committee notes that the State party was aware, at least from August 1992 when he was prescribed tranquillisers, of psychiatric difficulties the author faced. Indeed, by August 1993, it was evident that there was a conflict between the author's continued detention and his sanity. Despite increasingly serious assessments of the author's conditions in February and June 1994 (and a suicide attempt), it was only in August 1994 that the Minister exercised his exceptional power to release him from immigration detention on medical grounds (while legally he remained in detention). As subsequent events showed, by that point the author's illness had reached such a level of severity that irreversible consequences were to follow. In the Committee's view, the continued detention of the

⁶⁹ *A v. Australia*, op. cit., at para. 9.4.

author when the State party was aware of the author's mental condition and failed to take the steps necessary to ameliorate the author's mental deterioration constituted a violation of his rights under article 7 of the Covenant.

8.5 As to the author's arguments that his deportation would amount to a violation of article 7, the Committee attaches weight to the fact that the author was originally granted refugee status on the basis of a well-founded fear of persecution as an Assyrian Christian, coupled with the likely consequences of a return of his illness. In the Committee's view, the State party has not established that the current circumstances in the receiving State are such that the grant of refugee status no longer holds validity. The Committee further observes that the AAT, whose decision was upheld on appeal, accepted that it was unlikely that the only effective medication (Clozaril) and back-up treatment would be available in Iran, and found the author "blameless for his mental illness" which "was first triggered while in Australia". In circumstances where the State party has recognized a protection obligation towards the author, the Committee considers that deportation of the author to a country where it is unlikely that he would receive the treatment necessary for the illness caused, in whole or in part, because of the State party's violation of the author's rights would amount to a violation of article 7 of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of articles 7 and 9, paragraphs 1 and 4, of the Covenant.

10. 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. As to the violations of articles 7 and 9 suffered by the author during the first period of detention, the State party should pay the author appropriate compensation. As to the proposed deportation of the author, the State party should refrain from deporting the author to Iran. The State party is under an obligation to avoid similar violations in the future.

11. Bearing in mind that, by becoming a State 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, the Committee wishes to receive from the State party, within 90 days, information about the

measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

APPENDIX

Individual Opinion (partly dissenting) by Committee member Nigel Rodley

I agree with the Committee's findings in respect of the violations of articles 9, paragraph 1, and 7. Having found a violation of article 9, paragraph 1, however, the Committee unnecessarily also concluded that a violation of article 9, paragraph 4, was involved, using language tending to construe a violation of article 9, paragraph 1, as ipso jure "unlawful" within the meaning of article 9, paragraph 4. In this the Committee followed the trail it blazed in *A v. Australia* (560/1993).

In my view this was too broad a trail. Nor was it justified by the text of the Covenant. "Arbitrary" in article 9, paragraph 1, certainly covers unlawfulness. It is evident from the very notion of arbitrariness and the preparatory work. But I fail to see how the opposite is also true. Nor is there anything in the preparatory work to justify it. Yet this is the approach of *A v. Australia*, seemingly reaffirmed by the Committee in the present case.

It does not follow from this difficulty with the Committee's approach that I necessarily take the view that article 9, paragraph 4, can never be applied in a case in which a person is detained by a State party as long as legal formality is respected. I could, for example, imagine that torture of a detainee could justify the need for recourse to a remedy that would question the continuing legality of the detention.

My present argument is simply that the issue did not need addressing in the present case, especially in the light of the fact that the absence of the possibility of a judicial challenge to the detention forms part of the Committee's reasoning in finding a violation of article 9, paragraph 1.

Individual Opinion (partly dissenting) by Committee member David Kretzmer

The Committee has taken the view that lack of any chance of substantive judicial review is one of the factors that must be taken into account in finding that the author's continued detention was arbitrary, in violation of the author's rights under article 9, paragraph 1, of the Covenant. Like my colleague, Nigel Rodley, I am of the opinion that in these circumstances there was no need to address the question of whether the lack of such review also involved a violation of article 9, paragraph 4.

Individual Opinion (partly dissenting) by Committee members Nisuke Ando, Eckart Klein and Maxwell Yalden

While we agree with the Committee's finding of a violation of article 9, paragraphs 1 and 4, we are not

convinced by the finding that article 7 of the Covenant was also violated by the State party.

The Committee found violations of article 7 for two reasons. The first is set out in paragraph 8.4 of the Committee's Views, on the basis of an assessment of the author's prolonged detention after it had become apparent that "there was a conflict between the author's continued detention and his sanity". We find it difficult to follow this reasoning. Although it is true that the author's mental health deteriorated until his release from detention into his family's custody on 10 August 1994, we cannot find a violation of article 7, since such a conclusion would expand the scope of this article too far by arguing that the conflict between the author's continued detention and his sanity could only be solved by his release - and that the State party would otherwise be in violation of the said provision. The circumstances of the case show that the author was psychologically assessed and under permanent observation. The fact that the State party did not immediately order his release, but decided only on the

basis of a psychiatric report dated June 1994 unequivocally recommending release and external treatment (see paragraph 2.5) cannot be considered, in our view, to amount to a violation of article 7 of the Covenant.

We likewise hold that the second ground on which the Committee has based its finding of a violation of article 7 (para. 8.5) is not sound. The Committee's assessment is put together on the basis of several arguments, none of which is persuasive, either taken alone or together. We do not believe that the State party failed to support its conclusion that the author, as an Assyrian Christian, would not suffer persecution if deported to Iran. We refer in this regard to paragraphs 4.13 to 4.19 of the Committee's Views. Concerning the argument that the author would not receive effective medical treatment in Iran, we refer to the State party's submissions set out in paragraphs 4.20 and 4.21 of the Committee's Views. We do not see how these detailed arguments could be so lightly set aside in favour of an article 7 violation as has been done by the majority.

Communication 909/2000

Submitted by: Victor Ivan Majuwana Kankanamge

Alleged victim: The author

State party: Sri Lanka

Date of adoption of Views: 27 July 2004

Subject matter: Repeated indictment of journalist because of his publications

Procedural issues: Continuing violation - Level of substantiation of claim - Existence of effective remedies to be exhausted

Substantive issues: Undue delay - Right to freedom of expression - Restrictions necessary for the respect of rights or reputations of others

Articles of the Covenant: 2 (3); 3; 14 (3) (c); 19; and 26

Articles of the Optional Protocol: 1; 2; 5, paragraph 2 (b)

Finding: Violation (articles 14, paragraph 3 (c); and 19, paragraph 3, read with 2, paragraph 3).

1.1 The author of the communication, dated 17 December 1999, is Victor Ivan Majuwana Kankanamge, a Sri Lankan citizen, born on 26 June 1949, who claims to be a victim of a violation by Sri Lanka of articles 2 (3); 3; 14 (3) (c); 19; and 26. He is represented by counsel.

1.2 The Covenant and the Optional Protocol to the Covenant entered into force for the State party on 11 June 1980 and 3 January 1998 respectively. Sri Lanka also made a declaration according to which "[t]he Government of the Democratic Socialist Republic of Sri Lanka pursuant to article (1) of the

Optional Protocol recognises the competence of the Human Rights Committee to receive and consider communications from individuals subject to the jurisdiction of the Democratic Socialist Republic of Sri Lanka, who claim to be victims of a violation of any of the rights set forth in the Covenant which results either from acts, omissions, developments or events occurring after the date on which the Protocol entered into force for the Democratic Socialist Republic of Sri Lanka, or from a decision relating to acts, omissions, developments or events after that date. The Democratic Socialist Republic of Sri Lanka also proceeds on the understanding that the Committee shall not consider any communication from individuals unless it has ascertained that the same matter is not being examined or has not been examined under another procedure of international investigation or settlement".

1.3 On 17 April 2000, the Committee, acting through its Special Rapporteur for new communications, decided to separate the examination of the admissibility from the merits of the case.

The facts as presented by the author

2.1 The author is a journalist and editor of the newspaper "Ravaya". Since 1993, he has been indicted several times for allegedly having defamed ministers and high level officials of the police and other departments, in articles and reports published in his newspaper. He claims that these indictments

were indiscriminately and arbitrarily transmitted by the Attorney-General to Sri Lanka's High Court, without proper assessment of the facts as required under Sri Lankan legislation, and that they were designed to harass him. As a result of these prosecutions, the author has been intimidated, his freedom of expression restricted and the publication of his newspaper obstructed.

2.2 At the time of the submission of the communication, three indictments against the author, dated 26 June 1996 (Case No. 7962/96), 31 March 1997 (Case No. 8650/07), and 30 September 1997 (Case No. 9128/97), were pending before the High Court.

2.3 On 16 February 1998, the author applied to the Supreme Court for an order invalidating these indictments, on the ground that they breached articles 12 (1) and 14 (1)(a) of the Sri Lankan Constitution, guaranteeing equality before the law and equal protection of the law, and the right to freedom of expression. In the same application, the author sought an interim order from the Supreme Court to suspend the indictments, pending the final determination of his application. On 3 April 1998, the Supreme Court decided that the author had not presented a *prima facie* case that the indictments were discriminatory, arbitrary or unreasonable, and refused him leave to proceed with the application.

The complaint

3.1 The author claims that by transmitting to the High Court indictments charging him with defamation, the Attorney-General failed to properly exercise his discretion under statutory guidelines (which require a proper assessment of the facts as required in law for criminal defamation prosecution), and therefore exercised his power arbitrarily. By doing so, the Attorney-General violated the author's freedom of expression under article 19 of the Covenant, as well as his right to equality and equal protection of the law guaranteed by article 26.

3.2 The author also claims that his rights under article 2, paragraph 3, of the Covenant were violated because the Supreme Court refused to grant him leave to proceed with the application to suspend the indictments and thereby deprived him of an effective remedy.

3.3 Finally, the author claims a violation of article 3, but offers no explanation of that claim.

State party's admissibility observations and author's comments

4.1 On 17 March 2000, the State party provided observations only on the admissibility of the communication, as authorized by the Committee's

Special Rapporteur on Communications pursuant to rule 91 (3) of the Committee's Rules of Procedure.

4.2 The State party considers the communication inadmissible because it relates to facts that occurred before the Optional Protocol entered into force for Sri Lanka, that is 3 January 1998. Moreover, upon ratification of the Protocol, Sri Lanka entered a reservation by which the State party recognized the competence of the Committee to consider communications from authors who claim to be victims of a violation of the Covenant only as a consequence of acts, omissions, developments or events that occurred after 3 January 1998. The State party submits that, since the alleged violations of the Covenant were related to indictments that were issued by the Attorney-General prior to that date, the claims are covered by the reservation and therefore inadmissible.

4.3 The State party contends that article 19 (3) of the Covenant does not support the author's claim of a violation, because under that provision the exercise of the rights protected carries with it special duties and responsibilities and may be subject to restrictions provided by law which are necessary for the respect of the rights or reputations of others.

4.4 The State party argues that the author has not exhausted all available domestic remedies, which would have included representations to the Attorney-General regarding the indictments, or complaining to the Parliamentary Commissioner for Administration (the Ombudsman) or the National Human Rights Commission.

4.5 Finally, the State party considers that the author cannot invoke the jurisdiction of the Committee under article 2 (3) of the Covenant, because he has not established a violation of any of the rights under the Covenant for which remedies are not available under the Sri Lankan Constitution.

5.1 On 16 June 2000, the author responded to the State party's observations. On the competence of the Committee *ratione temporis*, and the State party's reservation on the entry into force of the Optional Protocol, he recalls the Human Rights Committee's General Comment No. 24, according to which "the Committee has insisted upon its competence, even in the face of such statements or observations, when events or acts occurring before the date of entry into force of the Optional Protocol have continued to have an effect on the rights of a victim subsequent to that date". He affirms that the violations he has alleged are continuing violations, so that the Committee has competence *ratione temporis*.

5.2 By reference to paragraph 13 of General Comment No. 24, the author argues that even acts or events that occurred prior to the entry into force of the Optional Protocol for the State party should be

admitted as long as they occurred after the entry into force of the Covenant for the State party.

5.3 On the State party's argument that the complaint should be rejected as inadmissible because the restrictions under article 19 (3) of the Covenant are attracted, the author replies that this is not an objection to admissibility but addresses the merits of the communication.

5.4 On the issue of exhaustion of domestic remedies, the author affirms that the Supreme Court is the only authority with jurisdiction to hear and make a finding on infringements of fundamental rights by executive or administrative action. As to representations to the Attorney-General, the author notes that there is no legal provision for making such representation once indictments have been filed, and in any case such representations would not have been effective since the Attorney General was himself behind the prosecutions. As regards a complaint to the Ombudsman or the National Human Rights Commission, the author stresses that these bodies are appointed by the President of Sri Lanka, and that they are vested only with powers of mediation, conciliation and recommendations but have no powers to enforce their recommendations. Only the Supreme Court is vested with the power to act on his complaint and to grant effective redress.

5.5 In relation to the State party's argument on article 2, paragraph 3, of the Covenant the author argues that a State party cannot invoke its internal laws as a reason for non-compliance with obligations under the Covenant.

Decision on admissibility

6.1 At its 72nd session, the Committee considered the admissibility of the communication. Having ascertained that the same matter was not being examined and had not been examined under another procedure of international investigation or settlement, the Committee examined the facts that were submitted to it.

6.2 The Committee noted that the State party contested the Committee's competence *ratione temporis* because, upon acceding to the Optional Protocol, Sri Lanka had entered a declaration restricting the Committee's competence to events following the entry into force of the Optional Protocol. In this respect, the Committee considered that the alleged violations had continued. The alleged violations had occurred not only at the time when the indictments were issued, but were continuing violations as long as there had not been a decision by a Court acting on the indictments. The consequences of the indictments for the author continued, and indeed constituted new alleged violations so long as the indictments remained in effect.

6.3 As regards the State party's claim that the communication was inadmissible because the author had failed to exhaust domestic remedies, the Committee recalled that the Supreme Court is the highest court of the land and that an application before it constituted the final domestic judicial remedy. The State party had not demonstrated that, in the light of a contrary ruling by the Supreme Court, making representations to the Attorney-General or complaining to the Ombudsman or to the National Human Rights Commission would constitute an effective remedy. The Committee therefore found that the author had satisfied the requirement of article 5, paragraph 2 (b) of the Optional Protocol and declared the communication admissible on 6 July 2001.

6.4 On 6 July 2001, the Committee declared the communication admissible. Whilst it specifically determined that the author's claims under articles 2 (3) and 19 should be considered on the merits, it left open the possibility of considering the author's other claims under articles 3, 14 (3) (c) and 26.

State party's merits observations

7.1 On 4 April 2002, the State party commented on the merits of the communication.

7.2 The State party draws attention to the fact that the indictments challenged by the author in his application to the Supreme Court were served during the term of office of two former Attorneys-General. It makes the following observations on certain aspects of the indictments in question:

Regarding indictment No. 6774/94 of 26 July 1994, further to an article written about the Chief of the Sri Lankan Railway, the State party notes that this indictment was withdrawn and could not be challenged before the Supreme Court, because it had been issued by a different Attorney-General than the one in office at the time of the application to the Supreme Court.

Regarding indictment No. 7962/96 of 26 June 1996, which related to an article about the Minister of Fisheries, the State party notes that the information on which the article was based was subject to an official investigation, which allegedly confirmed the veracity of the information in question. This was never presented to the Attorney-General and could still be transmitted with a view to securing a withdrawal of the indictment.

Regarding indictment No. 9128/97 of 30 September 1997, which related to an article about the Inspector General of Police (IGP) and to the alleged shortcomings of a criminal investigation in a particular case, the State party contends that the prosecution acted properly, in the best interest of justice, and in accordance with the relevant legal procedures.

7.3 The State party notes that, in addition to those complaints which led to criminal proceedings, there were 9 defamation complaints filed against the author between 1992 and 1997 in relation to which the Attorney-General decided *not* to issue criminal proceedings.

7.4 The State party underlines that the offence of criminal defamation, defined in section 479 of the Penal Code, may be tried summarily before the Magistrate's Court or the High Court, but no prosecution for this offence may be instituted by the victim or any other person, except with the approval of the Attorney-General. Moreover, for such an offence, the Attorney General has the right, in accordance with section 393 (7) of the Code of Criminal Procedure, to file an indictment in the High Court or to decide that non-summary proceedings will be held before the Magistrate's Court, "having regard to the nature of the offence or any other circumstances". The Attorney-General thus has a discretionary power under this provision.

7.5 The State party considers that, in the present case, the Attorney-General acted in accordance with the law and his duty was exercised "without any fear or favour", impartially and in the best interest of justice.

7.6 Regarding the Supreme Court's jurisdiction, the State party recalls that leave to proceed for an alleged breach of fundamental rights is granted by at least two judges and that the author was given an opportunity to present a *prima facie* case of the alleged violations complained about. The Supreme Court, after exhaustively analyzing the discretionary power of the Attorney-General and examining the material submitted to it in respect of the numerous complaints against the author, was of the opinion that the indictments served on the author were not arbitrary and did not constitute a continued harassment or an intention to interfere with his right to freedom of expression. In this connection, it took into account four previous indictments against the author, and concluded that they did not amount to harassment, because three were withdrawn or discontinued, and there was nothing to suggest any impropriety on the part of the prosecution. Moreover, during the same period, the Attorney-General had refused to take action on nine other complaints referred to in 7.3 above.

Author's comments

8.1 On 17 June 2002, the author contended that the State party avoided the main issue of his complaint, failing to explain why the Attorney General decided to file direct indictments in the High Court. In his opinion, the essence of the complaint is that, from 1980, the State party's government favoured important officials by prosecuting those

critical of their actions for defamation – a minor offence otherwise triable by a magistrate - directly in the High Court. In the author's case, while conceding that the Attorney General's discretion was not absolute or unfettered, the Supreme Court did not call the Attorney General to explain why he sent these indictments to the High Court. The Supreme Court carefully examined the three contested indictments and summarily refused leave to proceed to his application, which deprived him of the opportunity to establish a breach of the rights to equality and freedom of expression. The author considers that the Supreme Court overlooked that the media exercise their freedom of expression in trust for the public, and that heads of government and public officials are liable to greater scrutiny.

8.2 The author considers that, in its comments on the merits, the State party failed to explain why it believed that the Attorney-General acted "without fear or favour", in the best interest of justice and why a direct indictment was preferred to a non summary inquiry.

8.3 The author considers that in examining defamation charges, the following elements are relevant:

- The offence is normally tried in the Magistrate Court;

- The Attorney-General's approval is required for filing defamation proceedings in the Magistrate Court;

- The offence is amenable for settlement when tried before the Magistrate Courts but not before the High Court;

- Finger printing is only done after conviction in the Magistrate Court while it is done in the High Court when the indictment is served – the author was finger printed in the course of each of the proceedings against him.

8.4 The author finally submits that the 9 cases referred to by the State party in which the Attorney-General declined prosecution is no argument in support of the impartiality of the Attorney General, since the complainants in these other cases were either not influential, or were opponents to the government.

8.5 On 25 June 2004, the author's counsel advised that the outstanding indictments had been withdrawn.

Reconsideration of admissibility and examination of the merits

9.1 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. It considers that no information has been offered by the author in support of his claim of a violation of article 3, and accordingly declares this part of the communication inadmissible for lack of substantiation under article 2 of the Optional Protocol.

9.2 On the merits, the Committee first notes that, according to the material submitted by the parties, three indictments were served on the author on 26 June 1996, 31 March 1997, and 30 September 1997 respectively. At the time of the final submissions made by the parties, none of these indictments had been finally adjudicated by the High Court. The indictments were thus pending for a period of several years from the entry into force of the Optional Protocol. In the absence of any explanation by the State party that would justify the procedural delays and although the author has not raised such a claim in his initial communication, the Committee, consistent with its previous jurisprudence, is of the opinion that the proceedings have been unreasonably prolonged, and are therefore in violation of article 14, paragraph 3 (c), of the Covenant.

9.3 Regarding the author's claim that the indictments pending against him in the High Court constitute a violation of article 19 of the Covenant, the Committee has noted the State party's arguments that, when issuing these indictments, the Attorney General exercised his power under section 393 (7) of the Code of Criminal Procedure "without any fear or favour", impartially and in the best interest of justice.

9.4 So far as a violation of article 19 is concerned, the Committee considers that the indictments against Mr. Kankanamge all related to articles in which he allegedly defamed high State party officials and are directly attributable to the exercise of his profession of journalist and, therefore, to the exercise of his right to freedom of expression. Having regard to the nature of the author's profession and in the circumstances of the present case, including the fact that previous indictments against the author were either withdrawn or discontinued, the Committee

considers that to keep pending, in violation of article 14, paragraph 3 (c), the indictments for the criminal offence of defamation for a period of several years after the entry into force of the Optional Protocol for the State party left the author in a situation of uncertainty and intimidation, despite the author's efforts to have them terminated, and thus had a chilling effect which unduly restricted the author's exercise of his right to freedom of expression. The Committee concludes that the facts before it reveal a violation of article 19 of the Covenant, read together with article 2 (3).

9.5 In light of the Committee's conclusions above, it is unnecessary to consider the author's remaining claims.

10. 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 14, paragraph 3 (c), and article 19 read together with article 2 (3) of the International Covenant on Civil and Political Rights.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy including appropriate compensation. The State party is also under an obligation to prevent similar violations in the future.

12. 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 or 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. The State party is also requested to publish the Committee's Views.

Communication No. 910/2000

Submitted by: Mr. Ati Antoine Randolph (represented by counsel, Me Olivier Russbach)

Alleged victim: The author

State party: Togo

Date of adoption of Views: 27 October 2003

Subject matter: Alleged persecution - Unlawful arrest and torture by State officials of a political opponent - Alleged authorities' refusal to renew a passport

Procedural issues: Examination under another procedure of international investigation or settlement - Exhaustion of domestic remedies

Substantive issues: Arbitrary arrest - Inhuman treatment/ torture - Unfair trial - Right to leave a country

Articles of the Covenant: 2, paragraph 3 (a); articles 7; 9; and 10; 12; and 14

Articles of the Optional Protocol: 1, 2, 5, paragraphs 2 (a) and (b)

Finding: No violation

1.1 The author of the communication, Mr. Ati Antoine Randolph, born 9 May 1942, has Togolese and French nationality. He lives in exile in France and alleges that the Togolese Republic has violated his rights and those of his brother, Emile Randolph, under article 2, paragraph 3 (a); articles 7, 9 and 10; article 12, paragraph 2; and article 14 of the International Covenant on Civil and Political Rights. The author is represented by counsel.

1.2 Togo became a party to the Covenant on 24 August 1984 and to the Optional Protocol on 30 June 1988.

The facts as submitted by the author

2.1 Mr. Randolph first relates the circumstances surrounding the death of his brother, Counsellor to the Prime Minister of Togo, which occurred on 22 July 1998. He claims that the death resulted from the fact that the gendarmerie did not renew his brother's passport quickly enough so that he could be operated on in France, where he had already undergone two operations in 1997. His diplomatic passport having expired in 1997, the author's brother had requested its renewal; the author claims, however, that the gendarmerie confiscated the document. His brother later submitted another application, supported by his medical file. According to the author, no doctor in Togo had the necessary means to undertake such an operation. The gendarmerie issued a passport on 21 April 1998, but the applicant did not receive it until June 1998.

2.2 The author believes that the authorities violated his brother's freedom of movement, which was guaranteed under article 12, paragraph 2, of the International Covenant on Civil and Political Rights, by refusing to renew his passport quickly and by requiring the applicant's physical presence and his signature in a register in order to deliver the passport to him, thereby exacerbating his illness. The author believes that it was as a result of these events that his brother, in a very weakened condition and unable to fly on a regularly scheduled airline, died on 22 July 1998.

2.3 The author of the communication submits, secondly, facts relating to his arrest on 14 September 1985, together with about 15 others including his sister, and their 1986 trial for possession of subversive literature and insulting the head of State. During the period between his arrest and conviction, the author claims, he was tortured by electric current and other means and suffered degrading, humiliating and inhuman treatment. About 10 days after the arrest, the author was reportedly transferred to the detention centre in Lomé, and it was only then, according to the author, that he discovered he had been accused of insulting a public official, a charge that was later changed to insulting the head of State. The author notes in this respect that the head of State had not brought charges against anyone.

2.4 By a judgement on 30 July 1986, the text of which has not been submitted to the Committee, Mr. Randolph was sentenced to five years' imprisonment. The trial, he claims, was unfair because it violated the presumption of innocence and other provisions of the International Covenant on Civil and Political Rights. He has attached extracts from the 1986 report of Amnesty International in support of his claims.

2.5 The author claims that he did not have any effective remedy available to him in Togo. Later, he adds that he did not exhaust all domestic remedies because the Togolese justice system would not allow him to obtain, within a reasonable amount of time, fair compensation for injuries sustained. He claims that, even if he or his family had filed a complaint, it would have been in vain, for the State would not have conducted an investigation. He adds that filing a criminal suit against the gendarmerie would have exposed him and his whole family to danger. Moreover, when he was arrested and tortured, before

being sentenced, he had no possibility of filing a complaint with the authorities, who were the very ones who were violating human rights, nor could he file suit against the court that had unfairly convicted him. Mr. Randolph believes that, in these conditions, no compensation for injury suffered would be obtainable through the Togolese justice system.

2.6 After the death of the author's brother in the conditions described above, no one lodged a complaint, according to the author, for the same reasons as he had given before.

2.7 Mr. Randolph believes that, since his release, the injuries caused by the violations of his fundamental rights persist because he has been forced into exile and to live far from his family and loved ones, and also because of his brother's death, which was due to the failure on the part of the Togolese Republic to respect his brother's freedom of movement.

The complaint

3. The author invokes the violation of article 2, paragraph 3; articles 7, 9 and 10; article 12, paragraph 2; and article 14 of the Covenant. He requests fair compensation for the injuries suffered by him and his family as a result of the State's action, and an internationally monitored review of his trial.

State party's observations and author's comments

4.1 In its observations of 2 March 2000, the State party considers the substance of the communication without addressing the question of its admissibility. The State party rejects all the author's accusations, in particular those relating to torture, contending that during the trial the accused did not lodge any complaint of torture or ill-treatment. The State party cited the statements made following the trial by the author's counsel, Mr. Domenach, to the effect that the hearing had been a good one and that all parties, including Mr. Randolph, had been able to express their views on what had happened.

4.2 As for calling the trial unfair and alleging a violation of the presumption of innocence, the State party again cites an extract from a statement by Mr. Randolph's counsel, in which he declares that over the 10 months that he has been defending his clients in Togo, he has been able to do so in a satisfactory manner, with the assistance and encouragement of the authorities. He adds that the hearing was held in accordance with the rules of form and substance and in the framework of a free debate in conformity with international law.

4.3 With regard to the violation of freedom of movement, the State party contends that it cannot be

reproached for having prevented the author's brother from leaving the country by holding up his diplomatic passport, since the authorities had issued him a new passport. As to the formalities for picking up his passport, it is considered normal to require the physical presence of the interested party, as well as his or her signature on the passport and in the register of receipts; this procedure is in the interest of passport-holders because it is intended to prevent documents from being delivered to a person other than the passport-holder.

4.4 The State party contends that no legal or administrative body has received a claim for compensation for injury suffered by Mr. Ati Randolph.

5.1 In his comments of 22 August 2000, the author accuses Togo of having presented "a tissue of lies". He reaffirms the facts as already submitted and insists that he was detained in police custody from 14 to 25 September 1985, while the legally permissible length of such confinement is a maximum of 48 hours. During that period, the author was subjected to cruel, degrading and inhuman treatment, torture and death threats. In his view, the presumption of his innocence was not respected - he was removed from the civil service list, and he was called to appear before the head of State and of the Central Committee of the only political party, the one in power. His eyeglasses had been confiscated for three months and had been returned to him only after the intervention of Amnesty International. The author's vehicles had also been confiscated. He claims, in that regard, that one of the vehicles, which was returned to him upon his release, had been tampered with so that he could have died when trying to drive it. Lastly, he comments on various government officials in order to illustrate the undemocratic nature of the current regime, although this is not directly related to his communication.

5.2 From 25 September 1985 to 12 January 1987, the author was detained in the Lomé detention centre, where he was subjected to cruel, inhuman and degrading treatment and death threats. In a statement addressed to the Committee, the author's sister testifies that, in that connection, and under pressure from international humanitarian organizations, the regime was forced to have the prisoner examined by a doctor. Ms. Randolph claims that the lawyers and doctors chosen were loyal to the regime and did not acknowledge that the results - indicating there had been no torture - had been falsified.

5.3 The author's trial began only in July 1986. On 30 July 1986, the author was sentenced to five years in prison for insulting the head of State. On 12 January 1987, he was pardoned by the latter.

5.4 Mr. Randolph insists that he was tortured by electric shock on 15 September 1985 in the evening

and on the following morning. He claims that he was then threatened with death on several occasions. He states that he told his lawyers about this, and that he lodged complaints of torture with the court on two occasions: once in October 1985, but his complaint had been diluted by replacing “torture” by “ill-treatment”. The second time, in January 1986, he lodged his complaint in writing. In response to this action, the author claims, his right to a weekly family visit was suspended. The author also states that during the trial he had reported the torture and ill-treatment. This had been the reason, according to him, for the postponement of his trial from 16 to 30 July, supposedly for further information; he does not, however, offer any proof of these allegations.

5.5 The author also describes the conditions of his detention, for example, being forced to stay virtually naked in a mosquito-filled room, lying directly on the concrete, with the possibility of showering every two weeks at the start and spending only three minutes a day outside his cell, and having to shower in the prison courtyard under armed guard.

5.6 As for the trial, the author states that the President of the court - Ms. Nana - had close ties to the head of State. She had even participated in a demonstration demanding the execution of the author and the others charged in the case, and the confiscation of their property. Only the Association of African Jurists, represented by a friend of the head of State, had been authorized to attend the trial, while a representative of Amnesty International had been turned away at the airport.

5.7 The author maintains that no incriminating evidence or witnesses had been produced during the course of the trial. The case involved the distribution of leaflets to defame the head of State. Yet, according to the author, no leaflet was submitted in evidence and the head of State had not entered a defamation complaint.

5.8 The author claims that during the trial his attorneys had demonstrated that his rights had been violated. He states that he himself had shown the court the still-visible scars from having been burnt with electricity. But in his view the attorneys were under pressure and had therefore not pursued that argument.

5.9 Regarding his brother, the author contests the State party’s observations, stating that his diplomatic passport had not been extended but that it had taken nine months to issue a new ordinary passport.

State party’s further observations

6.1 In its note of 27 November 2000, the State party contests the admissibility of the communication. It requests the Committee to declare the communication inadmissible for three reasons:

failure to exhaust domestic remedies, use of insulting and defamatory terms and examination of the case by an international instance.

6.2 The State party contends that in Togo any person considering himself or herself to be the victim of human rights violations can have recourse to the courts, to the National Human Rights Commission and to the non-governmental institutions for the defence of human rights. In that connection, the State party states that the author did not submit an appeal to the courts, did not ask for a review of his trial and did not claim compensation for damage of any kind. As for the possible recourse to the National Human Rights Commission, the State party states that the author had not applied to it even though he acknowledged the Commission’s importance in his communication.

6.3 The State party insists, without further elaboration, that the author used insulting and defamatory terms in framing his allegations.

6.4 Concerning examination of the case under another international procedure, the State party submits that the United Nations Commission on Human Rights, in its resolution 1993/75 of 10 March 1993, had decided to monitor the situation of human rights in Togo, which it did until 1996. The State party points out that the author’s case was among those considered by the Commission on Human Rights during the period of monitoring.

Author’s further comments

7.1 The author submitted his comments on 13 January 2001. Once again criticizing and giving his opinion of various Togolese authorities, he contests the legality and legitimacy of the political regime in power. By way of evidence and in support of his communication, the author submits excerpts from various articles and books, without actually adding any new considerations in support of his previous allegations regarding human rights violations against himself personally or against members of his family.

7.2 He reiterates his comments of 22 August 2000 and makes further accusations against the political regime in office: corruption and denial of justice. He describes the current conditions for the issuance of passports by Togo, although this has no bearing on this communication.

7.3 Concerning the Government’s argument of inadmissibility because of the use of insulting and defamatory terms, the author believes that the terms he used were often insufficient to describe “the whole horror in which the Togolese people has been trapped for almost 35 years”. He adds that, if the Government still believes that the terms he used were insulting and defamatory, he stood “ready to

defend them before any judicial authority, any court of law, and to furnish irrefutable proof and incriminating evidence, producing as supporting witness the Togolese people”.

7.4 The author also cites “the denial of justice” as justification for his failure to exhaust domestic remedies. In that connection, the author expounds on the idea that General Eyadema’s conception of justice was entirely and exclusively self-serving. The author refers to the “fireworks affair” and asks the head of State “to respond immediately” to questions regarding the discovery and ordering of the explosives and also to explain the failure to produce any incriminating evidence in that case.

7.5 The author gives his opinion of the presiding judge of the court that convicted him, Ms. Nana, as someone close to the Government, and of the first deputy prosecutor, who did not investigate allegations of torture, as well as of others in high positions.

7.6 Regarding the non-exhaustion of available remedies, the author contends that “any attempt to secure a remedy that presupposes an impartial judicial system is impossible so long as the State party has a dictatorship at the helm”. Regarding the National Human Rights Commission, his view is that none of the applicants who had submitted complaints to it in 1985 had obtained satisfaction.

7.7 The author submits that the fact that the Commission on Human Rights had concluded its consideration of the situation of human rights in Togo did not preclude the Committee from considering his communication.

Admissibility decision

8.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

8.2 At its seventy-first session in April 2001, the Committee considered the admissibility of the communication.

8.3 The Committee noted that the part of the communication concerning the author’s arrest, torture and conviction refers to a period in which the State party had not yet acceded to the Optional Protocol to the International Covenant on Civil and Political Rights, i.e. prior to 30 June 1988. However, the Committee observed that the grievances arising from that part of the communication, although they referred to events that pre-dated the entry into force of the Optional Protocol for Togo, continued to have effects which could in themselves constitute violations of the Covenant after that date.

8.4 The Committee noted that the examination of the situation in Togo by the Commission on Human Rights could not be thought of as being analogous to the consideration of communications from individuals within the meaning of article 5, paragraph 2 (a), of the Optional Protocol. The Committee referred to its previous decisions, according to which the Commission on Human Rights was not a body of international investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol to the International Covenant on Civil and Political Rights.

8.5 The Committee further noted that the State party contested the admissibility of the communication on the ground of non-exhaustion of domestic remedies, given that no remedy had been sought by the author in respect of alleged violations of rights under the Covenant. The Committee found that the author had not put forward any argument to justify the non-exhaustion of available domestic remedies in respect of his late brother. Consequently, the Committee decided that this part of the communication was inadmissible.

8.6 However, regarding the allegations about the author’s own case (paragraphs 2.5, 5.6 and 5.8 above), the Committee considered that the State party had not responded satisfactorily to the author’s contention that there was no effective remedy in domestic law with respect to the alleged violations of his rights as enshrined in the Covenant, and consequently it found the communication to be admissible on 5 April 2001.

State party’s observations

9.1 In its observations of 1 October 2001 and 2002, the State party endorses the Committee’s decision on the inadmissibility of the part of the communication concerning the author’s brother, but contests the admissibility of the remainder of the communication in respect of the author himself.

9.2 Referring to paragraph 2.5 of the decision on admissibility, the State party reiterates its submission that the author has failed to exhaust domestic remedies, stressing in particular the opportunities to seek a remedy through the Court of Appeal and, if need be, the Supreme Court. The State party notes that it fully shares the individual opinion of one member of the Committee¹ and requests the Committee to take this opinion into account when re-examining the communication.

9.3 With reference to paragraph 5.6 of the decision on admissibility, the State party says that the regime has always respected the principle of the

¹ See appendix.

independence of the judiciary and that the author's doubts about the President of the court are gratuitous and unfounded claims made with the sole purpose of defaming her. The State party reiterates that the author's case was tried fairly and openly, in complete independence and impartiality, as the author's own counsel has noted (so the State party claims).

9.4 In connection with paragraph 5.8 of the decision on admissibility, the State party again refers to its observations of 2 March 2000.

Author's additional comments

10. In his comments of 3 April, 7 June and 14 July 2002, the author restates his arguments, especially that of the failure by the State party to respect human rights, institutions and legal instruments, and the de facto lack of independence of the judiciary in Togo.

Re-examination of admissibility decision and consideration of the merits

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

11.2 The Committee has taken note of the observations of the State party of 1 October 2001 and 2002 regarding the inadmissibility of the communication on the ground of failure to exhaust domestic remedies. It notes that the State party has adduced no new or additional elements concerning inadmissibility, other than the observations which it made earlier at the admissibility stage, which would prompt the Committee to re-examine its decision. The Committee therefore considers that it should not review its finding of admissibility of 5 April 2001.

11.3 The Committee passes immediately to consideration of the merits.

12. Noting the fact that the Optional Protocol entered into force for the State party on 30 June 1988, that is, subsequent to the release and exile of the author, the Committee recalls its admissibility decision according to which it would need to be decided on the merits whether the alleged violations of articles 7, 9, 10 and 14 continued, after the entry into force of the Optional Protocol, to have effects that of themselves constitute a violation of the Covenant. Although the author claims that he has been forced into exile and to live apart from his family and relatives, and although he has after the Committee's admissibility decision provided some additional arguments why he believes that he cannot return to Togo, the Committee is of the view that

insofar as the author's submission could be understood to relate to such continuing effects of the original grievances that in themselves would amount to a violation of article 12 or other provisions of the Covenant, the author's claims have not been substantiated to such a level of specificity that would enable the Committee to establish a violation of the Covenant.

13. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee do not reveal any violation of the Covenant.

APPENDIX

Individual opinion of Mr. Abdelfattah Amor with regard to the admissibility decision of 5 April 2001

While sharing the conclusion of the Committee regarding the inadmissibility of the part of the communication relating to the author's brother, I continue to have reservations about the admissibility of the rest of the communication. There are a number of legal reasons for this:

1. Article 5, paragraph 2 (b), of the Optional Protocol to the International Covenant on Civil and Political Rights states that: "The Committee shall not consider any communication from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged."

Point number one: the onus is on the Committee to satisfy itself that the individual has exhausted all domestic remedies. The Committee's role in the case is to ascertain rather than to assess. The author's allegations, unless they focus on an unreasonable delay in proceedings, insufficient explanations offered by the State party, or manifest inaccuracies or errors, are not such as to necessitate a change in the Committee's role.

Point number two: article 5, paragraph 2 (b), of the Optional Protocol is quite unambiguous and requires no interpretation. It is perfectly clear and restrictive. It is not necessary to go beyond the text to make sense of it, which would mean twisting it and changing its meaning and scope.

Point number three: the sole exception to the rule of exhaustion of domestic remedies concerns unreasonable delay in proceedings, which is clearly not applicable in the present instance.

2. It is undeniable that the sentencing of the author to five years' imprisonment in 1986 was never appealed, either before the author's pardon in January 1987 or at any time afterwards. In other words, from the standpoint of the criminal law, no remedy was ever explored, let alone applied.

3. From the standpoint of the civil law and an action to seek compensation, the author has never, either as a

principal party or in any other capacity, gone to court to claim damages, with the result that his case has been referred to the Committee for the first time as an initial action.

4. The author could have referred the case to the Committee with effect from August 1988, the date on which the Optional Protocol came into force with respect to the State party. The fact that he has waited more than 11 years to take advantage of the new procedure available to him cannot fail to raise questions, including that of a possible abuse of the right of submission referred to in article 3 of the Optional Protocol.

5. The Committee lacks accurate, consistent and systematic evidence that would enable it to corroborate the author's allegations about the State party's judicial system as a whole, either as regards its criminal or its civil side. By basing its position on the general absence of effective remedies, as claimed by the author, the Committee has made a decision which, legally speaking, is questionable and could even be contested.

6. It is to be feared that this decision will constitute a vexatious precedent, in the sense that it could be taken to condone a practice that lies outside the scope of article 5, paragraph 2 (b), of the Optional Protocol.

To sum up, I am of the view that, considering the circumstances described in the communication, the author's doubts about the effectiveness of the domestic remedies do not absolve him from exhausting them. The Committee should have concluded that the provision contained in article 5, paragraph 2 (b), of the Optional Protocol had not been satisfied and that the communication was inadmissible.

*Individual opinion (dissenting) by Committee member
Hipolito Solari-Yrigoyen*

I disagree with the present communication on the grounds set forth below.

1. The Committee notes the fact that the Optional Protocol entered into force for the State party on 30 June 1988, that is, subsequent to the release and exile of the author. At the same time the Committee recalls its admissibility decision according to which it would need to be decided on the merits whether the alleged violations of articles 7, 9, 10 and 14 continued, after the entry into force of the Optional Protocol, to have effects that of themselves constitute a violation of the Covenant. In this regard, the author says that he has been forced into exile and to live apart from his family and relatives. In the view of the Committee, this claim should be understood as referring to the alleged violations of the author's rights in 1985-1987, which relate to such continuing effects of the original grievances that in themselves would amount to a violation of article 12 and other related provisions of the Covenant which permanently prevent his safe return to Togo.

2. The Committee observes that in its first presentation, on 2 March 2000, the State party denied that the author had been forced into exile, but that subsequently, after his

detailed and specific comments made on 22 August 2000, it has not provided any explanation or made any statement which would clarify the matter, in accordance with its obligations under article 4.2 of the Optional Protocol. By means of a simple statement it could have rebutted the author's claim that he is unable to return safely to Togo and offered assurances regarding his return, but it did not do so. It should be borne in mind that only the State party could offer such guarantees to put an end to the ongoing effects which underlie the author's exile by arbitrarily depriving him of his right to return to his own country. In its presentations made on 27 November 2000 and 1 October 2001 and 2002, the State party confined itself to rejecting the admissibility of the complaint as far as the author is concerned. It should be borne in mind that the State has supplied no new elements which would indicate that the continuing effects of the events which occurred before 30 June 1988 have ceased.

3. It is necessary to ask whether the time which elapsed between the date when the Optional Protocol entered into force for the State party and the date when the complaint was submitted might undermine or nullify the argument relating to continuing effects which mean that the author's exile is involuntary. The answer is no, since exiles have no time limits as long as the circumstances which provoked them persist, which is the case with the State party. In many cases these circumstances have persisted longer than the normal human life span. Moreover, it cannot be forgotten that forced exile imposes a punishment on the victim with the aggravating factor that no judge has provided the accused with all the guarantees of due process before imposing the punishment. The punishment of exile, in short, is an administrative punishment. It is in addition a manifestly cruel one, as society has considered since the remotest times because of the effects on the victim, his family and his emotional and other ties when he is forcibly uprooted.

4. Article 12 of the Covenant prohibits forced exile, stating that no one shall be arbitrarily deprived of the right to enter his own country. In General Comment No. 27, the Committee stated that the reference to the concept of arbitrariness covers all State action, legislative, administrative and judicial. Moreover, the possibility that the author may have dual nationality is of no importance, since, as also mentioned in the General Comment, "the scope of 'his own country' is broader than that of 'his own nationality'". Thus the persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase "his own country", which gives recognition to a person's special links with that country.

5. The Human Rights Committee is of the view that the original grievances suffered by the author in Togo in 1985-1987 have a continuing effect in that they prevent him from returning in safety to his own country. Consequently, there has been a violation of article 12, paragraph 4, of the Covenant, read in conjunction with articles 7, 9, 10 and 14.

6. In accordance with article 2, paragraph 3 (a), of the Covenant, the Committee considers that the author is entitled to an effective remedy.

Communication No. 916/2000

Submitted by: Jayalath Jayawardena

Alleged victim: The author

State party: Sri Lanka

Date of adoption of Views: 22 July 2002 (seventy-fifth session)

Subject matter: Death threats against complainant after public accusations by the Head of State

Procedural issues: Exhaustion of domestic remedies
- Non-substantiation of claim

Substantive issues: Right to security of person -
Failure to investigate threats against life of complainant

Article of the Covenant: 9, paragraph 1

Article of the Optional Protocol: 2

Finding: Violation (article 9, paragraph 1)

1. The author of the communication, is Mr. Jayalath Jayawardena, a Sri Lankan citizen, residing in Colombo, Sri Lanka. He claims to be a victim of violations by Sri Lanka of the International Covenant on Civil and Political Rights. The author does not invoke any specific provision of the Covenant, however, the communication appears to raise issues under article 9, paragraph 1, of the Covenant. He is not represented by counsel.

The facts as submitted by the author

2.1 The author is a medical doctor and a member of the United National Party (UNP) in Sri Lanka. At the time of his initial communication, he was an opposition Member of Parliament but in December 2001 his party obtained a majority in Parliament and he was appointed Minister of Rehabilitation, Resettlement and Refugees. From 1998, Mrs. Chandrika Bandaranaike Kumaratunga, the President of Sri Lanka, made public accusations, during interviews with the media, that the author was involved with the Liberation Tigers of Tamil Elam (LTTE) and such allegations were given wide publicity by the "government-controlled" radio and television corporations. In addition, the same allegations appeared on the Daily News newspaper on 9 and 10 September 1998, and 5 January 2000, respectively.

2.2 On 3 January 2000, and during an interview broadcast over the State-owned television station, the President again accused the author of involvement with the LTTE. Two days later, a lawyer and leader of the All Ceylon Tamil Congress, who openly supported the LTTE, was assassinated by an unidentified gunman in Colombo. The author

feared that he too would be murdered and that the President's accusations exposed him to many death threats by unidentified callers and to being followed by unidentified persons.

2.3 On 2 March 2000, the Secretary-General of Parliament requested the Ministry of Defence to provide the author with the same security afforded to the Members of Parliament in the North-East of the country, as his work was concentrated in those provinces. He also stated that the author was in receipt of certain threats to his life and requested that he receive additional personal security. The Secretary-General of Parliament confirmed in two letters to the author that he did not receive a response from the Ministry of Defence to his request. On 13 March 2000, the President accused the UNP of complicity with the LTTE in an interview published by the Far Eastern Economic Review.

2.4 On or around 15 March 2000, the author received two extra security guards, however they were not provided with "emergency communication sets" and the author was not provided with dark tinted glass in his vehicle. Such security devices are made available to all government Members of Parliament whose security is threatened, as well as providing them with more than eight security guards.

2.5 In several faxes submitted by the author, he provides the following supplementary information. On 8 June 2001, a State-owned newspaper published an article in which it stated that the author's name had appeared in a magazine as an LTTE spy. After this incident, the author alleges to have received around 100 death threats over the telephone and was followed by several unidentified persons in unmarked vehicles. As a result of these calls, the author's family was in a state of "severe psychological shock". On 13 June 2001, the author made a complaint to the police and requested extra security, but this was not granted.

2.6 On 18 June 2001, the author made a statement to Parliament revealing the fact that his life and that of his family were in danger. He also requested the Speaker of the Parliament to refer his complaint to the "privileges committee".¹ Pursuant to his

¹ No further information is provided on this committee.

complaint to the Speaker a “select committee”² was set up to look into his complaint, however because of the “undemocratic prorogation to the parliament”, this matter was not considered.³

2.7 In addition, the author made a complaint to the police against a Deputy Minister of the Government who threatened to kill him. On 3 April 2001, the Attorney-General instructed the “Director of Crimes of Police” to prosecute this Minister. However, on 21 June 2001, the Attorney-General informed the Director of Crimes that he (the Attorney-General) would have to re-examine this case again following representations made by the Deputy Minister’s lawyer. The author believes that this is due to political pressure. On 19 June 2001, the author wrote to the Speaker of Parliament requesting him to advise the Secretary of the Ministry of Defence to provide him with additional security as previously requested by the Secretary-General of Parliament.

2.8 On the following dates the President and the State-owned media made allegations about the author’s involvement with the LTTE: 25 June 2001; 29 July 2001; 5 August 2001; 7 August 2001; and 12 August 2001. These allegations are said to have further endangered the author’s life.

2.9 Furthermore, on 18 July 2001, the author alleges to have been followed by an unidentified gunman close to his constituency office. The author lodged a complaint with the police on the same day but no action was taken in this regard. On 31 August 2001, a live hand grenade was found at a junction near his residence.⁴ During the parliamentary election campaign which ended on 5 December 2001, the author alleges that the President made similar remarks about the connection between the UNP and the LTTE.

The complaint

3.1 The author complains that allegations made by the President of Sri Lanka on the State-owned media, about his alleged involvement with the LTTE, put his life at risk. He claims that such allegations are tantamount to harassment and resulted from his efforts to draw attention to human rights issues in Sri Lanka. He claims that he has no opportunity to sue the President as she is immune from suit.

² No further information is provided on this committee.

³ No further information has been provided by the author on this matter.

⁴ According to a newspaper article, provided by the author on this matter, an investigation was carried out and the officer-in-charge stated that the incident had nothing to do with the author.

3.2 The author claims that the State party did not protect his life by refusing to grant him sufficient security despite the fact that he was receiving death threats.

3.3 The author further claims that the State party failed to investigate any of the complaints he made to the police on the issue of the death threats received against him.

State party’s admissibility and merits submission

4.1 By letter of 6 September 2000, the State party made its submission on the admissibility of the communication and by letter of 3 July 2001, its submission on the merits. According to the State party, the author has not availed himself of any domestic remedies as required under article 2 of the Optional Protocol. It states that if the author believed that the President’s allegations infringed his civil and political rights, there are domestic remedies available to him under the Constitution and the Penal Code of Sri Lanka, against the media, restraining it from publishing or broadcasting such information, or instituting proceedings against it. It also submits that, apart from the author’s statement that the President is immune from suit, he has not claimed that he has no faith in the judicial system in Sri Lanka for the purposes of pursuing his rights and claiming relief in respect of the publication or broadcasting of the material.

4.2 The State party contests that the author has been receiving death threats from unidentified callers and has been followed by unidentified persons, as there is no mention of him making such complaints to the domestic authorities. In this context, it also states that the author’s failure to report such threats is an important factor in assessing his credibility.

4.3 On the merits, the State party submits that as a Member of Parliament and a medical practitioner, the author led a very open life, participating in television programmes relating both to the political as well as the medical field. He actively took part in political debates both in the television and the print media, without any indication of restraint, which would normally have been shown by a person whose life is alleged to be “under serious threat”. In this regard, the State party submits that in response to the allegations made by the President, the author issued a denial, which was given an equivalent amount of television, radio and press coverage in both the government and private sectors.

4.4 The State party also submits that the fact that the author made no complaint to the domestic authorities about receiving death threats and did not pursue available legal remedies against the media restraining them from publication of material considered to be prejudicial to him, indicates that the author is engaged in a political exercise in

international forums, to bring discredit to the Government of Sri Lanka rather than vindicating any human right which has been violated. According to the State party, the fact that the author failed to refer to the violation of any particular right under the Covenant would also confirm the above hypothesis.

4.5 Furthermore, it is submitted that there is no link between the assassination of the leader of the All Ceylon Tamil Congress, who was a lawyer, and the President's allegations about the author. It states that the President did not refer to the leader of this party in the interview in question and states that he had been openly supporting the LTTE for a long period of time. According to the State party, there are many lawyers who appear for LTTE suspects in Sri Lankan courts but who have never been subjected to any form of harassment or threat, and there have been no complaints of such a nature to the authorities.

4.6 Finally, the State party submits that the President of Sri Lanka, as a citizen of this country, is entitled to express her views on matters of political importance, as any other person exercising the fundamental rights of freedom of expression and opinion.

Author's comments

5.1 On the issue of admissibility, the author submits that his complaint does not relate to the Sri Lankan press nor the Sri Lankan police but to the President's allegations about his involvement with the LTTE. He submits that the President herself should be accountable for the statements made against him by her. However, as the President has legal immunity no domestic remedy exists that can be exhausted. The author quotes from the Sri Lankan Constitution:

30-(1) "There shall be a President of the Republic of Sri Lanka who is the head of the State, the head of the executive and of the Government and the Commander-in-Chief of the Armed Forces.

35-(1) While any person holds office as President no proceedings shall be instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity."

5.2 With respect to the State party's submission that the author made no official complaint about the death threats and necessity for increased security, the author reiterates what attempts he made in this regard, stating that he made many complaints to the police and submits a copy of one such complaint, dated 11 January 2000.

5.3 The author adds that on 18 July 2001 the Speaker of the Parliament requested the Secretary of

the Ministry of Defence to provide the author with increased security. Similarly, on 23 July 2001, the leader of the opposition also wrote to the Secretary with the same request.⁵ In a letter, dated 27 July 2001, the Secretary informed the Leader of the Opposition that both of these letters were forwarded to the President for consideration. The author states that he does not expect to receive such increased security as the President is also the Commander-in-Chief of the Police and Armed Forces.

5.4 The author refers to observations by international organizations on this issue who referred to the allegations made by the President and requested her to take steps to protect the author's life, including the investigation of threats to his life. According to the author, the President did not respond to these requests.

5.5 Finally, the author states that, the President did openly and publicly label the leader of the All Ceylon Tamil Congress a supporter of the LTTE but in any event he does not intend the Committee to investigate the circumstances of his death.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its Rules of Procedure, decide whether or not the complaint is admissible under the Optional Protocol to the Covenant.

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

6.3 The Committee notes the author's claim that his rights were violated, as he received death threats following allegations made by the President on his involvement with the LTTE, and his claim that he has no remedy against the President herself, as she is immune from suit. The State party insists that the author could have taken a legal action against the media which broadcast or published the President's allegations. While the State party does not contest that, due to her immunity, the President could not

⁵ The author draws the Committee's attention to the following paragraph of this letter, "Mr. Jayawardena has made several complaints to the local police and the IGP himself all of which have been to no avail. So much so that as recently as the 18th of July 2001 an unidentified gunman was found loitering outside his home. It is regrettable to note that in spite of all this no action has been taken by your Ministry to accede to the request of the Speaker."

have been the subject of a legal action, it does not indicate whether the author had any effective remedies to obtain reparation for the eventual harm to his personal security which the President's allegations may have caused. For these reasons the Committee finds that the author has exhausted domestic remedies, and this part of the communication is admissible. The Committee notes that this claim may raise issues under article 9, paragraph 1, of the Covenant.

6.4 In relation to the issue of the State party's failure to investigate his claims of death threats, the Committee notes the State party's argument that the author did not exhaust domestic remedies as he failed to report these complaints to the appropriate domestic authorities. From the information provided, the Committee observes that the author made at least two complaints to the police. For this reason, and because the State party has not explained what other measures the author could have taken to seek domestic redress, the Committee is of the view that the author has exhausted domestic remedies in this regard. The Committee notes that this claim may raise issues under article 9, paragraph 1, of the Covenant. The Committee finds no other reason to question the admissibility of this aspect of the communication.

6.5 In relation to the issue of the State party's failure to protect the author by granting him increased security the Committee notes the author's argument that the level of security afforded to him was inadequate and not at the level afforded to other Members of Parliament, in particular to Members of Parliament working in the North-East of the country. The Committee notes, that although the State party did not specifically respond on this issue, the author does affirm that he received "two extra security guards" but provides no further elaboration on the exact level of security afforded to him as against other Members of Parliament. The Committee, therefore, finds that the author has failed to substantiate this claim for the purposes of admissibility.

6.6 The Committee therefore decides that the parts of the communication which relate to the claim in respect of the President's allegations against the author, and the State party's failure to investigate the death threats against the author are admissible.

Consideration of the merits

7.1 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.

7.2 In respect of the author's claim that the allegations made publicly by the President of Sri Lanka put his life at risk, the Committee notes that the State party has not contested the fact that these statements were in fact made. It does contest that the author was the recipient of death threats subsequent to the President's allegations but, on the basis of the detailed information provided by the author, the Committee is of the view that due weight must be given to the author's allegations that such threats were received after the statements and the author feared for his life. For these reasons, and because the statements in question were made by the Head of State acting under immunity enacted by the State party, the Committee takes the view that the State party is responsible for a violation of the author's right to security of person under article 9, paragraph 1, of the Covenant.

7.3 With regard to the author's claim that the State party violated his rights under the Covenant by failing to investigate the complaints made by the author to the police in respect of death threats he had received, the Committee notes the State party's contention that the author did not receive any death threats and that no complaints or reports of such threats were received. However, the State party has not provided any specific arguments or materials to refute the author's detailed account of at least two complaints made by him to the police. In the circumstances, the Committee concludes that the failure of the State party to investigate these threats to the life of the author violated his right to security of person under article 9, paragraph 1, of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal a violation by Sri Lanka of article 9, paragraph 1, of the Covenant.

9. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee concludes that the author is entitled to an appropriate remedy.

10. Bearing in mind that, by becoming a State 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 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

APPENDIX

Individual opinion (partially dissenting) by Committee members Nisuke Ando, Prafullachandra Bhagwati, Eckart Klein, David Kretzmer, Rajsoomer Lallah, and Maxwell Yalden

We share the Committee's view regarding the State party's failure to investigate the death threats against the author.

We disagree, however, on the Committee's decision that the author's claim of a violation of his right under article 9, paragraph 1, of the Covenant by the allegations by the President through the State-owned media against him (see above paragraph 3.1), is admissible under the

Optional Protocol. In our view, the author has not exhausted domestic remedies.

As stated above, the author's allegations related to the allegations by the President through the State-owned media, but the author has not explained why he failed to take legal action against the media or to go to the courts to stop any of those allegations made against him. The fact that the President as head of State enjoys personal immunity from suit does not mean that there was no procedure of redress against other State or State-controlled organs. Therefore, in our view, this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol and should not have been dealt with on the merits.

Communication No. 926/2000

Submitted by: Hak-Chul Shin (represented by counsel, Mr. Yong-Wan Cho)

Alleged victim: The author

State party: Republic of Korea

Date of adoption of Views: 16 March 2004

Subject matter: Seizure of a painting by authorities on national security grounds

Procedural issues: Exhaustion of domestic remedies

Substantive issues: Right to freedom of expression - Justifiable limitations on the exercise of this right

Article of the Covenant: 19, paragraphs 2 and 3

Article of the Optional Protocol: 5, paragraph 2 (a)

Finding: Violation (art. 19, paragraph 2)

1.1 The author of the communication is Hak-Chul Shin, a national of the Republic of Korea born on 12 December 1943. He claims to be a victim of a violation by the Republic of Korea of article 19, paragraph 2, of the Covenant. He is represented by counsel.

1.2 On 8 May 2000, the Committee, acting through its Special Rapporteur on New Communications, pursuant to Rule 86 of the Committee's Rules of Procedure, requested the State party not to destroy the painting for the production of which the author was convicted, whilst the case was under consideration by the Committee.

The facts as presented by the author

2.1 Between July 1986 and 10 August 1987, the author, a professional artist, painted a canvas-mounted picture sized 130cm by 160cm. The painting, entitled "Rice Planting (Monaeki)" was subsequently described by the Supreme Court in the following terms:

"The painting as a whole portrays the Korean peninsula in that its upper right part sketches Baek-Doo-San, while its lower part portrays the southern sea with waves. It is divided into lower and upper parts each of which portrays a different scene. The lower part of the painting describes a rice-planting farmer ploughing a field using a bull which tramps down on E.T. [the movie character "Extraterrestrial"], symbolizing foreign power such as the so-called American and Japanese imperialism, Rambo, imported tobacco, Coca Cola, Mad Hunter, Japanese samurai, Japanese singing and dancing girls, the then [United States'] President Ronald Reagan, the then [Japanese] Prime Minister Nakasone, the then President [of the Republic of Korea] Doo Hwan Chun who symbolizes a fascist military power, tanks and nuclear weapons which symbolize the U.S. armed forces, as well as men symbolizing the landed class and comprador capitalist class. The farmer, while ploughing a field, sweeps them out into the southern sea and brings up wire-entanglements of the 38th parallel. The upper part of the painting portrays a peach in a forest of leafy trees in the upper left part of which two pigeons roost affectionately. In the lower right part of the forest is drawn Bak-Doo-San, reputed to be the Sacred Mountain of Rebellion [located in the Democratic People's Republic of Korea (DPRK)], on the left lower part of which flowers are in full blossom and a straw-roofed house as well as lake is are portrayed. Right below the house are shown farmers setting up a feast in celebration of fully-ripened grains and a fruitful year and either sitting around a table or dancing, and children with an insect net leaping about."

The author states that as soon as the picture was completed, it was distributed in various forms and was widely publicized.

2.2 On 17 August 1989, the author was arrested on a warrant by the Security Command of the National Police Agency. The painting was seized and allegedly damaged by careless handling of the prosecutor's office. On 29 September 1989, he was indicted for alleged breach of article 7 of the National Security Law, in that the picture constituted an "enemy-benefiting expression".¹ On 12 November 1992, a single judge of the Seoul Criminal District Court, at first instance, acquitted the author. On 16 November 1994, three justices of the 5th panel of the Seoul District Criminal Court dismissed the prosecutor's appeal against acquittal, considering article 7 of the National Security Law applicable only to acts which were "clearly dangerous enough to engender national existence/security or imperil the free democratic basic order". On 13 March 1998, however, the Supreme Court upheld the prosecutor's further appeal, holding that the lower court had erred in its finding that the picture was not an "enemy-benefiting expression", contrary to article 7 of the National Security Law. In the Court's view, that provision is breached "when the expression in question is actively and aggressively threatening the security and country or the free and democratic order". The case was then remitted for re-trial before three justices of the Seoul District Criminal Court.

2.3 During the re-trial, the author moved that the Court refer to the Constitutional Court the question of the constitutionality of the Supreme Court's allegedly broad construction of article 7 of the National Security Law in the light of the Constitutional Court's previous confirmation of the constitutionality of an allegedly narrower construction of this article. On 29 April 1999, the Constitutional Court dismissed a third party's constitutional application raising the identical issue on the basis that, having previously found the provision in question to be constitutional, it was within the remit of the Supreme Court to define the scope of the provision. As a result, the Seoul District

¹ Article 7 of the National Security Law provides, *inter alia*,

"Any person who has benefited the anti-State organization by way of praising, encouraging or siding with or through other means the activities of an anti-State organization, its member or a person who had been under instruction from such organization, shall be punished by imprisonment for not more than seven years. ...

Any person who has, for the purpose of committing the actions stipulated in paragraphs 1 through 4 of this article, produced, imported, duplicated, processed, transported, disseminated, sold or acquired documents, drawings or any other similar means of expression shall be punished by the same penalty as set forth in each paragraph." [*author's translation*]

Criminal Court dismissed the motion for a constitutional reference.

2.4 On 13 August 1999, the author was convicted and sentenced to probation, with the court ordering confiscation of the picture. On 26 November 1999, the Supreme Court dismissed the author's appeal against conviction, holding simply that "the lower court decision [convicting the author] was reasonable because it followed the previous ruling of the Supreme Court overturning the lower court's original decision". With the conclusion of proceedings against the author, the painting was thus ready for destruction following its earlier seizure.

The complaint

3.1 The author contends that his conviction and the damage caused to the picture by mishandling are in violation of his right to freedom of expression protected under article 19, paragraph 2, of the Covenant. At the outset, he contends that the painting depicts his dream of peaceful unification and democratisation of his country based on his experience of rural life during childhood. He argues that the prosecution's argument, in depicting the painting as the author's opposition to a corrupt militaristic south and the desirability of a structural change towards peaceful, traditionally-based farming north, and thus an incitement to "communisation" of the Republic of Korea, is beyond any logical understanding.

3.2 The author further argues that the National Security Law, under which he was convicted, is directly aimed at restricting "people's voices". He recalls in this vein the Committee's Concluding Observations on the State party's initial and second periodic reports under article 40 of the Covenant,² its Views in individual communications under the Optional Protocol³ as well as recommendations of the Special Rapporteur of the Commission on Human Rights on the right to freedom of opinion and expression.⁴

3.3 The author notes that, at trial, the prosecution produced an "expert witness", whose opinion was regarded as authoritative by the Supreme Court, in support of the charges. This expert contended that the picture followed the theory of "socialist realism". In his view, it depicted a "class struggle", led by

² A/47/40, paras. 470-528 (initial report), and CCPR/C/79/Add.114, 1 November 1999 (second periodic report).

³ *Tae Hoon Park v. Republic of Korea*, Case No. 628/1995, Views adopted on 20 October 1998, and *Keun-Tae Kim v. Republic of Korea*, Case No. 574/1994, Views adopted on 3 November 1998.

⁴ E/CN.4/1996/39/Add.1.

farmers seeking to overthrow the Republic of Korea due to its relationship with the United States and Japan. The expert considered that the mountains shown in the picture represented the “revolution” led by the DPRK, and that the shape of houses depicted reflected those of the birthplace of former DPRK leader Kim Il Sung. Thus, in the expert’s opinion, the author sought to incite overthrow of the regime of the Republic of Korea and its substitution with “happy lives” lived according to DPRK doctrine.

3.4 While the lower courts regarded the picture as, in the author’s words, “nothing more than a description of the imagery situation in [his] aspirations for unification in line with his personal idea of Utopia”, the Supreme Court adopted the expert’s view, without explaining its rejection of the lower court’s view and of their assessment of the expert evidence. On re-trial, the same expert again gave evidence, contending that even though the picture was not drawn in accordance with “socialist realism”, it depicted happiness in the DPRK, which would please persons in the DPRK whenever they saw it, and that thus the picture fell within the purview of the National Security Law. Under cross-examination, it emerged that the expert was a former DPRK spy and former painting teacher without any further professional expertise in art, who was employed by the Institute for Strategic Research against Communism of the National Police Agency, whose task was to assist police investigation of national security cases.

3.5 According to the author, during the re-trial, his counsel pointed out that in 1994, during the author’s original trial, a copy of the picture was displayed in the National Gallery of Modern Art in an exhibition entitled “15 Years of People’s Art”, an artistic style positively commented upon by the Gallery. Counsel also led in expert evidence an internationally known art critic, who rejected the prosecution expert’s contentions. In addition, counsel, in arguing for a narrow interpretation of article 7 of the National Security Law, provided the court with the Committee’s previous Views and Concluding Observations, as well as the Special Rapporteur’s recommendations, all of which are critical of the National Security Law. Notwithstanding, the Court concluded that his conviction was “necessary” and justified under the National Security Law.

3.6 The author argues that the Court failed to demonstrate that his conviction was necessary for purposes of national security, as required under article 19, paragraph 2, to justify an infringement of the right to freedom of expression. The Court applied a subjective and emotional test, finding the picture “active and aggressive” in place of the objective standard previously articulated by the Constitutional Court. Without showing any link of

the author to the DPRK or any other implication of national security, the Supreme Court justices simply expressed personal feelings as to the effect of the picture upon viewing it. This demarche effectively places the burden of proof on the defendant, to prove himself innocent of the charges.

3.7 By way of remedy, the author seeks (i) a declaration that his conviction and the damage caused to the painting by careless handling violated his right to freedom of expression, (ii) unconditional and immediate return of the painting in its present condition, (iii) a guarantee by the State party of non-violation in the future by repeal or suspension of article 7 of the National Security Law, (iv) reopening his conviction by a competent court, (v) payment of adequate compensation, (vi) publication of the Committee’s Views in the Official Gazette and their transmission to the Supreme Court for distribution to the judiciary.

3.8 The author states that the same matter has not been submitted for examination under any other procedure of international investigation or settlement.

The State party’s admissibility and merits submissions and author’s comments

4.1 By Note verbale of 21 December 2001, the State party argued that the communication is inadmissible and lacking in merit. As to admissibility, the State party argues that as the judicial proceedings in the author’s case were consistent with the Covenant, the case is inadmissible.

4.2 Concerning the merits of the case, the State party contends that the right to freedom of expression is fully guaranteed as long as any expression does not infringe the law, and that the article 19 of the Covenant itself provides for certain restrictions on its exercise. As the painting was lawfully confiscated, there is no ground for either re-trial or compensation. In addition, re-trial is not provided for in national law and any amendment to law to so provide is not feasible. Any claims of a violation of the right to freedom of expression will be considered on the merits in individual cases. As a result, the State party cannot commit itself to a suspension or repeal of article 7 of the National Security Law, although a revision is under discussion.

5. Following reminders of 10 October 2002 and 23 May 2003, the author indicated, by communication of 3 August 2003, that as the State party had not provided any substantive reasoning in terms of article 19 of the Covenant to justify his conviction, he did not wish to comment further on the State party’s arguments.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its Rules of Procedure, decide whether or not the complaint is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol. With respect to the exhaustion of domestic remedies, the Committee notes that the State party has not claimed that there are any domestic remedies that have not been exhausted or could be further pursued by the author. Since the State party is claiming inadmissibility on the generic contention that the judicial proceedings were consistent with the Covenant, issues which are to be considered at the merits stage of the communication, the Committee considers it more appropriate to consider the State party's arguments in this respect at that stage.

Consideration of the merits

7.1 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.

7.2 The Committee observes that the picture painted by the author plainly falls within the scope of the right of freedom of expression protected by article 19, paragraph 2; it recalls that this provision specifically refers to ideas imparted "in the form of art". Even if the infringement of the author's right to freedom of expression, through confiscation of his painting and his conviction for a criminal offence, was in the application of the law, the Committee observes that the State party must demonstrate the necessity of these measures for one of the purposes enumerated in article 19 (3). As a consequence, any restriction on that right must be justified in terms of article 19 (3), i.e. besides being provided by law it also must be necessary for respect of the right or reputations of others, or for the protection of national security or public order (*ordre public*) or of public health and morals ("the enumerated purposes").

7.3 The Committee notes that the State party's submissions do not seek to identify which of these purposes are applicable, much less the necessity thereof in the particular case; it may however be

noted that the State party's superior courts identified a national security basis as justification for confiscation of the painting and the conviction of the author. As the Committee has consistently found, however, the State party must demonstrate in specific fashion the precise nature of the threat to any of the enumerated purposes caused by the author's conduct, as well as why seizure of the painting and the author's conviction were necessary. In the absence of such justification, a violation of article 19, paragraph 2, will be made out.⁵ In the absence of any individualized justification therefore of why the measures taken were necessary in the present case for an enumerated purpose, therefore, the Committee finds a violation of the author's right to freedom of expression through the painting's confiscation and the author's conviction.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 19, paragraph 2, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including compensation for his conviction, annulment of his conviction, and legal costs. In addition, as the State party has not shown that any infringement on the author's freedom of expression, as expressed through the painting, is justified, it should return the painting to him in its original condition, bearing any necessary expenses incurred thereby. The State party is under an obligation to avoid similar violations in the future.

10. Bearing in mind that, by becoming a State 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, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

⁵ See, for example, *Tae Hoon Park v. Republic of Korea*, Case No. 628/1995, Views adopted on 20 October 1998, at paragraph 10.3, and *Keun-Tae Kim v. Republic of Korea*, Case No. 574/1994, Views adopted on 3 November 1998, at paragraphs 12.4–12.5.

Communication No. 931/2000

Submitted by: Ms. Raihon Hudoyberganova
Alleged victim: The author
State party: Uzbekistan
Date of adoption of Views: 5 November 2004

Subject matter: Prohibition to wear a headscarf in institution of higher learning

Procedural issues: Level of substantiation of claim

Substantive issues: Unjustified limitations on the author's freedom of religion

Articles of the Covenant: 18; 19

Article of the Optional Protocol: 2

Finding: Violation (art. 18, para. 2)

1. The author of the communication is Raihon Hudoyberganova, an Uzbek national born in 1978. She claims to be a victim of violations by Uzbekistan of her rights under articles 18 and 19 of the International Covenant on Civil and Political Rights.¹ She is not represented.

The facts as presented by the author

2.1 Ms. Hudoyberganova was a student at the Farsi Department at the Faculty of languages of the Tashkent State Institute for Eastern Languages since 1995 and in 1996 she joined the newly created Islamic Affairs Department of the Institute. She explains that as a practising Muslim, she dressed appropriately, in accordance with the tenets of her religion, and in her second year of studies started to wear a headscarf ("hijab"). According to her, since September 1997, the Institute administration began to seriously limit the right to freedom of belief of practising Muslims. The existing prayer room was closed and when the students complained to the Institute's direction, the administration began to harass them. All students wearing the hijab were "invited" to leave the courses of the Institute and to study at the Tashkent Islamic Institute instead.

2.2 The author and the concerned students continued to attend the courses, but the teachers put more and more pressure on them. On 5 November 1997, following a new complaint to the Rector of the Institute alleging the infringement of their rights, the

students' parents were convoked in Tashkent. Upon arrival, the author's father was told that Ms. Hudoyberganova was in touch with a dangerous religious group which could damage her and that she wore the hijab in the Institute and refused to leave her courses. The father, due to her mother serious illness, took his daughter home. She returned to the Institute on 1 December 1997 and the Deputy Dean on Ideological and Educational matters called her parents and complained about her attire; allegedly, following this she was threatened and there were attempts to prevent her from attending the lectures.

2.3 On 17 January 1998, she was informed that new regulations of the Institute have been adopted, under which students had no right to wear religious dress and she was requested to sign them. She signed them but wrote that she disagreed with the provisions which prohibited students from covering their faces. The next day, the Deputy Dean on Ideological and Educational matters called her to his office during a lecture and showed her the new regulations again and asked her to take off her headscarf. On 29 January the Deputy Dean called the author's parents and convoked them, allegedly because Ms. Hudoyberganova was excluded from the students' residence. On 20 February 1998, she was transferred from the Islamic Affairs Department to the Faculty of languages. She was told that the Islamic Department was closed, and that it was possible to re-open it only if the students concerned ceased wearing the hijab.

2.4 On 25 March 1998, the Dean of the Farsi Department informed the author of an Order by which the Rector had excluded her from the Institute. The decision was based on the author's alleged negative attitude towards the professors and on a violation of the provisions of the regulations of the Institute. She was told that if she changed her mind about the hijab, the order would be annulled.

2.5 As to the exhaustion of domestic remedies, the author explains that on 10 March 1998, she wrote to the Ministry of Education, with a request to stop the infringement of the law in the Institute; allegedly, the result was the loss of her student status on 15 March 1998. On 31 March 1998, she filed a complaint with the Rector, claiming that his decision was illegal. On 13 April 1998, she complained to the Chairman of the Committee of Religious Affairs (Cabinet of Ministers); on 22 April 1998, the

¹ The International Covenant on Civil and Political Rights entered into force for the State party on 1 September 1991 - date of its independence from the USSR, and the Optional Protocol entered into force for the State party on 28 September 1995 (accession).

Chairman advised her to respect the Institute's regulations. On 14 April 1998, she wrote to the Spiritual Directorate of the Muslims in Uzbekistan, but did not receive "any written reply". On 3 March and 13 and 15 April 1998, she wrote to the Minister of Education and on 11 May 1998, she was advised by the Deputy Minister to comply with the regulations of the Institute.

2.6 On 15 May 1998, a new law "On the Liberty of Conscience and Religious Organisations" entered into force. According to article 14, Uzbek nationals cannot wear religious dress in public places.² The administration of the Institute informed the students that all those wearing the hijab would be expelled.

2.7 On 20 May 1998, the author filed a complaint with the Mirabadsy District Court (Tashkent), requesting to have her student rights restored. On 9 June 1998, the legal counsel of the Institute requested the court to order the author's arrest on the ground of the provisions of article 14 of the new law. Ms. Hudoyberganova's lawyer objected that this law violated human rights. According to the author, during the court's sitting on 16 June, her lawyer called on her behalf the lawyer of the Committee of Religious Affairs, who testified that the author's dresses did not constitute a cult dress.

2.8 On 30 June 1998, the Court dismissed the author's claim, allegedly on the ground of the provisions of article 14 of the Law on Freedom of Conscience and Religious Organizations. According to the author, the Institute provided the court with false documents to attest that the administration had warned her that she risked expulsion. The author

² Article 1 of the law read as follows: "The aim of the present law is to ensure the right of every person to freedom of worship and religion, and the citizens equality irrespective of their religious convictions, and to regulate relations arising from religious organizations' activity".

Article 14 reads as follows: "Religious rites and ceremonies. Religious organizations have a right to create and maintain facilities for free worship and carrying out religious rites, and to maintain pilgrimage sites. Worship, religious rites and ceremonies shall be exercised at a religious organization's premises, prayer buildings and other properties belonging to the organization, at pilgrimage sites, cemeteries, and in cases of ritual necessity and at citizens' will at home. Worship and religious rites can be exercised in hospitals, nursing homes, detention centers, prisons and labour camps at the request of the people staying there. Public worship and religious rites can be held outside religious buildings in the order established by the law of the Republic of Uzbekistan. Citizens of the Republic of Uzbekistan (except religious organization's ministers) cannot appear in public places in religious attire. Religious organizations cannot subject believers to compulsory payment of money, or taxation, and to actions insulting their honour and dignity".

then requested the General Prosecutor, the deputy Prime-Minister, and the Chairman of the Committee of Religious Affairs, to clarify the limits of the terms of "cult" (religious) dress, and was informed by the Committee that Islam does not prescribe a specific cult dress.

2.9 On 15 July 1998, the author filed an appeal against the District's court decision (of 30 June 1998) in the Tashkent City Court and on 10 September, the City Court upheld the decision. At the end of 1998 and in January 1999, she complained to the Parliament, to the President of the Republic, and to the Supreme Court; the Parliament and the President's administration transmitted her letters to the Supreme Court. On 3 February 1999 and on 23 March 1999, the Supreme Court informed her that it could find no reasons to challenge the courts' decisions in her case.

2.10 On 23 February 1999, she complained to the Ombudsman, and on 26 March 1999 received a copy of the reply to the Ombudsman of the Institute's Rector, where the Rector reiterated that Ms. Hudoyberganova constantly violated the Institute's regulations and behaved inappropriately with her professors, that her acts showed that she belonged to an extremist organization of Wahabites, and that he had no reason to readmit her as student. On 12 April 1999, she complained to the Constitutional Court and was notified that it had no jurisdiction to deal with her case and that her claim had been channelled to the General Prosecutor's Office, which had forwarded it to the Tashkent Prosecutor's Office. On 30 June 1999, the Tashkent Prosecutor's Office informed her that there were no reasons to annul the court's rulings in her case. On 1 July 1999, she complained again to the General Prosecutor with a request to have her case examined. She received no reply.

The complaint

3. The author claims that she is a victim of violations of her rights under articles 18 and 19 of the Covenant, as she was excluded from University because she wore a headscarf for religious reasons and refused to remove it.

State party's observations

4.1 On 24 May 2000, 26 February 2001, 11 October 2001, and 3 September 2004, the State party was requested to submit to the Committee information and comments on the admissibility and merits of the communication. The State party presented its comments on 21 October 2004. It recalls that on 21 May 1998, the author applied to the Mirabad District Court of Tashkent with a request to acknowledge the illegality of her dismissal from the Tashkent State Institute of Eastern

Languages and to restore her as a student. On 30 June 1998, the Mirabadsy District Court dismissed her appeal.

4.2 The State party explains that according to the Court's civil case, it transpired that the author was admitted in the Faculty of Languages in the Institute in 1995, and in 1996 she continued her studies in the Faculty of History (Islamic Department). According to paragraph 2 (d) of the Internal Regulations (regulating the rights and obligations of the Institute's students), in the Institute, students are forbidden to wear clothes "attracting undue attention", and forbidden to circulate with the face covered (with a hijab). This regulation was discussed at a general meeting of all students on 15 January 1998. The author was presented the text and she made a note that she disagrees with the requirements of paragraph 2 (d). On 26 January 1998, the Dean of the Faculty of History warned her that she violated the provisions of paragraph 2 (d), of the Institute's regulations. The author refused to sign the warning and a record in this respect was made on 27 January 1998.

4.3 On 10 February 1998, by order of the Dean of the Faculty of History, the author was reprimanded for infringement of the Internal Regulations. By order of the Rector of the Institute of 16 March 1998, Ms. Hudoyberganova was excluded from the Institute. The order was grounded on the "rough immoral attitude toward a teacher and infringement of the internal regulations of the Institute, after numerous warnings". According to the State party, no cassation appeal was introduced against this decision. Her claim under the supervisory procedure (*nadzornaya zhaloba*) gave no result.

Issues and proceedings before the Committee

Consideration of admissibility

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

5.2 The Committee notes that the same matter is not being examined under any other international procedure and that domestic remedies have been exhausted. The requirements of article 5, paragraph 2 (a) and (b), of the Optional Protocol have thus been met.

5.3 The Committee has noted that the author has invoked article 19, of the Covenant, without however providing specific allegations on this particular issue, but limited herself to the mere enumeration of the above article. Therefore, the Committee concludes that the author has not

substantiated this claim, for purposes of admissibility, and that this part of the communication is inadmissible under article 2 of the Optional Protocol.

5.4 As to the author's remaining claims under article 18 of the Covenant, the Committee considers that it has been sufficiently substantiated for purposes of admissibility, and decides to proceed to its examination on the merits.

Examination of the merits

6.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it, as required under article 5, paragraph 1, of the Optional Protocol.

6.2 The Committee has noted the author's claim that her right to freedom of thought, conscience and religion was violated as she was excluded from University because she refused to remove the headscarf that she wore in accordance with her beliefs. The Committee considers that the freedom to manifest one's religion encompasses the right to wear clothes or attire in public which is in conformity with the individual's faith or religion. Furthermore, it considers that to prevent a person from wearing religious clothing in public or private may constitute a violation of article 18, paragraph 2, which prohibits any coercion that would impair the individual's freedom to have or adopt a religion. As reflected in the Committee's General Comment No. 22 (para.5), policies or practices that have the same intention or effect as direct coercion, such as those restricting access to education, are inconsistent with article 18, paragraph 2. It recalls, however, that the freedom to manifest one's religion or beliefs is not absolute and may be subject to limitations, which are prescribed by law and are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others (article 18, paragraph 3, of the Covenant). In the present case, the author's exclusion took place on 15 March 1998, and was based on the provisions of the Institute's new regulations. The Committee notes that the State party has not invoked any specific ground for which the restriction imposed on the author would in its view be necessary in the meaning of article 18, paragraph 3. Instead, the State party has sought to justify the expulsion of the author from University because of her refusal to comply with the ban. Neither the author nor the State party have specified what precise kind of attire the author wore and which was referred to as "hijab" by both parties. In the particular circumstances of the present case, and without either prejudging the right of a State party to limit expressions of religion and belief in the context of article 18 of the Covenant and duly taking into account the specifics of the context, or prejudging

the right of academic institutions to adopt specific regulations relating to their own functioning, the Committee is led to conclude, in the absence of any justification provided by the State party, that there has been a violation of article 18, paragraph 2.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the Covenant, is of the view that the facts before it disclose a violation of article 18, paragraph 2, of the Covenant.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Ms. Hudoyberganova with an effective remedy. The State party is under an obligation to take measures 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 or not 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 and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

APPENDIX

Individual opinion (dissenting) by Committee member Hipolito Solari-Yrigoyen

My dissenting opinion regarding this communication is based on the following grounds:

In order to comply with the provisions of article 5, paragraph 1, of the Optional Protocol, the communication should be studied in the light of all the information supplied by the parties. In the present case, it is the author who has provided most of the information, although her statements fail to underpin her own allegations, and even contradict them.

According to the author (para. 2.4), she was excluded from the Tashkent State Institute for Eastern Languages by the Rector, after numerous warnings, on the following grounds:

1. Her negative attitude vis-à-vis the teaching staff;
2. Her infringement of the regulations of the Institute.

Regarding her negative attitude towards the teachers, the decision of Mirabad district court revealed that the author had accused one of the teachers of bribery, claiming that he was offering pass marks in examinations in return for money. According to the State party (para. 4.3), she was excluded because of her "rough

immoral attitude toward a teacher". The author has not supplied any information to justify her serious accusation against the teacher which would nullify the initial ground given for her expulsion. Nor has she explained any link between this ground for exclusion and the alleged violation of article 18 of the Covenant.

Regarding the infringement of the regulations of the Institute, which did not permit the wearing of religious clothing on Institute premises, the author states that she disagreed with the provisions because they "prohibited students from covering their faces" (para. 2.3). The State party points out that the internal regulations forbid students to wear clothes "attracting undue attention", and to circulate with the face covered (para. 4.2). Although the author and the State party do not specify which type of clothing the author was wearing, she states that she dressed "in accordance with the tenets of her religion". However, the author herself states that she complained to the Chairman of the Committee of Religious Affairs (Cabinet of Ministers), who "informed [her] that Islam does not prescribe a specific cult dress" (para. 2.8). The author has not rebutted this assertion, which she herself passed on.

Regarding the regulations of the university institute, it is necessary to bear in mind that academic institutions have the right to adopt specific rules to govern their own premises. It should also be added that these regulations applied to all students without exception, since the institution involved was a State institute of education, not a place of worship, and one in which the freedom to exercise one's own religion is subject to the need to protect the fundamental rights and freedoms of others, that is, religious freedom for all, safeguarded by the guarantee of equality before the law, whatever the religious convictions or beliefs of each individual student. It is not appropriate to request the State party to provide specific grounds for the restriction complained of by the author, since the regulations applied impose general rules on all students, and there is no restriction imposed on her alone or on the adherents of one religion in particular. Furthermore, the exclusion of the author, according to her own statements, arose from more complex causes, and not only the religious clothing she wore or her demand to cover her face within the Institute.

For the reasons set out and in the light of the information supplied, I conclude that the author has not substantiated any of her allegations that she was victim of a violation of article 18 of the Covenant.

In accordance with article 5, paragraph 4, of the Optional Protocol, I consider that the facts in the present case do not reveal any violation of articles 18 and 19 of the Covenant.

Individual opinion (concurring) by Committee member Nigel Rodley

I agree with the finding of the Committee and with most of the reasoning in paragraph 6.2. I feel obliged, however, to dissociate myself from one assertion in the final sentence of that paragraph, in which the Committee describes itself as 'duly taking into account the specifics of the context'.

The Committee is right in the implication that, in cases involving such 'clawback' clauses as those contained

in articles 12, 18, 19, 21 and 22, it is necessary to take into account the context in which the restrictions contemplated by those clauses are applied. Unfortunately, in this case, the State party did not explain on what basis it was seeking to justify the restriction imposed on the author. Accordingly, the Committee was not in a position to take any context into account. To assert that it has done so, when it did not have the information on the basis of which it might have done so, enhances neither the quality nor the authority of its reasoning.

Individual opinion (concurring) by Committee member Ruth Wedgwood

The facts of this case remain too obscure to permit a finding of violation of the Covenant. The author has complained to the Committee that she was prevented from wearing a “hijab” as a student at the Tashkent State Institute in Uzbekistan. “Hijab” is often rendered in translation as “head scarf” and may be nothing more than a scarf covering the hair and neck. But the author also wrote in her protest to the deans at the Tashkent Institute that she “disagreed with the provisions which prohibited students from covering their faces.” Paragraph 2.3. The State party states that under Institute regulations, students are “forbidden to circulate with the face covered (with a hijab).” Paragraph 4.2.

Without further clarification of the facts by the author, it would thus seem that the manifestation of religious belief at issue in this case may involve the complete covering of a student’s face in the setting of a secular educational institution. State parties have differed

in their practice. Some countries permit any form of religious dress, including the covering of faces, accommodating women who otherwise would find it difficult to attend university. Other States parties have concluded that the purposes of secular education require some restrictions on forms of dress. A university instructor, for example, may wish to observe how a class of students is reacting to a lecture or seminar, or to establish eye contact in asking and responding to questions.

The European Court of Human Rights recently concluded that a secular university could restrict women students in the use of a traditional hijab, consisting of a scarf covering the hair and neck, because of the “impact” on other women students. *See Leyla Sahim v. Turkey*, No. 4477/98, decided 29 June 2004. The Court asserted that the “rights and freedoms of others” and the “maintenance of public order” were implicated, because a particular garb might cause other persons of the same faith to feel pressure to conform. The European Court observed that it “did not lose sight of the fact that ... extremist political movements in Turkey” sought “to impose on society as a whole their religious symbols and conception of a society founded on religious precepts.”

Such interference with the manifestation of personal religious belief is problematic. But a State may be allowed to restrict forms of dress that directly interfere with effective pedagogy, and the covering of a student’s face would present a different set of facts. The uncertain state of the record in this case does not provide the basis for adequate consideration of the issue, or even for a *sui generis* finding of violation.

Communication No. 932/2000

Submitted by: Ms. Marie-Hélène Gillot et al.

Alleged victim: The authors

State party: France

Date of adoption of Views: 15 July 2002

Subject matter: Dispute over criteria for determining the electorates for referenda in New Caledonia

Procedural issues: Status of “victim” - Level of substantiation of claim

Substantive issues: Right to take part in public affairs - Discrimination on grounds of residence, ethnic origins, place of birth

Articles of the Covenant: 2; 25; 26

Articles of the Optional Protocol: 1; 2

Finding: No violation

1. There are 21 authors, all French citizens, resident in New Caledonia, a French overseas community: Mr. Jean Antonin, Mr. François Aubert, Mr. Alain Bouyssou, Mrs. Jocelyne Schmidt (née Buret), Mrs. Sophie Demaret (née Buston), Mrs. Michèle Philizot (née Garland), Ms. Marie-

Hélène Gillot, Mr. Franck Guasch, Mrs. Francine Keravec (née Guillot), Mr. Albert Keravec, Ms. Audrey Keravec, Ms. Carole Keravec, Mrs. Sandrine Aubert (née Keravec), Mr. Christophe Massias, Mr. Jean-Louis Massias, Mrs. Martine Massias (née Paris), Mr. Jean Philizot, Mr. Paul Pichon, Mrs. Monique Bouyssou (née Quéro-Valleyo), Mr. Thierry Schmidt, Mrs. Sandrine Sapey (née Tastet). The authors claim to be victims of violations by France of articles 2 (1), 12 (1), 25 and 26 of the International Covenant on Civil and Political Rights. The authors are represented by Ms. Marie-Hélène Gillot, who herself acts as an author.

The facts as submitted by the authors

2.1 On 5 May 1998, two political organizations in New Caledonia, the Front de Libération Nationale Kanak Socialiste (FLNKS) and the Rassemblement pour la Calédonie dans la République (RPCR),

together with the Government of France, signed the so-called Noumea Accord. The Accord, which forms part of a process of self-determination, established the framework for the institutional development of New Caledonia¹ over the next 20 years.

¹ New Caledonia (South-west Pacific island group; area: 19,058 km²; population: 197,000; capital: Noumea), colonized by France in 1853, has undergone several changes in institutions. Initially administered by a governor, it became an overseas territory under the 1946 French Constitution. Until 1988 the territory was in a legal impasse between the granting of a decree of autonomy and restoration of State trusteeship. From 1984 onwards the situation was characterized by violence between pro- and anti-independence factions. Mediation by the French authorities through a “dialogue mission” to restore civil order led in 1988 to a local political agreement and a set of conclusions, pursuant to which “the future of New Caledonia can be determined only through a vote on self-determination (...). The provisions of this accord shall be subject to approval by the people of France in a referendum”. The negotiators were seeking to avoid a repetition of the experiment attempted with the previous local referendum on self-determination in 1987. That had led to confrontation between the two parties over the “cut-off question” whether to accede to independence or remain part of the French Republic, followed by a resumption of violence, resulting in loss of life, with political failure as the outcome. Further to the Matignon Accords of 26 June 1988 resulting from the dialogue mission, the question of self-determination was put to a referendum on the basis of universal suffrage by the French Government on 6 November 1988. The outcome was the Referendum Act (No. 88-1028) of 9 November 1988, embodying statutory provisions in preparation for New Caledonia’s self-determination. The Act, which was approved by 57 per cent of the votes cast, established December 1998 as the date for holding a referendum in New Caledonia. Coexistence between the two communities led, in 1998, to a second phase, namely the Noumea Accord. Pursuant to the Accord there was a decision, by mutual agreement, to again extend the time frame and to pursue the process in the context of a new agreement. The Accord recognizes the “shadow of colonization” and makes provision for the establishment of a new legal entity under the French Constitution. It also provides for significant transfers of State authority to the territory of New Caledonia. In a phased, irreversible process, New Caledonia will ultimately enjoy general competence in all spheres, with the exception of the system of justice, public order, defence, finance and, to a large extent, foreign affairs. After the transition period, these other prerogatives of the State could be transferred to New Caledonia following approval by the people concerned. The Accord also recognizes New Caledonian citizenship: “The concept of citizenship establishes the basis for the restrictions on the electorate for elections to the institutions of the country and the final referendum.” It further provides that “New Caledonian citizens” are to take a decision, within a 15- to 20-year time frame, on accession to independence; if they do not choose independence, autonomy will be maintained.

2.2 Implementation of the Noumea Accord led to a constitutional amendment in that it involved derogations from certain constitutional principles, such as the principle of equality of political rights (restricted electorate in local ballots). Thus, by a joint vote of the French Parliament and Senate, and approval of a draft constitutional amendment by the Congress, the Constitution Act of New Caledonia (No. 98-610) of 20 July 1998 inserted a title XIII reading “Transitional provisions concerning New Caledonia” in the Constitution. The title comprises the following articles 76 and 77:

Article 76 of the Constitution provides that:

“The people of New Caledonia shall, before 13 December 1998, express their views on the provisions of the accord signed at Noumea on 5 May 1998 and published on 27 May 1998 in the Journal Officiel of the French Republic. Those persons fulfilling the requirements established in article 2 of Act No. 88-1028 of 9 November 1988 shall be eligible to vote. The measures required for the conduct of the voting shall be taken by decree of the Council of State, after consideration by the Council of Ministers.”

Article 77 provides that:

“Following approval of the Accord in the referendum provided for in article 76, the Organic Law, adopted following consultation with the deliberative assembly of New Caledonia, shall establish, to ensure the development of New Caledonia with due respect for the guidelines provided for in the Accord and in accordance with the procedures necessary for its implementation: [...] – regulations on citizenship, the electoral system [...] – the conditions and time frame for a decision by the people concerned in New Caledonia on accession to full sovereignty.”

2.3 An initial referendum was held on 8 November 1998. The Noumea Accord was approved by 72 per cent of those voting, and it was established that one or more referendums would be held thereafter. The authors were not eligible to participate in that ballot.

2.4 The authors contest the way in which the electorates for these various referendums, as established under the Noumea Accord and implemented by the French Government, were determined.

2.5 For the first referendum on 8 November 1998, Decree No. 98-733 of 20 August 1998 on organization of a referendum of the people of New Caledonia, as provided for by article 76 of the Constitution, determined the electorate with reference to article 2 of Act No. 88-1028 of 9 November 1988 (also determined in article 6.3 of the Noumea Accord), namely: “Persons registered on the electoral rolls for the territory on that date and resident in New Caledonia since 6 November 1988 shall be eligible to vote.”

2.6 For future referendums, the electorate was determined by the French Parliament in article 218 of the Organic Law of New Caledonia (No. 99-209) of 19 March 1999 (reflecting article 2.2 of the Noumea Accord),² pursuant to which:

“Persons registered on the electoral roll on the date of the referendum and fulfilling one of the following conditions shall be eligible to vote:

(a) They must have been eligible to participate in the referendum of 8 November 1998;

(b) They were not registered on the electoral roll for the referendum of 8 November 1998, but fulfilled the residence requirement for that referendum;

(c) They were not registered on the electoral roll for the 8 November 1998 referendum owing to non-fulfilment of the residence requirement, but must be able to prove that their absence was due to family, professional or medical reasons;

(d) They must enjoy customary civil status or, having been born in New Caledonia, they must have their main moral and material interests in the territory;

(e) Having one parent born in New Caledonia, they must have their main moral and material interests in the territory;

(f) They must be able to prove 20 years’ continuous residence in New Caledonia on the date of the referendum or by 31 December 2014 at the latest;

(g) Having been born before 1 January 1989, they must have been resident in New Caledonia from 1988 to 1998;

(h) Having been born on or after 1 January 1989, they must have reached voting age on the date of the

² Article 2.2 of the Noumea Accord: “The electorate for the referendums on the political organization of New Caledonia to be held once the period of application of this Accord has ended (sect. 5) shall consist only of: voters registered on the electoral rolls on the dates of the referendums provided for under section 5 who were eligible to participate in the referendum provided for in article 2 of the Referendum Act, or who fulfilled the conditions for participating in that referendum; those who are able to prove that any interruptions in their continuous residence in New Caledonia were attributable to professional or family reasons; those who have customary status or were born in New Caledonia and whose property and personal ties are mainly in New Caledonia; and those who, although they were not born in New Caledonia, have one parent born there and whose property and personal ties are mainly in New Caledonia. Young people who have reached voting age and are registered on the electoral rolls and who, if they were born before 1988, resided in New Caledonia from 1988 to 1998, or, if they were born after 1988, have one parent who fulfilled or could have fulfilled the conditions for voting in the referendum held at the end of 1998, shall also be eligible to vote in these referendums. Persons who, in 2013, are able to prove that they have resided continuously in New Caledonia for 20 years may also vote in these referendums.”

referendum and have one parent who fulfilled the conditions for participation in the referendum of 8 November 1998.

Periods spent outside New Caledonia for the performance of national service, for study or training, or for family, professional or medical reasons shall, in the case of persons previously domiciled in the territory, be included in the periods taken into consideration in order to determine domicile.”

2.7 The authors, who did not fulfil the above criteria, state that they were excluded from the referendum of 8 November 1998 and that they will also be excluded from referendums planned from 2014 onwards.

2.8 The authors state that, in challenging these violations, they have exhausted all domestic remedies.

2.9 On 7 October 1998, the authors filed a joint petition before the Council of State for rescission of Decree No. 98-733 of 20 August 1998, and thus of the referendum of 8 November 1998 comprising the restricted electorate authorized for that purpose. In a decision of 30 October 1998 the Council of State rejected the petition. It stated in particular that the precedence accorded to international commitments under article 55 of the Constitution does not apply, in the domestic sphere, to constitutional provisions and that, in the case in point, the provisions of articles 2, 25 and 26 of the International Covenant on Civil and Political Rights, cited by the authors, could not take precedence over the provisions of the Act of 9 November 1988 (determining the electorate in relation to Decree No. 98-733 of 20 August 1998 on the referendum of 8 November 1998), which had constitutional status.

2.10 Each author in fact applied to the Noumea administrative commission to be included in the electoral rolls, and thus authorized to participate in the referendum of 8 November 1998. The Noumea court of first instance, seized of the matter by each author in connection with the commission’s refusal to authorize registration, confirmed that decision.³ The court of cassation, having been seized of the case, in a decision of 17 February 1999 rejected the

³ Rulings dated 19 October 1998 on the petition by Mr. Jean Etienne Antonin; 23 October 1998 on the petitions by Mr. Alain Bouyssou, Mrs. Jocelyne Schmidt (née Buret), Mrs. Sophie Demaret (née Buston), Mrs. Michèle Philizot (née Garland), Mr. Jean Philizot, Mrs. Monique Bouyssou (née Quero-Valleyo), Mr. Thierry Schmidt; 26 October 1998 on the petitions by Mr. François Aubert, Ms. Marie-Hélène Gillot, Mr. Franck Guasch, Mrs. Francine Keravec (née Guillot), Mr. Albert Keravec, Ms. Audrey Keravec, Ms. Carole Keravec, Mrs. Sandrine Aubert (née Keravec), Mr. Christophe Massias, Mr. Jean-Louis Massias, Mrs. Martine Massias (née Paris), Mr. Paul Pichon and Mrs. Sandrine Sapey (née Tastet).

appeals by each author on the ground that they did not meet the conditions established for the referendum of 8 November 1998 as set forth in article 76 of the Constitution.

2.11 The authors further consider that any appeal against the future but certain violation of their right to vote in referendums from 2014 onwards is futile and foredoomed. They point out that the Organic Law (No. 99-209) of 19 March 1999 was declared constitutional by the Constitutional Council in its decision No. 99-410 DC of 15 March 1999, notwithstanding the derogations from constitutional rules and principles; that the Constitutional Council cannot be seized by a private individual; and that no administrative or ordinary court holds itself competent to rescind or set aside a provision of organizational legislation even if, as claimed by the authors, it is in fact unconstitutional. They maintain that the precedent established by the decision of the Council of State of 30 October 1998 (see above) forecloses any review by an administrative judge of the compatibility of a law based explicitly in the Constitution with a treaty. The authors claim that this theory of the constitutional shield is also accepted by the Court of Cassation, which would mean the failure of any future application to an electoral judge. Lastly, the authors conclude that any appeal against denial of their right to vote in the referendums from 2014 onwards is irretrievably doomed, and might even be subject to a fine for improper appeal, or an order to meet expenses not included in the costs.

The complaint

3.1 In the first place, the authors consider that denial of their right to vote in the referendums of 1998 and from 2014 onwards is unlawful, as it violates an acquired and indivisible right, in contravention of article 25 of the International Covenant on Civil and Political Rights. In addition to being French citizens, they state that they are holders of voters' registration cards and are registered on the New Caledonia electoral roll. They explain that at the time of the referendum of 8 November 1998 they had been resident in New Caledonia for periods of between three years and four months and nine years and one month, and that two authors, Mr. and Mrs. Schmidt, were born in New Caledonia. They assert that their permanent residence is in New Caledonia, where they wish to remain, since the territory constitutes the centre of their family and professional lives.

3.2 In the second place, the authors maintain that denial of their right to vote constitutes discrimination against them which is neither justified nor reasonable nor objective. They contest the criteria established to determine the electorates for the referendums of 1998 and 2014 or thereafter on the

grounds of the derogations from French electoral provisions⁴ and the consequent violations of the International Covenant on Civil and Political Rights; in that regard they draw attention to the following discriminatory elements.

3.3 The authors first draw attention to discrimination affecting only French citizens in New Caledonia precisely because of their residence in the territory. They assert that the criteria regarding length of residence established for the referendums represent departures from the electoral code applicable to all French citizens, irrespective of place of residence. They claim that this results in (a) penalization of those who have opted to reside in New Caledonia, and (b) discriminatory treatment between French citizens in terms of the right to vote.

3.4 Secondly, the authors claim that there is discrimination between French citizens resident in New Caledonia according to the nature of the ballot in question. They call into question the existence of a dual electorate, one encompassing all residents for national elections, and the second restricted to a certain number of residents for local ballots.

3.5 Thirdly, the authors complain of discrimination on the basis of the ethnic origin or national extraction of French citizens resident in New Caledonia. They maintain that the French authorities have established an ad hoc electorate for local ballots, so as to favour Kanaks⁵ and Caldoches,⁶ presented as being of Caledonian stock, whose political representatives signed the Noumea Accord. According to the authors, the Accord was concluded to the detriment of other French citizens resident in New Caledonia⁷ who originate in metropolitan France (including the authors), as well as Polynesians, Wallisians, Futunians and Asians. These persons represent a significant proportion of the 7.67 per cent of Caledonian electors deprived of the right to vote.

3.6 Fourthly, the authors maintain that the establishment of a restricted electorate on the basis

⁴ Under the French Electoral Code, article L.11, exercise of the right to vote requires registration on an electoral roll, either in the commune of domicile, irrespective of the length of residence, or in the commune of actual residence once six months have elapsed.

⁵ Kanaks: Melanesian community present in New Caledonia for approximately 4,000 years.

⁶ Caldoches: persons of European descent present in New Caledonia since colonization in 1853.

⁷ According to incomplete information supplied by the authors, of the 197,000 inhabitants of New Caledonia, 34 per cent are of European origin (including the Caldoches), 3 per cent of Polynesian origin, 9 per cent Wallisian and 4 per cent Asian.

of birth⁸ amounts to discrimination between citizens who are nationals of a single State, namely France.

3.7 Fifthly, the authors view the criterion relating to the parental connection⁹ as discriminatory.

3.8 Sixthly, the authors claim that they are victims of discrimination owing to the transmission of the right to vote by descent,¹⁰ resulting from the criterion of parental link.

3.9 In the third place the authors maintain that the period of residence for authorization to vote in the referendum of 8 November 1998, namely 10 years, is excessive. They affirm that the Human Rights Committee found that a period of residence of seven years established under the Constitution of Barbados violated article 25 of the International Covenant on Civil and Political Rights.¹¹

3.10 The authors also consider the period of residence determining the right to vote in referendums from 2014 onwards, namely 20 years, to be excessive. They again assert that the French authorities are seeking to establish an electorate of Kanaks and Caldoches for whom, moreover, the right to vote is maintained even in the event of lengthy absences from New Caledonia. They state that a period of residence of three years was established for the referendums on self-determination in the French Somali Coast¹² in 1959, the territory of the Afars and the Issas in 1976, and New Caledonia in 1987. The intent, according to the authors, was to avoid granting the vote to civil servants from metropolitan France on assignments of limited duration, generally less than three years, and thus without any intention of integrating, and for whom voting would have raised conflicts of interest. However, the authors stress that they are not in the situation of civil servants from metropolitan France in New Caledonia temporarily, but rather that of French citizens who have chosen to settle in

⁸ Organic Law (No. 99-209), art. 218, (d) and (e), of 19 March 1999.

⁹ Organic Law (No. 99-209), art. 218 (e) and (h) of 19 March 1999.

¹⁰ Organic Law (No. 99-209), art. 218, (e) and (h) of 19 March 1999.

¹¹ The authors give the following reference: Human Rights Committee Yearbook, 1981-1982, vol. 1, CCPR/3. In fact, as emphasized below (paras. 8.26 and 8.27) by the State party, this was not a position adopted by the Human Rights Committee, but an individual opinion expressed by one of its members at a meeting to consider the report of Barbados. At the time, the Committee did not adopt concluding observations.

¹² The French Somali Coast colonized by France in 1898, changed its name to the French Territory of the Afars and the Issas in 1967, and on 27 June 1977 attained independence as the Republic of Djibouti.

New Caledonia permanently. They further assert that the requirement of 20 years' residence in New Caledonia contravenes General Comment No. 25 of the Human Rights Committee, in particular paragraph 6 thereof.¹³

3.11 The authors claim violations by France of articles 2, 25 and 26 of the International Covenant on Civil and Political Rights. They seek the restoration by France of their full political rights. They call upon France to amend the provisions of the Organic Law (No. 99-209) of 19 March 1999 that contravene the Covenant, so as to allow their participation in referendums from 2014 onwards.

The State party's observations on admissibility

4.1 In its observations of 23 October 2000, the State party considers, first, that the authors' communication does not seem to fall under any heading of inadmissibility. Inasmuch as the authors establish their exclusion from the New Caledonian electorate for the referendum of 8 November 1998 pursuant to the Noumea Accord and also from referendums on the future status of the territory of New Caledonia to be held between 2014 and 2019, and having filed appeals as available before the national courts - which were definitively dismissed - against the acts under domestic law that they are challenging, in the view of the State party the authors must be regarded as being able to claim, rightly or wrongly, that they are victims of a violation of the Covenant and as having satisfied the obligation of exhaustion of domestic remedies.

4.2 The State party raises issues of substance that, in its opinion, have a bearing on the admissibility of the communication.

4.3 In this regard, the State party asserts that the complaint of a violation of article 12, paragraph 1, of the Covenant, which is referred to in the authors' arguments but not included in their final comments, must be rejected as manifestly incompatible with that provision. The State party maintains that the procedures for determining the electorate for the referendums on the future status of the territory of New Caledonia, while incontrovertibly affecting the right to vote of certain citizens, have no relevance to liberty of movement or choice of residence by persons lawfully present in French territory, of which New Caledonia forms part.

¹³ Human Rights Committee General Comment No. 25, para. 6: "[...] Where a mode of direct participation by citizens is established, no distinction should be made between citizens as regards their participation on the grounds mentioned in article 2, paragraph 1, and no unreasonable restrictions should be imposed."

4.4 The State party also asserts that invoking the provisions of articles 2, paragraph 1, and 26 of the Covenant is superfluous.

4.5 According to the State party, article 2, paragraph 1, of the Covenant sets forth the principle of non-discrimination in enjoyment of the rights recognized by the Covenant. For this reason, it can be invoked only in combination with another right appearing in the same instrument. In the present case the State party deems it pointless to invoke it in connection with article 25 on the freedom to vote, which in any event makes specific reference to article 2 in relation to the prohibition of any discrimination in this regard. In the view of the State party, the act of invoking article 25 of the Covenant in itself necessarily entails monitoring by the Committee of respect for article 2, paragraph 1.

4.6 The State party asserts that article 26 of the Covenant establishes a general prohibition of all discrimination arising under the law which, in contrast to the principle enshrined in article 2, paragraph 1, may, in accordance with the Committee's previous decisions,¹⁴ be invoked independently. With regard to this general anti-discrimination clause, the State party is of the view that the reference to article 2, paragraph 1, made in article 25 of the Covenant constitutes *lex specialis*, establishing a level of protection which is at least equivalent, if not superior. The State party considers that invoking article 26 of the Covenant does not advance the authors' case any more than invoking article 25.

4.7 The State party thus concludes, without prejudice to the merits of the complaint of discrimination made by the authors, that its consideration from the standpoint of articles 2, paragraph 1, and 26 of the Covenant is pointless, inasmuch as the complaint can be just as validly assessed on the basis of the provisions of article 25 alone.

Authors' comments on State party's admissibility observations

5.1 In their comments of 20 February 2001, the authors note that the State party does not formally contest admissibility.

5.2 They reject the State party's objection in relation to article 12, paragraph 1, of the Covenant. They assert that liberty of movement within a State and the effective freedom of a national of that State to choose a residence, guaranteed by article 12 of the Covenant, exist only

to the extent that such movement or establishment of a new residence is not penalized by the annulment of another Covenant right, namely the right to vote, which by its very nature is linked to residence. The authors consider that the right to change residence, as permitted under article 12, would have no meaning if such a choice meant being denied all civil rights in the new place of residence - for a period of 10-20 years.

5.3 The authors also contest the argument of inadmissibility adduced by the State party with regard to the superfluous nature of invoking article 2, paragraph 1, and article 26 of the Covenant. They accordingly maintain their view that the domestic legislative provisions that they are challenging violate both article 2, paragraph 1, in conjunction with the provisions of articles 25 and 26, and article 26 of the Covenant.

Additional observations by the State party on admissibility

6.1 In its observations dated 22 February 2001, the State party made its preliminary observations on the authors' assertion that they had been victimized. The State party contends that the authors cannot claim to be the victims of a violation of the provisions of the Covenant - within the meaning of article 2 of the Optional Protocol and rule 90 of the Committee's rules of procedure - as a result of the determination of the electorates in question unless that determination has had or will have the effect of excluding them from the referendums in question.

6.2 The State party notes, on the basis of the facts supplied by the authors, that most of the authors did not, at the time of the referendum of 8 November 1998, meet the 10-year residence requirement (two of them, however, Mr. and Mrs. Schmidt, claimed that they had resided in New Caledonia since birth. The State party affirms that it accordingly sees no reason for their exclusion from the referendum, unless the period of residence was interrupted, a point which they do not clarify). The State party concludes that the majority of the authors therefore have a demonstrated personal interest in contesting the conditions under which the November 1998 referendum was held.

6.3 On the other hand the State party considers that the information provided by the 21 authors indicates that by 31 December 2014 only Mrs. Sophie Demaret will be excluded from future referendums as a result of application of the 20-year residence requirement. According to the State party, the other 20 authors will have, on the assumption that they remain as they say they intend to do, in the territory of New Caledonia, a period of residence greater than 20 years and will thus be able to participate in the various referendums. The State

¹⁴ Views of the Human Rights Committee, Ibrahim Gueye, 3 April 1989.

party concludes that 20 of the 21 authors do not have a demonstrated personal interest in contesting the procedures for the organization of future referendums, and thus cannot claim to be victims of a violation of the Covenant. Consequently, that part of their communication is inadmissible.

6.4 The State party recalls its objection to (a) the complaint of a violation of article 12, paragraph 1, of the Covenant, in that it is manifestly incompatible with the provision cited, and (b) the invoking of article 2, paragraph 1, and article 26 of the Covenant in that they are superfluous.

Additional admissibility submission by State party

7.1 In their comments of 9 May 2001, the authors reject the State party's objection in relation to the 20 authors concerning the part of the petition relating to future ballots. They consider that the State party has not argued the case for inadmissibility concerning them in its submission of 23 October 2000, and that its objection dated 22 February 2001 is tardy. They further submit that the 20 authors would be unable to participate in referendums after 2014 if, in conformity with their right under article 12 of the Covenant, they were to temporarily leave New Caledonia for a period which would prevent them from fulfilling the condition of 20 years' continuous residence. They point out that the two authors born in New Caledonia, Mr. and Mrs. Schmidt, were not allowed to vote in the referendum of 8 November 1998 since they had lived outside the territory between 1988 and 1998 and the condition of 10 years' continuous residence had no longer been fulfilled.

7.2 The authors also maintain the part of their communication relating to articles 2, paragraph 1, 12, paragraph 1, and 26 of the Covenant, and therefore contest the State party's argument that the communication is inadmissible.

State party's merits observations

8.1 In its observations of 22 February 2001, the State party develops its argument on the merits of the part of the communication which it considers admissible, namely, the complaint of a violation of article 25 of the Covenant.

8.2 It recalls that, according to the broad interpretation of article 25 by the Human Rights Committee in its General Comment No. 25 of 12 July 1996, that article, inter alia, establishes the right of citizens to vote at elections and referendums (cf. para. 10 of the General Comment). However, the Committee admits that this right may be subject to restrictions, provided they are based on reasonable criteria (*idem*). It further states that discriminatory criteria such as those prohibited in article 2,

paragraph 1, of the Covenant may not serve as a basis for such restrictions (cf. para. 6).

8.3 The State party explains that the referendums which are the subject of the present dispute concern the institutional development of New Caledonia and the possibility that the territory may accede to independence. They form part of a process of self-determination by the people of this territory, even if they do not all have the direct purpose of determining the question of the territory's accession to full sovereignty. In the State party's view, the considerations which led to the adoption of article 53 of the Constitution, which provides that "no cession ... of territory is valid without the consent of the population concerned", are therefore valid for such referendums (whether or not this article is applicable to them). The State party considers that it is therefore in the nature of these referendums that they should be limited to eliciting the opinion of not the whole of the national population, but the persons "concerned" with the future of a limited territory who prove that they possess certain specific characteristics.

8.4 The State party pursues its argument by confirming that the electorate determined, in conformity with the options chosen by the negotiators of the Noumea Accords, for the referendums in dispute is in fact a "restricted" electorate, which differs from the "ordinary" electorate, corresponding to persons included on the electoral rolls.

8.5 The State party also confirms that to the condition of inclusion on the electoral rolls was added, for the first referendum held in November 1998, a condition of 10 years' residence as at the date of the ballot, and for future referendums it is required of the electors either that they were permitted to participate in the first referendum or that they are able to prove specific links with the territory of New Caledonia (birth, family ties, etc.) or, failing that, that they will have been living in the territory for 20 years on the date of the referendum in question.

8.6 In the view of the State party, the authors do not seem to question the principle of the limitation of the electorate to the population concerned. However, the State party recalls that, in support of their complaint of a violation of article 25 of the Covenant, they adduce the following arguments: violation of the right to vote; discrimination between French citizens resident in New Caledonia and other citizens; discrimination between the Caledonian residents themselves according to the nature of the ballots; discrimination according to ethnic origin or extraction; discrimination according to place of birth; discrimination according to family ties; discrimination on the ground of transmission of the right to vote by descent; excessive period of residence in order to be authorized to participate in

the first referendum; excessive period also for authorization to participate in future referendums; withdrawal of the right to vote from the authors.

8.7 By way of introduction, the State party points out that, insofar as article 25 of the Covenant provides that the right to participate in a vote may be subject to reasonable limitations, the authors' argument that they enjoy an absolute right to take part in the referendums in question must be rejected.

8.8 The State party considers that the debate is therefore limited to the question of the compatibility of the restrictions imposed on the electorate with the provisions of article 25 of the Covenant. On this point, in the opinion of the State party, the authors' closely-argued case seems to be built on two main contentions: the criteria used to determine the electorate are discriminatory; and the periods set for length of residence are excessive.

8.9 The State party observes that the contested legislative instrument merely incorporates the choices freely made by the representative local political organizations which negotiated the Noumea Accords. In its view, therefore, the legislature, by incorporating these choices - which it was by no means required to do - manifested its concern to take account of the opinion of the representatives of the local populations concerning the procedures for implementation of a process aiming at their self-determination. The State party considers that this approach was such as to guarantee the free choice of their political status, which article 25 of the Covenant precisely aims to protect (cf. above-mentioned General Comment of the Committee, para. 2).

8.10 Nevertheless, the State party does not dispute that those choices must be made in conformity with the provisions of article 25 of the Covenant. In this respect, it considers that these provisions have been fully observed in this case.

8.11 The State party explains, first, that the complaint on the ground of the discriminatory character of the criteria used to determine the electorate is unfounded.

8.12 In its opinion, there is in fact an objective difference in situation with regard to the referendums in dispute between the persons authorized to vote and those not authorized to vote.

8.13 In this connection, the State party recalls that the restrictions imposed on the electorate are dictated by the very purpose of the referendums. It maintains that this is all the more true since, as the authors themselves emphasize, their names are included on the "ordinary" electoral rolls and they enjoy without restriction the right to vote in ballots other than those relating to the territory of New Caledonia. In the State party's opinion, it is thus incorrect to say that

they have been deprived of their right to vote. This right to vote has been restricted, with the result that the authors have not been or will not be (in the case of just one of their number) consulted on questions in which they are not regarded as being "concerned".

8.14 The State party asserts that it is natural to consider that persons "concerned" in votes held in the context of a self-determination process are those who prove that they have particular ties to the territory whose fate is in question, ties which legitimize their participation in the vote.

8.15 The State party observes that, in the present case, the contested system enables these ties to be assessed in the light of several alternative, non-cumulative, elements: length of residence in the territory; possession of customary civil status; existence of moral and material interests in the territory, combined with the birth of the person concerned or his parents in the territory; for persons of full age born after the 1998 referendum, the fact that their parents were permitted to participate in that referendum.

8.16 The State party affirms that these are objective criteria, which have no connection with ethnic origin or political choices and which incontrovertibly establish the strength of the ties of the persons concerned with the territory of New Caledonia. In the State party's opinion, there is no doubt that persons fulfilling at least one of the conditions established are more concerned in the territory's future than those who fulfil none of the conditions.

8.17 The State party concludes that the determination used for the electorates thus has the effect of treating differently persons in objectively different situations as regards their links with the territory. For this reason, in its view, the determination cannot be deemed discriminatory.

8.18 The State party adds that, even admitting, solely for the sake of argument, that the determination of the electorates amounts to positive discrimination, this would not be contrary to article 25 of the Covenant.

8.19 In this connection, the State party recalls that, in its General Comment No. 18, the Committee observes: "... in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant".

8.20 Conversely, in the State party's view, article 1, paragraph 4, of the International Convention on the Elimination of All Forms of Racial Discrimination prohibits such action when, on the pretext of positive discrimination, it would "lead to the maintenance of separate rights for different racial groups".

8.21 In connection with these provisions, the State party says it is apparent that if the purpose of the organizational procedures for the referendum in question was to favour one community (e.g. the Kanak community) by allowing only that community to participate in the vote or by granting its members preferential representation or treatment through a specific college, that discriminatory treatment would certainly not be regarded as an admissible restriction under article 25 of the Covenant.

8.22 The State party emphasizes, however, that, as Louis Joinet, the Senior Advocate-General,¹⁵ has noted in his arguments, when the Court of Cassation came to consider the discrimination complaint in question, the criteria used for the composition of the electorate are based not on a distinction between Caldoches and Melanesians, but on the distinction made between national residents in the light of the length of their domicile on the island and their demonstrated links with it, whether their origin be Melanesian, European, Wallisian, etc.

8.23 The State party explains that these criteria do indeed favour long-standing residents over more recent arrivals. In its opinion, if for this reason, and despite the arguments adduced above, that could be regarded as an act of positive discrimination, it would not in principle be contrary to the provisions of the Covenant, as pointed out by the Committee in its above-mentioned General Comment No. 18. It could be censured only if it had the effect of maintaining different rights for separate racial groups, which, because of the criteria adopted, is not the case in the present situation.

8.24 The State party affirms, secondly, that the complaint that the restriction imposed on the electorate on the basis of length of residence in New Caledonia is unreasonable is likewise unfounded.

¹⁵ Senior Advocate-General of the Court of Cassation: The prosecution department of the Court of Cassation is composed of judges with the title "advocates-general". They are called upon, in a personal capacity, to give an opinion, in complete independence and impartiality, on the circumstances of the case and the applicable rules of law, and their opinion on the solutions required, as their conscience dictates, in the case submitted for jurisdiction. The Senior Advocate-General, who heads the department, has the specific responsibility of setting forth his argument before all the divisions of the Court when they assemble in plenary session because of the scope of the question of principle on which the Court is called upon to rule.

8.25 The State party refers to the authors' argument that the 10-year and 20-year residence requirements set for participation in past and future referendums are contrary to article 25 of the Covenant, in that these limits are too high and lead to the exclusion of a substantial part of the electorate.

8.26 The State party points out that the authors cite in support of that argument a decision of the Committee that a period of seven years' residence set by the Constitution of Barbados for the right to stand for election to the House of Assembly was unreasonable. The State party affirms that, in fact, that was not a position adopted by the Committee, but a single opinion expressed by one of its 18 members at a meeting,¹⁶ which was never adopted by the Committee itself. At no time, therefore, has the Committee reached a decision of the kind mentioned by the authors. The State party adds that the Committee did not in fact raise this question on the occasion of the submission of the second periodic report of Barbados in 1988.¹⁷

8.27. In addition, the State party points out that, in its General Comment on article 25 of the Covenant,¹⁸ the Committee cites no case based on a period of residence considered to be unreasonable.

8.28. Furthermore, the State party considers that, in the present case, if participation in the referendum of November 1998 was subject to a 10-year period of residence and if participation in future referendums will require 20 years' residence, in cases where the persons concerned do not meet any of the other conditions established, these conditions cannot be regarded as unreasonable.

8.29. The State party says it is true that the periods of residence thus established exceed the three-year limit set for a number of earlier referendums (e.g. the Act of 22 December 1966 concerning the referendum relating to the French Somali Coast; the Act of 28 December 1976 concerning the referendum relating to the territory of the Afars and the Issas).

8.30 However, in the opinion of the State party, there are no grounds for thinking that these minimum periods, which meet the need to limit referendums to people having genuine local roots, were unreasonable in the light of article 25 of the Covenant.

8.31 The State party argues that, firstly, these length of residence requirements meet the concern, expressed by the representatives of the local

¹⁶ Yearbook of the Human Rights Committee, 1981-1982, vol. I, CCPR/3, 256th meeting, 24 March 1981, p. 71, para. 9.

¹⁷ CCPR/C/SR.823, 825 and 826.

¹⁸ CCPR/C/12/Rev.1/Add.7, 12 July 1996.

population during the negotiation of the Noumea Accords, to ensure that the referendums will reflect the will of the population “concerned” and that their results cannot be undermined by a massive vote by people who have recently arrived in the territory and have no proven, strong ties to it. The State party considers that this concern is perfectly legitimate in the case of referendums held in the context of a self-determination process.

8.32 The State party considers, secondly, that these conditions excluded only a small proportion of the resident population (about 7.5 per cent) from the first referendum and, unless there is a major demographic change, this will also be the case with future referendums, for which the length of residence criterion will not in fact be the only criterion establishing the right to vote.

8.33 Lastly, in the opinion of the State party, no decision of the Committee provides grounds in the present case for regarding these requirements, which do not appear unreasonable either in their justification or in their practical consequences, as being contrary to the provisions of article 25 of the Covenant.

8.34 For all these reasons, the State party considers that the complaint of violation of article 25 of the Covenant must be dismissed.

Authors’ comments

9.1 In their comments of 9 May 2001, the authors again allege a violation by France of article 12, paragraph 1, of the Covenant, on the basis of their previous argument and with reference to paragraphs 2, 5 and 8 of the Committee’s General Comment No. 27 (67) on freedom of movement.¹⁹

9.2 They reassert that they maintain the part of their communication relating to a violation of article 2, paragraph 1, of the Covenant.

9.3 They reassert their position that the Committee should consider the violation of article 26 of the Covenant, irrespective of all other provisions, or in relation to article 25.

9.4 They refute the State party’s argument that there has been no violation of article 25 of the Covenant.

¹⁹ General Comment No. 27 (67): para. 2 “The permissible limitations which may be imposed on the rights protected under article 12 must not nullify the principle of liberty of movement”; para. 5 “The right to move freely relates to the whole territory of a State, including all parts of federal States”; para. 8 “Freedom to leave the territory of a State may not be made dependent on ... the period of time the individual chooses to stay outside the country”.

9.5 They again assert, first, their absolute right, as citizens fulfilling all the objective conditions for elector status (in particular, those relating to age of majority, non-deprivation of civil rights following a conviction under ordinary law, or major disability) enabling them to vote in all political ballots held at their place of residence for electoral purposes.

9.6 The authors recall that they consider themselves to be among the population “concerned” by the November 1998 and future referendums on the status of New Caledonia. They cite their personal interest and their sufficiently strong ties to the territory. They further state that French citizens resident in New Caledonia have been exclusively concerned in their daily lives by the “Caledonian Act” since the adoption of the Organic Law (No. 99-209) of 19 March 1999.

9.7 They further submit that the principle of “positive discrimination” cannot be applied in electoral matters and cannot be inferred from the Committee’s General Comment No. 18.

9.8 They explain, incidentally, that the Committee establishes a prerequisite for the adoption of measures of positive discrimination, namely, their temporary character and the fact that the general situation of certain population groups prevents or impairs the enjoyment of human rights.

9.9 In the authors’ opinion, the 20-year continuous residence requirement for participation in future ballots represents not a limitation in time, but a permanent situation of de jure exclusion of the authors from future Caledonian nationality.

9.10 The authors further raise the question how the exercise of their right to vote and that of people in their situation prevents or impairs the enjoyment of the human rights of other Caledonian communities. They again state that the provisions governing participation in the referendums of 1998 and 2014 or thereafter have been devised by the French authorities as a form of electoral favouritism allowed for purely political reasons. In their opinion, these authorities conceived, through the Noumea Accord, the falsely objective criterion of a lengthening of the period of residence in order to establish indirect and insidious discrimination.

9.11 They consider that the State party has not offered a serious answer to their criticism relating to the excessive period of continuous residence as a condition for voting in the 1998 and future ballots.

9.12 For their part, the authors adduce the following arguments. They note, first, that the two main communities in New Caledonia comprise (a) inhabitants of Melanesian origin (44 per cent of the population), and (b) inhabitants of Caldoche origin (30 per cent of the population). They maintain that (a) the supporters of independence have always been in a

minority, and (b) since the result of the self-determination referendum of 1987, which massively rejected independence, any other similar ballot would, in the current context, lead to the rejection of independence, albeit with risks of disorder. The authors explain that, in these circumstances, the FLNKS (representing the Kanaks) sought from the RPCR (representing the Caldoches), which found this to its advantage, an “understanding” aimed at forbidding as far as possible the non-Kanak, non-Caldoche inhabitants²⁰ from interfering in the political debate and the future of the territory, and also at winning, in the ballot to be held in 2014 or thereafter, the votes of additional Kanak electors on the assumption that there will be a greater demographic increase in the Melanesian community.

9.13 In response to the State party’s argument that the length of residence requirements meet the concern of the representatives of the local population in the context of the negotiation of the Noumea Accord to ensure that the referendums will reflect the will of the population “concerned”, the authors state that this concern on the part of the local political parties does not constitute a ground for exemption, and still less an objective and legitimate justification within the meaning of the Covenant.

9.14 They also reject the State party’s submission that the 7.5 per cent of Caledonian residents excluded from the referendums constitute a small proportion of the population. They point out that the actual figure is 7.67 per cent of the electors included on the electoral rolls on 8 November 1998, the date of the latest referendum.

9.15 Lastly, the authors again conclude that there has been a violation by France of article 25 of the Covenant.

Admissibility considerations

10.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

10.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined

²⁰ That is to say, 26 per cent of the population of New Caledonia: 4 per cent of European origin, 9 per cent of Wallisian and Futunian origin, 3 per cent of Polynesian origin, 4 per cent of Asian origin and 6 per cent of other origins. According to the Senior Advocate-General of the Court of Cassation, in 1996 the breakdown of the population of New Caledonia was as follows: 33 per cent Europeans, 44 per cent Melanesians, 22 per cent others.

under another procedure of international investigation or settlement.

10.3 Regarding the authors’ status as victims within the meaning of article 1 of the Optional Protocol, the Committee has noted that the State party recognized their personal interest in contesting the method of organization of the November 1998 referendum.

10.4 On the question of future referendums after the cut-off date of 31 December 2014, the Committee has examined the State party’s argument that only Mrs. Sophie Demaret will be excluded since she will not have met the 20-year residence requirement. In the State party’s view, however, the 20 other authors will, assuming that they remain in New Caledonia as they say they intend to do, be able to prove that they have lived in New Caledonia for over 20 years, which will enable them to participate in future referendums. According to the State party, therefore, these 20 authors do not have a proven personal interest in acting and, accordingly, may not claim the status of victims; hence this part of the communication is inadmissible. The Committee has also taken note of the authors’ argument, inter alia, that, apart from Mrs. Demaret, they will be unable to participate in future referendums if, in conformity with their right under article 12 of the Covenant, they were to temporarily leave New Caledonia for a period which would prevent them from meeting the 20-year continuous residence requirement.

10.5 After considering the arguments adduced and other information in the communication, the Committee notes that 20 of the 21 authors have (a) stressed their desire to remain in New Caledonia, which constitutes their permanent place of residence and the centre of their family and working lives, and (b) mentioned on a purely hypothetical basis a number of eventualities, namely, temporary departure from New Caledonia and a period of absence which, according to the individual situation of each author, would at some point result in exclusion from future referendums. The Committee considers that the latter arguments as raised by the authors, which are in fact at variance with their main argument concerning their present and future permanent residence in New Caledonia, do not go beyond the bounds of eventualities and theoretical possibilities.²¹ Consequently, only Mrs. Demaret, through having failed to accumulate 20 years’ residence in New Caledonia, will be able to claim victim status vis-à-vis the planned referendums, within the meaning of article 1 of the Optional Protocol.

²¹ Communication No. 35/1978, *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius* (para. 9.2).

10.6 As regards the complaints of violations of article 12, paragraph 1, of the Covenant, the Committee has taken note of the State party's arguments concerning the incompatibility *ratione materiae* of these allegations with the provisions of the Covenant. The Committee considers that the facts submitted by the authors and previously considered are not sufficiently substantiated for purposes of admissibility under article 2 of the Optional Protocol (para. 5.2).

10.7 Concerning the allegations of violations of articles 25 and 26 of the Covenant, the Committee declares this part of the communication admissible in that it seems to raise issues in respect of the articles invoked and believes that the complaint should be considered on its merits, in conformity with article 5, paragraph 2, of the Optional Protocol.

Examination of the merit

11.1 The Human Rights Committee has examined the present communication in the light of all the written information communicated by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

11.2 The Committee has to determine whether the restrictions imposed on the electorate for the purposes of the local referendums of 8 November 1998 and in 2014 or thereafter constitute a violation of articles 25 and 26 of the Covenant, as the authors maintain.

12.1 The authors maintain, first, that they have an absolute, acquired and indivisible right to vote in all political ballots organized in their place of residence.

12.2 On this point the Committee recalls its decisions in relation to article 25 of the Covenant, namely that the right to vote is not an absolute right and that restrictions may be imposed on it provided they are not discriminatory or unreasonable.²²

13.1 The authors maintain, secondly, that the criteria used to determine the electorates in local ballots represent a departure from French rules on electoral matters (the right to vote can be made dependent only on the criterion of inclusion on an electoral roll, either of the commune of domicile, irrespective of the period of residence, or of the commune of actual residence for at least 6 months) and thereby impose on them discriminatory restrictions which are contrary to the International Covenant on Civil and Political Rights.

²² Communications No. 500/1992, *J. Debreczeny v. Netherlands*; No. 44/1979, *Alba Pietrarroia on behalf of Rosario Pietrarroia Zapala v. Uruguay*; General Comment No. 18 relating to article 25 (fifty-seventh session, 1996), paras. 4, 10, 11 and 14.

13.2 In order to determine the discriminatory or non-discriminatory character of the criteria in dispute, in conformity with its above-mentioned decisions, the Committee considers that the evaluation of any restrictions must be effected on a case-by-case basis, having regard in particular to the purpose of such restrictions and the principle of proportionality.

13.3 In the present case, the Committee has taken note of the fact that the local ballots were conducted in the context of a process of self-determination of the population of New Caledonia. In this connection, it has taken into consideration the State party's argument that these referendums - for which the procedures were fixed by the Noumea Accord and established according to the type of ballot by a vote of Congress²³ or Parliament²⁴ - must, by virtue of their purpose, provide means of determining the opinion of, not the whole of the national population, but the persons "concerned" by the future of New Caledonia.

13.4 Although the Committee does not have the competence under the Optional Protocol to consider a communication alleging violation of the right to self-determination protected in article 1 of the Covenant, it may interpret article 1, when this is relevant, in determining whether rights protected in parts II and III of the Covenant have been violated. The Committee is of the view, therefore, that, in this case, it may take article 1 into account in the interpretation of article 25 of the Covenant.

13.5 In relation to the authors' complaints, the Committee observes, as the State party indeed confirms, that the criteria governing the right to vote in the referendums have the effect of establishing a restricted electorate and hence a differentiation between (a) persons deprived of the right to vote, including the author(s) in the ballot in question, and (b) persons permitted to exercise this right, owing to their sufficiently strong links with the territory whose institutional development is at issue. The question which the Committee must decide, therefore, is whether this differentiation is compatible with article 25 of the Covenant. The Committee recalls that not all differentiation constitutes discrimination if it is based on objective and reasonable criteria and the purpose sought is legitimate under the Covenant.

²³ Constitutional Act (No. 98-610) of 20 July 1998, whose article 76 determined conditions for participation in the 1998 ballot. Congress is constituted by the meeting of the National Assembly and the Senate for the purposes of amending the Constitution, in accordance with article 89 of the Constitution of 4 October 1958.

²⁴ Organic Law (No. 99-209) of 19 March 1999, whose article 218 determines conditions for participation in ballots as from 2014.

13.6 The Committee has, first of all, to consider whether the criteria used to determine the restricted electorates are objective.

13.7 The Committee observes that, in conformity with the issue in each ballot, apart from the requirement of inclusion on the electoral rolls, the criteria used are: (a) for the 1998 referendum relating to the continuation or non-continuation of the process of self-determination, the condition of length of residence in New Caledonia; and (b) for the purpose of future referendums directly relating to the option of independence, additional conditions relating to possession of customary civil status, the presence in the territory of moral and material interests, combined with birth of the person concerned or his parents in the territory. It accordingly follows, as the date for a decision on self-determination approaches, that the criteria are more numerous and take into account the specific factors attesting to the strength of the links to the territory. To the length of residence condition (as opposed to the cut-off points for length of residence) for determining a general link with the territory are added more specific links.

13.8 The Committee considers that the above-mentioned criteria are based on objective elements for differentiating between residents as regards their relationship with New Caledonia, namely the different forms of ties to the territory, whether specific or general - in conformity with the purpose and nature of each ballot. The question of the discriminatory or non-discriminatory effects of these criteria nevertheless arises.

13.9 With regard to the authors' complaint of discrimination in the 1998 referendum on the basis of their ethnic origin or national extraction, the Committee takes note of their argument that residents of New Caledonia from metropolitan France (including the authors), Polynesians, Wallisians, Futunians, West Indians and Reunion Islanders accounted for a significant proportion of the 7.67 per cent of Caledonian voters excluded from that referendum.²⁵

13.10 In the light of the foregoing, the Committee considers that the criterion used for the 1998 referendum establishes a differentiation between residents as regards their relationship to the territory, on the basis of the length of "residence" requirement (as distinct from the question of cut-off points for length of residence), whatever their ethnic origin or national extraction. The Committee also considers that the authors' arguments lack details concerning the numbers of the above-mentioned groups -

²⁵ The authors stated, however, that they were unable to provide details of the number of such residents within the 7.67 per cent of voters excluded.

whether or not they represent a majority - within the 7.67 per cent of voters deprived of their right to vote.

13.11 The Committee therefore considers that the criterion used for the 1998 referendum did not have the purpose or effect of establishing different rights for different ethnic groups or groups distinguished by their national extraction.

13.12 Concerning the authors' complaints of discrimination on the basis of birth, family ties and the transmission of the right to vote by descent (the latter violation deriving, according to the authors, from the criteria on family ties), and hence resulting from the criteria established for referendums from 2014 onwards, the Committee considers, first, that residents meeting these criteria are in a situation that is objectively different from that of the authors whose link to the territory is based on length of residence. Secondly, the Committee notes (a) that length of residence is taken into account in the criteria established for future ballots, and (b) that these criteria may be used alternatively. Hence the identification of voters from among the French residents of New Caledonia is based not solely on particular ties to the territory (such as birth and family ties) but also, in their absence, on length of residence. Consequently, every specific or general link to the territory - identified by means of the criteria on ties to New Caledonia - was applied to French residents.

13.13 Finally, the Committee considers that in the present case the criteria for the determination of restricted electorates make it possible to treat differently persons in objectively different situations as regards their ties to New Caledonia.

13.14 The Committee also has to examine whether the differentiation resulting from the above-mentioned criteria is reasonable and whether the purpose sought is lawful vis-à-vis the Covenant.

13.15 The Committee has taken note of the authors' argument that such criteria, although established by the Constitutional Act of 20 July 1998 and the Organic Law of 19 March 1999, not only represented a departure from national electoral rules, but were also unlawful vis-à-vis the Covenant.

13.16 The Committee recalls that, in the present case, article 25 of the Covenant must be considered in conjunction with article 1. It therefore considers that the criteria established are reasonable to the extent that they are applied strictly and solely to ballots held in the framework of a self-determination process. Such criteria, therefore, can be justified only in relation to article 1 of the Covenant, which the State party does. Without expressing a view on the definition of the concept of "peoples" as referred to in article 1, the Committee considers that, in the present case, it would not be unreasonable to limit

participation in local referendums to persons “concerned” by the future of New Caledonia who have proven, sufficiently strong ties to that territory. The Committee notes, in particular, the conclusions of the Senior Advocate-General of the Court of Cassation, to the effect that in every self-determination process limitations of the electorate are legitimized by the need to ensure a sufficient definition of identity. The Committee also takes into consideration the fact that the Noumea Accord and the Organic Law of 19 March 1999 recognize a New Caledonian citizenship (not excluding French citizenship but linked to it), reflecting the common destiny chosen and providing the basis for the restrictions on the electorate, in particular for the purpose of the final referendum.

13.17 Furthermore, in the Committee’s view, the restrictions on the electorate resulting from the criteria used for the referendum of 1998 and referendums from 2014 onwards respect the criterion of proportionality to the extent that they are strictly limited *ratione loci* to local ballots on self-determination and therefore have no consequences for participation in general elections, whether legislative, presidential, European or municipal, or other referendums.

13.18 Consequently, the Committee considers that the criteria for the determination of the electorates for the referendums of 1998 and 2014 or thereafter are not discriminatory, but are based on objective grounds for differentiation that are reasonable and compatible with the provisions of the Covenant.

14.1 Lastly, the authors argue that the cut-off points set for the length of residence requirement, 10 and 20 years respectively for the referendums in question, are excessive and affect their right to vote.

14.2 The Committee considers that it is not in a position to determine the length of residence requirements. It may, however, express its view on whether or not these requirements are excessive. In the present case, the Committee has to decide whether the requirements have the purpose or effect of restricting in a disproportionate manner, given the nature and purpose of the referendums in question, the participation of the “concerned” population of New Caledonia.

14.3 In addition to the State party’s position that the criteria used for the determination of the electorates favour long-term residents over recent arrivals owing to actual differences in concern with regard to New Caledonia, the Committee notes, in particular, that the cut-off points for length of residence are designed, according to the State party, to ensure that the referendums reflect the will of the population “concerned” and that their results cannot

be undermined by a massive vote by people who have recently arrived in the territory and have no proven, strong ties to it.

14.4 The Committee notes that the 21 authors were excluded from the 1998 referendum because they did not meet the 10 years’ continuous residence requirement. It also notes that one author will not be able to participate in the next referendum because of the 20 years’ continuous residence requirement, whereas the other 20 authors do, as things stand, have the right to vote in that referendum - 18 authors on the basis of the residence criterion and 2 others on the strength of having been born in New Caledonia, their ethnic origin and national extraction being of no consequence in this respect.

14.5 The Committee considers, first, that the cut-off points adopted do not have a disproportionate effect, given the nature and purpose of the referendums in question, on the authors’ situation, particularly since their non-participation in the first referendum manifestly has no consequences for nearly all of them as regards the final referendum.

14.6 The Committee further considers that each cut-off point should provide a means of evaluating the strength of the link to the territory, in order that those residents able to prove a sufficiently strong tie are able to participate in each referendum. The Committee considers that, in the present case, the difference in the cut-off points for each ballot is linked to the issue being decided in each vote: the 20-year cut-off point - rather than 10 years as for the first ballot - is justified by the time frame for self-determination, it being made clear that other ties are also taken into account for the final referendum.

14.7 Noting that the length of residence criterion is not discriminatory, the Committee considers that, in the present case, the cut-off points set for the referendum of 1998 and referendums from 2014 onwards are not excessive inasmuch as they are in keeping with the nature and purpose of these ballots, namely a self-determination process involving the participation of persons able to prove sufficiently strong ties to the territory whose future is being decided. This being the case, these cut-off points do not appear to be disproportionate with respect to a decolonization process involving the participation of residents who, over and above their ethnic origin or political affiliation, have helped, and continue to help, build New Caledonia through their sufficiently strong ties to the territory.

15. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of any article of the Covenant.

Communication No. 933/2000

Submitted by: Adrien Mundy Busyo, Thomas Osthudi Wongodi, René Sibou Matubuka et al.

Victims: Adrien Mundy Busyo, Thomas Osthudi Wongodi, René Sibou Matubuka et al.

State party: Democratic Republic of the Congo

Date of adoption of Views: 31 July 2003 (seventy-eighth session)

Subject matter: Dismissal of 315 judges by Presidential Decree

Procedural issues: Non-substantiation of claim

Substantive issues: Effective independence of the judiciary - Equitable hearing - Equal access to public service - Absence of remedy - Arbitrary arrest and detention - Right to liberty of the person

Articles of the Covenant: 9, 14, 19, 20, 21 and 25 (c)

Article of the Optional Protocol: 2

Finding: Violation (articles 25 (c); 14, paragraph 1; 9; and 2, paragraph 1)

1. The authors are Adrien Mundy Busyo, Thomas Osthudi Wongodi and René Sibou Matubuka, citizens of the Democratic Republic of the Congo, acting on their own behalf and on behalf of 68 judges who were subjected to a dismissal measure. They claim to be the victims of a violation by the Democratic Republic of the Congo of articles 9, 14, 19, 20 and 21 of the International Covenant on Civil and Political Rights. The communication also appears to raise questions under article 25 (c) of the Covenant.

The facts as submitted by the authors

2.1 Under Presidential Decree No. 144 of 6 November 1998, 315 judges and public prosecutors, including the above-mentioned authors, were dismissed on the following grounds:

“The President of the Republic;

Having regard to Constitutional Decree-Law No. 003 of 27 May 1997 on the organization and exercise of power in the Democratic Republic of Congo, as subsequently amended and completed;

Having regard to articles 37, 41 and 42 of Ordinance-Law No. 88-056 of 29 September 1988 on the status of judges;

Given that the reports by the various commissions which were set up by the Ministry of Justice and covered the whole country show that the above-mentioned judges are immoral, corrupt, deserters or recognized to be incompetent, contrary to their obligations as judges and to the honour and dignity of their functions;

Considering that the conduct in question has discredited the judiciary, tarnished the image of the system of justice and hampered its functioning;

Having regard to urgency, necessity and appropriateness;

On the proposals of the Minister of Justice;

Hereby decrees:

Article 1:

The following individuals are dismissed from their functions as judges ...”.

2.2 Contesting the legality of these dismissals, the authors filed an appeal, following notification and within the three-month period established by law, with the President of the Republic to obtain the withdrawal of the above-mentioned decree. Having received no response, in accordance with Ordinance No. 82/017 of 31 March 1982 on procedure before the Supreme Court of Justice, the 68 judges all referred their applications to the Supreme Court during the period from April to December 1999. According to the information provided by the authors, it appears, first of all, that the Attorney-General of the Republic, who was required to give his views within one month, deliberately failed to transmit the report¹ by the Public Prosecutor’s Office until 19 September 2000 in order to block the appeal. Moreover the Supreme Court, by a ruling of 26 September 2001, decided that Presidential Decree No. 144 was an act of Government inasmuch as it came within the context of government policy aimed at raising moral

¹ The authors transmitted a copy of the report by the Public Prosecutor’s Office. In the report, the Office of the Attorney-General of the Republic requests the Supreme Court of Justice to declare, first and foremost, that Presidential Decree No. 144 is an act of Government that is outside its jurisdiction; and, secondly, that this decree is justified because of exceptional circumstances. On the basis of accusations made by both the population and foreigners living in the Democratic Republic of the Congo against allegedly incompetent, irresponsible, immoral and corrupt judges, as well as of the missions carried out by judges in this regard, the Attorney-General of the Republic maintains that the Head of State issued Presidential Decree No. 144 in response to a crisis situation characterized by war, partial territorial occupation and the need to intervene as a matter of urgency in order to combat impunity. He stressed that it was materially impossible for the authorities to follow the ordinary disciplinary procedure and that the urgency of the situation, the collapse of the judiciary and action to combat impunity were incompatible with any decision to suspend the punishment of the judges concerned.

standards in the judiciary and improving the functioning of one of the three powers of the State. The Supreme Court consequently decided that the actions taken by the President of the Republic, as the political authority, to execute national policy escaped the control of the administrative court and thus declared inadmissible the applications by the authors.

2.3 On 27 and 29 January 1999, the authors, who formed an organization called the “Group of the 315 illegally dismissed judges”, known as the “G.315”, submitted their application to the Minister for Human Rights, without results.

2.4 The authors also refer to various coercive measures used by the authorities to prevent them from pressing their claims. They mention two warrants for the arrest of Judges René Sibou Matubuka and Ntumba Katshinga.² They explain that, following a meeting on the decree in question which was held between the G.315 and the Minister of Justice on 23 November 1998, the Minister withdrew the two warrants. The authors add that, further to their follow-up letter to the Minister of Justice concerning the lack of action taken following their meeting on the decree, Judges René Sibou Matubuka and Benoît Malu Malu were arrested and detained from 18 to 22 December 1998 in an illegal detention centre in the GLM (Groupe Litho Moboti) building belonging to the Task Force for Presidential Security. They were heard by persons who had neither been sworn in nor authorized by the Attorney-General of the Republic, as required by law.

The complaint

3.1 The authors claim, first of all, to be the victims of dismissal measures that they regard as clearly illegal.

3.2 They maintain that Presidential Decree No. 144 is contrary to Constitutional Decree-Law No. 003 of 27 May 1997 on the organization and exercise of power in the Democratic Republic of the Congo and Ordinance-Law No. 88-056 of 29 September 1988 on the status of judges.

3.3 According to the authors, while the above-mentioned legislation stipulates that the President of the Republic can dismiss a civilian judge only on the proposal of the Supreme Council of the Judiciary (CSM),³ the dismissals in question were decided on the proposal of the Minister of Justice, who is a member of the executive and thus took the place of the only body with jurisdiction in this regard, namely, the CSM. According to the authors, the law

² Dates of arrest warrants not specified.

³ The CSM acts as a disciplinary court to enforce a penalty, which may either be disciplinary (dismissal) or criminal (imprisonment for more than three months).

does not confer discretionary power, despite the circumstances described in Presidential Decree No. 144, i.e. urgency, necessity and appropriateness, which cannot be grounds for dismissal.

3.4 The authors also claim that the authorities failed to fulfil their obligation to respect the adversarial principle and its corollaries (which include the presumption of innocence) at all times when dealing with disciplinary matters. In fact, the authors received no warning or notification from any authority, body or commission and were, incidentally, never heard either by the inspecting magistrate or by the CSM, as required by law.

3.5 The authors maintain that, in violation of the obligation to justify any decision to dismiss a government official, Presidential Decree No. 144 cites only vague, imprecise and impersonal grounds, namely, immorality, desertion and recognized incompetence - and this, in their opinion, amounts in Congolese law to a lack of grounds. With regard to the claims of immorality and incompetence, the authors state that their personal files in the CSM secretariat prove the contrary. As to the claim of desertion, the authors assert that their departure from the places to which they were assigned was the result of war-related insecurity and that their registration with the CSM secretariat in Kinshasa, the city where they took refuge, attested to their availability as judges. They say that the CSM secretariat accorded them the treatment enjoyed by persons displaced by war.

3.6 The authors refer to the reports which were submitted to the Commission on Human Rights by the Special Rapporteur on the situation of human rights in the Democratic Republic of the Congo⁴ and the Special Rapporteur on the independence of judges and lawyers⁵ and in which they express concern about Presidential Decree No. 144 calling for the dismissal of the 315 judges and demonstrating that the judiciary is under the control of the executive. They also mention a statement by the head of the Office of the United Nations High Commissioner for Human Rights in the Democratic Republic of the Congo calling for the reinstatement of the dismissed judges.

3.7 Secondly, the authors are of the view that the illegal arrest, detention and interrogation of three members of their organization are abuses of power (see paragraph 2.4).

3.8 Lastly, the authors consider that they have exhausted domestic remedies. Recalling the failure of their appeals to the President of the Republic, the Minister for Human Rights and the Minister of Justice, and the ruling of the Supreme Court of

⁴ Document E/CN.4/1999/31 of 8 February 1999.

⁵ Document E/CN.4/2000/61 of 21 February 2000.

Justice, of 26 September 2001, they emphasize that the independence of the judges responsible for making the ruling was not guaranteed inasmuch as the Senior President of the Supreme Court, the Attorney-General of the Republic and other senior members of the judiciary were appointed by the new regime in power, without regard for the law stipulating that such appointments must be made on the proposal of the Supreme Council of the Judiciary. They add that, when these members of the judiciary were sworn in by the President of the Republic, the Senior President of the Supreme Court disregarded his obligation of discretion and made a statement on the lawfulness of the dismissal decree. Moreover, the authors consider that the Supreme Court, in its ruling of 26 September 2001, wrongly decided that their appeal was inadmissible and thus deprived them of any remedy.

3.9 Despite the request and the reminders (notes verbales of 7 December 2000, 12 July 2001 and 15 May 2003) the Committee sent to the State party asking for a reply to the authors' allegations, the Committee has received no response.

Admissibility considerations

4.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

4.2 In accordance with article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same question is not being examined under another procedure of international investigation or settlement.

4.3 The Committee considers that the authors' complaint that the facts as they described them constitute a violation of articles 19, 20 and 21 has not been sufficiently substantiated for the purposes of admissibility. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

4.4 The Committee considers that, in the absence of any information from the State party, the complaint submitted in relation to Presidential Decree No. 144 calling for the dismissal of 315 judges, including the authors of this communication, and to the arrest and detention of Judges René Sibou Matubuka and Benoît Malu Malu may raise questions under article 9, article 14, paragraph 1, and article 25 (c), of the Covenant which should be examined as to the merits.

Examination of the merits

5.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as

required under article 5, paragraph 1, of the Optional Protocol. It notes that the State party has not, despite the reminders sent to it, provided any replies on either the admissibility or the merits of the communication. The Committee notes that, under article 4, paragraph 2, of the Optional Protocol, a State party is under an obligation to cooperate by submitting to it written explanations or statements clarifying the matter and the measures, if any, that may have been taken to remedy the situation. As the State party has failed to cooperate in that regard, the Committee had no choice but to give the authors' allegations their full weight inasmuch as they were adequately substantiated.

5.2 The Committee notes that the authors have made specific and detailed allegations relating to their dismissal, which was not in conformity with the established legal procedures and safeguards. The Committee notes in this regard that the Minister of Justice, in his statement of June 1999 (see paragraph 3.8), and the Attorney-General of the Republic, in the report by the Public Prosecutor's Office of 19 September 2000 (see footnote 1), recognize that the established procedures and safeguards for dismissal were not respected. Furthermore, the Committee considers that the circumstances referred to in Presidential Decree No. 144 could not be accepted by it in this specific case as grounds justifying the fact that the dismissal measures were in conformity with the law and, in particular, with article 4 of the Covenant. The Presidential Decree merely refers to specific circumstances without, however, specifying the nature and extent of derogations from the rights provided for in domestic legislation and in the Covenant and without demonstrating that these derogations are strictly required and how long they are to last. Moreover, the Committee notes that the Democratic Republic of the Congo failed to inform the international community that it had availed itself of the right of derogation, as stipulated in article 4, paragraph 3, of the Covenant. In accordance with its jurisprudence,⁶ the Committee recalls, moreover, that the principle of access to public service on general terms of equality implies that the State has a duty to ensure that it does not discriminate against anyone. This principle is all the more applicable to persons employed in the public service and to those who have been dismissed. With regard to article 14, paragraph 1, of the Covenant, the Committee notes the absence of any reply from the State party and also notes, on the one hand, that the authors did not benefit from the guarantees to which they were entitled in their capacity as judges and by virtue of which they should have been brought before the Supreme Council of the

⁶ Communication No. 422/1990, *Adimayo M. Aduayom T. Diasso and Yawo S. Dobou v. Togo*, General Comment No. 25 on article 25 (fiftieth session - 1996).

Judiciary in accordance with the law, and on the other hand, that the President of the Supreme Court had publicly, before the case had been heard, supported the dismissals that had taken place (see paragraph 3.8) thus damaging the equitable hearing of the case. Consequently, the Committee considers that those dismissals constitute an attack on the independence of the judiciary protected by article 14, paragraph 1, of the Covenant. The dismissal of the authors was ordered on grounds that cannot be accepted by the Committee as a justification of the failure to respect the established procedures and guarantees that all citizens must be able to enjoy on general terms of equality. In the absence of a reply from the State party, and inasmuch as the Supreme Court, by its ruling of 26 September 2001, has deprived the authors of all remedies by declaring their appeals inadmissible on the grounds that Presidential Decree No. 144 constituted an act of Government, the Committee considers that, in this specific case, the facts show that there has been a violation of article 25, paragraph (c), read in conjunction with article 14, paragraph 1, on the independence of the judiciary, and of article 2, paragraph 1, of the Covenant.

5.3 Having regard to the complaint of a violation of article 9 of the Covenant, the Committee notes that Judges René Sibou Matubuka and Benoît Malu Malu were arbitrarily arrested and detained from 18 to 22 December 1998 in an illegal detention centre belonging to the Task Force for Presidential Security. In the absence of a reply from the State party, the Committee notes that there has been an arbitrary violation of the right to liberty of the person under article 9 of the Covenant.

6.1 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party has committed a violation of article 25 (c), article 14, paragraph 1, article 9 and article 2, paragraph 1, of the Covenant.

6.2 Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee is of the view that the authors are entitled to an appropriate remedy, which should include, inter alia: (a) in the absence of a properly established disciplinary procedure against the authors, reinstatement in the public service and in their posts, with all the consequences that that implies, or, if necessary, in similar posts;⁷ and (b) compensation calculated on the basis of an amount equivalent to the salary they would have received during the period of non-reinstatement.⁸ The State party is also under an obligation to ensure that similar violations do not occur in future and, in particular, that a dismissal measure can be taken only in accordance with the provisions of the Covenant.

6.3 The Committee recalls that, by becoming a State party to the Optional Protocol, the Democratic Republic of the Congo recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, under 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. Consequently, the Committee wishes to receive from the State party, within 90 days of the transmission of these findings, information about the measures taken to give effect to its views. The State party is also requested to make these findings public.

⁷ Communications No. 630/1995, *Abdoulaye Mazou v. Cameroon*; No. 641/1995, *Gedumbe v. Democratic Republic of the Congo*; and No. 906/2000, *Felix Enrique Chira Vargas-Machuca v. Peru*.

⁸ Communications Nos. 422/1990, 423/1990 and 424/1990, *Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo*; No. 641/1995, *Gedumbe v. Democratic Republic of the Congo*; and No. 906/2000, *Felix Enrique Chira Vargas-Machuca v. Peru*.

Communication No. 943/2000

[Original: FRENCH]

Submitted by: Guido Jacobs (not represented by counsel)

Alleged victim: The author

State party: Belgium

Date of adoption of Views: 7 July 2004 (eighty-first session)

Subject matter: Criteria and gender quotas for appointment of the members of the High Council of Justice

Procedural issues: Exhaustion of domestic remedies
- Non-substantiation of claim -
Incompatibility *ratione materiae*

Substantive issues: Discrimination - Equal treatment of men and women - Equal access to public office - Objective and reasonable justification - Proportionality between the purpose, means, modalities and aims of the law – Gender quota

Articles of the Covenant: 2; 3; 14, paragraph 1; 19, paragraph 1; 25; and 26

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

Finding: No violation

1. The author is Mr. Guido Jacobs, a Belgian citizen, born on 21 October 1948 at Maaseik (Belgium). He claims to be a victim of violations by Belgium of articles 2, 3, 14, paragraph 1, 19, paragraph 1, 25 and 26 of the International Covenant on Civil and Political Rights. He is not represented by counsel. The Covenant entered into force for Belgium on 21 July 1983 and the Optional Protocol to the Covenant on 17 August 1994.

The facts as submitted by the author

2.1 On 2 February 1999 the *Moniteur belge* published the Act of 22 December 1998 amending certain provisions of part two of the Judicial Code concerning the High Council of Justice, the nomination and appointment of magistrates and the introduction of an evaluation system.

2.2 As amended, article 259 bis-1, paragraph 1, of the Judicial Code provides that the High Council of Justice¹ shall comprise 44 members of Belgian

nationality, divided into one 22-member Dutch-speaking college and one 22-member French-speaking college. Each college comprises 11 justices and 11 non-justices.

2.3 Article 259 bis-1, paragraph 3, stipulates:

Council of Justice shall respect the independence referred to in paragraph 1. It shall consist of a French-speaking college and a Dutch-speaking college. Each college shall have an equal number of members and shall be composed equally of judges and officials of the public prosecutor's office directly elected by their peers under the conditions and according to the form determined by law, and of other members nominated by the Senate by a two-thirds majority of those voting, under the conditions established by law.

“Within each college there shall be a nomination and appointments committee and an advisory and investigative committee, on which representation shall be equally distributed as provided in the previous paragraph [...].”

Paragraph 3:

“The High Council of Justice shall exercise its authority in the following areas:

1. Presentation of candidates for appointment as judges [...] or members of the prosecutor's office;
2. Presentation of candidates for designation to the duties [...] of *chef de corps* in the public prosecutor's office;
3. Access to the position of judge or member of the public prosecutor's office;
4. Training of judges and members of the public prosecutor's office;
5. Establishment of general profiles for the designations referred to in 2;
6. Issuance of opinions and proposals concerning the general operation and organization of the judicial branch;
7. General supervision and promotion of the use of internal monitoring methods;
8. To the exclusion of all disciplinary and criminal tribunals:
 - acceptance and follow-up of complaints concerning the operation of the judicial branch;
 - initiation of inquiries into the operation of the judicial branch [...].”

¹ Article 151 of the Constitution instituting the High Council of Justice provides in paragraph 2:

“One High Council of Justice exists for all of Belgium. In the exercise of its attributes the High

“The group of non-justices in each college shall have no fewer than four members of each sex and shall be composed of no fewer than:

1. Four lawyers with at least 10 years’ professional experience at the bar;
2. Three teachers from universities or colleges in the Flemish or French communities with at least 10 years’ professional experience relevant to the High Council’s work;
3. Four members holding at least a diploma from a college in the Flemish or French community and with at least 10 years’ professional experience in legal, economic, administrative, social or scientific affairs relevant to the High Council’s work [...].”

2.4 Article 259 bis-2, paragraph 2, also stipulates:

“Non-justices shall be appointed by the Senate by a two-thirds majority of those voting. Without prejudice to the right to submit individual applications, candidates may be put forward by each of the bar associations and each of the universities and colleges in the French community and the Flemish community. In each college, at least five members shall be appointed from among the candidates proposed.”

2.5 Lastly, in accordance with paragraph 4 of the same article, “a list of alternate members of the High Council shall be drawn up for the duration of the term [...]. For non-justices this list shall be drawn up by the Senate [...] and shall comprise the candidates who are not appointed.”

2.6 Article 259 bis-2, paragraph 5, stipulates that nominations should be sent to the Chairman of the Senate, by registered letter posted within a strict deadline of three months following the call for candidates.

2.7 On 25 June 1999, the Senate published in the *Moniteur belge* a call for candidates for a non-justice seat on the High Council of Justice.

2.8 On 16 September 1999, Mr. G. Jacobs, first legal assistant in the Council of State, submitted his application within the legal three-month period.

2.9 On 14 October 1999, the Senate published a second call.

2.10 On 29 December 1999, the Senate elected the members of the High Council of Justice. The author was not elected but was included in the list of alternates for non-justices as provided in article 295 bis-2, paragraph 4.

The complaint

3.1 The author alleges violations of the rule of law, namely the Act of 22 December 1998, and of the Senate’s application of that rule.

3.2 With regard to the rule of law, the author considers that article 259 bis-1, paragraph 3, violates articles 2, 3, 25 and 26 of the Covenant on the following grounds.

3.3 The author claims that the introduction of a gender requirement, namely that four non-justice seats in each college be reserved for women and four for men, makes it impossible to carry out the required comparison of the qualifications of candidates for the High Council of Justice. In his view, such a condition means that candidates with better qualifications may be rejected in favour of others whose only merit is that they meet the gender requirement. The author claims that, in his case, the gender requirement works against male candidates but it could in the future be disadvantageous to women, and that this is discriminatory.

3.4 The author also maintains that it is strictly forbidden to apply a gender requirement to appointments by third parties (employers) under the Act of 7 May 1999 on the equal treatment of men and women with regard to working conditions, access to employment and promotion opportunities, access to an independent profession and supplementary social security schemes. The author maintains that the High Council of Justice comes under this Act, and that the application of the gender requirement in this regard is thus discriminatory.

3.5 In the author’s view, on the basis of an analysis by the legal department of the Council of State,² application of the gender requirement to the entire group of non-justices could equally lead to discrimination among the candidates in the three categories within that group.

3.6 As to the application of the rule of law, the author considers that the Flemish non-justices were appointed without regard for established procedure, with no interviews or any attempt at profiling the candidates, and without comparing their qualifications, in violation of articles 2, 19 and 25 of the Covenant.

3.7 The author claims that the key criterion for these appointments was membership of a political party, that is, nepotism: non-justice seats were allocated to the sister of a senator, a senator’s assistant and a minister’s personal assistant. The candidates’ required records of 10 or more years of professional experience relevant to the High Council’s work were neither considered nor compared. He adds that one senator resigned in protest against political nepotism and informed the press of his views, and that a candidate sent a letter

² The author does not provide reference to the document he cites for this purpose.

to the senators demonstrating that his qualifications were superior to those of the successful candidates.

3.8 The author contends that the application of the gender requirement also led to a violation of the principle of equality inasmuch as the appointment of men only, in the category of university professors, created inequality among the various categories of the non-justice group.

3.9 The author claims that the effect of a second call for candidates for one of the non-justice seats was to accept candidatures after the closing date for applications following the first call, which is illegal and discriminatory.

3.10 The author also argues that the appointment of non-justice alternates in alphabetical order is against the law, demonstrates that qualifications are not compared and results in discrimination between the appointed candidates and the alternates.

3.11 Lastly, the author states that there is no appeal procedure for contesting the above-mentioned violations for the following reasons.

3.12 He considers that article 14 of the coordinated laws on the Council of State does not allow any appeal to the Council of State concerning appointments. He also concludes that it is not possible to request the Court of Arbitration³ for a preliminary ruling on article 259 bis-1 of the Act of 22 December 1998.

3.13 In the author's view, the jurisdiction of the Council of State when trying cases of abuse of power derives from article 14, paragraph 1, of the above-mentioned laws, which stipulates that the administrative section hands down decisions on applications for annulment filed on grounds of breach of forms of action, either appropriate or prescribed on pain of avoidance, overstepping or wrongful use of authority, against acts or regulations of the various administrative authorities or administrative rulings in disputes.

3.14 The author states that decisions by the legislature fall outside the competence of the

³ According to the Special Act of 6 January 1989, adopted pursuant to article 142 of the Constitution, the Court of Arbitration rules on:

1. The conflicts described in article 141;
2. The violation through a law, a decree or a rule as described in article 134, of articles 10 (principle of equality), 11 (principle of non discrimination) or 24;
3. The violation through a law, a decree or a rule as described in article 134, of articles of the Constitution determined by law. Cases may be brought before the Court by any authority designated by law, any person with a legitimate interest or, for a preliminary ruling, by any court.

Council of State and that, until 1999, the same applied in principle to all acts, even administrative acts, of a body of any of the legislative assemblies. In this connection, he cites Council of State ruling No. 69/321 of 31 October 1997, which dismissed, on the grounds that the Council was not competent to rule on the legality of the act in question, an application for annulment brought by Meester de Betzen-Broeck against a decision by the Council of the Brussels-Capital Region not to include him in the recruitment reserve for a job as an accountant because he had failed the Regional Council's language test. He also refers to Court of Arbitration ruling No. 31/96 of 15 May 1996, issued in response to the Council of State's request for a preliminary ruling in the same proceedings (Council of the Brussels-Capital Region) on article 14, paragraph 1, of the coordinated laws on the Council of State. The plaintiff in that ruling claimed that article 14 violated the principle of equality in that it did not allow the Council of State to hear appeals against purely administrative decisions by legislative assemblies concerning civil servants. The Court of Arbitration ruled that the absence of a right of appeal against administrative decisions by a legislative assembly or its bodies, whereas such an action could be brought against the administrative decisions of an administrative authority, violated the constitutional principles of equality and non-discrimination. The Court further considered that the discrimination did not stem from article 14 but was rather the result of a gap in the legislation, namely the failure to institute a right of appeal against administrative decisions by legislative assemblies and their bodies.

3.15 Lastly, and as a subsidiary claim, the author cites this failure to institute a remedy against the Senate's appointment of non-justice members of the High Court of Justice as a violation of articles 2 and 14 of the Covenant, inasmuch as such a remedy can be sought against administrative decisions by an administrative authority.

3.16 The author adds that he has not been able to appeal against the provision in question, namely, article 295 bis-1, paragraph 3, directly to the Court of Arbitration, since the required legitimate interest was lacking during the six-month period allowed for appeal. In his view, the interest condition was met only when his application was submitted and validated, in other words, outside the six-month limit. The author also emphasizes that he could not have known that the provision in question would necessarily give rise to an illegal appointment.

3.17 The author considers that he has met the condition of having exhausted domestic legal remedies and states that the matter has not been submitted to another procedure of international investigation or settlement.

State party's admissibility submission

4.1 In its observations of 12 March 2001 and 23 August 2002, the State party disputes the admissibility of the communication.

4.2 As regards the rule of law, the State party maintains that the Special Act on the Court of Arbitration of 6 January 1989 did permit the author to appeal against the relevant part of the Act of 22 December 1998.

4.3 The State party says that the Court of Arbitration rules, *inter alia*, on applications for annulment of an act or part thereof on grounds of a violation of articles 6 and 6 bis of the Constitution. These articles – now articles 10 and 11 – of the Constitution enshrine the principles of equality and non-discrimination and are general in their scope. Article 11 prohibits all discrimination, whatever its origin. The State party stresses that the principle of non-discrimination contained in the Constitution applies to all the rights and freedoms granted to Belgians, including those flowing from international treaties to which Belgium has acceded.⁴

4.4 The State party specifies that article 2, 2° of the Court of Arbitration Act provides that appeals may be lodged by any physical person or legal entity with a proven interest. In the State party's view, the Court of Arbitration gives "interest" a wide interpretation, that is, from the moment when an individual may be affected, directly and adversely, by the rule disputed. Article 3, paragraph 1, of the Act also stipulates that applications to overturn an act must be lodged within six months of its publication.

4.5 The State party recalls that article 295 bis-1, paragraph 3, of the Judicial Code was published in the *Moniteur belge* on 2 February 1999, which means that the time limit for an appeal to the Court of Arbitration expired on 2 August 1999. The call for non-justice candidates for the High Council of Justice was published on 25 June 1999. Following this call, which repeated the provision in question, the author submitted his application to the Senate. In the State party's view, it should be noted that when the call for candidates was published, Mr. G. Jacobs was within the legal time limit for requesting the Court of Arbitration to overturn the provision in question. The State party considers that the author met the necessary conditions and had the necessary interest for lodging such an appeal.

4.6 As regards the application of the rule of law, the State party points out that the author had the possibility of lodging an appeal with the courts and tribunals of the Belgian judiciary.

4.7 The State party contends that a court is expected to hear subjective disputes, the status of which is governed by articles 144 and 145 of the Constitution. Article 144 attributes exclusive jurisdiction to the court in disputes concerning civil rights while article 145 confers on the court provisional powers, which the law may override, in disputes concerning political rights. In the State party's view, legislative bodies therefore remain subject to supervision by the courts and tribunals insofar as their decisions concern civil or political rights.

4.8 The State party considers that the author does not show that he would be unable to challenge the legality of the Senate's decision in the courts and tribunals of the judiciary in the context of a dispute relating to civil or political rights. In the State party's view, the provision in dispute does not therefore have the effect of depriving the author of all legal remedies since Mr. G. Jacobs can assert his rights as regards the Senate's appointment of members of the High Council of Justice in the ordinary courts.

4.9 As regards the subsidiary claim of violation of the principles of equality and non-discrimination due to the failure to institute a remedy against the Senate's decision to appoint non-justice members to the High Council of Justice whereas such action could be introduced against the administrative decisions by an administrative authority, the State party maintains that the author cannot legitimately invoke Court of Arbitration ruling No. 31/96 of 15 May 1996, insofar as it was pursuant to this ruling that the coordinated laws on the Council of State were amended. Article 14, paragraph 1, provides: "The section hands down decisions on applications for annulment filed on grounds of breach of forms of action, either appropriate or prescribed on pain of avoidance, overstepping or wrongful use of authority, against acts or regulations of the various administrative authorities, or against administrative decisions by legislative assemblies or their organs, including the mediators instituted within such assemblies, the Court of Accounts and the Court of Arbitration, and the organs of the judiciary and the High Council of Justice, concerning public contracts and the members of their personnel."

4.10 The State party explains that in the case in question the appointment of members of the High Council of Justice cannot be considered a purely administrative act by the Senate but is to a large extent an act forming part of the exercise of its legislative powers. It stresses that the establishment of the High Council of Justice is of great importance in society and cannot be compared with the recruitment of personnel by the legislature. Reference should be made here to the constitutional principle of the separation of powers. In the State party's view, this implies that an authority

⁴ Court of Arbitration, 23 May 1990, *R.W.* 1990-1991, 75.

subordinate to one branch of government cannot substitute its judgement for that of an authority stemming from another branch exercising its discretion, such as the legislature's discretionary power in the appointment of members of the High Council of Justice. Referring to Court of Arbitration ruling No. 20/2000 of 23 February 2000 and ruling No. 63/2002 of 28 March 2002, the State party explains that, based on the principle of the separation of powers, it may be maintained that the appointment of members of the High Council of Justice is not subject to appeal since the legislature, which includes the Senate, is independent. The State party therefore considers that the lack of an appeal to the Council of State to challenge the appointment of the members of the High Council of Justice is in no way a violation of the principles of equality and non-discrimination since such appointment may be compared to a legislative decision.

Author's comments

5.1 In his comments of 14 July 2001 and 13 October 2002, the author maintains and develops his arguments.

5.2 As to the rule of law, the author disputes the State party's argument on the possibility of application to the Court of Arbitration for annulment. He asserts that an appeal could not be lodged until the applications for appointment had been accepted or at least submitted, since before this any appeal would have constituted an *actio popularis*. Mr. Jacobs' application was submitted on 16 September 1999 and accepted on 21 September 1999, that is, after the six-month legal time limit for appeal set out in the Act of 2 February 1999. The author concludes that he therefore did not meet the condition of direct, personal and definite interest for filing an appeal within the required period.

5.3 Concerning the application of the rule of law, the author begins by considering that the lack of an appeal to the Council of State in his case is confirmed by the State party's observations and therefore constitutes a violation of articles 2 and 14 of the Covenant. Contrary to the State party, the author considers, as does the Court of Arbitration in its ruling No. 31/96, that the separation of powers cannot be interpreted as implying that the Council of State has no jurisdiction when a legislative body is party to the dispute to be decided, and that appointments by the Senate cannot be regarded as legislative decisions. With reference to the rulings of the Court of Arbitration cited by the State party (No. 20/2000 and No. 63/2002), the author points out that at the time this was a matter of internal organization among members of Parliament or justices, while he contends that in the case in question it is a matter of appointments to a *sui generis* entity at the intersection of the separate branches of government

and not part of the legislature as such; this means that the lack of any appeal against the appointment of its members violates the principle of equality.

5.4 The author adds that the State party's argument comparing "the importance in society" of members of the High Council and personnel in the legislature is of no relevance whatsoever. He considers that the reference to discrimination concerns not these two groups but rather decisions emanating from a legislative assembly (in this case the appointment of members of the High Council of Justice) and from an administrative authority (the appointment of justices), and that it is also unclear how "importance in society" might justify the lack of any appeal, particularly as such a check on lawfulness in no sense means that the court which rules on the appeal may substitute its judgement for that of another authority exercising discretionary power.

5.5 As regards the State party's argument as to the appeal the author might lodge with the courts and tribunals of the judiciary, first, concerning the question of access to Belgian courts, the author considers that the State party cannot simply confine itself to a general reference to the Constitution without precise indications as to the specific legal basis required to bring an action and as to the competent court. The State party also, he says, omits any reference to relevant applicable case law. As to the case law of the European Court of Human Rights,⁵ the author maintains that when citing local remedies the defendant State must prove that its legal system offers opportunities for efficient and appropriate remedies, something the State party does not do adequately in the current case.

5.6 The author claims that the lack of an appropriate appeal mechanism means that the courts cannot put an end to the violation. In the case in question, the courts cannot annul the disputed decision. Furthermore, for cases in which Parliament has some degree of discretion, the court cannot order compensation in kind (lack of a positive injunction). Believing that the State party probably refers to the possibility of bringing the matter before the court of first instance pursuant to article 1382 of the Civil Code, and asserts that this would not be an effective action. Supposing that a claim for damages could be considered an appropriate appeal mechanism, it is, in the author's view, an impossible action to bring in practice. Citing various legal analyses concerning Belgium, the author concludes that the legislature and the judiciary cannot be held legally responsible.

⁵ *Bozano v. France* ruling of 18 December 1986, series A, nr. 111, p. 18.

State party's merits submission

6.1 In its observations of 12 March 2001 and 23 August 2002, the State party asserts that the communication is without grounds.

6.2 As regards the rule of law, the State party explains that the objective being pursued is to ensure an adequate number of elected candidates of each sex. It adds that the presence of women on the High Council of Justice corresponds to the wish of Parliament to encourage equal access by men and women to public office in accordance with article 11 bis of the Constitution.

6.3 Recalling the debate on this issue during the travaux préparatoires for the Act of 22 December 1998, the State party stresses that legislators felt there should be no fewer than four men and four women among the 11 justices and the 11 non-justices, in order to avoid any underrepresentation of either sex in either group. In the State party's view, the report on this proposal further underlines that, since the High Council of Justice also serves as an advisory body, each college must be composed of members of both sexes. Parliament thus wished to apply the principles set out in the Act of 20 July 1990 to encourage balanced representation of men and women on advisory bodies. The State party considers that it follows from this that the provision in question, namely, article 295 bis-1, paragraph 3, has a legitimate objective.

6.4 The State party further maintains that the provision for 4 out of the 11 candidates – or just over one third – to be of a different sex does not result in a disproportionate restriction on candidates' right of access to the civil service. This rule is intended to ensure balanced representation of the two sexes and, in the State party's view, is both the only means of attaining the legitimate goal and also the least restrictive.

6.5 The State party accordingly considers that these provisions to ensure effective equality do not depart from the principles which prohibit discrimination on grounds of sex.

6.6 As regards the allegation of discrimination among persons appointed by the legislative authorities and by third parties, the State party refers to the Act of 20 July 1990 to encourage balanced representation of men and women on bodies with advisory capacity. It says that this Act imposes some degree of gender balance and is applicable whenever a body – for example, the High Council of Justice – has advisory capacity. The State party therefore considers that there is no discrimination since the gender balance rule applies to all consultative bodies.

6.7 As to the author's reference to employers in support of the allegation of discrimination against him, the State party asserts that the aforementioned

Act of 7 May 1999 is not applicable in this case, and refers to article 3, paragraph 1, of the Act which describes workers in the following terms: "Persons who perform work under a contract of employment and persons who perform work under the authority of a third party other than under a contract of employment, including apprentices." In the State party's view, the author's reasoning falls short in legal terms since he compares situations which are not comparable: the members of the High Council of Justice cannot be described as "workers" within the meaning of the aforementioned Act, since they do not perform work.

6.8 As to the allegation of discrimination by subgroup, the State party, referring to the travaux préparatoires for the Act of 22 December 1998,⁶ points out that the legislature did indeed take account of the observations of the Council of State to which the author refers. It stresses that the Government has submitted an amendment to an amendment to modify paragraph 3 of article 295 bis-1 by adding that the group of non-justices should include at least four members of each sex in each college.

6.9 In the State party's view, then, the Act has redressed the balance between the aim of the measure, namely to promote equality between men and women where it might not currently exist, and one of the principal aims of the law, namely to

⁶ The Council of State found that the initial text of the Act provided that each college of the High Council, which should be composed of 11 justices and 11 non-justices, should have no fewer than eight members of each sex. In appointing the 11 non-justices, the Senate was therefore required to ensure some degree of balance between men and women, the consequence of which might have been a gender imbalance among non-justices. The Council of State noted in this regard: "No reasonable justification seems possible for an imbalance (...)." The bill was adapted in response to these observations by the Council of State. During the travaux préparatoires, the following statement was made: "As regards the balance between men and women within the High Council, the Prime Minister stressed that in the first analysis it was important to respect the votes cast. In accordance with the present solution, it devolved on the Senate to ensure gender balance in the appointment of non-justices, and on that basis to ensure that the required quorum (no fewer than eight members of each sex) was attained.

This obligation of correction on the part of the Senate could be done away with [...]. [As regards the candidates for justice positions] the Prime Minister proposed that [...] each voter should cast three votes, at least one of which would be for a candidate for the seat and at least one for a candidate of the public prosecutor's office; he would prohibit voting for three candidates of the same sex.

A similar solution would ensure a sufficient number of elected candidates of each sex (between one and two thirds [for candidates for justice positions])" (Parl. Doc. 1997-98, 1677/8).

establish a High Council of Justice made up of individuals objectively selected for their competence. The State party explains, on the one hand, that the group of non-justices, the counterpart to the group of justices, is a distinct group whose members must all have 10 years' experience; and on the other, that within the groups of justices and non-justices, the rules relating to the sex of candidates are reasonable and justified by the legitimate ends sought by those rules.

6.10 With regard to the application of the rule of law and the complaint that the non-justices were appointed on the basis of their membership of a political party, the State party explains that the High Council of Justice was created, and the mandate system introduced, by the amendment of article 151 of the Constitution. That article sets forth the basic principles regarding the independence of the judiciary, the composition and terms of reference of the High Council of Justice, the procedures for appointing and designating magistrates, and the mandate and evaluation systems.

6.11 The State party argues that, although the High Council of Justice is regulated by article 151 of the Constitution, its composition (justices and non-justices) and its terms of reference (it has no judicial powers) preclude its being considered as a body representing the judiciary. The Council is in effect a *sui generis* body and does not form part of any of the three branches of government. According to the State party, it is an intermediary body linking the judiciary (whose independence it is bound to respect), the executive and the legislature.

6.12 The State party explains that the presence of non-justices helps the justices to avoid too narrow an approach to their work on the Council, and makes an essential contribution in terms of the perspective and experience of those exposed to the strictures of the law. The State party maintains, however, that this does not entail appointing individuals who are incapable of assisting the High Council in the performance of its tasks.

6.13 The State party further claims that, for the appointment of non-justices, there was every reason to establish a system that aimed, on the one hand, to prevent intervention by political bodies and thus further "politicization" and, on the other, to compensate for the inevitably somewhat undemocratic nature of the choice of candidates put forward by each of the occupational groups concerned.

6.14 According to the State party, it was for this reason that Parliament opted in the Constitution for a mixed system in which all non-justices are appointed by the Senate on a two-thirds majority of votes cast, but 5 of the 11 vacant places in each college must be filled with candidates put forward by the bar

associations, colleges and universities. The system allows each of these institutions to put forward one or more candidates who meet the legal requirements (not necessarily belonging to the same occupational groups as the submitting group) and are considered suitable for office.

6.15 In the State party's opinion, the purpose and the effect of creating the High Council of Justice was to depoliticize judicial appointments. Candidates must be elected by the Senate, by a two-thirds majority of those voting, i.e., a relative majority, which ensures depoliticization of the system.

6.16 The State party also describes in detail the procedure applied in appointing the non-justices in the case under consideration.

6.17 In all, there were 106 non-justice candidates, 57 French speakers and 49 Dutch speakers; their curricula vitae and files were available for consultation by senators at the Senate registry. Given the large number of candidates, it was decided, for practical reasons, not to conduct interviews. Allowing 15 to 30 minutes per person, interviewing 106 candidates would have taken a minimum of 26½ to 53 hours. The constraints of the parliamentary timetable made it impossible to devote that amount of time to interviews. It would have meant either setting aside several successive days or staggering the interviews over a period of weeks. In any case, it would not have been possible to conduct interviews in similar conditions for all candidates, since the same senators would probably not have been able to attend every one. Thus, according to the State party, a document-based procedure provided the best means of observing the principle of non-discrimination. The State party also emphasizes that the Senate has no constitutional, legal or regulatory obligation to conduct interviews.

6.18 The State party recalls that the appointment of non-justices must take into account five different criteria (each college must comprise at least four lawyers, three teachers from a college or university in the French or Flemish Community, four members who hold at least one qualification from a college in the French or Flemish Community, four members of each sex and five members put forward by universities, colleges and/or bar associations); it explains that, because of the number of criteria and the overlap between them, the Senate bodies decided to draw up a list of recommended candidates. Any other procedure, it seems, would have been unworkable, or even have discriminated against certain candidates. Taking a vote on each individual, for example, would have meant organizing at least 22 separate ballots. If in one such ballot no candidate obtained a two-thirds majority, as might well be expected, a second round of voting would have to be organized, thereby increasing the total number of

ballots. At the same time, it would have been necessary to ensure, from ballot to ballot, that all the membership requirements for each college had been met: if, after eight members of, say, the French-speaking college had been appointed, the Senate had found it had appointed only one lawyer candidate, only the remaining lawyer candidates would still have been eligible. At some point, then, it might have become possible only to vote for certain candidates. The same problem would have arisen had the voting been based on categories. The State party points out that the use of the recommended list method in nomination and appointment procedures is established practice in the Senate and the Chamber of Representatives.

6.19 In order to draw up the list of recommended candidates, the officers of the Senate met on 17 December 1999, French speakers and Dutch speakers separately. It was decided to allow one member of each political group to attend the meeting. This made it possible for all groups, including the only one not represented among the Senate officers, to take an active part in the consideration of the candidates. The officers received all candidates' *curricula vitae* in advance of the meeting, and the candidates' files were available for consultation at the Senate registry once applications had closed. The representatives of the political groups examined the *curricula vitae* of all candidates during the meetings held to draw up the list, and all the candidates' files and *curricula vitae* were therefore available throughout each meeting. The procedure adopted to draw up the recommended list for the Dutch-speaking college, for example, was described in detail at the Senate plenary of 23 December 1999. As explained at the time, the first Vice-President of the Senate went through all the applications one by one and, when each participant had given an opinion, 16 candidates were selected. The list of 16 candidates was then considered in relation to the five above-mentioned criteria and 13 candidates were retained (for 11 seats). Finally, after a lengthy discussion, the names of 11 candidates were chosen for the list.

6.20 In actually appointing the non-justices at the plenary of 23 December 1999, senators had the option, in a secret ballot, of either approving the recommended list or, if the list did not meet with their agreement, selecting candidates themselves. They were therefore given a two-part ballot paper, with (a) the recommended list of 11 French-speaking candidates and 11 Dutch-speaking candidates and with a single box to be marked; and (b) a list of all the candidates' names, divided into three categories, "qualification-holders", "lawyers" and "teachers", with a box beside each name. The ballot paper also included the legal provisions stipulating the criteria for membership of the Council. Those members who

supported the recommended list were required to mark the box above that list. Those who did not wish to approve the recommended list were required to cast 22 votes for their preferences, with a maximum of 11 for French-speaking candidates and 11 for Dutch-speaking candidates.

6.21 The result of the secret ballot was as follows: Votes cast: 59
Blank or spoiled ballots: 2
Valid votes: 57
Two-thirds majority: 38
The recommended list obtained 54 votes.

6.22 Thus, according to the State party, it is clear that a thorough examination of the candidates' *curricula vitae* and a comparison of their qualifications took place before either the recommended list was drawn up or the Senate plenary made the appointments. Furthermore, the State party considers that the author's complaints about politicization and nepotism are based on statements in the press and are unsupported by any evidence.

6.23 With regard to the complaint of discrimination between the subgroups, the State party refers to its arguments on the rule of law, presented above.

6.24 As to the complaint of discrimination between candidates in connection with the Senate's second call for applications, the State party explains that the second call was issued because the first call had produced insufficient applications: for the Dutch-speaking college there had been two applications from female candidates, yet, under article 295 bis-1, paragraph 3, of the Judicial Code, the group of non-justices in the High Council must comprise at least four members of each sex, per college, and that requirement must be met at the time the Council is constituted. The State party explains that the law, the case law of the Council of State, and parliamentary practice all permitted the Senate to issue a second call for applications, and that the second call was addressed to all who wished to apply, including those who had already responded to the first call (thus allowing the author to resubmit his application). Furthermore, according to the State party, applications sent in response to the first call remained valid, as was explicitly stated in the second call. The State party concludes that there was no discrimination and emphasizes that, without a second call for applications from non-justices, it would not have been possible to form a High Council of Justice in accordance with the Constitution.

6.25 In response to the complaint of discrimination on the grounds that the non-justice alternates had been ranked in alphabetical order, unlike the justices, the State party points out that the law on the one

hand explicitly stipulates that the justices shall be ranked by number of votes obtained, and on the other leaves the Senate free to rank the non-justices as it pleases.⁷ However, according to the State party, an alphabetical listing of the candidates does not imply an alphabetical order of succession. The State party explains that the order of succession in fact depends on which seat falls vacant, i.e. which subgroup the outgoing non-justice belongs to. When a seat falls vacant, the Senate must appoint a new member, and in order to do so it must first determine the profile of the successor, i.e. determine what conditions the new member must fulfil if the composition of the Council is to continue to comply with the law. In the first place, then, it must establish which candidates are eligible, and that will depend on the qualifications of both the retiring or deceased member and the remaining members. All candidates whose appointment would be consistent with the equitable arrangements required by law will be eligible for appointment. It is therefore quite incorrect to claim that the successors would have been appointed in alphabetical order, in violation of the principle of equality.

Author's comments

7.1 In his comments of 14 July 2001, 15 February 2002 and 13 October 2002, the author stands by his complaints against the State party.

7.2 Referring to the *Kalanke* judgement (European Court judgement C-450/93, of 17 October 1995), which found that there is discrimination where persons with equal qualifications are automatically given priority on grounds of sex in sectors where they are underrepresented, the author repeats that, in this case, the principle of appointment on a quota basis, i.e. without comparing applicants' qualifications, is a violation of the principle of equality. The author adds that, while female applicants might be given priority where applicants of different sexes had equal qualifications (although that in itself might be questionable), that would nevertheless be possible only provided the rules guaranteed that, in every individual case where a male/female applicant had equivalent qualifications to a female/male applicant, an objective evaluation of the applications would be made, examining all the requirements to be met by the individual applicant, and that, where one or more of the qualifications tipped the balance in favour of the female or male applicant, any priority given to men or women would be waived. In the author's view, fixed quotas – and, even more, floating quotas – prevent this from happening. The author also contends that the State party's argument that, in this

case, the only way to ensure balanced representation of the two sexes is to introduce quotas, is baseless and unacceptable. The author maintains that there are other steps Parliament could take, namely the elimination of social barriers, to facilitate access to such positions by particular groups. He adds that there is no inequality between men and women in the case under consideration, since too few applications were submitted by the group of women (applications from only two Dutch-speaking women following the first call), which, in the author's view, means that the purpose of the exercise is illegitimate. The author also points out that the State party's reference to article 11 bis of the Constitution is irrelevant insofar as that article was added on 21 February 2002, and thus did not exist at the time the disputed rule was established.

7.3 As to the complaint of discrimination between individuals appointed by the legislature and those nominated by third parties, the author contests the State party's invocation of the Act of 20 July 1990, on the promotion of balance between men and women in advisory bodies, insofar as, in his view, the High Council of Justice is more than simply an advisory body. The author claims it is the Act of 7 May 1999 on equal treatment of men and women – which prohibits gender requirements – that is applicable in this case. He considers that it is applicable to the Senate's call for applications on the one hand, since it covers public-sector employers in particular, and to the members of the High Council of Justice on the other hand, since, in his view, and contrary to the State party's contention, they do perform work. He does nevertheless acknowledge that that work is not performed "under the authority of another person", as the law in question requires.

7.4 Concerning the complaint of discrimination against a subgroup, the author recalls that, following the advice of the Council of State, Parliament had indeed made a distinction between the group of justices and the group of non-justices. He maintains, however, that in setting quotas for the non-justices, Parliament repeated the very error the Council of State had warned against. As a result, the author believes, there is an imbalance that cannot be rationally justified between, on the one hand, the degree of institutionalized discrimination among candidates for high public office and, on the other, the promotion of equality between men and women (which is supposedly lacking) and one of the principal aims of the Act, which is to create a High Court of Justice composed of individuals selected for their abilities.

7.5 In respect of the application of the rule of law, the author claims that non-justice members were appointed on political grounds and that there was no comparison of the candidates' qualifications, again

⁷ Article 295 bis-2, paragraph 4, of the Judicial Code.

because of the establishment of quotas favouring women.

7.6 The author repeats that the second call for candidates was illegal (the three-month time limit for submission of applications being a strict deadline) and asserts that it allowed candidates to be appointed by virtue of their sex, thanks to the quota, and through nepotism. In the author's view, the High Council of Justice could have been constituted without a second call, insofar as article 151 of the Constitution, which establishes the Council, does not provide for quotas based on sex. As to the list of successors required by law, the author considers that such a list should govern the order of succession.

Issues and proceedings before the Committee

Admissibility considerations

8.1 In accordance with rule 87 of its rules of procedure, before considering any claims contained in a communication, the Human Rights Committee must decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

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

8.3 With regard to the contested provision, namely, article 295 bis-1, paragraph 3, of the Act of 22 December 1998, the Committee takes note of the State party's argument that the author could have appealed to the Court of Arbitration. After having also considered the author's arguments, the Committee is of the opinion that Mr. Jacobs is correct in maintaining that he was not in a position to lodge such an appeal since he was unable to meet the requirement of direct personal interest within the prescribed time limit of six months from publication of the Act, and he cannot be held responsible for the lack of a remedy (see paragraph 5.2).

8.4 The Committee further notes that the author was unable to submit an appeal to the Council of State, as indeed the State party confirms in arguing that the lack of a right of appeal was due to the principle of the separation of powers (see paragraph 4.10).

8.5 With regard to the application of the Act of 22 December 1998 and in particular article 295 bis-1, the Committee takes note of the author's claim that the remedies before certain other Belgian courts and tribunals mentioned by the State party did not constitute effective remedies in the present case. The Committee recalls that it is implicit in rule 91 of its rules of procedure and in article 4, paragraph 2, of the

Optional Protocol, that a State party to the Covenant should submit to the Committee all information at its disposal, which, at the stage where the Committee must take a decision on the admissibility of a communication, means detailed information on the remedies available, in the particular circumstances of their case, to individuals claiming to be victims of violations of their rights. The Committee notes that the State party has referred only in general terms to the remedies available under Belgian law, and has failed to provide any information whatsoever on the remedy applicable in the present case, or to demonstrate that it would have been effective and available. In the light of these facts, the Committee considers that the author has met the conditions set forth in article 5, paragraph 2 (b) of the Optional Protocol.

8.6 With regard to the author's complaint of violations of article 19, paragraph 1, of the Covenant, the Committee considers that the facts presented are not sufficiently substantiated for the purposes of admissibility under article 2 of the Optional Protocol, in respect of this part of the communication.

8.7 With regard to the complaint of a violation of article 14, paragraph 1, of the Covenant, the Committee considers that the case under consideration is not concerned with the determination of rights and obligations in a suit at law; it is inconsistent *ratione materiae* with the article invoked and thus inadmissible under article 3 of the Optional Protocol.

8.8 Lastly, the Committee finds that the communication is admissible inasmuch as it appears to raise issues under articles 2, 3, 25 (c) and 26 of the Covenant, and should be considered as to the merits, in accordance with article 5, paragraph 2, of the Optional Protocol.

Consideration of the merits

9.1 The Human Rights Committee has examined the present communication in the light of all the written information communicated by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

9.2 With regard to the complaints of violations of articles 2, 3, 25 (c) and 26 of the Covenant, arising from article 295 bis-1, paragraph 3, of the Act of 22 December 1998, the Committee takes note of the author's arguments challenging the gender requirement for access to a non-justice seat on the High Council of Justice on the grounds that it is discriminatory. The Committee also notes the State party's argument justifying such a requirement by reference to the law, the objective of the measure, and its effect in terms of the appointment of candidates and the constitution of the High Council of Justice.

9.3 The Committee recalls that, under article 25 (c) of the Covenant, every citizen shall have the right and opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions, to have access, on general terms of equality, to public service in his or her country. In order to ensure access on general terms of equality, the criteria and processes for appointment must be objective and reasonable. State parties may take measures in order to ensure that the law guarantees to women the rights contained in article 25 on equal terms with men.⁸ The Committee must therefore determine whether, in the case before it, the introduction of a gender requirement constitutes a violation of article 25 of the Covenant by virtue of its discriminatory nature, or of other provisions of the Covenant concerning discrimination, notably articles 2 and 3 of the Covenant, as invoked by the author, or whether such a requirement is objectively and reasonably justifiable. The question in this case is whether there is any valid justification for the distinction made between candidates on the grounds that they belong to a particular sex.

9.4 In the first place, the Committee notes that the gender requirement was introduced by Parliament under the terms of the Act of 20 July 1990 on the promotion of a balance between men and women on advisory bodies.⁹ The aim in this case is to increase the representation of and participation by women in the various advisory bodies in view of the very low numbers of women found there.¹⁰ On this point, the Committee finds the author's assertion that the insufficient number of female applicants in response to the first call proves there is no inequality between men and women to be unpersuasive in the present case; such a situation may, on the contrary, reveal a need to encourage women to apply for public service on bodies such as the High Council of Justice, and the need for taking measures in this regard. In the present case, it appears to the Committee that a body

⁸ General comment N°28, on article 3 of the Covenant (sixty-eighth session, 2000), para. 29.

⁹ "Since the High Council also serves as an advisory body, each college shall comprise eight members of each sex." Bill of 15 July 1998, Discussion, p. 44, Belgian Chamber of Representatives. See also paragraph 6.3 of the present communication.

¹⁰ "A study of the actual situation reveals that, in the majority of the advisory bodies, the membership includes a very small number of women." Preamble to the Bill, p. 1, 27 March 1990, Chamber of Representatives, parliamentary documents; "A survey of the national consultative bodies shows that the proportion of women is no more than 10 per cent." Introduction to the Bill by the Secretary of State for Social Emancipation, p. 1, 3 July 1990, Belgian Senate.

such as the High Council of Justice could legitimately be perceived as requiring the incorporation of perspectives beyond one of juridical expertise only. Indeed, given the responsibilities of the judiciary, the promotion of an awareness of gender-relevant issues relating to the application of law, could well be understood as requiring that perspective to be included in a body involved in judicial appointments. Accordingly, the Committee cannot conclude that the requirement is not objective and reasonably justifiable.

9.5 Secondly, the Committee notes that the gender clause requires there to be at least four applicants of each sex among the 11 non-justices appointed, which is to say just over one third of the candidates selected. In the Committee's view, such a requirement does not in this case amount to a disproportionate restriction of candidates' right of access, on general terms of equality, to public office. Furthermore, and contrary to the author's contention, the gender requirement does not make qualifications irrelevant, since it is specified that all non-justice applicants must have at least 10 years' experience. With regard to the author's argument that the gender requirement could give rise to discrimination between the three categories within the group of non-justices as a result, for example, of only men being appointed in one category, the Committee considers that in that event there would be three possibilities: either the female applicants were better qualified than the male, in which case they could justifiably be appointed; or the female and male applicants were equally well qualified, in which case the priority given to women would not be discriminatory in view of the aims of the law on the promotion of equality between men and women, as yet still lacking; or the female candidates were less well qualified than the male, in which case the Senate would be obliged to issue a second call for candidates in order to reconcile the two aims of the law, namely, qualifications and gender balance, neither of which may preclude the other. On that basis, there would appear to be no legal impediment to reopening applications. Lastly, the Committee finds that a reasonable proportionality is maintained between the purpose of the gender requirement, namely to promote equality between men and women in consultative bodies; the means applied and its modalities, as described above; and one of the principal aims of the law, which is to establish a High Council composed of qualified individuals. Consequently, the Committee finds that paragraph 3 of article 295 bis-1 of the Act of 22 December 1998 meets the requirements of objective and reasonable justification.

9.6 In the light of the foregoing, the Committee finds that article 295 bis-1, paragraph 3, does not violate the author's rights under the provisions of articles 2, 3, 25 (c) and 26 of the Covenant.

9.7 As regards the complaints of violations of articles 2, 3, 25 (c) and 26 of the Covenant arising from the application of the Act of 22 December 1998, and in particular article 295 bis-1, paragraph 3, the Committee takes note of the author's arguments claiming, in the first place, that the appointment of the Dutch-speaking non-justices, the group to which Mr. Jacobs belonged, was conducted without regard to an established procedure, without interviews, profiling or comparison of qualifications, being based rather on nepotism and political affiliation. The Committee has also examined the State party's arguments, which explain in detail the procedure for appointing the non-justices. The Committee notes that the Senate established and put into effect a special appointments procedure, viz.: first, a list of recommended candidates was drawn up after consideration and comparison of all applications on the basis of the relevant files and curricula vitae; secondly, each senator was given the choice of voting, in a secret ballot, either for the recommended list, or for a list of all the candidates. The Committee finds that this appointments procedure was objective and reasonable for the reasons made clear in the State party's explanations: before the recommended list was drawn up and the Senate made the appointments, each candidate's curriculum vitae and files were examined and their qualifications compared; the choice of a procedure based on files and curricula vitae rather than on interviews was prompted by the number of applications and the constraints of the parliamentary timetable, and there was no legal provision specifying a particular method of evaluation, such as interviews (para. 6.17); the choice of the recommended list method had to do with the large number of criteria and the overlap between them, and was a practice already established in the Senate and Chamber of Representatives; lastly, it was possible for the senators to make the appointments using two methods of voting, which guaranteed them freedom of choice. Furthermore, the Committee finds that the author's complaints that the appointment of candidates was made on the basis of nepotism and political considerations have not been sufficiently substantiated.

9.8 With regard to the complaint of discrimination between categories within the group of non-justices arising from the introduction of the gender requirement, the Committee finds that the author has not sufficiently substantiated this part of the communication and, in particular, has produced no evidence to show that any female candidates were appointed despite being less well qualified than male candidates.

9.9 With regard to the complaint of discrimination between applicants in connection with the Senate's

second call for applications, and to the claim that the second call was illegal, the Committee notes that this call was issued because of the insufficient numbers of applications from women, i.e., two applications from women for the Dutch-speaking college – which the author concedes – whereas under article 295 bis-1, paragraph 3, each group of non-justices on the High Council of Justice must comprise at least four members of each sex. The Committee finds, therefore, that the second call was justified to allow the Council to be constituted and, furthermore, that there was no impediment to such action either in law or in parliamentary practice, particularly as the applications submitted in response to the first call remained valid.

9.10 As to the complaint of discrimination arising from the listing of non-justice alternates in alphabetical order, the Committee notes that article 295 bis-2, paragraph 4, of the Judicial Code gives the Senate the right to draw up the list of alternates but for them, unlike the justices, does not prescribe any particular method of ranking. Consequently it finds that, as shown by the State party's detailed argument, (a) the alphabetical order chosen by the Senate does not imply an order of succession; and (b) any succession in the event of a vacancy will require the appointments procedure to be conducted afresh. The author's complaints do not disclose a violation.

9.11 The Committee therefore finds that the application of the Act of 22 December 1998, and in particular of article 295 bis-1, paragraph 3, does not violate the provisions of articles 2, 3, 25 (c) and 26 of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of any article of the Covenant.

APPENDIX

*Individual opinion (concurring) of Committee member,
Ruth Wedgwood*

The Committee has concluded that the norms of non-discriminatory access to public service and political office embodied in Article 25 of the Covenant do not preclude Belgium from requiring the inclusion of at least four members of each gender on its High Council of Justice. The Council is a body of some significant powers, recommending candidates for appointment as judges and prosecutors, as well as issuing opinions and investigating complaints concerning the operation of the judicial branch. However, it is pertinent to note that the membership of the Council of Justice is highly structured by many other criteria as well, under the Belgium Judicial Code. The Council is comprised of two separate "colleges" for French-speaking and Dutch-speaking members. Within each college of 22 members, half are

directly elected by sitting judges and prosecutors. The other “non-justice” members are chosen by the Belgium Senate, and the slate must include a minimum number of experienced lawyers, college or university teachers, and other professionals, with “no fewer than four members of each sex” included among the eleven members of these “non-justice” groups. This electoral rule may benefit men as well as women, although it was rather clearly intended to assure the participation of women on this

“advisory” body. It is important to note that the constitution or laws of some States Parties to the Covenant may disdain or forbid any use of set-asides or minimum numbers for participation in governmental bodies, and nothing in the instant decision interferes with that national choice. The Committee only decides that Belgium is free to choose a different method in seeking to assure the fair participation of women as well as men in the processes of government.

Communication No. 950/2000

Submitted by: S. Jegatheeswara Sarma

Alleged victim: The author, his family and his son, J. Thevaraja Sarma

State party: Sri Lanka

Declared admissible: 14 March 2002 (seventy-fourth session)

Date of adoption of Views: 16 July 2003 (seventy-eighth session)

Subject matter: Involuntary disappearance

Procedural issues: Compatibility *ratione temporis* -
Effective and available remedies -
Unreasonably prolonged remedies

Substantive issues: Right to life - Right to liberty and security of the person - Torture, cruel, inhuman or degrading treatment or punishment - Right of detained person to be treated with humanity and with respect for inherent dignity of the human person - State’s positive obligation to investigate

Articles of the Covenant: 6, 7, 9 and 10

Article of the Optional Protocol: n.a.

Finding: Violation (articles 7 and 9)

1.1 The author of the communication, dated 25 October 1999, is Mr. S. Jegatheeswara Sarma, a Sri Lankan citizen who claims that his son is a victim of a violation by the State party of articles 6, 7, 9 and 10 of the International Covenant on Civil and Political Rights (the Covenant) and that he and his family are victims of a violation by the State party of article 7 of the Covenant. He is not represented by counsel.

1.2 The Covenant and the Optional Protocol to the Covenant entered into force for the State party respectively on 11 June 1980 and 3 October 1997. Sri Lanka also made a declaration according to which “[t]he Government of the Democratic Socialist Republic of Sri Lanka pursuant to article (1) of the Optional Protocol recognises the competence of the Human Rights Committee to receive and consider communications from individuals subject to the jurisdiction of the Democratic Socialist Republic of

Sri Lanka, who claim to be victims of a violation of any of the rights set forth in the Covenant which results either from acts, omissions, developments or events occurring after the date on which the Protocol entered into force for the Democratic Socialist Republic of Sri Lanka, or from a decision relating to acts, omissions, developments or events after that date. The Democratic Socialist Republic of Sri Lanka also proceeds on the understanding that the Committee shall not consider any communication from individuals unless it has ascertained that the same matter is not being examined or has not been examined under another procedure of international investigation or settlement”.

1.3 On 23 March 2001, the Committee, acting through its Special Rapporteur for new communications, decided to separate the examination of the admissibility from the merits of the case.

The facts as submitted by the author

2.1 The author alleges that, on 23 June 1990, at about 8.30 am, during a military operation, his son, himself and three others were removed by army members from their family residence in Anpuvalipuram, in the presence of the author’s wife and others. The group was then handed over to other members of the military, including one Corporal Sarath, at another location (Ananda Stores Compound Army Camp). The author’s son was apparently suspected of being a member of the LTTE (Liberation Tigers of Tamil Eelam) and was beaten and tortured. He was thereafter taken into military custody at Kalaimagal School allegedly after transiting through a number of other locations. There, he was allegedly tortured, hooded and forced to identify other suspects.

2.2 In the meantime, the author and other persons arrested were also transferred to Kalaimagal School, where they were forced to parade before the author's hooded son. Later that day, at about 12.45 pm, the author's son was taken to Plainain Point Army Camp, while the author and others were released. The author informed the Police, the International Committee of the Red Cross (ICRC) and human rights groups of what had happened.

2.3 Arrangements were later made for relatives of missing persons to meet, by groups of 50, with Brigadier Pieris, to learn about the situation of the missing ones. During one of these meetings, in May 1991, the author's wife was told that her son was dead.

2.4 The author however claims that, on 9 October 1991 between 1.30 and 2 pm, while he was working at "City Medicals Pharmacy", a yellow military van with license plate Nr. 35 Sri 1919 stopped in front of the pharmacy. An army officer entered and asked to make some photocopies. At this moment, the author saw his son in the van looking at him. As the author tried to talk to him, his son signalled with his head to prevent his father from approaching.

2.5 As the same army officer returned several times to the pharmacy, the author identified him as star class officer Amarasekara. In January 1993, as the "Presidential Mobile Service" was held in Trincomalee, the author met the then Prime Minister, and complained about the disappearance of his son. The Prime Minister ordered the release of the author's son, wherever he was found. In March 1993, the military advised that the author's son had never been taken into custody.

2.6 In July 1995, the author gave evidence before the "Presidential Commission of Inquiry into Involuntary Removals and Disappearances in the Northern and Eastern Provinces" (The Presidential Commission of Inquiry), without any result. In July 1998, the author again wrote to the President, and was advised in February 1999 by the Army that no such person had been taken into military custody. On 30 March 1999, the author petitioned to the President, seeking a full inquiry and the release of his son.

The complaint

3. The author contends that the above facts constitute violations by the State party of articles 6, 7, 9, and 10 of the Covenant.

State party's admissibility submission

4.1 By submission of 26 February 2001, the State party argues that the Optional Protocol does not apply *ratione temporis* to the present case. It considers that the alleged incident involving the involuntary removal of the author's son took place

on 23 June 1990 and his subsequent disappearance in May 1991, and these events occurred before the entry into force of the Optional Protocol for Sri Lanka.

4.2 The State party argues that the author has not demonstrated that he has exhausted domestic remedies. It is submitted that the author has failed to resort to the following remedies:

– A writ of habeas corpus to the Court of Appeal, which gives the possibility for the Court to force the detaining authority to present the alleged victim before it.

– In cases where the Police refuse or fail to conduct an investigation, article 140 of the State party's Constitution provides for the possibility of applying to the Court of Appeal to obtain a writ of *mandamus* in cases where a public authority fails or refuses to respect a statutory duty.

– In the absence of an investigation led by the police or if the complainant does not wish to rely on the findings of the police, such complainant is entitled directly to institute criminal proceedings in the Magistrate's Court, pursuant to section 136 (1) (a) of the Code of Criminal Procedure.

4.3 The State party argues that the author has failed to demonstrate that these remedies are or would be ineffective, or would extend over an unreasonable period of time.

4.4 The State party therefore considers that the communication is inadmissible.

Author's comments

5.1 On 25 May 2001, the author responded to the State party's observations.

5.2 With regard to the competence of the Committee *ratione temporis*, the author considers that he and his family are suffering from a continuing violation of article 7 as, at least to the present date, he has had no information about his son's whereabouts. The author refers to the jurisprudence of the Committee in *Quinteros v. Uruguay*¹ and *El Megreisi v. Libyan Arab Jamahiriya*² and maintains that this psychological torture is aggravated by the contradictory replies received from the authorities.

5.3 To demonstrate his continued efforts, the author lists the 39 letters and other requests filed in respect of to the disappearance of his son. These requests were sent to numerous Sri Lankan authorities, including the police, the army, the

¹ Case No. 107/1981, Views adopted on 21 July 1983.

² Case No. 440/1990, Views adopted on 24 March 1994.

national human rights commission, several ministries, the president of Sri Lanka and the Presidential Commission of Inquiry. Despite all these steps, the author has not been given any further information as to the whereabouts of his son. Moreover, following the submission of the present communication to the Committee, the Criminal Investigations Department was ordered to record the statements, in Sinhala, of the author and 9 other witnesses whom the author had cited in previous complaints, without any tangible outcome to date.

5.4 The author emphasizes that such inaction is unjustifiable in a situation where he had provided the authorities with the names of the persons responsible for the disappearance, as well as the names of other witnesses. He submitted the following details to the State party's authorities:

“1. On 23.06.1990 my son was removed by Army soldier Corporal Sarath in my presence at Anpuvalipuram. He hails from Girithala, Polanaruwa. He is married to a midwife at 93rd Mile Post, Kantale. She is working at Kantala Hospital.

2. On 09.10.1991 Amerasekera (Star Badge) from the army brought my son to City Medicals Pharmacy by van Nr. 35 Sri 1919.

3. On 23.06.1990 Army personnel who were on duty during the roundup at Anpuvalipuram: Major Patrick; Suresh Cassim [lieutenant]; Jayasekara [...]; Ramesh (Abeyapura).

4. During this period officers on duty at Plantain Point Army Camp. In addition to names mentioned in para. 3: Sunil Tennakoon (at present gone on transfer from here); Tikiri Banda (presently working here); Captain Gunawardena; Kundas (European).

5. Witnesses

My wife; Mr. S. Alagiah, 330, Anpuvalipuram, Trincomalee; Mr. P. Markandu, 442, Kanniya Veethi, Barathipuram, Trincomalee; Mr. P. Nemithasan, 314, Anpuvalipuram, Trincomalee; Mr. S. Mathavan (maniam Shop) Anpuvalipuram, Trincomalee; Janab. A.L. Majeed, City Medical, Dockyard Road, Trincomalee; Mrs. Malkanthi Yatawara, 80A, Walpolla, Rukkuwila, Nittambuwa; Mr. P. S. Ramiah, Pillaiyar Kovilady, Selvanayagapuram, Trincomalee.”

5.5 The author also testified before the Presidential Commission of Inquiry on 29 July 1995 and refers to the following statement of the commission:

“Regarding [...] the evidence available to establish such alleged removals or disappearances, [...] there had been large scale corroborative evidence by relatives, neighbours and fellow human beings [sic], as most of these arrests were done in full public view, often from Refugee Camps and during cordon and search operations where large numbers of people witnessed the incidents.

Regarding [...] the present whereabouts of the persons alleged to have been so removed or to have so disappeared, the Commission faced a blank wall in this

investigation. On the one hand the security service personnel denied any involvement in arrests in spite of large scale corroborative evidence of their culpability. [...]”

5.6 The author maintains that these facts reveal a violation of article 6, 7, 9 and 10 of the Covenant.

5.7 The author argues that he has exhausted all effective, available and not unduly prolonged domestic remedies. Referring to reports of international human rights organizations, the author submits that the remedy of *habeas corpus* is ineffective in Sri Lanka and unnecessarily prolonged. The author also refers to the report of the Working Group on Enforced or Involuntary Disappearances of 28 December 1998, which confirms that even if ordered by courts, investigations are not carried out.

5.8 The author submits that, during the period 1989-1990, in Trincomalee, the law was non-existent, the courts were not functioning, people were shot at sight and many were arrested. Police stations in the “Northern and Eastern Province” were headed by Sinhalese who arrested and caused the disappearance of hundreds of Tamils. As a result, the author could not report to the police about the disappearance of his son, for fear of reprisals or for being suspected of terrorist activities.

Admissibility decision

6.1 At its 74th session, the Committee considered the admissibility of the communication. Having ascertained that the same matter was not being examined and had not been examined under another procedure of international investigation or settlement, the Committee examined the facts that were submitted to it and considered that the communication raised issues under article 7 of the Covenant with regard to the author and his family and under articles 6, paragraph 1, 7, 9, paragraph 1, and 10 of the Covenant with regard to the author's son.

6.2 With respect to the application *ratione temporis* of the Optional Protocol to the State party, the Committee noted that, upon acceding to the Optional Protocol, Sri Lanka had entered a declaration restricting the Committee's competence to events following the entry into force of the Optional Protocol. However, the Committee considered that although the alleged removal and subsequent disappearance of the author's son had taken place before the entry into force of the Optional Protocol for the State party, the alleged violations of the Covenant, if confirmed on the merits, may have occurred or continued after the entry into force of the Optional Protocol.

6.3 The Committee also examined the question of exhaustion of domestic remedies and considered that

in the circumstances of the case, the author had used the remedies that were reasonably available and effective in Sri Lanka. The Committee noted that, in 1995, the author had instituted a procedure with an *ad hoc* body (the Presidential Commission of Inquiry into Involuntary Removals and Disappearances in the Northern and Eastern Provinces) that had been especially created for cases like this one. Bearing in mind that this Commission had not, after 7 years, reached a final conclusion about the disappearance of the author's son, the Committee was of the view that this remedy was unreasonably prolonged. Accordingly, it declared the communication admissible on 14 March 2002.

State party's merits submission

7.1 On 22 April 2002, the State party commented on the merits of the communication.

7.2 On the facts of the case and the steps that have been taken after the alleged disappearance of the author's son, the State party submits that, on 24 July and 30 October 2000, the Attorney General of Sri Lanka received two letters from the author seeking "inquiry and release" of his son from the Army. Further to these requests, the Attorney General's Department inquired with the Sri Lankan Army as to whether the author's son had been arrested and whether he was still being detained. Inquiries revealed that neither the Sri Lanka Navy, nor the Sri Lanka Air Force, nor the Sri Lanka Police had arrested or detained the author's son. The author's requests were transmitted to the Missing Persons Commission (MPC) Unit of the Attorney General's Department. On 12 December 2000, the coordinator of the MPC informed the author that suitable action would be taken and advised the Inspector General of Police (IGP) to conduct criminal investigation into the alleged disappearance.

7.3 On 24 January 2001, detectives of the Disappearance Investigations Unit (DIU) met with a number of persons, including the author and his wife, interviewed them and recorded their statements. On 25 January 2001, the DIU visited Plaine Point Army Camp. On the same day and between 8 and 27 February 2001, a number of other witnesses were interviewed by the DIU. Between 3 April and 26 June 2001, the DIU proceeded to the interview of 10 Army personnel, including the Officer commanding the Security Forces of the Trincomalee Division in 1990/91. The DIU completed its investigation on 26 June 2001 and transmitted its report to the MPC, which, on 22 August 2001, requested further investigation on particular points. The results of this additional investigation were transmitted to the MPC on 24 October 2001.

7.4 The State party submits that the results of the criminal investigation have revealed that, on 23 June

1990, Corporal Ratnamala Mudiyansele Sarath Jayasinghe Perera (hereafter Corporal Sarath) of the Sri Lankan Army and two other unidentified persons had "involuntarily removed (abducted)" the author's son. This abduction was independent of the "cordon and search operation" carried out by the Sri Lankan Army in the village of Anpuwalipuram in the District of Trincomalee, in order to identify and apprehend terrorist suspects. During this operation, arrests and detention for investigation did indeed take place in accordance with the law but the responsible officers were unaware of Corporal Sarath's conduct and of the author's son's abduction. The investigation failed to prove that the author's son had been detained at Plaine Point Army Camp or in any other place of detention, and the whereabouts of the author's son could not be ascertained.

7.5 Corporal Sarath denied any involvement in the incident and did not provide information on the author's son, nor any acceptable reasons why witnesses would have falsely implicated him. The MPC thus decided to proceed on the assumption that he and two unidentified persons were responsible for the "involuntary removal" of the author's son.

7.6 With regard to the events of 9 October 1991, when the author allegedly saw his son in company of Lieutenant Amarasekera, the investigation revealed that, during the relevant period, there was no officer of such name in the District of Trincomalee. The person on duty in the relevant area in 1990/91 was officer Amarasinghe who died soon thereafter as a result of a terrorist attack.

7.7 On 18 February 2002, the author sent another letter to the Attorney General stating that his son had been "removed" by Corporal Sarath, requesting that the matter be expedited and that his son be handed over without delay. On 28 February 2002, the Attorney General informed the author that his son had disappeared after his abduction on 23 June 1990, and that his whereabouts were unknown.

7.8 On 5 March 2002, Corporal Sarath was indicted of having "abducted" the author's son on 23 June 1990 and along with two other unknown perpetrators, an offence punishable under section 365 of the Sri Lankan Penal Code. The indictment was forwarded to the High Court of Trincomalee and the author was so informed on 6 March 2002. The State party submits that Corporal Sarath was indicted for "abduction" because its domestic legislation does not provide for a distinct criminal offence of "involuntary removal". Moreover, the results of the investigation did not justify the assumption that Corporal Sarath was responsible for the murder of the victim, as the latter was seen alive on 9 October 1991. The trial of Corporal Sarath will commence in late 2002.

7.9 The State party submits that it did not, either directly or through the relevant field commanders of

its Army, cause the disappearance of the author's son. Until the completion of the investigation referred to above, the conduct of Corporal Sarath was unknown to the State party and constituted illegal and prohibited activity, as shown by his recent indictment. In the circumstances, the State party considers that the "disappearance" or the deprivation of liberty of the author's son cannot be seen as a violation of his human rights.

7.10 The State party reiterates that the alleged "involuntary removal" or the "deprivation of liberty" of the author's son on 23 June 1990 and his subsequent alleged disappearance on or about 9 October 1991 occurred prior to the ratification of the Optional Protocol by Sri Lanka, and that there is no material in the communication that would demonstrate a "continuing violation".

7.11 The State party therefore contends that the communication is without merits and that it should, in any event, be declared inadmissible due to the reasons developed in paragraph 7.10.

Author's comments

8.1 On 2 August 2002, the author commented on the State party's observations on the merits.

8.2 The author submits that the disappearance of his son took place in a context where disappearances were systemic. He refers to the "final Report of the Commission of Inquiry into Involuntary Removal or Disappearance of Persons in the Northern and Eastern Provinces" of 1997, according to which:

[Y]outh in the North and East disappeared in droves in the latter part of 1989 and during the latter part of 1990. This large scale disappearances of youth is connected with the military operations started against the JVP in the latter part of 1989 and against the LTTE during Eelam War II beginning in June 1990 [...] It was obvious that a section of the Army was carrying out the instructions of its Political Superiors with a zeal worthy of a better cause. Broad power was given to the Army under the Emergency Regulations which included the power to dispose of the bodies without post-mortem or inquests and this encouraged a section of the Army to cross the invisible line between the legitimate Security Operation and large-scale senseless arrests and killings.

8.3 The author emphasizes that one aspect of disappearances in Sri Lanka is the absolute impunity that officers and other agents of the State enjoy, as illustrated in the Report of the Working Group on Enforced or Involuntary Disappearances after its third visit to Sri Lanka in 1999.³ The author argues

that the disappearance of his son is an act committed by State agents as part of a pattern and policy of enforced disappearances in which all levels of the State apparatus are implicated.

8.4 The author draws attention to the fact that the State party does not contest that the author's son has disappeared, even if it claims not to be responsible; that it confirms that the author's son was abducted on 23 June 1990 by Corporal Sarath and two other unidentified officers, although in a manner which was "distinctly separate and independent" from the cordon and search operation that was carried out by the Army in this location at the same time; and that it submits that officers of the Army had been unaware of Corporal Sarath's conduct and the author's son abduction.

8.5 The author indicates that enforced disappearances represent a clear breach of various provisions of the Covenant, including its article 7,⁴ and, emphasizing that one of the main issues of this case is that of imputability, considers that there is little doubt that his son's disappearance is imputable to the State party because the Sri Lankan Army is indisputably an organ of that State.⁵ Where the violation of Covenant rights is carried out by a soldier or other official who uses his or her position of authority to execute a wrongful act, the violation is imputable to the State,⁶ even where the soldier or the other official is acting beyond his authority. The author, relying on the judgement of the Inter-American Court of Human Rights in the *Velasquez Rodriguez Case*⁷ and that of the European Court of Human Rights, concludes that, even where an official is acting *ultra vires*, the State will find itself in a position of responsibility if it provided the means or facilities to accomplish the act. Even if, and this is not known in this case, the officials acted in direct contravention of the orders given to them, the State may still be responsible.⁸

⁴ *Celis Laureano v. Peru*, Case No. 540/1993, Views adopted on 25 March 1996.

⁵ *Velasquez Rodriguez Case* (1989), Inter-American Court of Human Rights, Judgement of 29 July 1998, (Ser. C) No. 4 (1988).

⁶ See *Caballero Delgado and Santana Case*, Inter-American Court of Human Rights, Judgement of 8 December 1995 (Annual Report of the Inter-American Court of Human Rights 1995 OAS/Ser.L/V III.33 Doc.4); *Garrido and Baigorria Case*, Judgement on the merits, 2 February 1996, Inter-American Court of Human Rights)

⁷ *Velasquez Rodriguez Case* (1989), Judgement of 29 July 1998, Inter-American Court of Human Rights, (Ser. C) No. 4 (1988), para. 169 - 170.

⁸ *Timurtas v. Turkey*, European Court of Human Rights, Application no. 23531/94, Judgement of 13 June 2000; *Ertak v. Turkey*, European Court of Human Rights, Application no. 20764/92, Judgement of 9 May 2000.

³ E/CN.4/2000/64/Add.1, paras. 34 and 35.

8.6 The author maintains that his son was arrested and detained by members of the Army, including Corporal Sarath and others unidentified, in the course of a military search operation and that these acts resulted in the disappearance of his son. Pointing to the overwhelming evidence before the Presidential Committee of Inquiry indicating that many of those in Trincomalee who were arrested and taken to Plaintain Point Army Camp were not seen again, the assertion that this disappearance was an isolated act initiated solely by Corporal Sarath, without the knowledge or complicity of other levels within the military chain of command, defies credibility.

8.7 The author contends that the State party is responsible for the acts of Corporal Sarath even if, as it is suggested by the State party, his acts were not part of a broader military operation because it is undisputed that the acts were carried out by Army personnel. Corporal Sarath was in uniform at the relevant time and it is not disputed that he was under the orders of an officer to conduct a search operation in that area during the period in question. The State party thus provided the means and facilities to accomplish the imputed act. That Corporal Sarath was a low ranking officer acting with a wide margin of autonomy and without orders from superiors does not exempt the State party from its responsibility.

8.8 The author further suggests that even if the acts were not directly attributable to the State party, its responsibility can arise due to its failure to meet the positive obligations to prevent and punish certain serious violations such as arbitrary violations of the right to life. This may arise whether or not the acts are carried out by non-state actors.

8.9 The author argues in this respect that the circumstances of this case must establish, at a minimum, a presumption of responsibility that the State party has not rebutted. In this case, referring to the jurisprudence of the Committee,⁹ it is indeed the State party, not the author, that is in a position to access relevant information and therefore the onus must be on the State to refute the presumption of responsibility. The State party has failed to initiate a thorough inquiry into the author's allegations in areas within which it alone has access to the relevant

⁹ See *Bleier v. Uruguay*, Case No. 30/1978, adopted on 24 March 1980, para 13.3 ("With regard to the burden of proof, this cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to relevant information. It is implicit in article 4 (2) of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities [...]").

information, and to provide the Committee with relevant information.

8.10 The author argues that according to the jurisprudence of the Committee¹⁰ and that of the Inter-American Court of Human Rights, the State party had a responsibility to investigate the disappearance of the author's son in a thorough and effective manner, to bring to justice those responsible for disappearances, and to provide compensation for the victims' families.¹¹

8.11 In the present case, the State party has failed to investigate effectively its responsibility and the individual responsibility of those suspected of the direct commission of the offences and gave no explanation as to why an investigation was commenced some 10 years after the disappearance was first brought to the attention of the relevant authorities. The investigation did not provide information on orders that may have been given to Corporal Sarath and others regarding their role in search operations, nor has it considered the chain of command. It has not provided information about the systems in place within the military concerning orders, training, reporting procedures or other process to monitor the activity of soldiers which may support or undermine the claim that his superiors did not order and were not aware of the activities of the said Corporal. It did not provide evidence that Corporal Sarath or his colleagues were acting in a personal capacity without the knowledge of other officers.

8.12 There are also striking omissions in the evidence gathered by the State party. The records of the ongoing military operations in this area in 1990 have indeed not been accessed or produced and no detention records or information relating to the cordon and search operation have been adduced. It also does not appear that the State party has made investigations into the vehicle bearing registration number 35 SRI 1919 in which the author's son was last seen. The Attorney General who filed the indictment against Corporal Sarath has not included key individuals as witnesses for the prosecution,

¹⁰ *Sanjuan Arevalo v. Colombia*, Case No. 181/1984, Views adopted on 3 November 1989; *Avellanal v. Peru*, Case No. 202/1986, Views adopted on 28 October 1988; *Mabaka Nsusu v. Congo*, Case No. 157/1983, Views adopted on 26 March 1986; and *Vicente et al. v. Colombia*, Case No. 612/1995, Views adopted on 29 July 1997; see also General Comment No. 6, HRI/GEN/1/Rev.1 (1994), para. 6.

¹¹ Concluding observations of the Human Rights Committee on the third periodic report of Senegal, 28 December 1992, CCPR/C/79/Add.10; see also *Baboeram v. Surinam*, Case No. 146/1983, Views adopted on 4 April 1985 and *Hugo Dermitt v. Uruguay*, Case No. 84/1981, Views adopted on 21 October 1982.

despite the fact that they had already provided statements to the authorities and may provide crucial testimony material to this case. These include Poopalapillai Neminathan, who was arrested along with the author's son and was detained with him at the Plaintain Point Army Camp, Santhiya Croose, who was also arrested along with the author's son but was released en route to the Plaintain Point Army Camp, S.P. Ramiah, who witnessed the arrest of the author's son and Shammugam Algiah from whose house the author's son was arrested. Moreover, there is no indication of any evidence having been gathered as to the role of those in the higher echelons of the Army as such officers may themselves be criminally responsible either directly for what they ordered or instigated or indirectly by dint of their failure to prevent or punish their subordinates.

8.13 On the admissibility of the communication, the author emphasizes that the Committee already declared the case admissible on 14 March 2002 and maintains that the events complained of have continued after the ratification of the Optional Protocol by the State party to the day of his submission. The author also cites article 17 of the United Nations Declaration on the Protection of All Persons from Enforced Disappearance.¹²

8.14 The author asks the Committee to hold the State party responsible for the disappearance of his son and declare that it has violated Articles 2, 6, 7, 9, 10 and 17 of the Covenant. He further asks that the State party undertake a thorough and effective investigation, along the lines suggested above; provide him with adequate information resulting from its investigation; release his son; and pay adequate compensation.

Examination of the merits

9.1 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.

9.2 With regard to the author's claim in respect of the disappearance of his son, the Committee notes that the State party has not denied that the author's son was abducted by an officer of the Sri Lankan

¹² Enforced disappearances "shall be considered a continuing offence as long as the perpetrators continue to conceal the fate and whereabouts of persons who have disappeared and these facts remain unclarified" Similarly, article 3 of the Inter-American Convention on the Forced Disappearance of Persons states that the offence of forced disappearance « shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined ».

Army on 23 June 1990 and has remained unaccounted for since then. The Committee considers that, for purposes of establishing State responsibility, it is irrelevant in the present case that the officer to whom the disappearance is attributed acted *ultra vires* or that superior officers were unaware of the actions taken by that officer.¹³ The Committee therefore concludes that, in the circumstances, the State party is responsible for the disappearance of the author's son.

9.3 The Committee notes the definition of enforced disappearance contained in article 7, paragraph 2 (i) of the Rome Statute of the International Criminal Court:¹⁴ *Enforced disappearance of persons* " means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time. Any act of such disappearance constitutes a violation of many of the rights enshrined in the Covenant, including the right to liberty and security of person (article 9), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (article 7), and the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (article 10). It also violates or constitutes a grave threat to the right to life (article 6).¹⁵

9.4 The facts of the present case clearly illustrate the applicability of article 9 of the Covenant concerning liberty and security of the person. The State party has itself acknowledged that the arrest of the author's son was illegal and a prohibited activity. Not only was there no legal basis for his arrest, there evidently was none for the continuing detention. Such a gross violation of article 9 can never be justified. Clearly, in the present case, in the Committee's opinion, the facts before it reveal a violation of article 9 in its entirety.

¹³ See article 7 of the Draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001) and article 2, paragraph 3 of the Covenant.

¹⁴ Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002.

¹⁵ See article 1, paragraph 2 of the Declaration on the Protection of All Persons from Enforced Disappearances, G.A. res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (1992). Adopted by General Assembly resolution 47/133 of 18 December 1992.

9.5 As to the alleged violation of article 7, the Committee recognizes the degree of suffering involved in being held indefinitely, without any contact with the outside world,¹⁶ and observes that, in the present case, the author appears to have accidentally seen his son some 15 months after the initial detention. He must, accordingly, be considered a victim of a violation of article 7. Moreover, noting the anguish and stress caused to the author's family by the disappearance of his son and by the continuing uncertainty concerning his fate and whereabouts,¹⁷ the Committee considers that the author and his wife are also victims of violation of article 7 of the Covenant. The Committee is therefore of the opinion that the facts before it reveal a violation of article 7 of the Covenant both with regard to the author's son and with regard to the author's family.

9.6 As to the possible violation of article 6 of the Covenant, the Committee notes that the author has not asked the Committee to conclude that his son is dead. Moreover, while invoking article 6, the author also asks for the release of his son, indicating that he has not abandoned hope for his son's reappearance. The Committee considers that, in such circumstances, it is not for it to appear to presume the death of the author's son. Insofar as the State party's obligations under paragraph 11 below would be the same with or without such a finding, the Committee considers it appropriate in the present case not to make any finding in respect of article 6.

9.7 In the light of the above findings, the Committee does not consider it necessary to address the author's claims under articles 10 and 17 of the Covenant.

¹⁶ See *El Megreisi v. Libyan Arab Jamahiriya*, Case No. 440/1990, Views adopted on 23 March 1994.

¹⁷ *Quinteros v. Uruguay*, Case No. 107/1981, Views adopted on 21 July 1983.

10. 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 articles 7 and 9 of the International Covenant on Civil and Political Rights with regard to the author's son and article 7 of the International Covenant on Civil and Political Rights with regard to the author and his wife.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author and his family with an effective remedy, including a thorough and effective investigation into the disappearance and fate of the author's son, his immediate release if he is still alive, adequate information resulting from its investigation, and adequate compensation for the violations suffered by the author's son, the author and his family. The Committee considers that the State party is also under an obligation to expedite the current criminal proceedings and ensure the prompt trial of all persons responsible for the abduction of the author's son under section 356 of the Sri Lankan Penal Code and to bring to justice any other person who has been implicated in the disappearance. The State party is also under an obligation to prevent similar violations in the future.

12. 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 or 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. The State party is also requested to publish the Committee's Views.

Communication No. 960/2000

Submitted by: Klaus Dieter Baumgarten

Alleged victim: The author

State party: Germany

Date of adoption of Views: 31 July 2003 (seventy-eighth session)

Subject matter: Shoot-to-kill orders at former inner-German border

Procedural issue: none

Substantive issues: Prohibition of retroactive punishment or punishment not based on law - Criminal offences under international human rights law - Discrimination

Articles of the Covenant: 15 and 26

Article of the Optional Protocol: none

Finding: No violation

1. The author of the communication is Klaus Dieter Baumgarten, a German citizen, who, at the time of his initial submission, was imprisoned in the prison of Düppel in Berlin, Germany.¹ He claims to be the victim of violations by Germany of articles 15 and 26 of the International Covenant on Civil and Political Rights. He is not represented by counsel.

The facts

2.1 From 1979 until his retirement in February 1990, the author was Deputy Minister of Defence and head of border troops (*Chef der Grenztruppen*) of the former German Democratic Republic (GDR).

2.2 On 10 September 1996, the Regional Court of Berlin (*Landgericht Berlin*) convicted the author of

¹ The Covenant and the Optional Protocol to the Covenant entered into force for the State Party on 23 March 1976 and 25 November 1993 respectively. Upon ratification of the Optional Protocol, the State Party entered the following reservation concerning article 5, paragraph 2 (a): "The Federal Republic of Germany formulates a reservation concerning article 5, paragraph 2 (a) to the effect that the competence of the Committee shall not apply to communications

(a) which have already been considered under another procedure of international investigation or settlement, or

(b) by means of which a violation of rights is reprimanded having its origin in events occurring prior to the entry into force of the Optional Protocol for the Federal Republic of Germany

(c) by means of which a violation of article 26 of the [said Covenant] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant."

homicide² and attempted homicide in several cases occurring between 1980 and 1989, sentencing him to a prison term of six years and six months. The court found that the author was responsible for the killing or attempted killing of the persons concerned, who, upon attempting to cross the border between the former GDR and the Federal Republic of Germany (FRG) including West Berlin, were shot by border guards or set off mines. On 30 April 1997, the Federal Court (*Bundesgerichtshof*) dismissed the author's appeal. The Federal Constitutional Court (*Bundesverfassungsgericht*) rejected his constitutional motion on 21 July 1997, holding that the previous court decisions did not violate constitutional law.

2.3 The author testified before the Regional Court of Berlin that, since 1960, the highest military organ of the former GDR, the National Defence Council formulated general policy guidelines on the protection and defence of the border, which had to be implemented by the Minister of Defence. The border troops (*Grenztruppen*) were directly subordinate to the Minister of Defence; the Head of Border Troops was, at the same time, one of the Deputy Ministers.

2.4 In order to implement the general policy guidelines of the National Defence Council, the Minister of Defence issued his annual order no. 101 for the protection of the border to the Head of Border Troops who, in turn, spelled out the required defence and security measures in more concrete terms in annual order no. 80. The content of this order was thereupon further interpreted and refined through the different levels of hierarchy in the border troops, and eventually reached every unit for implementation.

2.5 As Head of Border Troops and under his sole responsibility, the author issued the following orders: No. 80/79 of 6 October 1979, No. 80/80 of 10 October 1980, No. 80/81 of 6 October 1981, No. 80/83 of 10 October 1983, No. 80/84 of 9 October 1984, No. 80/85 of 18 October 1985, No. 80/86 of 15 October 1986 and No. 80/88 of 26 September 1988. Excerpts from these orders³ are cited in the judgement of the Berlin Regional Court:

² Referred to as "manslaughter" in the State party's submissions.

³ The English translations of these excerpts are based on the translations provided by the State party.

“The guard sections and units must reliably and without interruption guard, in the border sections assigned to them, the inviolability of the state border of the German Democratic Republic, apprehend border violators, and not permit border violations or the expansion of border provocations onto the state territory of the GDR. [...] The effectiveness of border security should be further increased. [...]

[Border guards] are to be trained to act in a way that is politically clever, decisive and shows initiative. [They are] primarily to be trained to apprehend border violators or provocateurs without having resort to firearms. In marksmanship training, soldiers should be enabled to handle their personal firearms safely and to safely combat targets that appear and that move by day and night. These tasks should be carried out with the least amount of ammunition.”⁴

“The readiness and ability of the forces deployed in the Border Service to prevent any attack on the state border through politically correct and tactically clever, decisive, active, cunning and resourceful action is to be further perfected. [...] [S]taff deployed for securing the border are trained in the uncompromising use of firearms in carrying out the combat order, if all other means of apprehension have been exhausted, in accordance with the regulations on the use of firearms [...]

Particular attention is to be paid to constantly ensuring the functionality and full effectiveness of the [border] installations. There should be [...] 39.2 km of border fence I, 10 facilities or border installations with fragmentation mines [...]. Transformation and main repair is to be implemented at [...] border installations with fragmentation mines, 6 facilities, 104 km border fence I. [...] In order to support the ‘pioneer’ and signal expansion in Border Command South, the exceptional service of two ‘pioneer’ companies should be ensured [...] from 24 June 1982 to 15 October 1982 [...]. The maintenance staff for the border installations with fragmentation mines [...] should not be deployed in 24-hour shifts. They should be planned and deployed for at least 15 working days of maintenance work per month. [...]

The efforts are to be directed at enabling the border soldiers to act in a way that is politically clever and shows initiative as well as determination in the Border Service, [...] to hit their targets whether these appear and move by day or by night.”⁵

“Border training is to be organized as a whole and shall respond to the requirements of reliably securing the state border day and night. The soldiers are to be trained in accurate shooting to combat [...] targets in all situations and shall be enabled to use their personal firearm in accordance with the legal provisions and military regulations, as well as in a responsible and decisive manner, in the border area. To apprehend border violators and provocateurs using

physical force, border troops shall receive training in border-related close combat.”⁶

“Through the coordinated, dispersed employment of forces and means, [...] attempts of border violations and other attacks on the state border should be recognized in time and be prevented reliably and through determined action.”⁷

“The focus should be on [...] the fast and precise recognition of indications of the preparation and the carrying out of border violations and provocations, actions in the border service which are politically clever, offensive as well as controlled under all circumstances, quick and targeted actions to arrest border violators without using firearms, [...] the prevention of border breakthroughs and the successful defence against border provocations [...]. In marksmanship training, the members of the border troops and units [...] are to be trained in such a way that they hit the target with the first shot [...] within the first third of the combat time available [...]. The focus is to be placed on [...] combating small targets at direct shooting distance with the personal firearm or with double arms.”⁸

“Combat and special training should enable the units, services, crews and border guards to recognize any indications of the preparation and the carrying out of border violations in good time, to act decisively and with initiative to prevent border violations, to successfully prevent border provocations and armed attacks on the territory of the GDR. [...] Effective measures are to be taken to improve marksmanship training. [...] [M]embers of the border guard should become more able to use their arms safely, to hit their target under all conditions and [...] with the first shot.”⁹

Domestic context and legislation

3.1 Between 1949 and 1961, approximately two and a half million Germans fled from the German Democratic Republic to the Federal Republic of Germany, including West Berlin. To stop this flow of refugees, the GDR started construction of the Berlin Wall on 13 August 1961 and reinforced security installations along the inner-German border, in particular by installing landmines, later replaced by SM-70 fragmentation mines. Hundreds of persons lost their lives attempting to cross the border, either because they set off mines, or because they were shot by East German border guards.

3.2 Following German reunification, public prosecutors started to investigate the killings of persons at the former inner-German border on the basis of the Treaty on the Establishment of a Unified

⁴ Order No. 80/79 of 6 October 1979 (excerpts).

⁵ Order No. 80/81 of 6 October 1981 (excerpts).

⁶ Order No. 80/83 of 10 October 1983 (excerpts).

⁷ Order No. 80/84 of 9 October 1984 (excerpts).

⁸ Order no. 80/85 of 18 October 1985 (excerpts).

⁹ Order no. 80/86 of 15 October 1986 (excerpts).

Germany of 31 August 1990 (*Einigungsvertrag*). The Unification Treaty, taken together with the Unification Treaty Act of 23 September 1990 declares, in the transitional provisions relating to the Criminal Code (articles 315 to 315c of the Introductory Act to the Criminal Code), that, as a rule, the law of the place where an offence was committed remains applicable for acts that occurred prior to the time when unification became effective. For offences committed in the former GDR, the Criminal Code of the former GDR remains applicable. Pursuant to section 2, paragraph 3, of the Criminal Code (FRG), the law of the FRG is applicable only if it is more lenient than that of the GDR.

3.3 The first chapter of the Special Section of the Criminal Code (GDR), entitled “Crimes against the national sovereignty of the German Democratic Republic, peace, humanity and human rights”, included the following introduction:

“The merciless punishment of crimes against the national sovereignty of the German Democratic Republic, peace, humanity and human rights, and of war crimes, is an indispensable prerequisite for stable peace in the world, for the restoration of faith in fundamental human rights and the dignity and worth of human beings, and for the preservation of the rights of everyone.”

Section 95 of the Criminal Code (GDR) provided:

“Any person whose conduct violates human or fundamental rights, international obligations or the national sovereignty of the German Democratic Republic may not invoke statute law, an order or instruction as justification; he shall be held criminally responsible.”

Sections 112 and 113 of the Criminal Code (GDR) sanctioned murder and “manslaughter”:

Section 112

Murder

“(1) Any person who intentionally kills another person shall be punished with no less than ten years’ imprisonment or with life imprisonment.

[...]

(3) Preparation and the attempt shall be punishable.”

Section 113

Manslaughter

“(1) The intentional killing of a person shall be punished with imprisonment of up to ten years if

1. the offender, without his own guilt, has been placed in a state of considerable excitement by mistreatment, serious threat or serious insult done to himself/herself or his/her family members by the person killed, and was forced or influenced thereby to commit the homicide;

2. a woman kills her child during or immediately following birth;
3. particular circumstances exist relating to the offence, reducing responsibility under criminal law.

(2) The attempt shall be punishable.”

Article 258 of the Criminal Code (GDR) provided:

“(1) Members of the armed forces shall not be criminally responsible for acts committed in execution of an order issued by a superior, save where execution of the order manifestly violates the recognized rules of public international law or a criminal statute.

(2) Where a subordinate’s execution of an order manifestly violates the recognized rules of public international law or a criminal statute, the superior who issued that order shall also be criminally responsible.

(3) Criminal responsibility shall not be incurred for refusal or failure to obey an order whose execution would violate the rules of public international law or a criminal statute.”

3.4 Pursuant to section 17, paragraph 2, of the People’s Police Act (*Volkspolizeigesetz*) of 11 June 1968, the use of firearms was justified

“(a) to prevent the imminent commission or continuation of an offence (*Straftat*) which appears, according to the circumstances, to constitute

- a serious crime (*Verbrechen*) against the sovereignty of the German Democratic Republic, peace, humanity or human rights
- a serious crime against the German Democratic Republic
- a serious crime against the person
- a serious crime against public safety or the State order
- any other serious crime, especially one committed through the use of firearms or explosives;

(b) to prevent the flight or effect the re-arrest of persons

- who are strongly suspected of having committed a serious crime or who have been arrested or imprisoned for committing a serious crime
- who are strongly suspected of having committed a lesser offence (*Vergehen*), or who have been arrested, taken into custody or sentenced to prison for committing an offence, where there is evidence that they intend to use firearms or explosives, or to make their escape by some other violent means or by assaulting the persons charged with their arrest, imprisonment, custody or supervision, or to make their escape jointly with others
- who have received a custodial sentence and been incarcerated in a high-security or ordinary prison

(c) against persons who attempt by violent means to effect or assist in the release of persons arrested, taken into custody or sentenced to imprisonment for the commission of a serious crime or lesser offence.

(3) The use of firearms must be preceded by a clear warning or warning shot, save where imminent danger may be prevented or eliminated only through targeted use of the firearm.

(4) When firearms are used, human life should be preserved wherever possible. Wounded persons must be given first aid, subject to the necessary security measures being taken, as soon as implementation of the police operation permits.

(5) Firearms must not be used against persons who appear, from their outward aspect, to be children, or when third parties might be endangered. If possible, firearms should not be used against juveniles or female persons.

(6) The use of firearms shall be regulated in detail by the Minister of the Interior and Head of the German People's Police [...].”

Under section 20, paragraph 3, of the People's Police Act, these provisions were also applicable to members of the National People's Army (*Nationale Volksarmee*).

3.5 On 1 May 1982, the Act on the State Border (*Grenzgesetz*) of the GDR entered into force, replacing section 17, paragraph 2, of the People's Police Act insofar as the use of firearms by border guards was concerned. Section 27 of the State Border Act reads:

“(1) The use of firearms is the most extreme measure entailing the use of force against the person. Firearms may be used only where resort to physical force, with or without the use of mechanical aids, has been unsuccessful or holds out no prospect of success. The use of firearms against persons is permitted only where shots aimed at objects or animals have not produced the desired result.

(2) The use of firearms is justified to prevent the imminent commission or continuation of an offence (*Straftat*) which appears in the circumstances to constitute a serious crime (*Verbrechen*). It is also justified in order to arrest a person strongly suspected of having committed a serious crime.

(3) The use of firearms must in principle be preceded by a clear warning or warning shot, save where imminent danger may be prevented or eliminated only through targeted use of the firearm.

- (4) Firearms must not be used when
- (a) the life or health of third parties may be endangered;
 - (b) the persons appear, from their outward aspect, to be children: or
 - (c) the shots would violate the sovereign territory of a neighbouring State.

If possible, firearms should not be used against juveniles or female persons.

(5) When firearms are used, human life should be preserved where possible. Wounded persons must be given first aid, subject to the necessary security measures being taken.”

3.6 By contrast with the use of firearms, the installation of mines was not regulated by statutory law, but by a series of service regulations and orders which provided for measures to secure border installations through mines, as well as the use of firearms.¹⁰

3.7 The term “serious crime” (*Verbrechen*) referred to in section 17, paragraph (2) (a), of the People's Police Act and in section 27, paragraph 2, of the State Borders Act was defined in section 1, paragraph 3, of the Criminal Code:

“Serious crimes are attacks dangerous to society (*gesellschaftsgefährliche Angriffe*), against the sovereignty of the German Democratic Republic, peace, humanity or human rights, war crimes, offences against the German Democratic Republic and deliberately committed criminal acts against life (*vorsätzlich begangene Straftaten gegen das Leben*). Similarly considered crimes are other offences dangerous to society which are deliberately committed against the rights and interests of citizens, socialist property and other rights and interests of society, and constitute serious violations of socialist legality and which, on that account, are punishable by at least two years' imprisonment or in respect of which, within the limits of the penalties applicable, a sentence of over two years' imprisonment has been imposed.”

3.8 In principle, the GDR denied its citizens the right to travel to a Western country including the FRG and Berlin (West). Approval was required to travel to these countries. Under the legal provisions applicable to the issuance of passports and visas in the GDR, it was, however, impossible for persons who enjoyed no political privileges, had not reached retirement age or had not been exempted on the basis of certain types of urgent family business, to leave the GDR legally for a Western country. Crossing the border without an authorization constituted a criminal offence under section 213 (“Illegal border crossing”) of the Criminal Code (GDR) which read:

“(1) Any person who illegally crosses the border of the German Democratic Republic or contravenes provisions regulating temporary authorization to reside in the German Democratic Republic and transit through the German Democratic Republic shall be punished by a custodial sentence of up to two years, a

¹⁰ See the Federal Constitutional Court's decision of 21 July 1997, at pp. 4-5 (referring to the Federal Constitutional Court's decision of 24 October 1996 – BVerfGE 95, 96).

suspended sentence with probation, imprisonment or a fine.

(2) [...]

(3) In serious cases, the offender shall be sentenced to one to eight years' imprisonment. Cases are to be considered serious in particular where

1. the offence endangers human life or health;
2. the offence is committed through the use of firearms or by dangerous means or methods;
3. the offence is committed with particular intensity;
4. the offence is committed by means of forgery, falsified documents or documents fraudulently used, or through the use of a hiding place;
5. the offence is committed jointly with others; or
6. the offender has already been convicted of illegally crossing the border.

(4) Preparation and attempt shall be criminal offences.”

3.9 Serious cases of illegal border crossing, as defined in section 213, paragraph 3, of the Criminal Code, included the use of a ladder to climb over border fences, which was considered a commission of the offence by the use of dangerous means (section 213, para. 3, no. 2),¹¹ and the crossing of the border under considerable physical efforts (section 213, para. 3, no. 3: “particular intensity”).¹² Depending on the intensity of commission, such acts constituted either misdemeanours (*Vergehen*) or serious crimes (*Verbrechen*).¹³ Frequently, serious cases of illegal border crossing were deemed to constitute serious crimes,¹⁴ either because they were punishable by more than two years' imprisonment¹⁵ or because they were considered “attacks dangerous to society” or a “serious violation of socialist legality”,¹⁶ under section 1, paragraph 3, of the Criminal Code (GDR).

¹¹ Cf. Ministry of Justice of the German Democratic Republic (ed.), *Strafrecht der Deutschen Demokratischen Republik: Kommentar zum Strafgesetzbuch*, Berlin 1987, p. 475.

¹² Ibid.

¹³ Ibid., p. 474.

¹⁴ Cf. Alexy, Robert, *Mauerschützen – zum Verhältnis von Recht, Moral und Strafbarkeit* (1993), at p. 11; Brunner, G., „Recht auf Leben“, in: Brunner, G. (ed.), *Menschenrechte in der DDR* (1989), at p. 120; Polakiewicz, Jörg, „Verfassungs- und völkerrechtliche Aspekte der strafrechtlichen Ahndung des Schußwaffeneinsatzes an der innerdeutschen Grenze“, *Europäische Grundrechtezeitschrift* 1992, at p. 179.

¹⁵ See Alexy, *Mauerschützen*, at p. 11.

¹⁶ See *ibid.*, at p. 11-12.

3.10 No member of the border troops was ever prosecuted in the GDR for ordering the use of firearms or for executing such orders.

3.11 The Covenant entered into force for the German Democratic Republic on 23 March 1976. However, it was never incorporated into the GDR's domestic legal order by Parliament (*Volkskammer*), as required by article 51¹⁷ of the GDR Constitution.¹⁸

Procedure before the domestic tribunals

4.1 The Berlin Regional Court, in its judgement of 10 September 1996, found that, based on the provisions on homicide of the GDR Criminal Code, the author was responsible for the deaths or injuries inflicted on persons trying to cross the border at the inner-German border or, respectively, the Berlin Wall, by virtue of his annual orders, triggering a chain of subsequent orders and, thereby, inciting the acts committed by border guards in the cases at issue. While the Court recognized that it was not the author's direct intention to cause the death of border violators, it argued that he was fully aware, and accepted, that, as a direct consequence of the application of these orders, persons attempting to cross the border could lose their lives. It rejected the author's claim that he had erred about the prohibited nature of his orders, since such error was avoidable, given his high military rank, his competencies and the fact that his orders manifestly violated the right to life, thereby infringing the criminal laws of the GDR. It held that the author's acts were neither justified by the pertinent service regulations issued by the Minister of National Defence, nor under article 27, paragraph 2, of the State Border Act, arguing that these legal justifications were invalid because they manifestly violated basic principles of justice and internationally protected human rights, as enshrined in the International Covenant on Civil and Political Rights.

4.2 The Court argued that, by giving priority to the inviolability of the GDR's state borders over the right to life of unarmed fugitives who attempted to cross the inner-German border, these grounds of justification violated legal principles based on the intrinsic worth and dignity of the human person and recognized by the community of nations. The Court concluded that in such a case, the positive law had to be superseded by considerations of justice. Such a

¹⁷ Article 51 of the GDR Constitution reads: “Parliament (the *Volkskammer*) approves State treaties of the German Democratic Republic and other international treaties, insofar as they modify Acts of Parliament. It decides upon the termination of such treaties.”

¹⁸ See Alexy, *Mauerschützen*, at pp. 16-17 (with further references).

finding did not constitute a breach of the principle of non-retroactivity in article 103, paragraph 2, of the German Basic Law (*Grundgesetz*), since the expectation that the law, as applied in GDR state practice, would continue to be applied so as to broadly construe a legal justification contrary to human rights, did not merit protection of the law. The Court dismissed order no. 101 as a lawful excuse, holding that under article 258, paragraph 1, of the Criminal Code (GDR), criminal responsibility was not excluded where the execution of an order manifestly violated recognized rules of public international law or a criminal statute. In assessing the punishment, the Court balanced the following aspects: (1) the totalitarian structure of the GDR which left the author only with a limited scope of action, (2) the author's high age and his expressions of regret for the victims, (3) the considerable lapse of time since the commission of the acts, (4) his (albeit avoidable) error as to the unlawfulness of his acts (in his favour), and (5) his participation, at a high level of hierarchy, in the maintenance and increased sophistication of the system of border control (to his detriment). Based on the relevant provisions of the Criminal Code (FRG), which were more lenient than the corresponding norms of the Criminal Code (GDR), the Court decided to impose a reduced sentence.

4.3 The Federal Constitutional Court, in its decision of 21 July 1997, rejected the author's constitutional complaint that the decisions of the Berlin Regional Court and the Federal Court violated the principle of non-retroactivity in article 103, paragraph 2, of the Basic Law by retroactively declaring acts punishable which, under GDR law, had been lawful. The Court stated that it was precluded from reviewing the interpretation and application of the criminal law of the former GDR, its review being limited to the question of whether constitutional law had been violated by the lower courts' decisions. The Court found no breach of Article 103, paragraph 2, of the Basic Law since the author's expectation that his acts were justified under GDR practice did not merit constitutional protection. By reference to its previous decision on border shootings,¹⁹ the Court reiterated that the *bona fide* basis protected by article 103, paragraph 2, of the Basic Law was absent where a State codified norms which sanction the most severe criminal wrongs, such as the intentional killing of human beings, but at the same time provide for legal justifications that exclude criminal responsibility, and thereby encourage the commission of such wrongs and disregard universal human rights recognized by the community of nations. The strict protection, in article 103, paragraph 2, of the Basic Law, of the legitimate expectation of the legality of one's acts did not apply in the particular case, especially since the

injustice of the GDR's system of border control could only prevail as long as that State had existed.

The complaint

5.1 The author claims that he is a victim of violations of articles 15 and 26 of the Covenant, because he was convicted for acts committed in the line of duty which did not constitute a criminal offence under GDR law or under international law.

5.2 With regard to the alleged violation of article 15 of the Covenant, the author claims that, by judging his acts, the State party's courts deprived the relevant GDR legislation of its original meaning, replacing it by their own concept of justice. He argues that the reasoning of the Courts amounts to the absurd contention that the East German Parliament placed members of the armed forces at double jeopardy, by enacting criminal laws requiring them to comply with their professional duties, and at the same time criminalizing such compliance, eventually only in order to prevent the prosecution of the fulfillment of such duties by means of legal justifications. He submits that compliance with professional duties never constituted a criminal offence under GDR law since it was not contrary to the interests of society, as required by section 1, paragraph 1, of the Criminal Code (GDR). On the contrary, non-compliance with service regulations or orders governing the protection of the state borders itself entailed criminal responsibility, the only exception pertaining to cases where the order manifestly violated the recognized rules of public international law or a criminal statute (section 258 of the GDR's Criminal Code).

5.3 The author contends that international law did not prohibit the installation of mines along the border between two sovereign states which, moreover, marked the demarcation line between the two largest military alliances in history and had been ordered by the Commander-in-chief of the Warsaw Pact. He notes that the mines were only used in military exclusion zones, were clearly indicated by warning signs, and that involuntary access was prevented by high fences. He further claims that, when considering the second periodic report of the GDR in 1983, the Committee found the East German system of border control to be in conformity with the Covenant.

5.4 Furthermore, the author argues that criminal intent required the apparent and wilful disregard of certain basic social norms, which obviously was not the case in instances of compliance with one's professional duties.

5.5 According to the author, at the time of the entry into force of the Unification Treaty on 3 October 1990, no basis for prosecuting his acts existed. The legal system of the GDR did not provide for incurring criminal responsibility on the sole basis of natural law concepts, which had no

¹⁹ BVerfGE 95, 96 ("Mauerschützen").

foundation in the GDR's positive law. When the FRG agreed to include the prohibition of the retroactive application of its criminal law in the Unification Treaty, it did so in the light of the historically unique chance to unify both German States, accepting that its own concepts of justice could not be applied to acts committed in the former GDR. The author concludes that his conviction, therefore, lacked a legal basis in the Unification Treaty.

5.6 With respect to the reference to "international law" in article 15, paragraph 1, and the limitation clause in article 15, paragraph 2, of the Covenant, the author submits that at the material time, his acts were not criminal under international law, nor under the general principles of law recognized by the community of nations.

5.7 Regarding the alleged violation of article 26 of the Covenant, the author claims that he had been discriminated against as a former citizen of the GDR because the German courts failed to apply the statutory provisions of the FRG relating to the use of firearms, which stipulate that the knowledge of the danger of such arms did not imply an intent to kill, to his case, and instead presumed that he had accepted the death of border violators as a consequence of his orders pertaining to the use of firearms.

5.8 The author states that he has exhausted all available domestic remedies and that the same matter is not being examined under another procedure of international investigation or settlement.

State party's observations on admissibility and merits

6.1 By note verbale of 5 September 2001, the State party made its submission on the admissibility and merits of the communication. It confirms the facts of the case as submitted by the author. However, it disputes the allegation that the author's conviction violated articles 15 and 26 of the Covenant.

6.2 As to the alleged violation of article 15 of the Covenant, the State party recalls that the Regional Court of Berlin found that the author's acts were punishable under GDR law at the time of their commission. It quotes extensively from a landmark decision of the Federal Court,²⁰ which is also cited in the judgement of the Berlin Regional Court.²¹ According to that decision, the legal justification in

section 27, paragraph 2, of the Border Act, as applied in the GDR's State practice, had to be disregarded in the application of the law because it violated basic notions of justice and humanity in such an intolerable manner that the positive law must give way to justice (so-called *Radbruch formula*).²² In assessing the conflict with material justice, the Court refers to the Covenant, in particular articles 6 and 12, as "more specific criteria" for that assessment, concluding that the restrictive visa policy of the GDR was inconsistent with the limitations clause in article 12, paragraph 3, of the Covenant since it made the exception to the freedom to leave one's own country the general rule, thereby ignoring the close ties between the Germans from both States who belonged to one and the same nation. Similarly, the Court found the use of firearms against border violators, in its unprecedented perfection, to be inconsistent with article 6, since it was disproportionate to the itself illegitimate aim of deterring third persons from crossing the border without authorization. On these premises, the Court held that section 27, paragraph 2, of the Border Act had to be disregarded as a ground for justification because the GDR itself should have interpreted that provision restrictively on the basis of its international obligations, its constitutional provisions and the principle of proportionality laid down in article 30, paragraph 2, of the GDR Constitution and in section 27, paragraph 2, of the Border Act. In the Court's opinion, section 27, paragraph 2, first sentence, had to be construed as follows: "The border guard was allowed to use a firearm to prevent flight in the cases referred to there; but the ground for justification met its limits when, with conditional or unconditional intent to kill, shots were fired on a refugee who, in the circumstances, was unarmed and also did not otherwise constitute a danger to the life and limb of others."

6.3 The State party invokes another judgement,²³ in which the Federal Court recalled that the GDR had always stated that it endorsed the principles of the United Nations and that article 91 of the GDR Constitution declared the generally recognized rules of international law on the punishment of crimes against humanity and of war crimes to be directly applicable law. The State party concludes from both judgements that the Federal Court did not, therefore, rely on international law, but derived its assessment that the author's acts were punishable from the domestic law of the GDR. The fact that these offences were not prosecuted in the GDR does not imply that they did not constitute criminal offences.

²⁰ BGHSt 39, p. 1, at pp. 15 *et seq.*

²¹ See pp. 104-106 of the Berlin Regional Court's judgement of 10 September 1996.

²² See Radbruch, Gustav, "Gesetzliches Unrecht und übergesetzliches Recht", *Süddeutsche Juristen-Zeitung* (1946), p. 105, at p. 107.

²³ BGHSt 40, p. 241, at pp. 245 *et seq.*

6.4 The State party refers to the Federal Constitutional Court's landmark decision²⁴ on the issue, which emphasized that, in the absence of a legitimate expectation not to be punished, the prohibition of the retroactive application of criminal laws in article 103, paragraph 2, of the Basic Law was not applicable to situations where the other state (the GDR) made provision for criminal offences to cover the most serious criminal wrongs, but at the same time excluded criminal liability through grounds of justification which went beyond the written norms, instigated such wrongs, and violated human rights recognized by the community of nations. In the interest of material justice, the strict application of article 103, paragraph 2, must give way. Otherwise the administration of criminal justice in the Federal Republic would run counter to its own rule of law premises. Although the wording of the GDR's provisions on the use of firearms at the inner-German border corresponded to that of the FRG's provisions on the use of force, the written law of the GDR was, in fact, eclipsed by the requirements of political expediency, which subordinated the individual's right to life to the State's interest in preventing the unauthorized crossing of its borders. In the absence of any admissible justification for the border killings, the definition of homicide in sections 112 and 113 of the Criminal Code applied to the author's acts.

6.5 The State party recalls that, in accordance with the Committee's jurisprudence, it is primarily for the courts and authorities of the State party to interpret and apply domestic law. Only if such interpretation or application is arbitrary may the Committee intervene. The decisions of the German courts with regard to the author were, however, not arbitrary.

6.6 The State party submits that article 15 of the Covenant only applies if the person concerned cannot reasonably ascertain, from the wording of the law, that his or her acts are punishable and also cannot foresee that he could be held criminally responsible for his acts. Given the author's position as a trained and qualified, high-ranking "military scientist", it should have been obvious to him that his orders were contrary to articles 6 and 12 of the Covenant, and that he could be prosecuted for his acts, should the political circumstances in the GDR change.

6.7 The State party rejects the author's claim that the Committee never found the GDR's system of border control to be in violation of the Covenant and recalls that, prior to 1992, the Committee did not adopt concluding observations on the human rights situation in reporting States parties. However, when

the former GDR presented its first and second periodic reports before the Committee in 1978 and in 1984, several Committee members expressed clear criticism with regard to the system of border control. The author should also have noted the disapproval of the system of border control in the practice of international organizations, in particular the appearance of the former GDR on the "1503-list" of the Commission on Human Rights, from 1981 to 1983, precisely because of border killings and violations of article 13 of the Universal Declaration of Human Rights.

6.8 The State party concludes that, in line with the Committee's General Comment No. 6²⁵ as well as its consistent jurisprudence,²⁶ it is legally obliged under article 6, paragraph 1, of the Covenant to prosecute and punish those who arbitrarily deprived citizens of the former GDR of their lives. Subsidiarily, it submits that the author's conviction could be covered by article 15, paragraph 2, of the Covenant if his acts were criminal at the material time, according to the general principles of justice recognized by the community of nations. In that regard, the State party emphasizes the close link between the Nuremberg Principles and the *Radbruch formula* and contends that the system of border control led to grave violations of human rights.

6.9 With respect to the alleged violation of article 26 of the Covenant, the State party submits that the author's prosecution was solely based on his personal involvement in the system of border control and that the prohibition of discrimination does not mean that persons cannot be held criminally responsible. Criminal responsibility for offences under GDR law could be incurred by anyone subject to the GDR's criminal law, irrespective of his or her citizenship.

Author's comments

7.1 On 14 November 2001, the author responded to the State party's submission. He reiterates the arguments stated in his initial communication and adds that article 15 of the Covenant required the German courts to apply the GDR's law of criminal procedure and, in particular, its law of burden of proof to establish his criminal liability. Under the GDR's criminal law, intent to kill could not be presumed on the basis of one's knowledge of the possible lethal consequences of the use of firearms. Instead, the expectation that a border violator would

²⁴ BVerfGE 95, p. 96, at pp. 133 *et seq.*

²⁵ See Human Rights Committee, 16th session (1982), General Comment No. 6, at para. 3.

²⁶ In this regard, the State party refers to, *inter alia*, Communication No. 161/1983, *Herrera Rubio v. Colombia*, Views adopted on 2 November 1987, at paras. 10.3 and 11.

only be injured or would refrain from climbing over mine installations precluded such intent. Self-endangering behaviour always disrupted the chain of cause and effect required to establish criminal liability.

7.2 The author rejects the State party's contention that the GDR's written norms were eclipsed by orders which left no room for weighing the use of firearms against the principle of proportionality, and submits that all military orders and service regulations required soldiers to save the life of border violators, whenever possible.

7.3 Furthermore, he argues that, even in the hypothesis that fulfillment of military duties constituted a criminal offence under GDR law, the Unification Treaty precluded the German courts from negating the existing legal justifications solely because these justifications prevented criminal prosecution of such acts. The fact that German courts systematically violated the Unification Treaty does not make the State party's position any more justifiable.

7.4 The author admits that the GDR was bound by its legal obligations under the Covenant. However, since he was not identical with the GDR as a subject of international law, the Covenant could not create rights or duties for him, let alone establish his criminal liability, in the absence of an incorporation of that instrument into the GDR's domestic law. He indicates that, pursuant to article 2, paragraph 2 (b), of the European Convention for the Protection of Human Rights and Fundamental Freedoms, deprivation of life does not violate the human right to life when it results from the use of force which is absolutely necessary in order to effect a lawful arrest or to prevent the escape of a person lawfully detained.

7.5 The author submits that the installation of mines at the inner-German border was a preventive military measure against a possible attack by NATO forces. He denies that the mines were deployed with the intent to kill people. Instead, their enclosure by fences and the placement of clearly visible warning signs were intended to deter border violators from entering mined areas. No one forced border violators to enter the mine fields, the danger of which was known to them. The author recalls that border guards were never required to make excessive use of their firearms. Border violators were always warned by shouts to stop and by at least one warning shot. They could always stop their attempt to cross the border to prevent being shot at; shots were always aimed at their feet. According to the author, the death of persons attempting to cross the border was an exception rather than the general rule.

7.6 The author argues that, because of the complex chain of orders, a high-ranking member of

the armed forces can never directly control the use of firearms in each individual case, but is limited to setting out the requirements for such use which have to be respected by each individual soldier. Although the use of firearms frequently implies a risk to life, ordering such use cannot be equated to intentionally killing the person concerned. Furthermore, the author argues that he cannot be held responsible for the GDR's visa policy.

7.7 The author submits that the State party's Parliament (*Bundestag*) enacted a law in 1993 which retroactively stayed the statutory limitations contained in sections 82 and 83 of the Criminal Code (GDR) for the period during which offences committed in relation to the system of border control had not been prosecuted in the GDR for political reasons. He argues that the State party ignored the adoption by the State Council (*Staatsrat*), the GDR government, of a general amnesty, dated 17 July 1987, which also applied to acts of homicide committed prior to 7 October 1987.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

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

8.3 The Committee also notes that the State party did not contest the admissibility of the communication. It therefore considers that there is no obstacle to the admissibility of the communication, and, accordingly, decides that the communication is admissible insofar as it raises issues under articles 15 and 26 of the Covenant.

Consideration of the merits

9.1 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.

9.2 As regards the author's claim under article 15, the Committee is called upon to determine whether the conviction of the author for homicide and attempted homicide by the German courts amounts to a violation of that article.

9.3 At the same time, the Committee notes that the specific nature of any violation of article 15, paragraph 1, of the Covenant requires it to review whether the interpretation and application of the relevant criminal law by the domestic courts in a specific case appear to disclose a violation of the prohibition of retroactive punishment or punishment otherwise not based on law. In doing so, the Committee will limit itself to the question of whether the author's acts, at the material time of commission, constituted sufficiently defined criminal offences under the criminal law of the GDR or under international law.

9.4 The killings took place in the context of a system which effectively denied to the population of the GDR the right freely to leave one's own country. The authorities and individuals enforcing this system were prepared to use lethal force to prevent individuals from non-violently exercising their right to leave their own country. The Committee recalls that even when used as a last resort lethal force may only be used, under article 6 of the Covenant, to meet a proportionate threat. The Committee further recalls that States parties are required to prevent arbitrary killing by their own security forces.²⁷ It finally notes that the disproportionate use of lethal force was criminal according to the general principles of law recognized by the community of nations already at the time when the author committed his acts.

9.5 The State party correctly argues that the killings violated the GDR's obligations under international human rights law, in particular article 6 of the Covenant. It further contends that those same obligations required the prosecution of those suspected of responsibility for the killings. The State party's courts have concluded that these killings

²⁷ Human Rights Committee, 16th session (1982), General Comment No. 6 (article 6), at para. 3.

violated the homicide provisions of the GDR Criminal Code. Those provisions required to be interpreted and applied in the context of the relevant provisions of the law, such as section 95 of the Criminal Code excluding statutory defences in the case of human rights violations (see paragraph 3.3) and the Border Act regulating the use of force at the border (see paragraph 3.5). The State party's courts interpreted the provisions of the Border Act on the use of force as not excluding from the scope of the crime of homicide the disproportionate use of lethal or potentially lethal force in violation of those human rights obligations. Accordingly, the provisions of the Border Act did not save the killings from being considered by the courts as violating the homicide provisions of the Criminal Code. The Committee cannot find this interpretation of the law and the conviction of the author based on it to be incompatible with article 15 of the Covenant.

10. With regard to the author's allegation of a violation of article 26 of the Covenant, the Committee notes that the Treaty on the Establishment of a Unified Germany provides for the applicability of the criminal law of the former GDR to all acts committed on the territory of the former GDR, prior to the unification becoming effective. The Committee takes note of the author's allegation that certain provisions of the State party's law that would have been applied on the use of firearms by officials of the FRG had not been applied in his case. However, the Committee observes that the author has failed to demonstrate that persons in a similar situation in the former GDR or FRG have, in fact, been treated differently. Therefore, the Committee concludes that he has not substantiated his claim and considers that there has been no violation of article 26 in this respect.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of articles 15 and 26 of the Covenant.

Communication No. 981/2001

Submitted by: Teófila Casafranca de Gómez

Alleged victim: Ricardo Ernesto Gómez Casafranca

State party: Peru

Date of adoption of Views: 22 July 2003 (seventy-eighth session)

Subject matter: Torture followed by conviction of terrorism

Procedural issue: none

Substantive issues: Torture/cruel, inhuman and degrading treatment - Right to liberty and security of the person - Arbitrary arrest and detention - Right to a fair trial - Right to be tried without undue delay - Presumption of innocence - Principle of non-retroactivity - Equality before the law

Articles of the Covenant: 7; 9, paragraphs 1 and 3; 14, paragraphs 1, 2 and 3 (c); and 15

Article of the Optional Protocol: none

Finding: Violation (articles 7; 9, paragraphs 1 and 3; 14 and 15)

1. The author of the communication, dated 26 October 1999, is Teófila Casafranca de Gómez, representing her son, Ricardo Ernesto Gómez Casafranca, a Peruvian citizen currently imprisoned after having been sentenced to 25 years' imprisonment for the offence of terrorism. Although the author does not cite specific provisions of the Covenant, the communication may raise issues under articles 7; 9, paragraphs 1 and 3; 14, paragraphs 1, 2 and 3 (c); and 15 of the International Covenant on Civil and Political Rights, which entered into force for Peru on 28 April 1978. The Optional Protocol entered into force on 2 October 1980. The author is represented by counsel.

The facts as submitted by the author

2.1 The victim was a student at the Faculty of Dentistry of the Inca Garcilaso de la Vega University, and also worked in the family restaurant. On 3 October 1986 he was arrested in a building near to his home, where he had gone to clean up after being stopped at gunpoint by the police. The arrest was made without any arrest warrant, and without the detainee having been arrested in flagrante delicto; he was taken to the offices of DIRCOTE,¹ where he was locked in the cells while the police made inquiries.

2.2 According to the author, the victim was subjected to cruel and savage physical, psychological and mental torture. In the records of the second oral hearing, held in 1998, the prisoner states that he was tortured to obtain certain statements. Specifically, he tells of how they bent back his hands and twisted his arms, hoisted him up in the air, put a pistol in his mouth, took him to the beach and attempted to drown him, and later attempted to rape him by inserting a candle in his anus. On 7 September 2001 Mr. Gómez Casafranca reported the torture to which he had been subjected while at DIRCOTE on 3 October 1986 to the National Police Department of Human Rights. On 17 September 2001 the Department issued a finding in which it noted that the victim had been advised by counsel and that he had not submitted a complaint in a timely manner. Mr. Casafranca was charged with homicide, bodily injury and terrorist acts. The author maintains that her son always maintained his innocence and did not even know the other accused persons who, possibly owing to the torture to which they too were subjected, implicated him in the offence.

2.3 According to the author, the police, in an utterly arbitrary act, brought charges against the prisoner in attestation No. 91-D4-DIRCOTE of 22 October 1986, implicating him in acts which he neither committed nor participated in. According to the DIRCOTE police attestation, Ricardo Ernesto Gómez Casafranca, alias "Tomás", was the military militia commander of a terrorist cell of Sendero Luminoso, belonging to the Ñaña Chosica central sector. The cell recruited more members, organized "people's schools", carried out dynamite attacks and fire bombings and sought to destroy police units. The attestation states that Ricardo Ernesto Gómez Casafranca is the perpetrator, with others, of a terrorist offence in that on 31 July 1986 he took part in the fire bombing, using home-made devices, of the Papelera Peruana SA company. The author was also accused of other offences, including offences against human life, the person and health, and against company property. The attestation states that a search of the person of Ricardo Ernesto Gómez Casafranca revealed no weapons, explosives or subversive propaganda. A search of his home also proved negative. Nevertheless, analysis revealed that the writing in several political texts deemed as subversive, was that of Ricardo Ernesto Gómez Casafranca. In addition, the detainees Sandro Galdo

¹ Department of Counter-Terrorism.

Arrieta, Francisco Reyna García, Ignacio Guizado Talaverano and Rosa Luz Tineo Suasnabar accused him of belonging to Sendero Luminoso.

2.4 The prisoner was brought before examining magistrate No. 39 of the Lima High Court, who opened an investigation by issuing an order for his detention on 23 October 1986. The author states that the office of the prosecutor produced no evidence to corroborate the accusations against her son. However, the report of the office of the provincial prosecutor, dated 22 July 1987, states that, as indicated in the police attestation, Mr. Gómez Casafranca, with others, is part of a Sendero Luminoso terrorist cell belonging to the Ñaña Chosica central sector. The report also refers to the various statements by other defendants, who maintained that they had not confirmed their police statement because it had been obtained under torture.²

2.5 In the oral proceedings, the judges confined themselves to questioning the alleged victim on the basis of the contentions in the police report, without taking into account events at the pre-trial stage. On 22 December 1988 Lima Seventh Correctional Court acquitted him, declaring him innocent of the charges brought against him.

2.6 The Office of the Attorney-General applied for annulment of the judgement, which was declared void on 11 April 1997 by the faceless Supreme Court. The Court held that the facts had not been properly determined or the evidence properly verified.

2.7 On 11 September 1997 the police arrested Mr. Gómez Casafranca at his home for an appearance at further oral proceedings based on the same charges; this time, on 30 January 1998, he was sentenced to 25 years' imprisonment by the Special Criminal Counter-Terrorism Division. The sentence was confirmed by the Supreme Court on 18 September 1998.

The complaint

3.1 The author claims violation of the right of her son to protection of the person and to physical, psychological and mental integrity and of his right not to be subjected to torture while being held. She also claims that the victim's right to liberty and security of person has been violated.

3.2 The author further claims that the State party, in pursuing its counter-insurgency policy, has violated judicial guarantees of due process and protection of the courts. She also maintains that there has been a violation of the right to judicial

² Sandro Galdo Arrieta, Francisco Reyna García, Ignacio Guizado Talaverano and Rosa Luz Tineo Suasnabar.

protection, that is, the right to a hearing with due guarantees and presumption of innocence. Moreover, she contends that the sentence handed down against her son was based solely on the transcription of the police report, there being no mention of legal grounds or of individual criminal liability.

3.3 Lastly, the author claims violation of the principle of legality, equality of the victim before the law, and retroactivity.

The State party's observations on the admissibility and merits

4.1 In its communication dated 20 December 2001 the State party acknowledges that all the requirements for admissibility have been met and that the victim has exhausted all domestic remedies and that the matter has not been submitted to any other international body.

4.2 On the merits, the State party indicates that Mr. Gómez Casafranca was arrested under the law on the investigation of terrorist offences and in the context of the 1979 Constitution then in force. Legislative Decree No. 46, adopted on 10 March 1981, that is before the alleged victim was arrested, provided, in its article 9, that the police could place in preventive detention for a period not exceeding 15 days those allegedly involved in such offences as perpetrators or participants, subject to providing immediate notification in writing to the Public Prosecutor's Office and within 24 hours to the examining magistrate. Accordingly the police acted in accordance with the law.

4.3 The State party maintains that the communication does not contest the compatibility of Legislative Decree No. 46 with the International Covenant on Civil and Political Rights, or its validity before national courts. The State party asserts that Peruvian judges could have found the decree incompatible with the Constitution had they considered that it was not applicable to the author's son. Neither was the victim the subject of any application for habeas corpus or *amparo*, either at the time of pre-trial detention or during the trial for terrorism. Accordingly, his detention was in accordance with article 9, paragraph 1, of the Covenant.

4.4 Regarding the author's claims that her son was subjected to cruel torture, the State party maintains that the file relating to the pardon³ contains a copy of medical certificates corroborating

³ Act No. 26655 was passed to give pardons to individuals convicted of terrorism, and it is administered by the National Council of Human Rights of Peru. There is no information about any decision taken in relation to Mr. Gómez Casafranca.

the absence of any physical ill-treatment of the victim.

4.5 The State party also asserts that the communication simply refers to torture without specifying the date or the methods of torture to which the victim was allegedly subjected. Accordingly there is no proof of a violation of article 7 of the Covenant.

4.6 The State party asserts that the norms of due process provided for in article 14 of the Covenant have been observed. According to the State party, the author's claims that there was a violation of due process and protection of the courts, of the right to judicial protection and to a hearing with due guarantees, of the principle of the presumption of innocence, and of grounds based on the facts and applicable legislation, have not been substantiated.

4.7 The State party maintains that the victim was judged on conditions of equality by the Peruvian courts. He was heard in public hearings on two occasions, when he appeared before a tribunal composed of professional judges specializing in criminal law, where he had an opportunity to be heard, and where he was able to exercise his right to defend himself, both in person and by counsel of his choosing. According to the State party, the courts that judged him had already been constituted prior to his appearance, in accordance with the legislation then in force: the Code of Criminal Procedure, approved in Act No. 9024 of 23 November 1939; and Decree Law No. 25475, as amended by Act No. 26248⁴ and Act No. 26671,⁵ and that the latter abolished the so-called "faceless courts". That is, he was not judged in a closed hearing by a "faceless" court, but on two occasions was examined at public hearings by judges comprising a competent (previously established by law), independent (selected on the basis of the institutional guarantees provided for in the Constitution and by law) and impartial tribunal.

4.8 The State party maintains that, although the Criminal Chamber of the Supreme Court which annulled the judgement that had acquitted Mr. Casafranca on 11 April 1997 was a "faceless" Chamber, the judgement had enough reasoning.

4.9 The principle of the presumption of innocence set forth in article 14, paragraph 2, of the Covenant, was respected during the judicial investigation and in the trial. The evidence and other testimony produced in a fair trial led the judges to conclude that the

presumption of innocence was unfounded. The Supreme Court concurred in confirming the judgement.

4.10 The State party maintains that the judicial decisions were based on the facts and the law. Although this is not a right expressly set forth in the Covenant, it is in accordance with the concept of due process.

4.11 Regarding the claims that there were violations of the principles of legality, equality before the law and retroactivity, the State party maintains that the courts investigated and punished the alleged victim for the offence of terrorism and applied the special criminal rules relating to investigation and punishment. That is, regarding the procedural norms applied in the 1998 trial, they applied Legislative Decree No. 46 of 10 March 1981, Act No. 24651 of 6 March 1987 and Decree Law No. 25475 of 5 May 1992.

4.12 With regard to the acquittal of 22 December 1988, the State party maintains that the Seventh Correctional Court applied, as substantive criminal legislation, Legislative Decree No. 46, then applicable to the offences attributed to the victim, consisting in the homicide of police officer Román Rojas Saavedra on 22 June 1986, the attempted arson at the Papelera Peruana SA factory on 31 July 1986, the blowing up of high-tension pylons on 27 July 1986, the homicide of police corporal Aurelio da Cruz del Águila on 11 August 1986, the homicide of police officer Rolando Marín Paucar on 2 September 1986 and the planning of the homicide of Enrique Thomas Ojeda, an Aprista Peruvian party candidate in Chaclacayo.

4.13 Legislative Decree No. 46 was repealed by article 6 of Act No. 24651 of 6 March 1987. This Act was applied in the conviction of 30 January 1998. The Criminal Division for terrorism offences of the Lima High Court thus applied a legal provision (Act No. 24651) that post-dated the events it considered unlawful. Its decision was endorsed by the Supreme Court on 18 September 1998. However, Legislative Decree No. 46 and Act No. 24651 applied similar penalties to offences constituting terrorism. Accordingly, the author has not demonstrated how this could be incompatible with article 15 of the Covenant.

4.14 Lastly, the State party notes that the acts for which the Peruvian courts sentenced the victim were offences under the applicable national legislation, and that the provision in force at the time can be applied so that the acts are properly classified. The situation could be rectified through a further decision by the courts, rather than by the executive.

4.15 In conclusion, the State party reiterates that it has no observations to make on admissibility, that due process was respected, and that neither the right

⁴ Act No. 26248 of 25 November 1993, which re-established the habeas corpus in cases of terrorism and treason.

⁵ Act No. 26671 of 12 October 1996, which established that "faceless" judges will no longer function from 15 October 1997.

of the victim to liberty nor to security of person was violated.

Author's comments on admissibility and merits

5.1 The author alleges in her comments that all the assertions by the State party are false, having the sole object of concealing the violation of articles 9 and 14 of the Covenant. According to the author, the State party has not responded to her specific allegations regarding the victim, who has been sentenced to a term of imprisonment after having been tried by a "faceless" court and convicted without evidence or any attribution of material individual liability by applying laws that were not in force when the acts occurred, as in the judgement of 30 January 1998.

5.2 The author claims that the victim was arrested without there being a warrant and without being caught in flagrante delicto. With regard to the period of detention, the law provided for a maximum of 15 days' detention at the police station. Yet the victim was held for 22 days and the judgement made no reference to this. Further, the State party has not provided any information on the torture to which the victim was subjected.

5.3 The author maintains that the judgement is a continuation of the methods applied by the "faceless" courts. The right to due process, the presumption of innocence and burden of proof as well as the principle of legality were violated. Further, the author alleges that the judgement was a literal reproduction of the police attestation in contravention of the principle of legality and equality before the law. She further maintains that the victim was sentenced under a law that was not in force at the time the acts were committed, namely June to December 1986, whereas the sentence was pronounced under Act No. 24651 of 6 March 1987.

5.4 The author states that this judgement violated the principles of liberty and security of person, the principle of equality before the law and retroactivity, the right to due process and effective protection of the courts.

Issues and proceedings before the Committee

Admissibility considerations

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the complaint is admissible under the Optional Protocol to the Covenant.

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

Protocol. It has further ascertained that the victim has exhausted domestic remedies for the purposes of article 5, paragraph 2 (b), of the Optional Protocol.

6.3 The Committee also notes that the State party has not refuted the applicability of article 5, paragraphs 2 (a) and (b), of the Optional Protocol to the case, thereby accepting its admissibility. Accordingly, and bearing in mind the author's claims, the Committee declares the communication admissible and proceeds to consideration of the merits of the case on the basis of the information provided by the parties, in accordance with article 5, paragraph 1, of the Optional Protocol.

Consideration of the merits

7.1 With regard to the author's claims that her son was subjected to ill-treatment while being held at the police station, the Committee notes that, while the author does not provide further information in this regard, the attached copies of the records of the oral proceedings of 30 January 1998 reveal how the victim described in detail before the judge the acts of torture to which he had been subjected. Taking into account the fact that the State party has not provided any additional information in this regard, or initiated an official investigation of the events described, the Committee finds that there was a violation of article 7 of the Covenant.

7.2 With respect to the allegations of a violation of the right of the victim to liberty and security of person and that her son was arrested without a warrant, the Committee regrets that the State party has failed to provide an explicit response to this claim, merely asserting in general terms that Mr. Gómez Casafranca was arrested in accordance with Peruvian law. The Committee notes the author's claim that her son was held for 22 days at the police station, whereas the law provides for a period of 15 days. The Committee considers that since the State party has not contested these claims due weight must be attached to them. Accordingly the Committee finds that there was a violation of article 9, paragraphs 1 and 3, of the Covenant.

7.3 Regarding the author's claims under article 14, the Committee takes note of the fact that Mr. Gómez Casafranca was, after first acquitted in 1988, ordered for retrial by a "faceless" Chamber of the Supreme Court. This alone raises issues under article 14, paragraphs 1 and 2. Taking into account that Mr. Gómez Casafranca was convicted after retrial in 1998, the Committee takes the view that whatever measures were taken by the Special Criminal Counter-Terrorism Chamber to guarantee Mr. Gómez Casafranca's presumption of innocence, the delay of some 12 years after the original events and 10 years after the first trial resulted in a violation of the author's right, under article 14, paragraph 3 (c), to be

tried without undue delay. In the circumstances of the case, the Committee concludes that there was a violation of article 14 of the right to a fair trial taken as a whole.

7.4 With regard to the author's claims that there was a violation of the principles of non-retroactivity and equality before the law as a result of the application of Act No. 24651 of 6 March 1987, subsequent to the events in the case, the Committee notes that the State party acknowledges that this occurred. While it is true, as asserted by the State party, that acts of terrorism at the time of the events were already offences under Legislative Decree No. 46 of March 1981, it is equally true that Act No. 24651 of 1987 amended the penalties, by imposing higher minimum sentences and thereby making the situation of guilty parties worse.⁶ Although Mr. Gómez Casafranca was sentenced to the minimum term of 25 years under the new law, this was more than double compared to the minimum term under the previous law, and the Court gave no explanation as to what would have been the sentence under the old law if still applicable.

⁶ Legislative Decree No. 46 of March 1981 sets the minimum penalty at 12 years' imprisonment and sets no maximum penalty. Act No. 24651 of 1987 sets the minimum penalty at 25 years' imprisonment and the maximum at life imprisonment, but only for leaders of terrorist organizations.

Accordingly, the Committee finds that there was a violation of article 15 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee constitute violations of articles 7; 9, paragraphs 1 and 3; 14 and 15 of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to release Mr. Gómez Casafranca and pay him appropriate compensation. The State party is also under an obligation to ensure that similar violations do not occur in future.

10. 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 or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 90 days, information on the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

Communication No. 983/2001

Submitted by: John K. Love, William L. Bone, William J. Craig, and Peter B. Ivanoff (represented by counsel, Kathryn Fawcett)

Alleged victim: The authors

State party: Australia

Date of adoption of Views: 25 March 2003 (seventy-seventh session)

Subject matter: Mandatory retirement age for pilots

Procedural issues: Compatibility *ratione temporis* and continuing effect - Notion of victim - Incompatibility *ratione materiae*

Substantive issues: Discrimination on the ground of age (other status) - Reasonable and objective criteria

Articles of the Covenant: 2, paragraphs 2 and 3; and 26

Articles of the Optional Protocol: 1 and 2

Finding: No violation

1. The authors of the communication are William L. Bone, William J. Craig, Peter B. Ivanoff and John K. Love, all Australian citizens, who claim to be victims of a violation by Australia of articles 2,

paragraphs 2 and 3, and 26 of the International Covenant on Civil and Political Rights. The authors are represented by counsel. The Optional Protocol to the International Covenant on Civil and Political Rights entered into force for Australia on 25 December 1991.

The facts as presented by the authors

2.1 On 27 October 1989, 24 November 1989, 10 January 1990 and 24 March 1990, respectively, Messrs. Ivanoff, Love, Bone and Craig, all experienced pilots, commenced contracts as pilots on domestic aircraft operated by Australian Airlines, now part of Qantas Airlines Limited. Australian Airlines was wholly State-owned and operated by Government-appointed management. The airline

terminated the authors' contracts upon their reaching 60 years of age pursuant to a compulsory age-based retirement policy. The respective dates of the authors' compulsory retirement were the day before they reached 60 years of age, that is, for Mr. Craig, 29 August 1990; for Mr. Ivanoff, 18 September 1990; for Mr. Bone, 12 October 1991; and, for Mr. Love, on 17 May 1992. The contracts under which they were employed did not include a specific clause to provide for compulsory retirement at that or any other age. Each of the authors held valid pilot licences, as well as medical certificates, at the time of the terminations. Following the termination, Mr. Ivanoff was engaged by another airline company as a B727 captain and in 1997 was working as a B737 simulator instructor.¹

2.2 From 25 December 1991 onwards, the airline refused the authors' requests for re-employment negotiations. On 12 June 1992, the four authors submitted a complaint to the Australian Human Rights and Equal Opportunities Commission (HREOC) claiming that they had been discriminated against on the basis of their age. The investigation of the complaints was drawn out, according to the authors, due to the airline's refusal to take part in negotiation or conciliation, and, possibly, contentious medical evidence. Following the takeover in 1993 of Australian Airlines by the Government-owned Qantas, Qantas was entirely sold to private ownership in a transaction completed on 31 July 1995.

2.3 On 30 March 1994, the federal Industrial Relations Act 1988 was amended to make it unlawful to terminate a person's employment on the grounds of his or her age. Following that amendment, a Mr. Allman, also a pilot employed by Australian Airlines, lost his job upon reaching 60 years of age. He took an action against the company and, on 18 March 1995, the Industrial Relations Court found in his favour. Mr. Allman was re-employed as a result. Since that date, Qantas (having taken over Australian Airlines) ceased to impose a retirement age on its domestic pilots.

2.4 On 14 August 1995, the (then) Human Rights Commissioner, who performs HREOC's function of inquiring into any act or practice that may constitute discrimination, reviewed the findings of previous Commissioners who had concluded that mandatory retirement was discriminatory and formed the same opinion. On 9 November 1995, the Commissioner convened an inquiry into the authors' dismissals, taking submissions from Qantas (the respondent) and the authors. On 12 April 1996, the

Commissioner decided that the compulsory retirement of the authors upon reaching the age of 60 constituted discrimination in employment based on age. It rejected the argument that the age limit of 60 was per se required to ensure the safety of flight operations. The Commissioner made the following recommendations to Qantas: (1) the airline should discontinue the practice of compulsorily retiring its employees on the sole basis that they reach 60 years of age; (2) that the airline should pay the authors compensation for loss of earnings suffered as a result of the discriminatory conduct; (3) that the airline should make the necessary arrangements for Mr. Ivanoff to undertake the Qantas "over 60" medical tests and, if these and other requirements of the Civil Aviation Authority were satisfied, to re-employ Mr. Ivanoff and where necessary retrain him as a pilot to fly equivalent aircraft or aircraft as near to equivalent as possible to those he was flying prior to his compulsory retirement. More generally, it recommended to the federal Government to institute a comprehensive national ban on age discrimination, including a removal of the mandatory retirement provisions in the *Public Service Act 1922* and other federal legislation.

2.5 Qantas, now in private hands, refused to accept the findings of the Commissioner and rejected its recommendation to pay compensation. On 10 May 1996, its legal advisers responded to HREOC that it had generally discontinued the practice of compulsory retirement at 60; however, it considered that it was not appropriate to accept the recommendations for re-employment or compensation made by HREOC in the specific case. It noted that its policy, which had been based primarily on air safety, was lawful, and had not been rendered unlawful by the legislation empowering HREOC to make recommendations. It recalled that it had made plain during the HREOC hearings that it would not be inclined to accept recommendations for re-employment or compensation.

The complaint

3. The authors allege that Australia has violated their rights to non-discrimination on the basis of age under article 26, through failing to protect them from terminations in the workplace made on this proscribed ground. They also allege a violation of article 26's protection against age discrimination in the refusal of Australian Airlines to engage in, and the failure of the State to facilitate, from 25 December 1991, re-employment negotiations concerning Mr. Ivanoff. Moreover, the authors argue that, where violations have occurred, the State party is under an obligation to comply with the recommendations for redress of its own human rights commission. In response to the State party's submission, the authors further add a violation of article 2 in that the State party has failed to provide

¹ No information is provided on what, if any, further professional employment the remaining authors undertook.

an effective remedy for a violation of a Covenant right.²

State party's submissions on admissibility and merits

4.1 By submission of 3 January 2002, the State party responded, disputing both the admissibility and the merits of the communication.

4.2 As to the complaint of principle that the State party has failed to implement HREOC's recommendations, the State party regards this complaint in its entirety as falling *ratione materiae* outside the Covenant, for nothing in article 26 of the Covenant requires any such thing.

4.3 Turning to the specific recommendations of HREOC (i) to repeal compulsory retirement provisions in the *Public Service Act 1922* and other federal legislation, and (ii) to legislate a comprehensive national prohibition on age discrimination, the State party further argues that the allegation is inadmissible *ratione personae* as the victims are not victims of an alleged failure to take either of these steps. As to (i), the authors were not employed under the *Public Service Act 1922* and so any alteration to, or failure to alter, that Act would not have affected them. As to (ii), the authors have not demonstrated how they were affected by the absence of a comprehensive ban on age discrimination. There is no indication such a legislative framework would have affected the dismissal decisions. Nor is there any evidence of post-dismissal discrimination, or how that would have been prevented by the framework in question.

4.4 As to the merits of these allegations, the State party states, as to (i), that the *Public Service Act 1999* removed compulsory age retirement for Commonwealth public servants. As to (ii), the State party notes that new legislation, designed to change old social conditions, cannot be translated into reality from one day to another.³ When making changes to legislative frameworks, it is appropriate that States be given time to make the changes in line with their democratic and constitutional processes. Currently, the State party has decided to implement one of the main recommendations of HREOC's "Age Matters" report (2000), by developing a Federal Age Discrimination Act, prohibiting age discrimination, in consultation with business and community groups. Drafting is in progress. The State party has also abolished compulsory age retirement in some areas of Commonwealth responsibility: *Public Service Act 1999* and *Abolition of Compulsory Age Retirement*

² See, *infra*, paragraph 5.3.

³ The State party refers to the similar submissions made by the State party in *Pauger v. Austria*, Communication No. 415/1990, Views adopted on 26 March 1992.

(*Statutory Officeholders*) Act 2001, and it intends to abolish compulsory retirement for directors of public companies. In 1996, the *Workplace Relations Act 1996* (superseding the *Industrial Relations Act*) prohibited termination of employment on the basis of age. In States and Territories, discrimination is unlawful in areas of employment, education and training, accommodation, goods and services and clubs. Accordingly, the State party argues it is taking gradual steps, in fact, to eliminate age discrimination.

4.5 As to the complaint that (i) the dismissals from Australian Airlines violated article 26, as did (ii) the State's failure to protect them against that, the State party argues that the claim is inadmissible *ratione temporis* in relation to Messrs. Bone, Craig and Ivanoff. These three authors were dismissed prior to the entry into force of the Optional Protocol. Nor have they argued that there are any continuing effects which, in themselves, constitute a violation of the Covenant. The State party submits that the consequence of the dismissals - no longer being employed - did not of itself constitute a violation of the Covenant, for the dismissals were one-off events. Any argument of continuing effects based on a refusal to re-employ the authors would, properly conceived, be a fresh and separate act of discrimination (if at all).

4.6 Moreover, the State party argues as to (i) that as the dismissals were carried out by an incorporated company, rather than the Government, the allegation does not relate to a State party, as required by article 1 of the Optional Protocol. The State party refers to the Committee's jurisprudence finding communications directed against non-State entities inadmissible.⁴ The State party argues that its responsibility for the acts of an incorporated company depends on its links with it. Where an entity is not part of the formal structure of the State, its acts may still constitute acts of the State where internal law empowers the entity to exercise elements of governmental authority.⁵ In this case, while the State party owned all shares in Australian Airlines, a Commonwealth Government Business Enterprise (CGBE), at the time of the dismissals, the Government did not intervene in day-to-day administration.

4.7 The State party explains that its relationship with the airline was governed by a mix of legislation covering its general governance arrangements and policy with all CGBEs. In 1988, policy changes enhanced the airline's autonomy and gave it greater

⁴ *F.G.G. v. The Netherlands*, Case No. 209/1986, Decision adopted 25 March 1987, and *BdB v. The Netherlands*, Case No. 273/1989, Decision adopted 30 March 1989.

⁵ Shaw, M.: *International Law* (4th ed.) (1997), pp. 548-549; Brownlie, I.: *Principles of Public International Law* (5th ed.), p. 449.

flexibility, with government control being minimized. Following the *Australian Airlines (Conversion to a Public Company) Act 1988*, day-to-day controls were removed from the public service, leaving more operations subject to commercial management decisions under a board with increased responsibilities. As such, employment matters were for the airline management, under direction of its board and within broad government guidelines. As an incorporated company, it acted at its own discretion and was not exercising government powers. Accordingly, if there was any discrimination (which is denied), Australian Airlines rather than the State party is responsible for it.

4.8 As to the merits of this allegation, the State party submits that the dismissals were based on reasonable and objective criteria, did not violate article 26 and accordingly the authors required no protection against such action. The State party refers to the Committee's jurisprudence that distinctions are not discrimination if based on reasonable and objective grounds and aimed at a legitimate purpose. The State party submits that, as a matter of logic and fairness, this determination should be made on the basis of the information available at the time the act took place. Thus, a distinction that was reasonable and objective on the medical information available to the airline at the time is not discounted by the emergence of subsequent contrary practice.

4.9 The State party points out that the Committee's test differs from that applied by HREOC and in the Australian courts, that is, the "inherent requirement" of the position test justifying an age distinction.⁶ Therefore the decisions of these local bodies denying that a particular age was an inherent medical requirement are not determinative of the broader question of whether the dismissals were objectively and reasonably justified.

4.10 Turning to the particular case, the State party argues the dismissals were justified, reflecting an internationally-accepted standard, based on medical studies and evidence, and enacted in order to ensure the greatest possible safety to passengers and others affected by air travel (a purpose legitimate under the Covenant). Before HREOC, Qantas has argued that mandatory retirement was necessary to minimize to the lowest extent possible risk to the safety of passengers, crew and the wider public; while any age limit was arbitrary, as some fit pilots would be forced to retire, a limit of 60 struck a fair balance between pilots wishing to prolong careers and public safety. Similarly, the decision of the Chief Pilot of Australian Airlines to impose a mandatory retirement was based on universally-applied and

long-established custom of the Australian airline industry and the inherent requirements of the job.

4.11 The State party argues that the decision was informed by medical studies and evidence from various published scientific papers on the subject.⁷ In the *Christie* court proceedings, expert evidence had also considered the age restriction "prudent and necessary" and justified by the medical and operational data. Although HREOC accepted the court's finding in *Christie* that "none of the cited studies supports any conclusion between [mandatory retirement] and aircraft safety", the State party submits that this is not determinative for the wider question of reasonable and objective criteria. Rather, the medical studies and data available at the time of the dismissals were adequate to give rise to a belief that mandatory retirement was necessary for safety and that the dismissals were objective and reasonable.

4.12 Moreover, the mandatory retirement policy was instituted with consideration to the international safety standards set by the International Civil Aviation Organization (ICAO), which are intended to be mandatory and are followed by many States as best practice. It is expected that States conform to "standards" and endeavour to conform with "recommended practices". The Convention on International Civil Aviation provides a standard that 60 is the limit for a pilot-in-command of international flights, and a recommended practice that 60 be the limit for co-pilots. One hundred and sixty-two States out of 186, have *not* notified the ICAO of a failure to conform with the standard. From these figures, the State party extrapolates a widely-accepted international safety standard pointing to reasonableness and objectivity of the dismissals.

4.13 In 1992, the State party modified its Civil Aviation Regulations enabling commercial passenger pilots aged 60-65, and aged over 65, to fly if, inter alia, they had completed an aeroplane proficiency check/flight review within a year or six months, respectively, of the flight. On 3 March 2000, the State party made notifications to the ICAO of non-compliance on the standard and the recommended practice. Thus, the State party permits pilots over 60 to fly, while recognizing that there are safety concerns requiring precautionary measures. While it no longer accepts that mandatory retirement at 60 is per se necessary to ensure safety, at the time of the dismissals it was reasonable and objective for a mandatory retirement to be based on this consideration, for at that time the medical evidence indicated risks arising solely after reaching age 60. It

⁶ *J.B. Christie v. Qantas Airways Ltd.* (1995) AILR 38; *Qantas Airways Ltd. v. Christie* (1998) 193 CLR 280.

⁷ The studies referred to by the State party are summarized in the HREOC report.

follows that the distinction was not contrary to article 26, and that the State party was not obliged to protect the authors against the application of that distinction.

4.14 As to the allegation that the refusal to enter re-employment negotiations constituted age discrimination, the State party again argues that any such refusal was taken by Australian Airlines, for which it was not responsible. Moreover, the allegation has not been substantiated, for the authors have provided no information relating to these alleged refusals, nor have they explained why the alleged refusals amounted to age discrimination. On these two bases, then, this allegation also is inadmissible.

Authors' comments

5.1 By submissions of 14 March 2002, the authors reject the State party's submissions.

5.2 At the outset, they clarify that they make no allegation with respect to the *Public Service Act 1922*.

5.3 As to the first allegation (that the State party failed to legislate a comprehensive age discrimination ban, contrary to HREOC's recommendation), the authors expand on their claim. They argue that this failure itself constitutes a breach of the Covenant. Moreover, since a primary statutory purpose of HREOC is to protect Covenant rights, a failure to give effect to its recommendations when it identifies violations of those rights breaches the State party's obligations under articles 2, paragraphs 2 and 3, and 26 of the Covenant. In the alternative, and at a minimum, the failure to implement HREOC recommendations should be seen as evidence of a violation.

5.4 As to the admissibility of this first claim, the authors cite the "actually affected" test of standing adopted in the *Mauritian Women*⁸ case, contending that they do not make abstract allegations but rather satisfy this condition in the following ways: (i) at the time of the dismissals, there was no legislation in place rendering that policy illegal, and/or (ii) when legal action began on 12 June 1992, there was no legislation in place enabling an effective challenge to the dismissal, and/or (iii) at the time HREOC issued its recommendations, there was no legislation in place allowing enforcement thereof, and/or (iv), in Mr. Ivanoff's case, there was no provision to gain redress for the failure to re-employ him at that point.

5.5 As to the merits of this first claim, the authors invite the Committee to reject the State party's submissions of step-by-step implementation, over

time, of HREOC's recommendations. They argue that while the Government has received recommendations concerning a comprehensive, enforceable age discrimination over the years, it has provided no details as to the progress in drafting an "Age Discrimination Bill", nor of its contents, nor whether and when it may enter into force. This, so argue the authors, distinguishes the case from the situation in *Pauger v. Austria*⁹ where information on the time frame and implementation of remedial legislation had been provided. If the Committee accepts that the State party is taking appropriate measures, the authors note that in *Pauger* the Committee regarded the State party implicitly acknowledging that the complaint had been made out. Similarly here, according to the authors, the State party had not denied that its failure to implement a comprehensive ban on age discrimination violated the Covenant. Rather, by outlining the steps being taken to redress the breach, they are acknowledging the breach is made out. Additionally, the Committee in *Pauger* was of the view that the State party should offer the victim an appropriate remedy despite the steps being taken, and the authors invite the Committee to take the same approach.

5.6 As to the second claim (that the State party allowed the authors' dismissal from Australian Airlines on discriminatory grounds in contravention of its obligations under article 26), (i) the authors reject the State party's arguments as to admissibility. As to the arguments of inadmissibility *ratione temporis* for the three authors dismissed prior to the entry into force of the Optional Protocol on 25 December 1991 ("the relevant date"), they argue that these acts of discrimination continued, or had continuing effects, after that date in several ways. These were (a) that they were prevented from working at their former employer, subsequent to the relevant date, due to the compulsory retirement policy, (b) that they lodged complaints to HREOC after the relevant date, (c) that findings in their favour were made by HREOC after the relevant date, and (d) that their former employer, after the relevant date, failed to implement HREOC's findings, and, in Mr. Ivanoff's case, failed to re-employ him.

5.7 The authors also reject the State party's argument of inadmissibility *ratione personae*, which contended that, as Australian Airlines was an incorporated company and Commonwealth Government Business Enterprise at the time of the dismissals, subject to "the normal provisions relating to control, performance, accountability and performance of company activities", there was no violation by a State party. The authors argue that, while some steps had been taken to create a level of independence for the airline, its incorporation occurred pursuant to statute, and all shares were held

⁸ *Aumeeruddy-Cziffra et al. v. Mauritius*, Case No. 35/1978, Views adopted on 9 April 1981.

⁹ *Op. cit.*

by the State party's Government. They submit that the Government was ultimately responsible for management decisions in its sole shareholder capacity, and accordingly is directly responsible for the discriminatory dismissals. In addition, the State party was responsible for the dismissals, as well as the subsequent effects, by failing to have legislation in place to prevent age discrimination.

5.8 As to the merits of the second claim, the authors argue that the dismissals were not based upon reasonable and objective grounds and thus violated article 26. They submit that the proper test is whether, at the time of the dismissals, the age distinction made was objective, reasonable and legitimate for a purpose under the Covenant. The authors submit that test is not materially different from that applied by HREOC and the Australian courts,¹⁰ which evaluated whether it was an "inherent requirement" of the job that an airline pilot be under 60 and found this was not the case. The authors submit that HREOC, in rejecting the submissions advanced by Australian Airlines, implicitly found that the age distinction was neither reasonable nor objective, and that therefore the Committee need not re-examine that question *ab initio*.

5.9 The authors emphasize that a number of the considerations now advanced by the State party in favour of the proposition that the age distinction was objective and reasonable were considered by HREOC in its conclusions. These included (a) that the compulsory retirement age was based on an internationally accepted standard, (b) that medical evidence supported the policy, (c) that the policy ensured the greatest possible air passenger safety, (d) that the Australian Airlines Chief Pilot imposed the mandatory retirement age because of long-standing industry practice. The authors note that the State party has not implemented the international standards upon which they seek to rely in justifying the compulsory retirement policy. Indeed, the State party concedes that it no longer recognizes a mandatory retirement age of 60 as being of itself necessary to ensure safety. The authors go further to argue that on an objective and reasonable view, it had indeed never been necessary.

5.10 As to the State party's argument that the relevant test should be what Australian Airlines *believed* to be reasonable at the time of the dismissals, the authors note that this kind of "subjective" test was rejected by HREOC. The authors contend that the test of the justification for the distinction must be objective, for otherwise a State party could simply assert its belief that a

differentiation was reasonable in order to avoid a finding of breach of the Covenant. The authors add that the State party had not demonstrated how the distinction in the case had the aim of achieving "a purpose which is legitimate under the Covenant", that being an extra element of the "objective and reasonable" test which had to be satisfied.

5.11 In any event, the authors submit that HREOC's decision was in accordance with international interpretation of Discrimination (Employment and Occupation) Convention 111 of the International Labour Organization (ILO).¹¹ The ILO's Committee of Experts has commented that an "inherent requirement" of an age distinction for a particular job must be proportionate to the aim being pursued and must be necessary because of the very nature of the job in question. The authors submit that the views of the Committee of Experts should be taken into account to assess the "objective and reasonable" criterion under article 26.

5.12 In sum, the authors invite the Committee to conclude that the distinction was not based upon objective and reasonable grounds, to accept HREOC's findings, or, if it wished to reconsider all the evidence in the matter, to invite the authors to supply further evidence.

5.13 As to the third claim (that the State party, in violation of the Covenant, failed to facilitate Mr. Ivanoff's attempt to be re-employed), the authors reject the State party's arguments of inadmissibility. Regarding substantiation, it considers that the letter of airline counsel to HREOC dated 10 May 1996 substantiates the claim, for it makes clear that Qantas would not re-employ Mr. Ivanoff as its policy was based on air safety and was not unlawful. As to the argument that there was no violation by a State party, the authors repeat their arguments above on this point.¹²

Supplementary submissions by the State party

6.1 By further submissions of 13 May 2002, the State party responded to the authors' comments, reiterating its earlier submissions and making certain further comments.

6.2 As to the allegation that a failure to create a comprehensive prohibition on age discrimination of itself violates article 26 (as distinct from the allegation related to implementing HREOC's recommendations), the State party contends that as

¹⁰ *Christie v. Qantas Airways Ltd.* (1995) AILR 1,623 (3-134).

¹¹ Article 1, paragraph 2, of the Convention provides that "Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination."

¹² *Supra*, at paragraph 5.7.

the authors' dismissals were based on reasonable and objective criteria and, therefore, were not discriminatory, then there was nothing for the law to prohibit. Accordingly, a failure to implement a comprehensive prohibition on age discrimination did not violate article 26 insofar as the authors' case is concerned.

6.3 The State party rejects counsel's contention that it has implicitly admitted, by outlining the remedial steps being taken, that the alleged refusal to implement a legislative framework violated article 26. It reiterates that the authors cannot contend that an absence of legislation affected them in the abstract in the absence of some act of discrimination committed against them.

6.4 The State party rejects that age discrimination legislation that it has described in progress is in response to HREOC's findings in the authors' case. Rather it is in response to the recommendations made entirely separately in HREOC's "Age Matters Report" of June 2000, that the Government is incidentally implementing the recommendation to create a comprehensive prohibition on age discrimination. The State party emphasizes that it is not creating a comprehensive legislative prohibition on age discrimination because it considers itself to be in violation of the Covenant, but rather to ensure that there is a balance between the need to eliminate unfair discrimination on the basis of age and the need to ensure sufficient flexibility to allow for situations where age requirements have particular significance.

6.5 Responding to counsel's interpretation of *Pauger v. Austria*,¹³ the State party argues that as there has been no violation of the Covenant, there is no reason for the authors to receive a remedy. In response to counsel's comment that (unlike *Pauger*) insufficient information on the progress of the proposed legislative prohibition on age discrimination has been provided, the State party argues that it is not necessary to do so, as there has not been any violation of the Covenant. However, to assist the Committee, it states that the Government has begun the process of developing age discrimination legislation. The Government is consulting with business and with community organizations representing older persons, children and youth before making informed and balanced decisions about the specific content of the Bill. Initial work has been done in identifying the central issues and questions that arise as to content of an Age Discrimination Bill, and it is likely that the Bill will cover age discrimination in a range of areas of public life, such as employment; education and access to goods, services and facilities. The Bill will

be introduced during the term of the current Government.

6.6 As to the contention that a failure to implement HREOC's recommendations violates article 2 (in addition to 26), the State party notes that this is a new allegation arising at a late stage of the communication process, and asks the Committee to consider whether it is appropriate for the Committee to accept allegations not included in the authors' original communication. In particular, the Committee is asked to note that the new allegation is not related to new evidence or events and therefore there is no reason why the authors could not have raised it in their original communication. In any event, the Committee's constant jurisprudence is that article 2 is an accessory right that cannot be invoked independently of another right. As there has been no violation of article 26 in this case, there cannot have been a violation of article 2.

6.7 As to the temporal aspect of the alleged violations, the State party rejects that there were any continuing effects (for Craig, Ivanoff and Bone) which *themselves* constituted a violation of the Covenant.¹⁴ Specifically, in response to the continuing effects advanced by the authors, the State party notes that the authors' dismissals were one-off events. If there was any violation of the Covenant, it occurred at the time of dismissal. The fact that the authors were not able to work for their former employer after the date of dismissal is not itself a violation of the Covenant. Further, having the right to lodge a complaint (to HREOC), and doing so, is not of itself a violation of the Covenant, and having received findings in one's favour (by HREOC) is not of itself a violation of the Covenant. Finally, as a refusal to implement the recommendations of a domestic human rights body is not a violation of the Covenant, such a refusal cannot be a continuing effect as it cannot of itself be a violation of the Covenant.

6.8 The State party argues that there is no evidence to support counsel's contention that HREOC formed the implicit conclusion that the distinction made by Australian Airlines was neither objective nor reasonable. It goes on to argue that, even if there were such evidence, "the Committee must make its own determination of whether or not the authors' dismissals were objective and reasonable. The Committee, not [HREOC], is the body empowered by the Covenant to 'receive and consider communications'. It would be inappropriate for the Committee to subordinate its decision-making power to a national body when the States parties have consented that the Committee

¹³ Op. cit.

¹⁴ *M.A. v. Italy*, Case No. 117/1981, Decision adopted on 10 April 1984.

would be exercising its decision-making power independent of the determinations of national bodies”.

6.9 As to counsel’s submissions on subjective/objective nature of the test to be applied, the State party states that, while it referred to “belief” in its submissions, it did not intend to submit that the Committee should consider whether the dismissals were reasonable and objective based on the belief of the decision maker. Rather, it intended to ask the Committee to consider whether the dismissals were based on reasonable and objective criteria. It further submits that whether or not the criteria were reasonable and objective is to be determined by reference to the information available to the decision maker at the time at which the dismissals occurred.

6.10 The State party argues that Australian Airlines based its decision to dismiss the authors on objective and reasonable criteria then available to it, derived from internationally accepted standards, medical studies and evidence, and concerns for passenger safety. As to counsel’s comment that it had not demonstrated how the distinction in the authors’ circumstances has the aim of achieving “a purpose which is legitimate under the Covenant”, it refers to its submissions stating that a measure enacted in order to ensure the greatest possible safety to passengers and other persons affected by air travel is a purpose legitimate under the Covenant. Plainly, such a purpose falls under article 6 and is not contrary to the Covenant.

6.11 As to counsel’s argument that HREOC’s approach was consistent with the interpretation of ILO Convention 111 and should be respected by the Committee, the State party submits that the interpretation of ILO Convention 111 is not relevant to, nor determinative of, the case before the Committee under the Covenant.

6.12 In response to the authors’ comments that the “inherent requirement” test, applied *inter alia* by the ILO Committee of Experts, is essentially analogous to the “objective and reasonable” test, the State party argues that there are significant differences, for asking whether or not a requirement is necessary differs from asking whether or not a requirement is objective and reasonable. A requirement may not be necessary in an absolute sense but it may still be objective and reasonable given the probabilities involved. The State party requests the Committee to follow its jurisprudence and apply the objective and reasonable test, rather than an inherent requirement/necessity test.

6.13 In response to the authors’ comments that the State party has not implemented the international standards upon which it relies for the justification of the compulsory age retirement policy, the State party

notes that while the ICAO standard referred to is not directly implemented in its law, it does conform with the standard where an Australian airline flies into or out of a country that complies with the standard.

6.14 In response to the authors’ request to the Committee to supply further submissions if it decides to reconsider all the evidence in respect of this matter in order to make a determination pursuant to the objective and reasonable test, the State party asks the Committee to note that the authors are aware that the Committee may proceed to a determination pursuant to the objective and reasonable test. It asks, therefore, why the authors have not presented available evidence in support of their submissions at this point, rather than delay consideration of the communication in piecemeal fashion. The State party is satisfied that the matter is ready for consideration now, but requests the opportunity to respond if the Committee asks the authors for further evidence.

6.15 As to the allegation on the refusal to enter into re-employment negotiations, the State party maintains that no evidence has been presented indicating that the decisions not to enter re-employment negotiations, or to re-hire Mr. Ivanoff, were made on any other basis than that of legal considerations. Accordingly, the allegation is not substantiated and inadmissible.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a), of the Optional Protocol. The Committee further notes that the State party has not advanced any argument that there remain domestic remedies to be exhausted, and thus is not precluded by article 5, paragraph 2 (b), of the Optional Protocol from considering the communication.

7.3 As to the State party’s arguments that the claims of three of the four author (Messrs. Bone, Craig and Ivanoff) are barred *ratione temporis*, the Committee considers that the acts of alleged discrimination, properly understood, occurred and were complete at the time of the dismissals. The Committee does not consider that the continuing effects in this case of these acts could *themselves* amount to violations of the Covenant, nor that

subsequent refusals to take up re-employment negotiations could appropriately be understood as fresh acts of discrimination independent of the original dismissal. It follows that the claims of these three authors are inadmissible *ratione temporis*. The claim by Mr. Love, however, being based on his dismissal after the entry into force of the Optional Protocol, is not inadmissible for this reason.

7.4 The Committee notes the State party's additional arguments on admissibility to the effect that Mr. Love's dismissal was, in truth, an act purely of Australian Airlines and was not, under rules of attribution of State responsibility, imputable to the State party, and further that Mr. Love cannot be regarded as a victim, in terms of the Optional Protocol, of an *absence* of an age discrimination ban. The Committee considers that, in the light of the need for a close examination and assessment of the particular facts and law relevant to these issues, it is appropriate to address these arguments at the merits stage, for they are intimately bound up with the assessment of the scope of the State party's obligation under article 26 of the Covenant to respect and ensure the equal protection of the law against discriminatory dismissal.

7.5 As to the claim relating to a direct obligation under the Covenant to implement the findings of domestic human rights bodies (such as HREOC), which are non-binding under domestic law, the Committee considers that, while it will pay due consideration to the determinations of such bodies which have in whole or on part relied on provisions of the Covenant, in the ultimate analysis it must be for the Committee to interpret the Covenant in the manner it considers correct and appropriate. The Committee agrees with the State party's position that States parties have ratified the Optional Protocol on the understanding that it will be for the Committee to exercise its decision-making power on the interpretation of the Covenant independently of the determination by any national bodies. It follows that an obligation *per se* under the Covenant to implement non-binding findings of such non-judicial bodies is incompatible *ratione materiae* with the Covenant, and this particular claim is inadmissible under article 3 of the Optional Protocol.

Consideration of the merits

8.1 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.

8.2 The issue to be decided by the Committee on the merits is whether the author(s) have been subject to discrimination, contrary to article 26 of the Covenant. The Committee recalls its constant

jurisprudence that not every distinction constitutes discrimination, in violation of article 26, but that distinctions must be justified on reasonable and objective grounds, in pursuit of an aim that is legitimate under the Covenant. While age as such is not mentioned as one of the enumerated grounds of prohibited discrimination in the second sentence of article 26, the Committee takes the view that a distinction related to age which is not based on reasonable and objective criteria may amount to discrimination on the ground of "other status" under the clause in question, or to a denial of the equal protection of the law within the meaning of the first sentence of article 26. However, it is by no means clear that mandatory retirement age would generally constitute age discrimination. The Committee takes note of the fact that systems of mandatory retirement age may include a dimension of workers' protection by limiting the lifelong working time, in particular when there are comprehensive social security schemes that secure the subsistence of persons who have reached such an age. Furthermore, reasons related to employment policy may be behind legislation or policy on mandatory retirement age. The Committee notes that while the International Labour Organization has built up an elaborate regime of protection against discrimination in employment, mandatory retirement age does not appear to be prohibited in any of the ILO Conventions. These considerations will of course not absolve the Committee's task of assessing under article 26 of the Covenant whether any particular arrangement for mandatory retirement age is discriminatory.

8.3 In the present case, as the State party notes, the aim of maximizing safety to passengers, crew and persons otherwise affected by flight travel was a legitimate aim under the Covenant. As to the reasonable and objective nature of the distinction made on the basis of age, the Committee takes into account the widespread national and international practice, at the time of the author's dismissals, of imposing a mandatory retirement age of 60. In order to justify the practice of dismissals maintained at the relevant time, the State party has referred to the ICAO regime which was aimed at, and understood as, maximizing flight safety. In the circumstances, the Committee cannot conclude that the distinction made was not, at the time of Mr. Love's dismissal, based on objective and reasonable considerations. Consequently, the Committee is of the view that it cannot establish a violation of article 26.

8.4 In the light of the above finding that Mr. Love did not suffer discrimination in violation of article 26, it is unnecessary to decide whether the dismissal was directly imputable to the State party, or whether the State party's responsibility would be engaged by a failure to prevent third party discrimination.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of article 26 of the Covenant.

APPENDIX

Individual opinion (concurring in the result) by Committee member Nisuke Ando

I share the conclusion of the majority Views that the imposition of a mandatory retirement age of 60 is not a violation of article 26. However, I am unable to agree with the Views' statement that "a distinction related to age ... may amount to discrimination on the ground of 'other status' under the clause in question, or to a denial of the equal protection of the law within the meaning of the first sentence of article 26" (para. 8.2), for the following reasons:

Firstly, I consider that "age" should not be included in "other status" because age has a distinctive character which is different from all the grounds enumerated in article 26. All the grounds enumerated in article 26 are applicable only to a portion of the human species, however large it may be. In contrast, age is applicable to all the human species, and because of this unique character, age constitutes ground to treat a portion of persons differently from others in the whole scheme of the Covenant. For example, article 6, paragraph 5, prohibits the imposition of death sentence on "persons below 18 years of age", and article 23, paragraph 2, speaks of "men and women of marriageable age". In addition, terms such as "every child" (art. 24) and "every citizen" (art. 25) presuppose a certain age as a legitimate ground to differentiate persons. In my opinion, "other status" referred to in article 26 should be interpreted to share the characteristic which is common to all the grounds enumerated in that article, thus precluding age. Of course, this does not deny that differentiation based on "age" may raise issues under article 26, but the term "such as" which precedes the enumeration implies that there is no need to include "age" in "other status".

Secondly, I doubt whether the issue in the present case is "a denial of the equal protection of the law within the meaning of the first sentence of article 26". In essence, the authors of the present case are claiming that "professional qualifications" to be a pilot should be judged on the basis of each individual's physical and other capacities (abilities), that the imposition of a mandatory retirement age ignores this basis, and that such imposition constitutes discrimination based on age which is prohibited under article 26. This is tantamount to claiming that different treatment of persons of the same age with different capacities violates the principle of equal protection of the law. However, a professional qualification usually requires a minimum age, while a person below that age may well have sufficient capacities to qualify for the profession. In other words, a professional qualification usually requires a certain minimum age as well as maximum age, and such age requirements have little to do with the principle of equal protection of the law.

Thirdly, in my opinion, the present case concerns "the right to work" and its "legitimate limitations" under the International Covenant on Economic, Social and Cultural Rights (art. 6, para. 1, and art. 4, respectively). Thus, at issue here is a proper balance between an economic or social right and its limitations. Of course, article 26 of the International Covenant on Civil and Political Rights prohibits discrimination in law or in fact in any field regulated and protected by public authorities, thus applying to economic or social rights as well. Nevertheless, as in the present case, the limitations of certain economic or social rights, in particular the right to work or to pension or to social security, require thorough scrutiny of various economic and social factors, of which the State party concerned is ordinarily in the best position to make objective and reasonable evaluation and adjustment. This means that the Human Rights Committee should respect the limitations of those rights set by the State party concerned unless they involve clearly unfair procedural irregularities or entail manifestly inequitable results.

Individual opinion (concurring in the result) by Committee member Prafullachandra Natwarlal Bhagwati

The question is whether imposing a mandatory age of retirement at 60 for airline pilots could be said to be a violation of article 26 of the Covenant. Article 26 does not say in explicit terms that no one shall be subjected to discrimination on ground of age. The prohibited grounds of discrimination are set out in article 26, but age is not one of them. Article 26 has therefore no application in the present case, so runs an argument that could be made.

This argument, plausible though it may seem, is in my opinion not acceptable. There are two good reasons why I take this view.

In the first place, article 26 embodies the guarantee of equality before the law and non-discrimination. This is a guarantee against arbitrariness in State action. Equality is antithetical to arbitrariness. Article 26 is therefore intended to strike against arbitrariness in State action. Now, fixing the age of retirement at 60 for airline pilots cannot be said to be arbitrary. It is not as if a date has been arbitrarily picked out by the State party for retirement of airline pilots. It is not uncommon to find that in many countries 60 years is the age fixed for superannuation of airline pilots, since that is the age at which it would not be unreasonable to expect airline pilots would be affected, particularly since they have to fly airplanes which require considerable alacrity, alertness, concentration and presence of mind. I do not think that the selection of the age of 60 years for mandatory retirement for airline pilots can be said to be arbitrary or unreasonable so as to constitute a violation of article 26.

In the second place, the words "such as" preceding the enumeration of the grounds in article 26 clearly indicate that the grounds there enumerated are illustrative and not exhaustive. Age as a prohibited ground of discrimination is therefore not excluded. Secondly, the word "status" can be interpreted so as to include age. It is therefore a valid argument that if there was discrimination on the grounds of age, it would attract the applicability of

article 26. But it must still be discrimination. Every differentiation does not incur the vice of discrimination. If it is based on an objective and reasonable criterion having rational relation to the object sought to be achieved, it would not be hit by article 26. Here, in the present case,

for the reasons given above, prescribing the age of 60 years as the age of mandatory retirement for airline pilots could not be said to be arbitrary or unreasonable, having regard to the need for maximizing safety, and consequently it was not in violation of article 26.

Communication No. 986/2001

Submitted by: Mr. Joseph Semey

Alleged victim: The author

State party: Spain

Date of adoption of Views: 30 July 2003 (seventy-eighth session)

Subject matter: Conviction of complainant for drug-related offences

Procedural issues: Exhaustion of domestic remedies - Remedy which has no chance of being successful - Same matter not being examined under another procedure of international investigation or settlement

Substantive issues: Right to review of conviction and sentence by higher tribunal

Articles of the Covenant: 9, paragraph 1; 14, paragraphs 1, 2, 3 (d) and (e), and 5; and 26

Articles of the Optional Protocol: 2; 3; 5, paragraph 2 (a)

Finding: Violation (article 14, paragraph 5)

1. The author of the communication is Mr. Joseph Semey,¹ a Canadian and Cameroonian citizen, currently being held at the Penitentiary Centre in Segovia, Spain.² He claims to be a victim of violations by Spain of article 14, paragraphs 1, 2, 3 (d) and (e), and 5, and article 26 of the International Covenant on Civil and Political Rights. In a later communication he also claims to be the victim of a violation by Spain of article 9, paragraph 1, of the Covenant. He is not represented by counsel.

*The facts as submitted by the author*³

2.1 On 29 October 1991, a woman named Isabel Pernas arrived in Lanzarote, one of the

¹ Also known as Johnson or Spencer Mas vicky.

² The International Covenant on Civil and Political Rights and the Optional Protocol to the Covenant entered into force for the State party on 27 July 1977 and 25 April 1985 respectively.

³ The facts are set out by the author in three communications dated 18 December 2000, 22 March 2001 and 14 November 2001.

Canary Islands, aboard a flight from Madrid. On her arrival in Lanzarote, she was detained by police for a check. At that instant, a black passenger wearing cap and glasses quickly left the baggage retrieval hall without collecting a travel bag that supposedly belonged to him. The bag had been checked in under the name of Remi Roger. The woman, who was carrying drugs under her clothing, said that the drugs had been supplied to her by a man named Johnson in Madrid.

2.2 The author of the communication, Joseph Semey, states that he was detained in Madrid on 7 February 1992 and wrongly sentenced to 12 years' imprisonment by the Las Palmas Provincial Court in March 1995 for a supposed offence against public health which he had never committed. According to the author, he was implicated in the incident solely on the basis of verbal statements made by Ms. Isabel Pernas. He maintains that he was implicated on account of hostile relations between himself, Joseph Semey, and the family of Ms. Pernas' boyfriend, a man named Demetrio. He explains that he had previously been in prison for direct involvement in the killing of Demetrio's cousin and had just got out of jail when he was wrongly caught up in this incident.

2.3 The author states that Ms. Pernas told the police she had met him in a Madrid discotheque the night before she was detained with the drugs, and it was at that meeting that he had supposedly arranged with her to transport the drugs from Madrid to Lanzarote. This, he says, is untrue, since on 28 October 1991 the discotheque (Discoteca Los Sueños) was closed for the day (he supplies a letter to that effect signed by the manager).

2.4 The story that he, Joseph Semey, accompanied Isabel Pernas on her trip to Lanzarote using the name Remi Roger is, the author explains, an invention by Ms. Pernas. According to the author, Remi Roger was a close friend of Isabel and her boyfriend, Demetrio. He, Remi Roger and another black man shared an apartment in Madrid. At the

trial, Ms. Angela Peñalo Ortiz, the author's girlfriend, confirmed that Remi Roger, who is also black and resembles the author, really existed. It has never been shown, the author adds, that the items found in the bag left on the baggage conveyor at Lanzarote airport belonged to him.

2.5 According to the author, the examining magistrate departed from proper procedure when one of the members of the Civil Guard responsible for investigating the case, Francisco Falero, was allowed to pick him out in an identification parade and testify against him over a year after the incident had taken place. The police, says the author, knew all the details of the case and had his photographs on the police file.

2.6 The author also maintains that the Court found him guilty solely on the basis of the statements made by Ms. Pernas during the pre-trial proceedings and took no account of the evidence and defence witnesses that he put forward. He claims that on the morning of the incident he went to Herrera de la Mancha prison to see his compatriot, Nong Simon, but was unable to do so because visiting hours had changed; in the afternoon, after visiting the prison, he travelled with a Mr. and Mrs. Bell to Estepona. Mr. Bell stated as much to a notary. What Ms. Pernas says cannot, in the author's opinion, carry more weight than the evidence of other witnesses; he repeats that there is no proof he was in Lanzarote.

2.7 The author applied to the Supreme Court for judicial review of his case, but the Court limited itself to pronouncing on the grounds for review and upheld the sentence of the lower Court; at no time did it review the evidence on which the Provincial Court said it had based its guilty verdict. He also submitted an appeal to the Constitutional Court which was not entertained because it had been submitted too late, i.e. not when the Supreme Court handed down its decision.

2.8 The author applied to the European Court of Human Rights in Strasbourg but his application was declared inadmissible on the grounds that he had not exhausted domestic remedies (his appeal for protection - *amparo* - was not timely).

The complaint

3.1 The author maintains that he is the victim of violations by Spain of the following articles of the International Covenant on Civil and Political Rights:

(a) Article 26 and article 14.1

3.2 The author considers that he was found guilty because he was black, and says people in Spain have the idea that blacks and Latin Americans are bound up with the drugs trade. This, he claims, in combination with the racism that exists in the

country, means that anything a Spaniard can say carries much more weight than anything said by a black. Had he been Spanish, he says, he would not have been sent to prison on the strength of the statements made against him. In this sense he claims that the principle of equality set forth in article 26 of the Covenant has been violated.

3.3 He also alleges a violation of article 14.1 of the Covenant, since in his case there was no equality before the courts and the courts were not impartial. Isabel Pernas was sentenced to 3 years in prison; he was sentenced to 12. The sentencing court, in the author's view, violated procedural safeguards in passing judgement on him on the strength of statements made during the pre-trial proceedings. He argues that an order for his imprisonment as the culprit was issued solely on the basis of what Isabel Pernas said, without his being given a hearing beforehand. The Court also summoned the same civil guards who had conducted the entire investigation against him so that one could testify for the prosecution and pick him out in an identification parade a year after the incident at issue (prosecution witness Francisco Falero). Mr. Falero had been involved several times in helping to transport him from the Penitentiary Centre to the chambers of the investigating magistrate during the judicial inquiries, and thus knew who he was. The committal for trial was also based on statements by Isabel Pernas and took no account of the various points in his favour. He claims that it is not up to him to prove that he was not in Lanzarote that day, but up to the prosecution to show that he was. He maintains it has not been shown that he was using the name of Remi Roger, nor that he was the owner of the travel bag abandoned at the airport. He repeats that a mere accusation cannot be regarded as convincing proof that an individual is guilty of a crime.

(b) Article 14.2

3.4 According to the author's account, Ms. Pernas was detained in the Canary Islands and, on the basis of her statements, he was detained in Madrid. Before he was transferred to the Canary Islands to appear before the judicial authority that had ordered his detention, an order for his imprisonment was issued citing him as the perpetrator of an offence against public health. On the strength of a mere verbal accusation, the author says, the imprisonment order should have cited him as a suspect, not the perpetrator of an offence. Ms. Pernas' statements cannot counteract the presumption of innocence. Anyone, the author says, must be given a hearing by the competent judicial authority before an order for imprisonment on charges can be issued. The only way to establish whether a person is guilty is by conducting a trial, and guilt can be pronounced only in a final judgement, not in an imprisonment order.

(c) Article 14.3 (d)

3.5 The author states that the investigating magistrate (Arrecife Trial Court No. 2) forced him to make his initial statements without his counsel present. He says that Ms. Carmen Dolores Fajardo was the roster attorney on duty, but she was not there and the magistrate made him make his statements in the presence of counsel for the prosecution, Ms. Africa Zabala Fernandez, alone. He maintains that the Supreme Court was wrong to state that he and the individual who implicated him had appointed the same counsel, Ms. Africa Zabala, to defend them: that was completely incorrect. He affirms that there is nothing to suggest that he appointed Ms. Zabala to defend him.

(d) Article 14.3 (e)

3.6 The author says that his counsel requested a face-to-face meeting between him and Ms. Isabel Pernas on a number of occasions (28 September, 22 October and 6 November 1992) but this was refused by the examining magistrate in the case. What is more, Ms. Pernas was put on trial before the author and could not be questioned either by the court or by author's counsel. The author says that Ms. Pernas' counsel and the public prosecutor came to an arrangement under which she was tried and sentenced to three years in prison.

(e) Article 14.5

3.7 The author claims that the Supreme Court did not re-evaluate the circumstances which led the Provincial Court to sentence him to 12 years in prison without verifying the oral accusation at his trial. He adds that the right to an effective remedy before the Supreme Court is routinely violated in all applications for judicial review (*casación*), as the Human Rights Committee has acknowledged.

(f) Article 9.1

3.8 In a second communication, the author maintains that requiring him to serve his full sentence of 12 years breaches article 9.1 of the Covenant, because article 98 of the Spanish Penal Code provides for parole after three quarters of the sentence. He says that he ought to have been granted parole but, because of the complaints he has lodged about the Spanish justice system, he is being made to serve his whole sentence.

3.9 The author goes on to say, without specifying which article of the Covenant might have been violated, that procedural safeguards have been breached since two trials have been conducted on the same offence. On 26 November 1993 the First Division of the Provincial Court in Las Palmas, Gran Canaria, tried Isabel Pernas and sentenced her to three years of short-term ordinary imprisonment. Two years

later, the Fifth Division of the same Court conducted a second trial, against Joseph Semey, which Isabel Pernas did not attend. According to the author, the sentencing court says in its judgement that the statements made by Isabel Pernas can definitely be taken into consideration despite her absence from his trial; this contradicts the Criminal Proceedings Act, which states that pre-trial proceedings are merely a preparation for trial, and a trial can never be just a rubber stamp on the pre-trial proceedings. The police officers who conducted the investigation against him also failed to appear at the trial.

State party's observations on admissibility

4.1 In observations dated 17 September 2001, the State party requests the Committee to declare the communication inadmissible. It explains that, under article 2 of the Optional Protocol to the Covenant, the individual must have exhausted all available domestic remedies; that means that the domestic remedies have been correctly used and, thus, that they have been exercised within the legally established deadlines. If an individual seeks to exercise an available domestic remedy outside the deadlines, the domestic body must reject it for being outside the deadlines. The State party maintains that the author has not exhausted available domestic remedies, since exhausting means "exhausting correctly".

4.2 In this specific case, the Supreme Court handed down a judgement on 16 May 1996 which was communicated to Mr. Semey's representative on 13 June 1996. The deadline for applying for judicial protection (*amparo*) to the Constitutional Court is "within 20 days following notification of the court's decision", according to article 42.3 of the Constitutional Court Organization Act (No. 2/1979) of 3 October 1979. Mr. Joseph Semey submitted his application for judicial protection on 11 November 1998, two years after he had been notified of the verdict. Under the law, therefore, the Constitutional Court declared his application for judicial protection inadmissible for having been submitted after the deadline. Failure to exhaust domestic remedies because his application for judicial protection was submitted after the deadline was the reason why Mr. Semey's application to the European Court of Human Rights was rejected.

Author's comments on admissibility

5.1 On dated 14 November 2001, the author recalled that the Human Rights Committee has on several previous occasions rejected the claim of failure to exhaust the remedy of appeal to the Constitutional Court for judicial protection (*amparo*) advanced by the State party as grounds for requesting that the communication should be

declared inadmissible - specifically in the case of Cesáreo Gómez Vázquez, whose counsel applied to the Committee immediately after the Supreme Court passed judgement, without exhausting the remedy of appeal to the Constitutional Court. As in the case of *Cesáreo Gómez Vázquez v. Spain*, the grounds advanced by Spain should be rejected in this instance.

5.2 The author claims that he did apply for judicial protection within the stated deadline but his application was not accepted. The Constitutional Court has on various occasions turned down basic appeals, in clear violation of the presumption of innocence. The author also claims the Court says that it cannot modify facts that have already been established, because it is not possible for a higher court in Spain to return to and evaluate the evidence in a case.

5.3 Regarding the stipulation in article 2 of the Optional Protocol, the author affirms that under article 5, paragraph 2 (b), of the Protocol not all domestic remedies have to be exhausted if their application is unreasonably prolonged: he is thus perfectly entitled to apply to the Committee without having exhausted the remedy of application for judicial protection under the Constitution. Lastly, it must be borne in mind that individuals' rights are more than just bureaucratic matters, and the fact that he has not exhausted the remedy of applying to the Constitutional Court for judicial protection is no reason why the violations of his rights that he has suffered should all go unpunished.

5.4 The author asserts that his application to the Constitutional Court for judicial protection was not submitted after the deadline. Under Spanish law, the deadline for submitting any kind of judicial appeal is reckoned from the day following final legal notification of the sentence or order against which appeal is to be lodged, and in this case the final legal notification was the official transcript of the final sentence by the sentencing court. This final official transcript of the final sentence, signed and sealed by the clerk of the court, is, according to the author, dated 25 September 1998, and he submitted his application to the Constitutional Court for judicial protection within the legal 20-day deadline. The author claims that in judgement No. 29/1981 of 24 July 1981, the Constitutional Court accepted that an appellant was entitled to lodge an appeal once he was in possession of the official transcript of the sentence.

5.5 The author explains that the Constitutional Court declared his application for judicial protection inadmissible, having been submitted outside the deadline, because in the Court's view he ought to have appealed in 1996, within 20 days of being notified of the Supreme Court's ruling. He points out

that no one notified him of that ruling. He feels that, as a party concerned and as the party convicted, he ought to have been notified of it personally.

5.6 As the file shows, the Supreme Court notified Mr. Vázquez Guillén, the attorney who brought the application for judicial review (*casación*) before the Court. The author argues that notifying the attorney on his behalf is not legally valid, because he never gave the attorney any sort of authorization to accept any notification on his behalf. For someone to represent him legally would require a power of attorney signed by him before a notary, as stipulated by the Spanish Criminal Proceedings Act. At the time when the application for judicial review was submitted to the Supreme Court, the author says, he as a foreigner was unaware of what an attorney did. Mr. Guillén never spoke to him and they are not acquainted. For his appeal, the author says, he appointed Mr. Caballero as counsel.

Further State party observations on admissibility and merits

6.1 In observations dated 16 January 2002, the State party returns to the question of admissibility. It mentions that the applicant expressly acknowledges that domestic remedies were not exhausted, since the application for judicial protection was submitted after the deadline, and seeks to justify his actions with three arguments:

(a) *First day of reckoning for the 20-day deadline for appealing the Supreme Court's ruling to the Constitutional Court.* According to the author, the period to the deadline does not begin to run with notification of sentence, but with final notice thereof. The State party says that the author is incorrect in this, and it is against all procedural standards to seek to confuse notification of a sentence for the purpose of challenge and receipt of an official transcript of the Court's final judgement for the purpose of execution of sentence. The applicant also alleges that he was given notice of the official transcript on 25 September 1998 and submitted his application for judicial protection within the 20-day deadline: 11 November 1998 is 47 days later;

(b) *The applicant says he did not appoint Mr. Vázquez Guillén as his attorney before the Supreme Court.* The State party submits a copy of the application to the Supreme Court for judicial review, which says "for the purposes of representation before this Chamber of the Court, he appoints the attorney Mr. Argimiro Vázquez Guillén, and the Lanzarote lawyer, Mr. Felipe Callero González, will continue to handle his defence";

(c) *The applicant considers that the Committee's ruling in the Cesáreo Gómez Vázquez case should apply to him.* The State party sees no

resemblance between the case of Joseph Semey and the subject of the decision on admissibility in communication 701/96. In Joseph Semey's case, an application for judicial protection (*amparo*) was submitted - after the deadline, but it was submitted. No application for judicial protection was made in communication 701/96. In Joseph Semey's case the application for judicial protection discussed the presumption of innocence. Communication 701/96 claimed that judicial protection was unnecessary, given the Constitutional Court's repeated position that application for judicial review (*casación*) could be regarded as fulfilling the requirements of article 14.5 of the Covenant.

6.2 To conclude, the actual situation, as the applicant admits, is that domestic remedies were not exhausted correctly, and as a result the communication is inadmissible under article 2 of the Optional Protocol.

6.3 On the merits, the State party points out that the author indicates dissatisfaction with the way the domestic courts weighed up the evidence. The Committee, an international body, does not weigh up evidence, for that is the province of the domestic courts. Its task is to determine whether the weighing-up of the evidence in a criminal case, taken as a whole, was reasonable or, alternatively, arbitrary. The State party adds that the author was convicted in criminal proceedings in which the court gave appropriate reasons for its sentence and the sentence was subsequently upheld by the Supreme Court on reviewing the weighing-up of the evidence.

6.4 The State party mentions that Mr. Semey's defence strategy was to deny that he had been the person who gave the woman the drugs, bought her the clothes and plane ticket, and accompanied her on her trip, abandoning a large bag on the baggage retrieval conveyor. It refers to the judgement of the Provincial Court, which has the following to say about this claim:

"The accused denied having ever had any connection to the delinquent behaviour of Isabel Pernas San Román, attributing the fact that she accused him directly of having supplied her with the drugs ... to the fact that she was the girlfriend of Demetrio, whose cousin the accused had killed. The defence also expressed regret that Isabel had not been brought to the full court hearing for cross-examination, since that had not been possible during the earlier trial on the case.

"It is our belief ... that Isabel's statement can perfectly well be taken into account despite her absence from this trial because, first, her statements during the pre-trial proceedings, always made in the presence of a lawyer, have found their way into this trial in documentary form taken to be reproduced with the assent of the parties, thus providing access both to what Isabel said at the earlier trial, to which the representatives of the individual standing trial today

and, hence, those representatives' managers, were expressly summoned, although they attended only the statements made during the investigation stage, including in particular her testimony under questioning during which, in the presence of and under questions from the accused Joseph Semey's defence lawyer then and now, she was cross-examined and said she was unaware that Joseph Semey had been convicted of killing one of Demetrio's cousins; second, Isabel's story is solidly backed up by the testimony of Civil Guard member Francisco Falero Guerra ..."

6.5 Second, the author claims that he was not in Lanzarote on 29 October 1991 since he was visiting a friend in the Herrera jail that day and then travelled with an English couple to Estepona on the Costa del Sol. It is not at all clear that he did visit the prison, however, and prison officials deny that the visit took place since 29 October was not a visiting day. As for the journey from Herrera to Madrid and from Madrid to Estepona with an English couple, the Court says that this second alibi "proved utterly contrived and scarcely credible since, on the one hand, in his first statement to the examining magistrate (in the presence of two lawyers) the accused spoke only of his visit to Herrera and unpardonably omitted any reference to his trip to Estepona ... and on the other hand, because the Bells' statement to the notary was made just eight days before Semey made his statement, in response to a telephone call along those lines from the defence lawyer, and this really robs what the English couple has to say of any spontaneity or unrehearsedness".

6.6 The State party says that one may agree or disagree with the weight attached by the court to this alibi, but its opinion cannot be criticized as arbitrary.

6.7 The State party also refers to the Supreme Court's ruling:

"In view of the above, it must be recognized that the lower court had at its disposal during the trial oral evidence of the facts, and found, moreover, sufficient material in the proceedings to assess the credibility of that evidence, which rules out a breach of the right to presumption of innocence.

"Furthermore, it has to be acknowledged that the trial court has given appropriate reasons for its sentence and that the accused has been suitably defended by a lawyer of his choosing, having received a reasoned response from the competent court."

6.8 The author regrets that there was no face-to-face confrontation between him and Isabel Pernas. Semey's lawyer asked the woman all the questions he thought appropriate during her interrogation, with due regard for the principle of adversarial proceedings. It is pointed out that in his response to the charges against him and at the opening of his trial, Mr. Semey did not suggest any face-to-face meeting between him and the woman. A copy of the

court record is appended, showing that the principle of adversarial proceedings was respected and that the author of the communication and his lawyer made no complaint about his rights having been violated. If Mr. Semey's defence counsel wished to interrogate the woman and bring her face to face with his client at the trial, it was essential that he should suggest as much in the response to the charges. By communication dated 24 January 2002, moreover, the State party asserts that nowhere in his response to the charges did Mr. Semey request the appearance of Ms. Pernas at the trial.

6.9 As regards the difference in sentence between him and Ms. Pernas, the reason is obvious. The woman was tried for an offence against public health (as a mere accessory) and, given the mitigating circumstance of her spontaneous repentance, sentenced to three years in prison. Joseph Semey was put on trial as a drug trafficker and, given the aggravating circumstance of a previous offence (he was found guilty on 13 July 1987 of criminal homicide), sentenced to 12 years in prison.

6.10 The State party notes that it was never claimed either during the trial or in the application for judicial review that the author's counsel was not present when he made his first statement to the magistrate. By communication dated 24 January 2002, the State party reports that, after being detained in Madrid on 7 February 1992, Joseph Semey said he was appointing "the duty lawyer" as his counsel. That same day he made a statement before the magistrate in Madrid, asserting that his real name was Joseph Semey, not Spencer, in the presence of Ms. Carmen Martínez González, a lawyer. In Lanzarote, on 14 May 1992, he gave a statement to the magistrate in the presence of the duty counsel, Ms. Carmen Dolores Fajardo.

6.11 As regards the failure to apply the principle of *in dubio, pro reo*, the State party says that the sentencing court follows this principle when it is not certain if the accused is guilty, and then the doubt must be resolved in favour of the accused. In the present case, the sentencing court "found the appellant guilty without any doubt", as the Supreme Court put it.

6.12 The State party concludes concludes there was no violation of the safeguards established by article 14 of the Covenant, and submits that the communication should be declared inadmissible or, if declared admissible, dismissed on the merits.

Author's comments on State party's observations

7.1 By communication dated 11 February 2002, the author points out that the document advanced by the State party as proof that he appointed Vázquez Guillén as his attorney is not legally valid. Under

article 874 of the Criminal Proceedings Act, the attorney who will submit an application for judicial review (*casación*) to the Supreme Court in Spain has to be appointed by the appellant in writing before a notary, and for the power to represent to be legally accredited, besides the appellant and the notary, the attorney appointed must also sign himself. The document furnished by the State bears only one signature, the author points out: his own. The author also states that he never had any contact with the attorney in question, and that none of the notifications which the Supreme Court sent to Mr. Vázquez on his behalf were valid.

7.2 On his failure to exhaust the remedy of application to the Constitutional Court for judicial protection, the author refers once again to communication 701/96 and repeats that article 5, paragraph 2 (b), of the Optional Protocol does not require all domestic remedies to be exhausted if their application is unreasonably prolonged. Whereas the State party sees no resemblance between the two cases, he believes the opposite, i.e. that failing to lodge an appeal and doing so after the established deadline amount to the same thing. In either case the remedy is regarded as unexhausted, and the Committee's ruling on communication 701/96 ought to apply to him.

7.3 Regarding the State party's claim that the case was found inadmissible by the European Court of Human Rights because domestic remedies had not been exhausted, the author says that the Committee does not necessarily apply the same doctrine as the Court, especially given that article 5, paragraph 2 (b), of the Optional Protocol does not require all domestic remedies to be exhausted if their application is unreasonably prolonged.

7.4 On the merits, the author repeats what he said in earlier communications to the effect that a verbal accusation cannot amount to conclusive proof, and repeats his comments about the statements by Civil Guard member Francisco Falero.

7.5 The author repeats that he did indeed visit the prison at Herrera de la Mancha. He was given permission to visit his friend, Nong Simon, who was in the closed section (module 2). The visit was authorized four days before the incident at issue. The author explains that visiting days at module 2 were Mondays and Thursdays, and on Monday, 29 October 1991, he went there but was informed that Simon had been moved to another module three days previously and could not be visited, because in the new module the visiting days were Wednesdays and Fridays. As he was unable to visit Simon, it is logical, the author explains, that the visit did not officially take place. While he was there he did meet Trainer D. Juanjo, who said he remembered talking to him in late October but could not remember the exact date.

7.6 The fact that he had not mentioned the alibi of his journey to Estepona in his first statement to the examining magistrate did not mean that it was not true. He had said nothing because he feared compromising his friends by citing them as witnesses in an affair involving drug-trafficking. He had mentioned the point to his lawyer, who said that their testimony was very important and decided to telephone them.

7.7 Under the law, anyone accused of a crime is innocent until proved guilty; nowhere does the law say that a person shall be guilty until his innocence is proven. The author repeats that there is no physical evidence to implicate him in the incident, because he was detained, tried and convicted solely on the basis of the story told by Isabel Pernas.

7.8 On the reasons for his being sentenced to 12 years' imprisonment given the aggravating circumstance of a previous offence, the author says that under article 22.8 of the Spanish Penal Code it is considered that there is a repeat offence when, at the time he commits an offence, the culprit has previously been the subject of an enforceable judgement for a similar offence. In his case, this was the first time he had been arrested and found guilty of an offence related to drug-trafficking.

7.9 Concerning the statements he made without a lawyer, the author says it is true that when he was moved to the island for questioning by the investigating magistrate, Ms. Carmen Dolores Fajardo was the duty counsel. When he was taken to make his first statement to the magistrate in late April 1992, she was not there because of ill health, and the only lawyer in attendance was Isabel Pernas' lawyer, counsel for the prosecution Ms. Africa Zabala Fernández. At the time, the author says, he thought that the counsel present was his, since they were unacquainted. Only when he made his second statement, on 14 May 1992, and Ms. Carmen Dolores was present, did he realize that he had made his earlier statement without his lawyer there. He adds that his private counsel lodged a legal protest about this in the appeal for amendment against the order for trial, and did so again in the application for judicial review (*casación*).

7.10 The author points out that the statement he made before examining magistrate No. 6 in Madrid in the presence of Ms. Carmen Martínez had nothing to do with the Lanzarote case which prompted his communication to the Committee. That statement (to which the State party refers) was to do with the forged British passport he had when he was detained; the Madrid court could not take statements from him about the Lanzarote case because the Madrid magistrate had not been asked by his counterpart in Arrecife to take statements about the drug-trafficking issue.

7.11 The author repeats once again that his rights to be heard, to a fair trial and to effective legal protection have been violated. He again alludes to the falsehood of the statements made by Isabel Pernas and the irregularities in the statements and identifications made by the civil guard.

Issues and proceedings before the Committee

Admissibility considerations

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

8.2 The Committee notes that the State party is contesting the communication on the grounds of failure to exhaust domestic remedies. However, the Committee has consistently taken the view that a remedy does not have to be exhausted if it has no chance of being successful. The Committee considers, as it did in the case of *Cesáreo Gómez Vázquez v. Spain* (communication No. 701/1996), that the case law of the Spanish Constitutional Court shows repeated rejections of applications for *amparo* against conviction and sentence. The Committee therefore considers that there is no obstacle to the communication's admissibility.

8.3 Pursuant to article 5, paragraph 2 (a), of the Optional Protocol, before considering a communication the Committee must ascertain that the same matter is not being examined under another procedure of international investigation or settlement. The Committee is aware that there is a discrepancy between the Spanish text of article 5, paragraph 2 (a), and the English and French versions⁴ which goes beyond a mere translation error and reveals fundamental differences in substance. This discrepancy was discussed by the members of the Committee at its fourth session in New York on 19 July 1978 (CCPR/C/SR.88).⁵ Therefore, bearing

⁴ Article 5, paragraph 2 (a) "El Comité no examinará ninguna comunicación de un individuo a menos que se haya cerciorado de que: El mismo asunto no ha sido sometido ya a otro procedimiento de examen o arreglo internacionales" ["Le Comité n'examinera aucune communication d'un particulier sans s'être assuré que: La même question n'est pas déjà en cours d'examen devant une autre instance internationale d'enquête ou de règlement." "The Committee shall not consider any communication from an individual unless it has ascertained that: The same matter is not being examined under another procedure of international investigation or settlement."]

⁵ In the discussion, Committee members differed in their views on the subject.

in mind the decision taken on the matter in 1978, the Committee reiterates that the term “*sometido*” in the Spanish version should be interpreted in the light of the other versions, i.e. that it should be understood as meaning “is being examined” by another procedure of international investigation or settlement. On the basis of this interpretation, the Committee considers that the case of Joseph Semey is not being examined by the European Court. The Committee also notes that the State party has not invoked its reservation to article 5, paragraph 2 (a), of the Optional Protocol. Consequently, there is no obstacle to the communication’s admissibility in this respect.

8.4 As to the author’s allegation of a violation of article 26 of the Covenant, to the effect that he was convicted because he was black, the Committee believes that the author has not provided information to back up his complaint for purposes of admissibility within the meaning of article 2 of the Optional Protocol. Similarly, the Committee considers that the author’s allegation of a violation of article 9, paragraph 1, of the Covenant, in that he was obliged to serve his entire sentence, has not been substantiated sufficiently for purposes of admissibility under article 2 of the Optional Protocol.

8.5 Concerning the claim that Isabel Pernas and the author were tried at different times, the Committee notes that the author has not established a link with the rights violated under the Covenant, hence this allegation is also inadmissible under article 3 of the Optional Protocol.

8.6 The Committee notes that the author’s allegation of a violation of article 14, paragraphs 1 and 2, refers especially to the weighing of facts and evidence. As the Committee has stated on other occasions (*934/2000 G. v. Canada*), it is for the courts of States parties, and not for the Committee, to weigh up the facts in a particular case. It is not within the Committee’s competence to review facts or statements that have been weighed up by the domestic courts unless the weighing-up was manifestly arbitrary or there was a miscarriage of justice. The information before the Committee does not show that the Spanish courts’ weighing-up of the facts was manifestly arbitrary or can be considered to amount to a denial of justice. Consequently, this allegation too has not been substantiated for the purposes of admissibility under article 2 of the Optional Protocol.

8.7 Concerning the allegation of a violation of article 14, paragraph 3 (e), of the Covenant, relating to the refusal to arrange a face-to-face meeting, the material before the Committee shows that the parties participated in an adversarial procedure and that the author’s defence counsel had the opportunity to interrogate Ms. Isabel Pernas. Similarly, the information before the Committee does not show

that the author raised this question before the national courts before he submitted it to the Committee. Consequently, this part of the communication is inadmissible under article 2 of the Optional Protocol.

8.8 With regard to the alleged violation of article 14, paragraph 3 (d), in that the duty lawyer was not present when the author made his statements before the examining magistrate in Arrecife, the Committee notes that, according to the State party, no such claim was made either during the trial or in the application for judicial review. It also notes that, according to the author, this was mentioned in the appeal for amendment against the order for trial and in the application for judicial review. The Committee has thoroughly examined the appeal for amendment and concludes that there is no mention of this point. Similarly, on examining the application for judicial review, the Committee found a note in the papers submitted by the author, reading “have not found the application for judicial review”. Consequently, on the basis of the information submitted by the author, the Committee concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

8.9 The Committee considers that the allegation of a violation of article 14, paragraph 5, has been substantiated with regard to admissibility and therefore proceeds to consider it on the merits.

Consideration on the merits

9.1 The Committee takes note of the author’s arguments regarding a possible violation of article 14, paragraph 5, of the Covenant in that the Supreme Court did not re-evaluate the circumstances which led the Provincial Court to convict him. The Committee also notes that, according to the State party, the Supreme Court did review the sentencing court’s weighing-up of the evidence. Despite the State party’s position to the effect that the evidence was re-evaluated in the context of the judicial review, and on the basis of the information and papers which the Committee has received, the Committee reiterates its Views expressed in the *Cesáreo Gómez Vázquez* case and considers that the review was incomplete for the purposes of article 14, paragraph 5, of the Covenant.

9.2 The Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal a violation of article 14, paragraph 5, of the Covenant in respect of Joseph Semey.

9.3 Pursuant to article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy. The author should be entitled to have his

conviction reviewed in conformity with the requirements of article 14, paragraph 5, of the Covenant. The State party is under an obligation to prevent similar violations in the future.

10. Bearing in mind that, by becoming a State 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 and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in the event that a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

Communication No. 1002/2001

Submitted by: Franz Wallmann et al. (represented by Alexander H.E. Morawa)

Alleged victim: The authors

State party: Austria

Date of adoption of Views: 1 April 2004 (eightieth session)

Subject matter: Compulsory membership in the Chamber of Commerce and imposition of membership fees

Procedural issues: State party reservation - Same matter - Notion of "having been examined" - Notion of victim - Non-substantiation of claims - Exhaustion of domestic remedies - Lack of reasonable prospect of success of remedies

Substantive issues: Right to freedom of association, including the right to found or join another association for similar commercial purposes

Articles of the Covenant: 22, paragraph 1

Articles of the Optional Protocol: 1; 2; article 5, paragraph 2 (a)

Finding: No violation

1. The authors of the communication are Franz Wallmann (first author) and his wife, Rusella Wallmann (second author), both Austrian nationals, as well as the "Hotel zum Hirschen Josef Wallmann" (third author), a limited partnership including a limited liability company, represented by Mr. and Mrs. Wallmann for the purposes of this communication. The authors claim to be a victim of violations by Austria¹ of article 22, paragraph 1, of the Covenant. They are represented by counsel.

The facts as submitted by the authors

2.1 The first author is the director of a hotel in Salzburg, the "Hotel zum Hirschen", a limited partnership (*Kommanditgesellschaft*) acting as the third author. Until December 1999, the first author and Mr. Josef Wallmann were the company's partners, in addition to its general partner, the "Wallmann Gesellschaft mit beschränkter Haftung", a limited liability company (*Gesellschaft mit beschränkter Haftung*). Since December 1999, when the first author and Josef Wallmann left the limited partnership, the second author holds 100 percent of the shares of both the limited liability company and the limited partnership.

2.2 The "Hotel zum Hirschen Josef Wallmann", a limited partnership (*Kommanditgesellschaft*) is a compulsory member of the Salzburg Regional Section of the Austrian Chamber of Commerce (*Landeskammer Salzburg*), as required under section 3, paragraph 2, of the Chamber of Commerce Act (*Handelskammergesetz*). On 26 June 1996, the Regional Chamber requested the limited partnership's to pay its annual membership fees (*Grundumlage*) for 1996, in the amount of 10,230.00 ATS.²

2.3 On 3 July 1996, the first author appealed on behalf of the limited partnership to the Federal Chamber of Commerce (*Wirtschaftskammer Österreich*) claiming a violation of his right to freedom of association protected under the Austrian

¹ The Covenant and the Optional Protocol to the Covenant entered into force for the State party respectively on 10 December 1978 and 10 March 1988. Upon ratification of the Optional Protocol on 10 December 1987, the State party entered the following reservation: "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 European Convention for the Protection of Human Rights and Fundamental Freedoms."

² 1 euro is equivalent to ATS 13.76.

Constitution (*Bundesverfassungsgesetz*) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). On 9 January 1997, the Federal Chamber of Commerce rejected the appeal.

2.4 The first author lodged a constitutional complaint with the Austrian Constitutional Court (*Verfassungsgerichtshof*), which declared the complaint inadmissible on 28 November 1997, since it had no prospect of success in the light of the Court's jurisprudence regarding compulsory membership in the Chamber of Commerce, and referred the case to the Supreme Administrative Court (*Verwaltungsgerichtshof*) to review the calculation of the annual fees. Accordingly, that tribunal did not address the question of the limited partnership's compulsory membership.

2.5 On 3 July 1998, the first author submitted an application to the European Commission of Human Rights (European Commission), alleging a violation of his rights under articles 6, paragraph 1 (right to a fair trial in the determination of his civil rights and obligations), 10 (freedom of expression), 11 (freedom of association) and 13 (right to an effective remedy) of the European Convention. In a letter dated 10 July 1998, the Secretariat of the former European Commission advised the first author of its concerns as to the admissibility of his application, informing him that, according to the Commission's jurisprudence, membership in a chamber of commerce was not covered by the right to freedom of association since chambers of commerce could not be considered associations within the meaning of article 11 ECHR. Moreover, article 6 of the Convention did not apply to domestic proceedings concerning the levy of taxes and fees. His application would therefore have to be declared inadmissible by the Commission. In the absence of any further observations by the author, his application could neither be registered, nor be transmitted to the Commission.

2.6 By letter of 22 July 1998, the first author responded to the Secretariat, setting out his arguments in favour of registering his application. On 11 August 1998, the Secretariat of the European Commission informed the author that his application had been registered. As a consequence of the entry into force of Protocol No. 11 to the European Convention on 1 November 1998, the author's application was transferred to the European Court of Human Rights. On 31 October 2000, a panel of three judges of the Court declared the application inadmissible under article 35, paragraph 4, of the Convention, noting "that the applicant has been informed of the possible obstacles to its admissibility" and finding that the matters complained of "do not disclose any appearance of a

violation of the rights and freedoms set out in the Convention or its Protocols".³

2.7 On 13 October 1998 and on 16 December 1999, respectively, the Federal Commerce Chamber dismissed the third author's appeals against decisions of the Salzburg Regional Chamber specifying the limited partnership's annual membership fees for 1998 and 1999. No constitutional complaint was lodged against these dismissals.

The complaint

3.1 The authors claim to be victims of a violation of article 22, paragraph 1, of the Covenant, because the limited partnership's compulsory membership in the Regional Chamber of Commerce, combined with the obligation to pay annual membership fees, effectively denies them their right to freedom of association, including the right to found or join another association for similar commercial purposes.

3.2 The authors submit that the applicability of article 22 to compulsory membership in the Austrian Federal Chamber and Regional Chambers of Commerce has to be determined on the basis of international standards. Their qualification as public law organizations under Austrian legislation does not reflect their true character, since the Chambers: (1) represent the interests of the businesses that make up their membership, rather than the public interest; (2) engage themselves in a broad range of economic, profit-oriented activities; (3) assist their members in establishing business contacts; (4) exercise no disciplinary powers vis-à-vis their members; and (5) lack the characteristics of professional organizations in the public interest, their common feature being limited to "doing business". The authors contend that article 22 of the Covenant is applicable to the Chambers, since they perform the functions of a private organization representing its economic interests.

3.3 The authors argue that even if the Chambers were to be considered public law organizations, the financial burden placed on their members by the annual membership fees effectively prevents members from associating with one another outside the Chambers, since individual businessmen cannot reasonably be expected to make similar contributions in addition to the Chambers' annual membership fees, to fund alternative private associations to enhance their economic interests. The annual membership fees therefore serve, and are calculated, as a *de facto* prohibition of the exercise of the right freely to associate outside the Chambers.

³ See European Court of Human Rights, Third Section, Decision on the admissibility of Application No. 42704/98 (*Franz Wallmann v. Austria*), 31 October 2000.

3.4 For the authors, the compulsory membership scheme is not a necessary restriction to further any legitimate State interest within the meaning of article 22, paragraph 2, of the Covenant. There is no such compulsory membership in most other European States.

3.5 With regard to the Austrian reservation to article 5, paragraph 2 (a), of the Optional Protocol, the authors argue that, taking the text of the reservation literally, the same matter has not been examined by the “European Commission of Human Rights”, as the first author’s application to the Commission was dismissed by the European Court of Human Rights without any examination on the merits, in particular as regards the questions of whether the Austrian Chamber of Commerce falls under the definition of “association” and whether its compulsory membership makes it impossible for individuals to exercise their right to freedom of association outside the Chamber. The failure of the European Court’s Secretariat first to inform the author about the concerns as to the admissibility of his application deprived him of his right to forum selection by withdrawing his application before the European Court and submitting it to the Committee. The fact that he had already received a letter from the Commission’s Secretariat in July 1998 is said to be irrelevant, since it pre-dated the registration of his application and because the Court’s case law had evolved in the meantime.

State party’s observations on admissibility

4.1 On 26 September 2001, the State party made its submission on the admissibility of the communication. It considers that, insofar as the first author is concerned, the Committee’s competence to examine the case is precluded by article 5, paragraph 2 (a), of the Optional Protocol read in conjunction with the relevant Austrian reservation.

4.2 The State party argues that the reservation is applicable to the communication because the first author had already brought the same matter before the European Commission of Human Rights, whose Secretariat informed him of its concerns as to the admissibility of his application, concluding that the application would likely be declared inadmissible. Given that the Secretariat did not only raise formal issues in the letter to the first author, but referred to several precedents from the Commission’s substantive case law, the State party argues that the European Commission proceeded to an examination of the merits of the application and has, therefore, “examined” the same matter.

4.3 In addition, the European Court, in its decision of 31 October 2000, stated that it “had examined the application”. The fact that the Court eventually rejected the application as inadmissible is

without prejudice to this finding, since it was not dismissed on the formal grounds set out in article 35, paragraphs 1 and 2, of the Convention. Rather, the Court’s finding that the matters complained of “do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols” clearly shows that the Court’s examination also comprised “a far-reaching analysis of the merits of the case”. The application was thus rejected on the merits, in accordance with article 35, paragraph 4, of the Convention, as manifestly ill-founded.

4.4 For the State party, the applicability of the reservation is not hampered by its explicit reference to the European Commission of Human Rights. Even though the author’s application was eventually rejected by the European Court and not by the European Commission, the Court has taken over the former Commission’s functions after the entry into force of Protocol No. 11 on 1 November 1998, when all cases previously pending before the Commission were transferred to the new European Court. The new Court must therefore be considered the former Commission’s successor.

4.5 Finally, the State party submits that the fact that the European Court did not inform the first author of its intention to dismiss his application does not constitute a reason for which the Austrian reservation could not apply in the present case.

Author’s comments

5.1 By letter of 15 October 2001, the first author amended the communication so as to include his wife and the “Hotel zum Hirschen Josef Wallmann” limited partnership as additional authors.

5.2 In response to the State party’s observations on admissibility, the authors submit that permissible and duly accepted reservations to international treaties become integral parts of these treaties and must therefore be interpreted in the light of the rules in articles 31 and 32 of the Vienna Convention on the Law of Treaties. Since the Austrian reservation, pursuant to the ordinary meaning of its wording, clearly refers to an examination by the European Commission of Human Rights, no room is left for an interpretation based on its context or object and purpose, let alone the supplemental means of treaty interpretation in article 32 of the Vienna Convention (*travaux préparatoires* and circumstances of treaty conclusion). The ordinary meaning of the reservation’s text being equally clear in requiring that the same matter “has not been *examined*”⁴ by the European Commission, the mere fact that the first author *submitted* an application to the former

⁴ Emphasis added.

Commission is not sufficient to justify the applicability of the reservation to his present communication.

5.3 The authors reiterate that the application was never “examined” by the European Commission, as the Secretariat’s letter of 10 July 1998, informing the first author of certain admissibility-related concerns, was sent at a time when the application had neither been registered nor brought to the attention of the Commission. Similarly, the Commission never examined the application after it had been registered because of its referral to the new European Court, after entry into force of Protocol No. 11.

5.4 The authors reject the State party’s argument that the new European Court simply replaced the former European Commission and that the Austrian reservation, despite its wording, should cover cases in which the same matter was examined by the new Court, on the basis that the new Court’s competencies are broader than those of the former Commission.

5.5 Moreover, the authors argue that, in any event, it appeared from the reference, in the European Court’s decision, to the letter of 10 July 1998 of the Secretariat that the Court rejected the application as inadmissible *ratione materiae* with article 11 of the Convention, which cannot, however, be considered an examination within the meaning of the Austrian reservation, in accordance with the Committee’s jurisprudence.⁵

5.6 The authors recall that the Austrian reservation to article 5(2) (a) of the Optional Protocol is the only one explicitly referring to the “European Commission of Human Rights” instead of “another procedure of international investigation or settlement”. The aim of the drafters of the reservation is said to be irrelevant, because the clear and ordinary meaning of the Austrian reservation does not permit having resort to supplemental means of treaty interpretation within the meaning of article 32 of the Vienna Convention.

5.7 By reference to the jurisprudence of the European and the Inter-American Courts of Human Rights, the authors emphasize that reservations to human rights treaties must be interpreted in favour of the individual. Any attempt to broaden the scope of the Austrian reservation should be rejected, as the Committee disposes of adequate tools to prevent an improper use of parallel proceedings, such as the concepts of “substantiation of claims” and “abuse of

⁵ The authors refer to Communication No. 441/1990, *Robert Casanovas v. France*, Views adopted on 19 July 1994, at para. 5.1, and Communication No. 808/1998, *Georg Rogl v. Germany*, decision on admissibility adopted on 25 October 2000, at paras. 9.3 *et seq.*

the right to petition”, in addition to article 5, paragraph 2 (a), of the Optional Protocol.

5.8 The authors conclude that the communication is admissible under article 5, paragraph 2 (a), of the Optional Protocol, insofar as the first author is concerned, because the same matter is not being examined by another procedure of international investigation or settlement and since the Austrian reservation does not apply. Insofar as the second and the third authors are concerned, there is no need for the Committee to consider whether the Austrian reservation to article 5, paragraph 2 (a), applies, since these authors and not petition the European Commission or Court of Human Rights.⁶

5.9 Lastly, the authors submit that they have sufficiently substantiated, for purposes of admissibility, that the Austrian Federal and the Regional Chambers of Commerce perform the functions of associations within the meaning of article 22, paragraph 1, of the Covenant.

Additional observations by State party

6.1 On 30 January 2002, the State party submitted further observations on the admissibility and, in addition, on the merits of the communication. It argues that the communication is inadmissible under articles 1 and 2 of the Optional Protocol, insofar as the third author is concerned, since, according to the Committee’s jurisprudence,⁷ associations and corporations cannot be considered individuals, nor can they claim to be victims of a violation of any of the rights protected in the Covenant.

6.2 The State party submits that the communication is also inadmissible with regard to the first and second authors, because they are essentially claiming violations of the rights of their partnership. Although, as a limited partnership, the “Hotel zum Hirschen Joseph Wallmann” has no legal personality, it may act in the same way as entities with legal personality in its legal relations, which was reflected by the fact that the “Hotel zum Hirschen Josef Wallmann” was a party to the domestic proceedings. Since all domestic remedies were brought in the name of the third author and no claim related to the first and second authors

⁶ In this regard, the authors refer to Communication No. 645/1995, *Vaihere Bordes and John Temeharo v. France*, decision on admissibility adopted on 22 July 1996, at para. 5.2.

⁷ The State party refers to Communications No. 104/1981, *J.R.T. and the W.G. Party v. Canada*, decision on admissibility adopted on 6 April 1983, at para. 8 (a); No. 502/1992, *S.M. v. Barbados*, decision on admissibility adopted on 31 March 1994, at para. 6.3, and No. 737/1997, *Michelle Lamagna v. Australia*, decision on admissibility adopted on 7 April 1999, at para. 6.2.

personally has been substantiated for purposes of article 2 of the Optional Protocol, the first and second authors have no standing under article 1 of the Optional Protocol. The first and second authors also failed to exhaust domestic remedies, as only the third author was a party to the domestic proceedings.

6.3 Furthermore, the second author cannot claim to be a victim of the impugned decision of the Salzburg Regional Chamber of Commerce of 26 June 1996, as she only became a partner of the limited partnership and shareholder of the limited liability company in December 1999.

6.4 With regard to the authors' argument that the Austrian reservation only refers to the European Commission but not to the European Court of Human Rights, the State party explains that the reservation was made on the basis of a recommendation by the Committee of Ministers, which suggested that member States of the Council of Europe, "which sign or ratify the Optional Protocol might wish to make a declaration [...] whose effect would be that the competence of the UN Human Rights Committee would not extend to receiving and considering individual complaints relating to cases which are being or already have been examined under the procedure provided for by the European Convention".⁸

6.5 The State party submits that its reservation differs from similar reservations made by other member States only insofar as it directly addresses the relevant Convention mechanism, for the sake of clarity. All reservations aim at preventing any further international examination following a decision of the review mechanism established by the European Convention. It would, therefore, be inappropriate to deny the Austrian reservation its validity and continued scope of application merely because of the organizational reform of the review mechanism.

6.6 The State party notes that, because of the merger of the European Commission and the "old" Court, the "new" European Court can be considered the "legal successor" of the Commission, since most of its key functions were formerly discharged by the Commission. Given that the reference to the European Commission in the State party's reservation was specifically made in respect of these functions, the reservation remains fully operative after the entry into force of Protocol No. 11. The State party contends that it was not foreseeable, when it entered its reservation in 1987, that the review mechanisms of the European Convention would be modified.

⁸ Council of Europe, Committee of Ministers Resolution (70) 17 of 15 May 1970.

6.7 The State party reiterates that the same matter was already examined by the European Court which, in order to reject the author's application as being inadmissible, under article 35, paragraphs 3 and 4, of the European Convention, had to examine it on the merits, if only summarily. It concludes that the communication is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol.

6.8 On the merits, the State party submits that the Austrian Chamber of Commerce is a public organization, established by law rather than private initiative, and to which article 22 of the Covenant does not apply. Compulsory membership in chambers, such as, chambers for workers and employees, agricultural chambers, and chambers for the self-employed, is commonplace under Austrian law. Certain characteristics of the Chamber of Commerce are laid down in the Austrian Constitution, including its compulsory membership, its organization as a public law organization, its financial and administrative autonomy, its democratic structure and its supervision by the State, including the supervision of its financial activities by the Court of Audit. Moreover, the Chamber participates in matters of public administration by commenting on bills of Parliament, which have to be submitted to experts of the Chamber, by nominating lay judges for labour and social courts, as well as delegates for a large number of commissions in the field of public administration.

6.9 The State party refutes the authors' arguments equating the Federal and Regional Chambers with private associations (see para. 3.2), arguing that (1) the representation of the common economic interests of Chamber members is in the public interest; (2) the Chamber is a non-profit organization, whose membership fees are limited and must not exceed the amount required for the necessary expenses, pursuant to article 131 of the Chamber of Commerce Act; (3) the addresses of Chamber members are accessible to the general public, through the Trade Register; (4) the fact that the Chamber has no disciplinary powers does not compel the conclusion that the Chamber is not a professional organization, as the existence of disciplinary powers is not a constitutive element of such organizations; (5) except for disciplinary matters, the Chamber can in every respect be compared to professional organizations in the public interest.

6.10 The State party submits that any comparison with the structure of commerce chambers in other European countries fails to recognize that the Austrian Chamber could not fulfill the public functions assigned to it if it were treated on an equal basis with private associations. The public law character of the Chamber was also confirmed by the

European Court of Human Rights⁹, on the basis that it was created by law and not by private act and that it discharges functions in the public interest, such as the prevention of unfair trade practices, the promotion of professional training and the supervision of the actions of its members. The State party endorses the European Court's conclusion that article 11 of the European Convention does not apply to the Chamber of Commerce and considers the argument applicable to article 22 of the Covenant.

6.11 Concerning the author's contention that the annual membership fees of the Chamber in their effect prevent members from founding or joining alternative associations, the State party submits that these fees are relatively modest compared with the authors' other expenses and are tax deductible, as are contributions to private professional or trade organizations. The annual contribution to the private Association of Hotel Owners, ranging between 5,000 and 24,000 ATS, has not prevented its nearly 1,000 members from joining the Association. In the authors' case, the fee would amount to less than 10,000 ATS, a fee they could afford.

Additional comments by the authors

7.1 By letter of 11 March 2002, the authors responded to the State party's additional observations. While agreeing that the Committee has, in principle, held so far that only individuals can lodge communications, they argue that nothing precludes several persons who are engaged in the same commercial activity from submitting a complaint together.¹⁰ According to the Committee's jurisprudence,¹¹ such "categories of persons" form a semi-independent entity for purposes of admissibility under articles 1 and 2 of the Optional Protocol, while the individuals concerned merely stand behind that entity. The standing of "categories of persons" thus points to a developing practice which will eventually result in the recognition of entities made up of individuals as authors of communications.

7.2 The authors submit that, by denying that the first and second authors have substantiated a violation of their own rights, the State party overlooks that the

⁹ The State party refers to the Court's decision on admissibility on Application No. 14596/89 (*Weiss v. Austria*), 10 July 1991.

¹⁰ The authors refer to Communication No. 273/1988, *B. d. B. et al. v. The Netherlands*, decision on admissibility of 30 March 1989.

¹¹ Reference is made to Communication No. 359/1989, *John Ballantyne, Elizabeth Davidson and Gordon McIntyre v. Canada*, Views adopted on 31 March 1991, at para. 10.4.

right to freedom of association under article 22 is "by [its] nature inalienably linked to the person".¹² The fact that this right is also linked, to a certain extent, to commercial activities does not make it less protected.¹³ Since the first and second authors have been personally affected in their economic activities by the levy of annual membership dues, based on their compulsory membership in the Chamber of Commerce, they did not lose their individual rights simply because they founded a business pursuant to the requirements of domestic law, nor did they lose the right to claim these rights by means of individual petition.¹⁴

7.3 On domestic remedies, the authors argue that in the absence of any specification by the State party as to which other proceedings the first and second authors could have initiated under Austrian law to claim their right to freedom of association, apart from appealing the Chamber's decision and lodging a constitutional complaint, in the name of the limited partnership, the State party's procedural objection must fail.¹⁵ Moreover, through these proceedings, the State party was given an opportunity to remedy the alleged violation of article 22 of the Covenant, which, according to the Committee's jurisprudence,¹⁶ is the main purpose of the requirement to exhaust domestic remedies.

7.4 As to the alleged failure of the second author to substantiate her claim to be a victim of a violation of article 22, the authors submit that the "Hotel zum Hirschen Joseph Wallmann" limited partnership continues to be a compulsory member of the Chamber of Commerce. While their communication was originally directed against the decision determining the membership fees for 1996, subsequent decisions concerning membership fees have been similar. The second author was affected

¹² Quoted from Communication No. 455/1991, *Allan Singer v. Canada*, Views adopted on 26 July 1994, at para. 11.2.

¹³ The authors refer to Communication No. 359/1989, *John Ballantyne, Elizabeth Davidson and Gordon McIntyre v. Canada*, Views adopted on 31 March 1991, at para. 11.3.

¹⁴ In support of this claim, the authors refer to Communication No. 273/1988, *B. d. B. v. The Netherlands*, decision on admissibility adopted on 30 March 1989, and Communication No. 316/1988, *C.E.A. v. Finland*, decision on admissibility adopted on 10 July 1991.

¹⁵ The authors refer to Communication No. 83/1981, *Machado v. Uruguay*, Views adopted on 4 November 1983, at para. 6.

¹⁶ Reference is made to Communications No. 220/1987, *T. K. v. France*, decision on admissibility adopted on 8 November 1989, at para. 8.3, and No. 222/1987, *H. K. v. France*, decision on admissibility adopted on 8 November 1989, at para. 8.3.

by these decisions, once she became a partner and shareholder of the “Wallmann Gesellschaft mit beschränkter Haftung”.

7.5 Regarding exhaustion of domestic remedies against subsequent decisions of the Salzburg Regional Chamber, the authors state that the Federal Chamber of Commerce, on 13 October 1998 and 16 December 1999, respectively, dismissed the third author’s appeals against the decisions concerning its membership fees for 1998 and 1999. No further appeals were brought against these dismissals, since such remedies would have been futile, in the light of the Constitutional Court’s consistent jurisprudence and, in particular, its decision of 28 November 1997 rejecting the constitutional complaint concerning the membership fees for 1996.¹⁷

7.6 With respect to the Austrian reservation, the authors reiterate that nothing prevented the State party from entering a reservation upon ratification of the Optional Protocol precluding the Committee from examining communications if the same matter has already been examined “under the procedure provided for by the European Convention”, as recommended by the Committee of Ministers, or from using the broader formulation of a previous examination by “another procedure of international investigation or settlement”, as other States parties to the European Convention did.

7.7 Moreover, the authors submit that the State party is free to consider entering a reservation to that effect by re-ratifying the Optional Protocol, as long as such a reservation could be deemed compatible with its object and purpose. What is not permissible, in their view, is to broaden the scope of the existing reservation in a way contrary to fundamental rules of treaty interpretation.

7.8 The authors reject the State party’s argument that key tasks of the “new” European Court, such as decisions on admissibility and establishment of the facts of a case, were originally within the exclusive competence of the European Commission, arguing that the “old” European Court also consistently dealt with these matters. They question that the reorganization of the Convention organs was not foreseeable in 1987 and quote parts of the Explanatory Report to Protocol No. 11, summarizing the history of the “merger” deliberations from 1982 until 1987.

7.9 On the merits, the authors contest the State party’s arguments to the effect that the Chamber of Commerce is a public law organization, by submitting (1) that the mere fact that the Chamber

¹⁷ The authors refer to Communication No. 210/1985, *Wim Hendriks v. The Netherlands*, Views adopted on 27 July 1988, at para. 6.3.

was established by law does not make it a public law organization; (2) that the right to comment on draft laws is not peculiar to public law organizations; (3) that the Court of Audit supervises the financial activities of many entities, including companies partly owned by the State; (4) that members of commissions in the field of public administration are nominated not only by certain chambers, but also by associations representing relevant interest groups such as trade unions or the churches.

7.10 Moreover, the authors argue (1) that, while the fact that groups of people have the opportunity to have their interests represented may be in the public interest, this does not convert the economic interests of the Chamber members into the “public interest”; (2) that the Chamber engages in extensive profit-based economic activity, as it is a shareholder of companies and undertakes advertisement campaigns on behalf of its members; (3) that the task of sanctioning members who infringe professional duties constitutes the crucial characteristic of professional organizations operating in the public interest, according to the case law of the European Commission of Human Rights;¹⁸ (4) that the European Court of Human Rights confirmed the public law character of the Austrian Chamber of Commerce, in 1991, merely on the basis of the domestic laws establishing the Chamber without making a substantive assessment of the question;¹⁹ (5) that the Chamber is merely a private association, which is unjustifiable given special powers to participate in all branches of government and to require compulsory membership.

7.11 As regards their freedom to found and join other associations, the authors submit that compulsory membership in one entity will generally affect adversely their resolve to found and join another association, as well as their prospects of convincing other compulsory members to join the alternative association. They reiterate that the annual membership fees, amounting to 40,000 ATS, is not an amount they can easily afford, given the losses of the limited partnership over the past years and the need for improving the hotel’s facilities.²⁰

¹⁸ The authors refer to the Commission’s decisions on Applications No. 19363/92 (*Gerhard Hirmann v. Austria*), 2 March 1994, and No. 14331-2/88 (*Paul Revert and Denis Legallais v. France*), 8 September 1989.

¹⁹ The decision criticized is Application No. 14596/89 (*Franz Jakob Weis v. Austria*), decision on admissibility of 10 July 1991.

²⁰ Both the losses of the limited partnership as well as the necessary improvements of the facilities of the hotel are specified in the communication.

7.12 The authors reiterate that they have sufficiently substantiated their claim, at least for purposes of admissibility.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

8.2 The Committee notes that the State party has invoked its reservation under article 5, paragraph 2 (a), of the Optional Protocol, which precludes the Committee from considering claims if the “same matter” has previously been examined by the “European Commission on Human Rights”. As to the authors’ argument that the first author’s application to the European Commission was, in fact, never examined by that organ but declared inadmissible by the European Court of Human Rights, the Committee observes that the European Court, as a result of treaty amendment by virtue of Protocol No. 11, has legally assumed the former European Commission’s tasks of receiving, deciding on the admissibility of, and making a first assessment on the merits of applications submitted under the European Convention. The Committee recalls that, for purposes of ascertaining the existence of parallel or, as the case may be, successive proceedings before the Committee and the Strasbourg organs, the new European Court of Human Rights has succeeded to the former European Commission by taking over its functions.²¹

8.3 The Committee considers that a reformulation of the State party’s reservation, upon re-ratification of the Optional Protocol, as suggested by the authors, only to spell out what is in fact a logical consequence of the reform of the European Convention mechanisms, would be a purely formalistic exercise. For reasons of continuity and in the light of its object and purpose, the Committee therefore interprets the State party’s reservation as applying also to complaints which have been examined by the European Court.²²

8.4 As to the question of whether the subject matter of the present communication is the same matter as the one examined by the European Court, the Committee recalls that the same matter concerns

the same authors, the same facts and the same substantive rights. The first two requirements being met, the Committee observes that article 11, paragraph 1, of the European Convention, as interpreted by the Strasbourg organs, is sufficiently proximate to article 22, paragraph 1, of the Covenant²³ now invoked, to conclude that the relevant substantive rights relate to the same matter.

8.5 With respect to the authors’ argument that the European Court has not “examined” the substance of the complaint when it declared the first author’s application inadmissible, the Committee recalls its jurisprudence that where the European Commission has based a declaration of inadmissibility not solely on procedural grounds,²⁴ but on reasons that include a certain consideration of the merits of the case, then the same matter has been “examined” within the meaning of the respective reservations to article 5, paragraph 2 (a), of the Optional Protocol.²⁵ The Committee is satisfied that the European Court went beyond an examination of purely procedural admissibility criteria when declaring the first author’s application inadmissible, because it did “not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols”.

8.6 The Committee notes that, the authors, based on the reference in the European Court’s decision to the letter of the European Commission’s Secretariat, explaining the possible obstacles to admissibility, argue that the application was declared inadmissible *ratione materiae* with article 11 of the Convention, and that it has therefore not been “examined” within the meaning of the Austrian reservation. However, it cannot be ascertained, in the present case, on exactly which grounds the European Court dismissed the first author’s application when it declared it inadmissible under article 35, paragraph 4, of the Convention.²⁶

²³ Cf. Nowak, Manfred, *U.N. Covenant on Civil and Political Rights – CCPR Commentary* (1993), at p. 387.

²⁴ See, for example, Communication No. 716/1996, *Pauger v. Austria*, Views adopted on 25 March 1999, at para. 6.4.

²⁵ See, for example, Communications No. 121/1982, *A.M. v. Denmark*, decision on admissibility adopted on 23 July 1982, at para. 6, and No. 744/1997, *Linderholm v. Croatia*, decision on admissibility adopted on 23 July 1999, at para. 4.2.

²⁶ Article 35, paragraph 4, of the European Convention reads, in pertinent parts: “The Court shall reject any application which it considers inadmissible under this article.” This refers, *inter alia*, to the inadmissibility grounds set out in article 35, paragraph 3, i.e. inadmissibility *ratione materiae*, manifestly ill-founded applications, and abuse of the right of application.

²¹ See Communication No. 989/2001, *Kollar v. Austria*, decision on admissibility adopted on 30 July 2003, at para. 8.2.

²² See *ibid.*, at para. 8.3.

8.7 Having concluded that the State party's reservation applies, the Committee concludes that the communication is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol, insofar as the first author is concerned, since the same matter has already been examined by the European Court of Human Rights.

8.8 The Committee observes that the examination of the application by the European Court did not concern the second author, whose communication, moreover, relates to different facts than the first author's application to the European Commission, namely the imposition of membership fees by the Salzburg Regional Chamber after she had become a partner of the limited partnership as well as a shareholder of the limited liability company in December 1999. The State party's reservation does not therefore apply insofar as the second author is concerned.

8.9 The Committee considers that the second author has substantiated, for purposes of article 2 of the Optional Protocol, that the applicability of article 22 of the Covenant to the Austrian Chamber of Commerce cannot *a priori* be excluded. It further notes that the "Hotel zum Hirschen Josef Wallmann KG", being a limited partnership, has no legal personality under Austrian law. Notwithstanding the fact that the third author has, and availed itself of its, capacity to take part in domestic court proceedings, the second author, who holds 100 percent of the shares of the limited partnership, is, in her capacity as partner, liable for the third author's obligations vis-à-vis its creditors. The Committee therefore considers that the second author is directly and personally affected by the third author's compulsory membership in the Chamber and the resulting annual membership fees, and that she can therefore claim to be a victim of a violation of article 22 of the Covenant.

8.10 To the extent that the second author complains that the practical effect of the annual membership fees is to prevent her from founding or joining alternative associations, the Committee finds that she failed to substantiate, for purposes of admissibility, that the annual payments to the Chamber is so onerous as to constitute a relevant restriction on her right to freedom of association. The Committee concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

8.11 As to the State party's objection that the second author failed to exhaust domestic remedies, as the limited partnership itself was party to the domestic proceedings, the Committee recalls that wherever the jurisprudence of the highest domestic tribunals has decided the matter at issue, thereby eliminating any prospect of success of an appeal to

the domestic courts, authors are not required to exhaust domestic remedies.²⁷ The Committee notes that the State party has not shown how the prospects of an appeal by the second author against the levy of annual membership fees by the Chamber for the years 1999 onwards would have differed from those of the appeal lodged by the limited partnership and eventually dismissed by the Austrian Constitutional Court in 1998, for lack of reasonable prospect of success.

8.12 Accordingly, the Committee concludes that the communication is admissible insofar as the second author complains, as such, about the compulsory membership of the "Hotel zum Hirschen Joseph Wallmann" limited partnership in the Chamber of Commerce and the resulting membership fees charged since December 1999.

8.13 Regarding the third author, the Committee notes that the "Hotel zum Hirschen Josef Wallmann" is not an individual, and as such cannot submit a communication under the Optional Protocol. The communication is therefore inadmissible under article 1 of the Optional Protocol, insofar as it is submitted on behalf of the third author.

Consideration of the merits

9.1 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.

9.2 The issue before the Committee is whether the imposition of annual membership fees on the "Hotel zum Hirschen" (third author) by the Salzburg Regional Chamber of Commerce amounts to a violation of the second author's right to freedom of association under article 22 of the Covenant.

9.3 The Committee has noted the authors' contention that, although the Chamber of Commerce constitutes a public law organization under Austrian law, its qualification as an "association" within the meaning of article 22, paragraph 1, of the Covenant has to be determined on the basis of international standards, given the numerous non-public functions of the Chamber. It has equally taken note of the State party's argument that the Chamber forms a public organization under Austrian law, on account of its participation in matters of public administration as well as its public interest objectives, therefore not falling under the scope of application of article 22.

9.4 The Committee observes that the Austrian Chamber of Commerce was founded by law rather

²⁷ See, for example, Communication No. 511/1992, *Länsmän et al. v. Finland*, at para. 6.1.

than by private agreement, and that its members are subordinated by law to its power to charge annual membership fees. It further observes that article 22 of the Covenant only applies to private associations, including for purposes of membership.

9.5 The Committee considers that once the law of a State party establishes commerce chambers as organizations under public law, these organizations are not precluded by article 22 of the Covenant from imposing annual membership fees on its members, unless such establishment under public law aims at circumventing the guarantees contained in article 22. However, it does not appear from the material before the Committee that the qualification of the Austrian

Chamber of Commerce as a public law organization, as envisaged in the Austrian Constitution as well as in the Chamber of Commerce Act of 1998, amounts to a circumvention of article 22 of the Covenant. The Committee therefore concludes that the third author's compulsory membership in the Austrian Chamber of Commerce and the annual membership fees imposed since 1999 do not constitute an interference with the second author's rights under article 22.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it do not disclose a violation of article 22, paragraph 1, of the Covenant.

Communication No. 1011/2001

Submitted by: Francesco Madafferi and Anna Maria Immacolata Madafferi (represented by counsel, Messrs. Mauro Gagliardi and Acquaro)

Alleged victim: The authors and their four children, Giovanni Madafferi, Julia Madafferi, Giuseppina Madafferi and Antonio Madafferi

State party: Australia

Date of decision: 26 July 2004 (eighty-first session)

Subject matter: Separation of family in case of removal of the father

Procedural issues: Request for interim measures of protection - Exhaustion of domestic remedies - Effective remedy - Non-substantiation of claim - Incompatibility with the Covenant

Substantive issues: Conditions of detention - Right to leave one's own country - Notion of "own country" - Arbitrary interference with the family - Protection of minor

Articles of the Covenant: 7; 9; 10, paragraph 1; 12, paragraph 4; 17; 23 and 24

Articles of the Optional Protocol and Rules of Procedure: 2; 3 and 5, paragraph 2 (b); rule 86

Finding: Violation (article 10, paragraph 1; article 17, paragraph 1, read in conjunction with article 23; and article 24, paragraph 1)

1.1 The authors of the communication are Francesco Madafferi, an Italian national, born on 10 January 1961 and Anna Maria Madafferi, an Australian national, also writing on behalf of their children Giovanni Madafferi, born 4 June 1991, Julia Madafferi, born 26 May 1993, Giuseppina Madafferi, born 10 July 1996, and Antonio Madafferi, born 17 July 2001. All four children are Australian nationals. Francesco Madafferi is

currently residing with his family in Melbourne, Victoria, Australia. The authors claim to be victims of violations by Australia of articles 2, 3, 5, 7, 9, 10, 12, 13, 14, 16, 17, 23, 24 and 26, of the International Covenant on Civil and Political Rights. They are represented by counsel, Mr. Mauro Gagliardi and Mr. Acquaro.

1.2 An interim measures request to prevent the deportation of Mr. Madafferi, which was submitted at the same time as the initial communication, was at first denied by the Committee's Special Rapporteur on New Communications. However, in light of the psychological report provided, the Special Rapporteur, in the exercise of his mandate, decided to include the following phrase in the note transmitting the communication to the State party with the request for information on admissibility and merits, "The Committee wishes to draw the attention of the State party to the psychological impact of detention upon [Mr. Madafferi], and the possibility that a deportation, if implemented while the communication is before the Committee, may violate the State party's obligations under the Covenant".¹

¹ The authors had provided a psychological report, dated 4 July 2001, in which the psychiatrist expressed his "serious concern about [Mr. Madafferi's] psychological state under conditions of continued detention. One might expect [...] the dysfunctional symptoms of his stress disorder to be exacerbated by further detention [...] there will be serious issues not only about his being able to

The facts as submitted by the authors

2.1 On 21 October 1989, Francesco Madafferi arrived in Australia on a tourist visa, which was valid for six months from the date of entry. He came from Italy, where he had served a two year prison term and was released in 1986. On entering Australia, Mr. Madafferi had no outstanding criminal sentence or matters pending in Italy.

2.2 After April 1990, Mr. Madafferi became an unlawful non-citizen. On 26 August 1990, he married Anna Maria Madafferi, an Australian national. He believed that his marriage had automatically granted him residence status. The couple had four children together, all born in Australia. Mr. Madafferi's extended family are all residents in Australia.

2.3 In 1996, having been brought to the attention of the Department of Immigration and Multicultural Affairs (hereinafter "DIMIA"), Mr. Madafferi filed an application for a spouse visa to remain permanently in Australia. In this application, he disclosed his past convictions and included details of sentences handed down, in absentia, in Italy which only became known to him following his initial interview with the Immigration officers. Extradition was never sought by the Italian authorities.

2.4 In May 1997, DIMIA refused the application for a spouse visa, as he was considered to be of "bad character", as defined by the Migration Act, in light of his previous convictions. This decision was appealed to the Administrative Appeals Tribunal (hereinafter referred to as "AAT").

2.5 On 7 June 2000, and after a two-day hearing, the AAT set aside the decision under review and remitted the matter to the Minister of DIMIA (hereinafter "the Minister") for reconsideration in accordance with a direction that Mr. Madafferi "not be refused a visa on character grounds solely on the basis of the information presently available..."² In

adequately instruct his legal advisers but also whether or not he will be so damaged psychologically that he will be unable to return to his previous capacity [...]"

² According to this decision, although the Deputy President initially remarked that Mr. Madafferi is not of good character he went on to say that, "There is no reliable evidence that he has committed any crime since the mid-1980s. He was only 23 years old at the time of the second attempted extortion and 24 years old at the time of the fight in prison. He is now 39 years old [...] I think it would be inappropriate to judge him by the crimes that he committed long ago in another country." The Tribunal also pointed out that some of the convictions in Italy were conducted in absentia and possibly subject to appeal and reversal should he choose to pursue such remedies. In addition, it added that such convictions conducted in absentia are intolerable under Australian law and accordingly should not be given weight

July 2000, rather than reconsidering the matter in accordance with the direction of the AAT, the Minister gave notice of his intention under a separate section of the Migration Act 1958 – subsection 501A – to refuse Mr. Madafferi's request for a visa.

2.6 In August 2000, the Italian authorities, on their own motion, extinguished part of the outstanding sentences and declared that the remainder of the outstanding sentences would be extinguished in May 2002.³ According to the authors, the Minister did not take these actions of the Italian authorities into account.

2.7 On 18 October 2000, the Minister used his discretionary power, under subsection 501A, to overrule the AAT decision and refused Mr. Madafferi a permanent visa. On 21 December 2000, following an application by Mr. Madafferi's lawyer, the Minister gave his reasons, claiming that since Mr. Madafferi had prior convictions and an outstanding term of imprisonment in Italy, he was of "bad character" and that therefore it would be in the "national interest" to remove him from Australia. According to the authors, the Minister failed to make proper enquiries with the Italian authorities and relied incorrectly on the assumption that Mr. Madafferi had an outstanding sentence of over 4 years. Further clarification was asked of the Minister and provided by him in January 2001. On 16 March 2001, Mr. Madafferi surrendered himself to the authorities and was placed in the Maribyrnong Immigration Detention Centre in Melbourne for an indefinite period.

2.8 On 18 May 2001, the Federal Court dismissed an application for judicial review of the Minister's decision. On 5 June 2001, this decision was appealed to the Full Court of the Federal Court. On 13 November 2001, the Full Federal Court heard the appeal and reserved its decision. On 31 January 2002, Mr. Madafferi was advised that one of the three judges of the Full Federal Court had fallen ill and would not be able to hand down his judgement. Mr. Madafferi chose to have a reconstituted court decide the appeal on the papers rather than the two

under Australian jurisprudence. Appropriate attention was also paid to Mr. Madafferi's children who "[...] must be regarded as a primary consideration." The weight attached to the interests of the children is in accordance with the High Court's decision in *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 183 CLR 273. The presiding judge concluded that, "[...] the factors weighting in favour of the granting of a visa, particularly the interests of the children, should predominate over the factors weighting in favour of refusing one".

³ On 22 June 2002 the Italian Authorities notified Mr. Madafferi that they had extinguished his outstanding sentence and cancelled the outstanding warrant for his arrest.

remaining judges handing down their decision. On 17 July 2002, the reconstituted Full Federal Court, dismissed the appeal.

The complaint

3.1 The authors claim that as Mrs. Madafferi does not intend to accompany her husband to Italy if he is removed, the rights of all the authors, particularly the children, will be violated as the family unit will be split up. It is claimed that such a separation would cause psychological and financial problems for all concerned, but more particularly for the children, considering their young ages.

3.2 The authors claim that the decision of the Minister was arbitrary in overturning the decision of the AAT without any new information and without due consideration of the information, facts and opinion of the presiding judge. It is claimed that the Minister abused his discretion and failed to afford procedural fairness to Mr. Madafferi's case. They claim that his decision was politically driven by "the media's contempt for Mr. Madafferi and other members of his family." In this regard, the authors also stress that Mr. Madafferi has never been convicted of an offence in Australia.

3.3 In addition, the authors claim that the detention centre in which Mr. Madafferi was held does not rise to the health standards and humane environment even accorded to serious criminal offenders. It is also claimed that Mr. Madafferi's rights have been violated by denying him other alternative detention measures like home detention or alternate home arrest which would allow him to continue to be with his family, particularly in light of the birth of his last child, pending resolution of his immigration status. In this regard it is claimed that Mr. Madafferi was not allowed to attend the birth of his fourth child, born on 17 July 2001.

State party's admissibility and merits submission

4.1 By submission of March 2002, the State party commented on the admissibility and merits of the communication. It submits that the entire communication is inadmissible in so far as it purports to be lodged on behalf of Mrs. Madafferi and the Madafferi children, as they have not given their authority to do so. It submits that the entire communication is inadmissible for failure to exhaust domestic remedies as, at the time of its submission, the Full Court of the Federal Court had not yet handed down its decision and the authors still had the option of appealing a negative decision by this court to the High Court. In addition, it submitted that the authors had not availed themselves of the remedy of *habeas corpus*, to review the lawfulness of Mr. Madafferi's detention, nor did they lodge a

complaint with the Human Rights and Equal Opportunities Commission.

4.2 It submits that the entire communication is inadmissible for failure to substantiate any of the allegations. With the exception of the allegations that articles 9, paragraph 1 and 10, paragraph 1, have been violated in relation to Mr. Madafferi, all of the allegations contained in the communication are inadmissible on the basis of incompatibility with the Covenant. A number of the allegations are inadmissible in relation to certain members of the family as they cannot be considered victims of the alleged violations.

4.3 On the merits, the State party submits that the authors failed to provide sufficient pertinent evidence to permit an examination of the merits of the alleged violations. As to a possible violation of article 7, the State party submits that the treatment of Mr. Madafferi and its effects on the other authors did not amount to severe physical or mental suffering of the degree required to constitute torture, but was lawful treatment in accordance with the State party's immigration laws. As to the psychological assessments of the authors, it submits that whilst there is evidence that Mr. Madafferi and the Madafferi children are suffering emotionally as a result of his detention and proposed removal, they do not amount to evidence of a violation of article 7, as they do not document suffering of a sufficient severity caused by factors beyond the incidental effects of detention and its inherent separation from the rest of the family. As evidence, it submits a copy of a medical report, dated 20 August 2001, which concludes that whilst Mr. Madafferi is suffering a range of stress-related symptoms, these are in the mild to moderate range and consistent with what would be expected given his detention and proposed removal.

4.4 With respect to the alleged violation of article 9, the State party submits that Mr. Madafferi's detention is lawful and in accordance with procedures established by law, the Migration Act. As he does not hold a visa, he is an unlawful non-citizen under the definition in section 14 of the Migration Act. Under Section 189, such unlawful non-citizens in Australia are detained mandatorily. The State party submits that the Minister was entitled to use his discretionary power under the Migration Act not to grant a visa to Mr. Madafferi. His actions in this regard have been challenged throughout the court system and found to be lawful.

4.5 The State party denies that Mr. Madafferi's detention is arbitrary. It submits that detention in the context of immigration is an exceptional measure reserved for people who arrive or remain in Australia without authorisation. The aim of immigration detention is to ensure that potential immigrants do not enter Australia before their claims to do so have

been properly assessed and found to justify entry. It also provides Australian officials with effective access to those persons for the purposes of investigating and processing their claims without delay, and if those claims are unwarranted, to remove such persons from Australia as soon as possible.

4.6 The State party submits that the detention of people who seek to remain in Australia unlawfully is consistent with the fundamental right of sovereignty, pursuant to which States may control the entry of non-citizens into their territory. Australia has no system of identity cards, or other national means of identification or system of registration which is required for access to the labour market, education, social security, financial services and other services. This makes it more difficult for Australia to detect, monitor and apprehend illegal immigrants in the community, compared to countries where such a system is in place.

4.7 On the basis of past experience, it may reasonably be assumed that if individuals were not detained but released into the community, pending finalisation of their status, there would be a strong incentive for them not to adhere to the conditions of their release and to disappear into the community and remain in Australia unlawfully, especially where such individuals have a history of non-compliance with migration laws. The State party's immigration detention policy must also be seen in the broader context of the overall migration program. All applications to enter or remain in Australia are thoroughly considered, on a case by case basis. Although the exhaustion of all legal remedies means that the processing time is extended in some cases, it also ensures that all claimants are assured of a detailed consideration of all the factors relevant to their case. This has occurred in Mr. Madafferi's case. The reasonableness of the State party's mandatory detention provisions was considered by the High Court in *Chu Kheng Lim v. Minister for Immigration and Ethnic Affairs*.⁴

4.8 The State party submits that its migration laws are not arbitrary per se, and that they were not enforced in an arbitrary manner in the case of Mr. Madafferi. Several factors demonstrate that Mr. Madafferi was treated in a reasonable, necessary, appropriate, predictable and proportional manner to the ends sought, given the circumstances of his case. Firstly, he was always treated in accordance with domestic laws. Secondly, the failure of the character test established by section 501A⁵ of

the Migration Act due to Mr. Madafferi's criminal record, the fact that he twice overstayed his Australian entry permit and his dishonesty when dealing with migration officials meant that it was reasonable and predictable that he would be denied a visa, notwithstanding the fact that he had established a family in Australia. Direction 17 provides directions on, inter alia, the application of the character test.⁶

satisfy the Minister that the person passes the "character test", then the Minister can: set aside a decision of a delegate or the AAT not to refuse to grant a visa to the person or to refuse to cancel a visa already issued to the person; and refuse to grant a visa to the person or cancel a visa that has been granted to the person, but only where the Minister is satisfied that the refusal or cancellation is in the national interest. Sub-section 501 (6) provides that a person does not pass the character test if: "(a) the person has a substantial criminal record (as defined by subsection (7)); or (b) the person has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct; or (c) having regard to either or both of the following: (i) the person's past and present criminal conduct; (ii) the person's past and present general conduct; the person is not of good character; or (d) in the event the person were allowed to enter or to remain in Australia, there is a significant risk that the person would: (i) engage in criminal conduct in Australia; or (ii) harass, molest, intimidate or stalk another person in Australia; or (iii) vilify a segment of the Australian community; or (iv) incite discord in the Australian community or in a segment of that community; or (v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way. Otherwise, the person passes the character test."

"Substantial criminal record" is defined for the purposes of the character test in sub-section 501 (7) to mean where: "(a) the person has been sentenced to death; or (b) the person has been sentenced to imprisonment for life; or (c) the person has been sentenced to a term of imprisonment of 12 months or more; or (d) the person has been sentenced to 2 or more terms of imprisonment (whether on one or more occasions), where the total of those terms is 2 years or more; or (e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution."

⁶ The State party explains that in addition to legislative provisions, a number of directions were made under section 499 of the Migration Act to ensure that the powers under that Act are exercised in a proper and consistent manner. The Minister tables such directions in Parliament. These directions do not limit the discretion of a decision maker or authorise improper decision making. At the time of the decision to deny Mr. Madafferi a visa, Direction 17 dealt with visa refusal and cancellation under section 501. It provided directions on, inter alia, the application of the character test in the Act.

⁴ (1992) 176 CLR 1.

⁵ Section 501A(2) of the Migration Act provides that where the Minister: reasonably suspects that a person does not pass the "character test"; and the person does not

4.9 Thirdly, the decision of the Minister was based on a full consideration of all relevant issues as evidenced by the extensive reasons and supplementary reasons provided by the Minister for his decision. These issues included: the interests of Mrs. Madafferi and her children; Australia's international obligations; Mr. Madafferi's criminal history; Mr. Madafferi's conduct since arriving in Australia; the interests of maintaining the integrity of the Australian immigration system and protecting the Australian community; the expectations of the Australian community and the deterrent effect of a decision to deny Mr. Madafferi a visa.

4.10 Fourthly, Mr. Madafferi unsuccessfully sought to challenge the Minister's decision in the Federal Court, which found that the Minister's decision did not involve an error of law, improper exercise of power or bias, was carried out in accordance with the *Migration Act* and was not based on any lack of evidence. Fifthly, he was detained in order to facilitate his removal from the State party and has remained there only whilst he has challenged that removal order. Sixthly, his detention was the subject of review by the Federal Court and was not overturned. It has recently been agreed that Mr. Madafferi be approved for home detention, subject to approval of the practical aspects of such detention.

4.11 The State party contests that it has violated article 10 with respect to the conditions of detention. It provides a statement from the Detention Services Manager for Victoria (where the detention centre Mr. Madafferi was detained is located) to demonstrate that Mr. Madafferi was treated humanely whilst detained, with the level of services provided more than adequate to satisfy his basic needs.

4.12 In relation to the allegation that Mr. Madafferi was not able to be present at the birth of Antonio Madafferi, it is stated that permission was granted for Mr. Madafferi to be present at the birth as long as he was supervised. It was Mrs. Madafferi who stated that she did not want Mr. Madafferi to be present at the birth under such circumstances. The State party acknowledges that there was a delay in permitting Mr. Madafferi to visit the hospital, but that this was rectified speedily and an extra visit allowed as a result. The State party submits that requiring Mr. Madafferi to be supervised in such circumstances was prudent to ensure that he did not abscond.

4.13 The State party submits that Mr. Madafferi is not lawfully in its territory and this fact negates any allegation that he has been the victim of a violation of article 12, paragraph 1, of the Covenant. The operation of article 12, paragraph 3, which establishes a number of exceptions to the rights established by article 12, paragraph 1 means that Mr. Madafferi's detention does not amount to a denial of the right to

liberty of movement or freedom to choose his residence, in contravention of article 12, paragraph 1.

4.14 As to a possible violation of article 12, paragraph 4, the State party submits that Mr. Madafferi's link with Australia is insufficient to assert that it is his own country for the purposes of this provision. None of the situations that were identified by the Committee in *Stewart v. Canada*,⁷ as giving rise to special ties and claims in relation to a country so that a non-citizen cannot be considered to be a mere alien, exist in relation to Mr. Madafferi and his relationship with Australia. He has not been stripped of his nationality in violation of international law. Mr. Madafferi did not seek to acquire a right to stay in the State party in accordance with Australia's immigration laws, despite the fact that the State party has well established mechanisms for applying for Australian nationality and does not place unreasonable impediments on the acquisition of Australian citizenship.

4.15 On article 13, the State party submits that Mr. Madafferi is not lawfully in Australia, that the decision to expel him is in accordance with Australian law, and that he had numerous opportunities to have this decision reviewed.

4.16 As to the claim of a violation of article 14, paragraph 1, the State party refers to the Committee's decision in *Y.L. v. Canada*,⁸ where the Committee considered the definition of a "suit at law", and adopted a two-pronged interpretation, examining the nature of the right in question and the forum in which the question must be adjudicated. In relation to the nature of the right in question, the State party refers to decisions of the European Court of Human Rights ("ECHR") to demonstrate that the right to a residence permit does not fall within the rights established by article 6, of the ECHR, which is very similar to article 14 of the Covenant.⁹ An administrative decision at first instance to deny a visa does not amount to a "suit at law" for the purposes of this provision. Such a decision cannot be characterized as a determination of rights and obligations in a "suit at law", as it does not involve legal proceedings brought by one person to

⁷ Case No. 538/1993.

⁸ Case No. 112/81.

⁹ In relation to the nature of the rights in question the State party refers to the following cases of the ECHR to demonstrate that deportation proceedings are not "suits at law". *Agee v. United Kingdom*, 7729/76, DR 7, 164, which related to the right to reside in a country and the removal of an alien; *X v. United Kingdom*, 7902/77, DR 9, 224, which concerned the termination of a residence permit granted to an alien and a decision to deport the alien; *Appal et al v. United Kingdom*, 8244/78 DR 17, 149, which concerned a request for a residence permit.

determine their rights as against another, but rather an administrative decision where one person determines the rights of another person pursuant to a statute. A decision on whether to allow a person to enter and/or remain in its territory is a matter for the State concerned. As to the forum in which the right is adjudicated upon, the State party reaffirms that an administrative decision at first instance to deny a visa does not amount to a “suit at law”.

4.17 As to article 17, the State party submits that requiring one member of a family to leave Australia while the other members are permitted to remain, does not necessarily involve “an interference” with the family life of the person removed or the people who remain.¹⁰ It submits that article 17 is aimed at the protection of individual privacy and the interpersonal relationships within a family that derive from this right to privacy. The detention and proposed removal of Mr. Madafferi does not interfere with the privacy of the Madafferi family as individuals or their relationships with each other. The proposed removal is not aimed at affecting any of the relations between any members of the family and the State party will not obstruct the maintenance and development of the relationships between the members of the family. The detention and proposed removal of Mr. Madafferi is solely aimed at ensuring the integrity of the State party’s immigration system. In its view, decisions about whether the other family members will continue their lives in Australia or travel with Mr. Madafferi to Italy or any other country are for the family to make. It points out that only Mr. Madafferi is subject to removal; the Madafferi children can remain in Australia with Mrs. Madafferi. Considering the young ages of the children and the fact that both of their parents are of Italian ancestry, they would be able to successfully integrate into Italian society, if Mr. Madafferi is joined by other members of his family. In this context, the State party notes the advice of the authors that Mr. Madafferi is not required to serve his outstanding Italian prison sentences when he returns to Italy. Once he is removed from Australia, it is submitted that he will be able to make an offshore application for a visa permitting him to return.

¹⁰ In this regard it refers to *Winata v. Australia*, Case No. 930/2000, in which the Committee decided that “the mere fact that one member of a family is entitled to remain in the territory of a State party does not necessarily mean that requiring other members of the family to leave involves ... interference.” It also refers to several cases of the ECHR to support its argument that there is no legitimate expectation of continuing life in a State territory where a member of a family has been residing in a country unlawfully.

4.18 If the Committee is of the view that the State party’s conduct in relation to Mr. Madafferi constitutes an “interference” with the Madafferi family, such interference would be neither “unlawful” nor “arbitrary”. Reference is made to the fact that the Covenant recognizes the right of States to undertake immigration control.

4.19 The State party contests the claim of a violation of article 23, and argues that its obligation to protect the family does not mean that it is unable to remove an unlawful non-citizen just because that person has established a family with Australian nationals. Article 23 must be read in light of the State party’s right, under international law, to control the entry, residence and expulsion of aliens.¹¹ In accordance with this right, the Covenant allows the State party to take reasonable measures to control migration into Australia, even where such measures may involve removal of a parent. The situation whereby Mr. Madafferi can only be with his family if they travel to Italy would be brought about by Mr. Madafferi’s conduct rather than by the State party’s failure to take steps to protect the family unit. These submissions show that the decision to deny Mr. Madafferi a visa was made in accordance with Australian law and after a consideration of the impact of the decision on, among other things, the Madafferi family.

4.20 The State party notes that the allegation that article 24 was violated appears to be solely based on the fact that it is proposed to remove Mr. Madafferi from Australia. It submits that this action would not amount to a failure to provide protection measures that are required by the Madafferi children’s status as minors. One of the factors considered by the Minister in making the decision to deny Mr. Madafferi a visa was the “best interest” of the Madafferi children. Any long-term separation of Mr. Madafferi from the Madafferi children will occur as a result of decisions made by Mr. and Mrs. Madafferi, not the result of State party actions. The authors have not provided any evidence that the children cannot be adequately protected by Ms. Madafferi, should they remain in Australia or that there are any obstacles to the children continuing a normal life in Italy.

4.21 The State party indicates that the alleged violation of article 26 appears to relate to the guarantee of equality before the law by the Minister in denying Mr. Madafferi a visa. The State party refutes this claim and refers to its arguments on article 9; it submits that the Minister’s decision was necessary, appropriate, predictable and proportional and argues that: the decision was lawful; that

¹¹ It refers to the ECHR case of *Moustaquim v. Belgium* (1991) 13 EHRR 802, at page 814.

Mr. Madafferi failed the character test; that he was permitted to make submissions to the Minister prior to him making his decision; that the Minister provided reasons for his decision; and that his decision was judicially reviewed and found not to involve any error of law, improper exercise of power or bias, that it was in accordance with the Migration Act and not based on any lack of evidence.

4.22 As to violations of articles 2, 3, 5, 14, paragraph 2 to 7, and 16, the State party provides detailed arguments dismissing these claims on grounds of inadmissibility and lack of merit.

Interim measures request

5.1 On 16 September 2003, the authors informed the Secretariat that the State party intended to deport Mr. Madafferi on 21 September 2003, requested interim measures of protection to prevent his deportation. They further requested a direction from the Committee that he be transferred to home detention.

5.2 The authors provide an update on the factual situation. On 7 February 2002, on the basis of Mr. Madafferi's deteriorating psychological state and the effect the separation was having on the other members of the family, the Minister directed that Mr. Madafferi be released into home detention. This was done on 14 March 2002. In home detention, he continued to suffer mental ill health and was visited by doctors, psychiatrists and counsellors, at his own expense. The symptoms that had developed by the time he was released into home detention did abate, but he continued to suffer from symptoms of mental ill health during the home detention arrangement.

5.3 On 20 June 2003, special leave to the High Court to review the Minister's ability to intervene and to set aside the decision of the AAT was denied. On 25 June 2003, DIMIA terminated the home detention agreement due to the increased risk that Mr. Madafferi would abscond following the High Court decision five days earlier, which meant that domestic remedies were exhausted. On the same day, Mr. Madafferi was returned to immigration detention at Maribyrnong. A constitutional writ issued by the author was dismissed by the High Court on 25 June 2003.

5.4 Mr. Madafferi's return to detention is described as comparable to an "army style raid", during which 17 armed Australian Federal Police arrived unannounced in an escort van accompanied by two other vehicles of the Australian Federal Police. Mr. Madafferi surrendered himself without a struggle. Mrs. Madafferi was terrified for the safety of her husband, as she thought he was being removed from Australia. The two younger children who also witnessed the event suffered from eating disorders for weeks thereafter. The authors claim

that this action by the authorities was unwarranted and disproportionate to the circumstances of the case, particularly in the light of Mr. Madafferi's compliance with all the conditions of home detention over a 15-month period.

5.5 Prior to the termination of home detention, medical evidence was presented to DIMIA, at its request, in support of the contention that home detention ought to continue, since the medical grounds for which the Minister had originally directed detention continued to exist or would likely reappear if the author were to be returned to Immigration Detention at Maribyrnong. Thus, the authors argue, the State party acted against its own medical and psychiatric advice in terminating home detention.¹²

5.6 On 22 June 2002, the Italian authorities notified Mr. Madafferi that they had extinguished his outstanding sentences and cancelled his arrest warrant. In June 2003, Mr. Madafferi requested the Minister to revisit his decision to refuse Mr. Madafferi a spouse visa in light of this information. The Minister advised that he had no legal basis to revisit the decision; this was confirmed by the Federal Court on 19 August 2003; that decision is currently on appeal to the Full Court.

5.7 On 18 September 2003, in light of the materials provided, the fact that deportation was scheduled for 21 September 2003, and that consideration of the communication was scheduled for the Committee's 79th session (October 2003), the Special Rapporteur, acting under Rule 86 of the Committee's Rules of Procedure, requested the State party not to deport Mr. Madafferi until the conclusion of this session. He also requested the State party to provide at its earliest convenience information on transferral to home detention or other measures taken to alleviate the risk of serious injury, including serious self-harm, that had been identified to exist, including by the State party's authorities, in the event of Mr. Madafferi's continued immigration detention.

5.8 By submission of 17 October 2003, the State party submitted that it would accede to the Special Rapporteur's request not to deport Mr. Madafferi until its consideration at the Committee's 79th session. It set out the facts of the case as submitted by the authors and added that Mr. Madafferi was removed from home detention having exhausted

¹² According to the authors, the Migration Agent, John Young, submitted a number of medical reports to DIMIA, including one by a Dr. Arduca, in which he stated that "In my opinion, this state of severe mental conflict puts Mr. Madafferi at significant risk of self-harm. Removing him from his home and family and placing him in detention would profoundly compound this risk."

domestic remedies, in accordance with section 198 of the Migration Act, which requires that unlawful non-citizens should be removed as soon as practicable.

5.9 As to the measures taken to alleviate the risk of further injury, the State party refers to a medical report, dated 26 September 2003, in which the treatment received by Mr. Madafferi since returning to the detention centre is summarised. This includes daily consultations with the Centre Nurse and Counsellor and regular consultations with the South West Mental Health Services. Mr. Madafferi's mental state continued to decline, however, to the extent that he was admitted to a psychiatric hospital on 18 September 2003, and declared unfit to travel abroad.¹³

5.10 On 7 November 2003, the Special Rapporteur, acting under Rule 86 of the Committee's Rules of Procedure, extended the rule 86 request to the State party until the 80th session, in light of further comments received from the authors and a request from the State party to comment thereon.

Author's comments on State party's submission

6.1 By submission of 30 September 2003, the authors provide an update on the facts of the communication and comments on the admissibility and merits. Mr. Madafferi's transfer to home detention, which lasted from 14 March 2002 to 25 June 2003, was "on an actual cost recovery basis to the department". The estimated cost was \$16,800 per month which was paid in advance and after the placement of a \$50,000 bond, the author was released into home detention on 14 March 2002. The authors paid the initial instalment payment of \$16,800 and a further \$16,800. Since then, no further payments have been made as the family have been unable to raise any more funds. The authors claim that they were under duress to accept the financial conditions of home detention, against the advice of their lawyers, as the only way in which they could be reunited. They also claim that the obligation to procure home detention as an alternative form of immigration detention was a matter incumbent on the State Party to procure given the deteriorating health of Mr. Madafferi and not for the authors to pay as a method of stabilizing his medical condition.

6.2 The authors continue to allege violations of all the original articles claimed (as per para. 1) and provide clarification on the claims of articles 9, 10, 12, 13, 17, 23 and 24. As to article 9, they submit

¹³ Mr. Madafferi remained an involuntary patient for approximately six months. Since then he has been residing with his family and receiving psychiatric treatment. Apparently, he is still unfit to travel.

that this claim only relates to Mr. Madafferi. They argue that although the decision to detain him is lawful, it was arbitrary, being neither "reasonable" nor "necessary" in all the circumstances of this case. There is no evidence of flight risk, since the very nature of the application was that Mr. Madafferi sought to remain with his family in Australia. Neither was there evidence that he had committed an offence since arriving in Australia. He has no remaining attachments to Italy but has lived in Australia for 15 years where he has a family, business (retail fruit shop), a mortgage and a tax number. He was the sole bread winner of his family; should he be returned to Italy, there is no likelihood of him gaining any meaningful employment sufficient to maintain and support his family. In these circumstances, his detention is disproportionate and unwarranted. By reason of his detention, Mrs. Madafferi is denied social security benefits as a single mother, as the domestic law does not consider the parties legally separated. Neither is she eligible for an invalid or carer's pension, on the basis of his inability to work.

6.3 Alternative forms of detention, prior to his detention at the Maribyrnong Immigration Detention Centre were not considered by the State party. Home detention was only implemented following the emotional distress to Mr. Madafferi and only for a limited period. No reasons have been provided by the State party on why home detention or a similar form report style of detention was not considered or implemented at any other period. When home detention was finally directed by the Minister the DIMIA took in excess of eight weeks to implement the direction.

6.4 As to the State party's argument that Mr. Madafferi overstayed his visa on two occasions, the authors argue that he was 15 years old the first time subject to the care and guidance of his father, and thus had no control over his departure. The second overstay resulted from his incorrect belief that by marrying an Australian citizen, he would be entitled automatically to remain in Australia. The authors highlight that his entry into Australia occurred prior to the introduction of the character strengthening provision (Direction 17) of domestic legislation.¹⁴

6.5 According to the authors, procedural fairness was not afforded to Mr. Madafferi, since he had a reasonable expectation that on the determination of his application for a spouse visa before the AAT, that the AAT would finally determine his application for a spouse visa. The Minister did not appeal the decision

¹⁴ They state that Direction 17 has been the subject matter of judicial review and has subsequently been replaced by Direction 21.

of the AAT nor did DIMIA reconsider the decision in accordance with the directions of the AAT. In setting aside the AAT decision and re-commencing the process of review Mr. Madafferi was not afforded procedural fairness. It is submitted that but for the Minister's further intervention and decision of 18 October 2000, it was reasonable to expect that Mr. Madafferi's application for a spouse visa would be granted on reconsideration by the DIMIA.

6.6 The authors clarify that the allegation of a violation of article 10, paragraph 1, of the Covenant relates only to Mr. Madafferi. Prolonged detention of Mr. Madafferi at Maribyrnong was not appropriate as this facility is considered a short term facility only. The facilities have been overstretched and overcrowding has been frequent. The anxiety and stress of confinement of detention is claimed to be a strain on the habits, religious practices and customs of detainees. The authors submit that conditions of detention centres in Australia are well documented.

6.7 The authors point to the following episodes which are not exhaustive but are illustrative of the violation of the author's rights under this provision. Firstly, the failure to allow the author to attend the birth of his fourth child since a detention officer stated that a taxi could not be organised in time despite the fact that 4 hours prior notice was given to DIMIA. Following the birth, the attendance of security guards at the labour ward intimidated Mrs. Madafferi and resulted in the visit being terminated. Secondly, the failure of DIMIA to allow the author more than one visit of his wife and child at the hospital and on the arrival of the child at home. The author concedes that the State party allowed a further visit at the hospital however this was under heavy escort of guards by the State party.

6.8 Thirdly, the failure of the DIMIA to consent to a more liberal arrangement of home detention to allow the family to participate and interact as a family unit for the benefit of the children. Mr. Madafferi was either prevented from attending family functions or escorted by guards, attracting public attention. This only served to highlight further the public humiliation of the author and his family in a public place. Fourthly, the manner in which home detention was terminated by DIMIA on 25 June 2003 by the use of unnecessary and disproportionate force. Fifthly, the neglect and/or refusal to act on medical advice and warnings of the State party's own medical and psychological doctors that the continued immigration detention of Mr. Madafferi had a severe impact on his mental health. He was not treated for mental health problems for a prolonged period. His admission as an involuntary patient in a psychiatric hospital could have been avoided if the warnings were acceded to.

6.9 The authors contend that article 12, paragraph 1, does apply to the circumstances of this case and nothing in paragraph 3 of the article ought to restrict the application of paragraph 1 to the facts of this case.¹⁵ The authors submit the following facts to demonstrate that Mr. Madafferi has created links to Australia which possess the characteristics necessary to call Australia "his own country" within the meaning of article 12, paragraph 4: both of his parents in Italy have passed away; his grandfather arrived and settled in Australia in 1923 and remained there until he passed away; his father arrived in Australia in the 1950s and re-settled back in Italy on retirement, with an Australian pension; he has not returned to Italy; he holds an Australian driver's licence, a taxation file number, a national Medicare health card, and operates a retail business employing staff and paying taxes relevant to the business; he held an Italian passport which he allowed to expire, renounced his residency within his town of birth and is no longer registered as domiciled in Italy; the Italian authorities are aware and have noted that he is a resident of Australia; and Mr. Madafferi's brothers and sister have all formally renounced their Italian citizenship. In addition, the authors submit that Mr. Madafferi has committed no crimes in Australia. As to the allegation of "non-disclosure of offences imposed in absentia in Italy", the authors submit "were initially unbeknown to Mr. Madafferi at the time of the first interview with immigration officers who raised the issue."

6.10 On article 13, the authors argue that by refusing Mr. Madafferi a spouse visa, the Minister in part relied on the fact that an outstanding warrant for Mr. Madafferi's arrest existed in Italy. In June 2002, the warrant for his arrest was recalled following the extinguishment of the outstanding sentences in Italy. The authors claim a violation of article 13, as the Minister refused to reconsider his decision in light of the changed circumstances, stating that he had no legal basis to do so.

6.11 As to alleged violations of articles 17, 23 and 24, (relating to all the authors), it is submitted that if Mr. Madafferi is removed from Australia, Mrs. Madafferi and the children will remain in Australia. Such a forced physical separation would be forced on them by the State party thus constituting an interference with the family life and/or unit of the family by the State party. There is no suggestion that the marriage and the family bond is not genuine and strong, and there is medical evidence demonstrating that all family members would be affected and saddened by separation.

6.12 As to the argument that Mrs. Madafferi and the children should follow Mr. Madafferi, the

¹⁵ No further argumentation is provided by the authors.

author's argue that this is an emotive argument, not a legal one. They are Australian nationals and are entitled to remain in Australia; their residency is protected by other articles of the Covenant. If they were to follow Mr. Madafferi to Italy, they would find it difficult to integrate. The children are already experiencing emotional and speech difficulties given their involvement in the present case. Such problems will be compounded in Italy, where their ability to communicate is restricted. Mrs. Madafferi and the Madafferi children have never been to Italy; only Mrs. Madafferi speaks a little Italian. They have no extended family members in Italy.

6.13 It is argued that if the family remain in Australia without Mr. Madafferi, Mrs. Madafferi will be unable to cope with the children. In autumn 2003, she suffered an acute nervous breakdown and was admitted to Rosehill Hospital Essendon (Victoria) for five days. The pressure of the present case and the difficulties in raising and attending to four young children on her own has been and continues to be overwhelming.

6.14 The authors argue that Mr. Madafferi's removal to Italy would be for an indefinite period with no real prospect of return to Australia, even on a temporary visit. They argue that the "character" issue is an essential criterion to any spouse visa application whether made on or off shore. Inability to meet this criterion will result, in practical terms, in Mr. Madafferi being unsuccessful in every visa application to re enter Australia. It is submitted that no delegate will have the authority to overrule the Minister's personal ruling made in this case and that it may also be a factor dissuading the AAT from exercising its discretion, should an application be refused at first instance and the decision be appealed.

State party's supplementary comments

7.1 By submission of 6 April 2004, the State party submits that new counsel in the case has not been authorised by the authors and that therefore the communication is inadmissible *ratione personae*. It submits that it has no obligation, as argued by the authors, to procure home detention as an alternative form of detention, given Mr. Madafferi's medical condition and that alternative detention is only permitted in exceptional circumstances. As to the costs of home detention, it is argued that Mr. Madafferi accepted the costs of such detention and at all stages the State party took reasonable steps to provide him with appropriate care.

7.2 It submits that it has not received any evidence that any sentences or convictions have been extinguished or expunged from Mr. Madafferi's criminal record, and the fact that he had incurred criminal convictions and sentences would be

relevant to any decision relating to the granting of a visa.

7.3 As to the author's claim under article 9 that Mr. Madafferi is a low flight risk, the State party refers to correspondence from DIMIA to Mr. Madafferi's migration agent, dated 25 June 2003 regarding the termination of home detention, in which it is stated that now domestic remedies have been exhausted the risk of flight is high. As to the claim that the Minister decided the matter afresh rather than to reconsider it as directed by the AAT in its decision of 7 June 2000, the State party acknowledges that the Minister was *prima facie* under an obligation to so reconsider. However, it reiterates that some decisions of the AAT may be set aside by the Minister under section 501A of the Migration Act 1958 (footnote 11), and that the decision of 18 October 2000 was valid.

7.4 As to the claim that Mr. Madafferi could have reasonably expected that the AAT would determine his application for a spouse visa, the State party submits that it is not within the jurisdiction of the AAT to determine his eligibility for such a visa, as its consideration was limited to the refusal of the spouse visa on character grounds and its direction on remittal related solely to character.

7.5 The State party denies that the Maribyrnong Immigration Detention Centre is classified as a short term facility. It was considered an appropriate facility in this case as it allowed easy access by Mr. Madafferi's family and lawyer. As to the claim that the State party should have consented to a more liberal form of home detention, the State party submits that Mr. Madafferi was free to receive any visitors in his family home, and special arrangements were made for him to attend a number of family functions including a wedding, the confirmation receptions for two of his children and a family engagement. As to the allegation that home detention was terminated with unreasonable force, it submits that an officer from DIMIA attended Mr. Madafferi's house with eight Australian Federal Police Officers and two Australian Corrections Management Officers. The visit was reported to have lasted eight minutes. Meeting Mr. Madafferi in the driveway, the DIMIA officer informed him that he was now in DIMIA's custody and required to return to the Maribyrnong Immigration Detention Centre Melbourne. Mr. Madafferi was escorted to a vehicle parked in the street. It is the recollection of the DIMIA officer that the AFP officers did not display arms. On 19 January 2004, the Deputy Director of Clinical Services at the Weeribee Mercy Mental Health Program reported that Mr. Madafferi is still not fit to be discharged from hospital.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

8.2 The Committee has ascertained, in accordance with article 5, paragraph (a), of the Optional Protocol, that the same matter is not being examined under another international procedure of international investigation or settlement.

8.3 On the question of standing and the State party's argument that the authors' counsel have no authorisation to represent them, the Committee notes that it has received written confirmation of one representative's authority to act on the authors' behalf, who in turn submitted further submissions prepared by the authors' domestic legal representatives. Thus, the Committee concludes that both of the authors' representatives have standing to act on their behalf and the communication is not considered inadmissible for this reason.

8.4 As to the State party's argument that domestic remedies have not been exhausted, as the administrative remedy of submitting a complaint to the Human Rights and Equal Opportunity Commission was not pursued by the authors, the Committee invokes its jurisprudence¹⁶ that any decision handed down by this body would only have recommendatory, rather than binding, effect, and thus cannot be described as a remedy which would be effective within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

8.5 As to the claim that domestic remedies have not been exhausted, as Mr. Madafferi failed to apply for *habeas corpus* and that the appeals of the Full Federal Court and High Court on the lawfulness of the Minister's decision remained to be considered, the Committee notes that at the time of consideration of this communication, these remedies had been exhausted by the authors.

8.6 As to the claims under articles 2, 3, 12, paragraphs 1 to 3, 14, paragraphs 2 to 7, and 16, the Committee finds that the authors have failed to substantiate, for the purposes of admissibility, how any of their rights have in fact been violated under these provisions. These claims are therefore inadmissible under article 2 of the Optional Protocol. Furthermore, as article 5 of the Covenant does not give rise to any separate individual right, the claim

made under that provision is incompatible with the Covenant and hence inadmissible under article 3 of the Optional Protocol.

8.7 As to the claims that the Minister did not afford Mr. Madafferi procedural fairness either in the application of his discretionary power or in his refusal to reconsider Mr. Madafferi's visa request, the Committee notes that the authors did not link these issues to any specific articles of the Covenant. In addition, the Committee notes that the lawfulness of the Minister's decision to invoke his discretionary powers was reviewed judicially both by the Federal Court and Full Federal Court, and that the issue of whether the Minister could revisit such a decision was similarly reviewed by the Federal Court. Thus, although the Committee is of the view that the application of this procedure may raise issues under articles 14, paragraph 1 and 13 of the Covenant, it finds that the authors have not sufficiently substantiated any such claims for the purposes of admissibility. Accordingly, the Committee finds this claim inadmissible, under article 2 of the Optional Protocol. However, the Committee does find that the claim of procedural unfairness in the application of the Minister's discretionary power does raise an issue under article 26 which has been sufficiently substantiated for the purposes of admissibility. The Committee concludes, therefore, that this claim is admissible in respect of article 26 of the Covenant.

8.8 As to any issues that may arise with respect to the period Mr. Madafferi was in home detention, including his obligation to pay for the security services provided by the State party and the State party's alleged failure to monitor his mental health during this period, it appears from the documentation provided that the terms of Mr. Madafferi's home detention were contractually based and approved by the authors. From a review of this agreement, it appears that the conditions included the authors' obligation to pay for medical costs, and that this was not a term of the agreement that was challenged in the domestic courts. In fact, the only issue arising from this contract that was challenged in the domestic courts related to the amount owed by the authors. The legality per se of the contract was not challenged. For this reason, any issues that may arise under the Covenant with respect to the matter of contractual terms on home detention are inadmissible, for failure to exhaust domestic remedies, under article 5, paragraph 2 (b), of the Optional Protocol.

8.9 The Committee considers that the authors' remaining claims under articles 9, 12, paragraph 4, 10, paragraph 1 and 7, as they relate to Mr. Madafferi only; and articles 17, 23 and 24, relating to all the authors, are admissible and proceeds to their examination on the merits.

¹⁶ *C. v. Australia*, Case No. 900/1999.

Consideration of the merits

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

9.2 As to the claim of a violation of article 9, relating to the author's detention, the Committee notes that the author has been detained since 16 March 2001, albeit for part of the period at home. It recalls its jurisprudence that, although the detention of unauthorised arrivals is not per se arbitrary, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case: the element of proportionality becomes relevant. It notes the reasons behind the State party's decision to detain Mr. Madafferi and cannot find that his detention was disproportionate to these reasons. It also notes that although Mr. Madafferi did begin to suffer from psychological difficulties while detained at the Maribynong Immigration Centre until March 2002, at which point and on the advice of doctors, the State party removed him to home detention, he had not displayed any signs of such psychological problems on arrival at the detention centre one year earlier. Thus, although it is a matter of concern to the Committee now, after the events, that the detention of Mr. Madafferi apparently greatly contributed to the deterioration of his mental health, it cannot expect the State party to have anticipated such an outcome. Accordingly, the Committee cannot find that the State party's decision to detain Mr. Madafferi from 16 March 2001 onwards, was arbitrary within the meaning of article 9, paragraph 1, of the Covenant.

9.3 As to Mr. Madafferi's return to Maribyrnong Immigration Detention Centre on 25 June 2003, where he was detained until his committal to a psychiatric hospital on 18 September 2003, the Committee notes the State party's argument that as Mr. Madafferi had by then exhausted domestic remedies, his detention would facilitate his removal, and that the flight risk had increased. It also observes the author's arguments, which remain uncontested by the State party, that this form of detention was contrary to the advice of various doctors and psychiatrists, consulted by the State party, who all advised that a further period of placement in an immigration detention centre would risk further deterioration of Mr. Madafferi's mental health. Against the backdrop of such advice and given the eventual involuntary admission of Mr. Madafferi to a psychiatric hospital, the Committee finds that the State party's decision to return Mr. Madafferi to Maribyrnong and the manner in which that transfer was affected was not based on a proper assessment of the circumstances of the case but was, as such,

disproportionate. Consequently, the Committee finds that this decision and the resulting detention was in violation of article 10, paragraph 1, of the Covenant. In the light of this finding in respect of article 10, a provision of the Covenant dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out generally in article 7, it is not necessary to separately consider the claims arising under article 7.

9.4 The Committee notes the authors' claim that Mr. Madafferi's rights were violated under articles 10, paragraph 1, and 7 also, on the grounds of his conditions of detention, while detained in the detention centre; his alleged ill-treatment including the events surrounding the birth of his child; and, in particular, the State party's failure to address the deterioration of his mental health and to take appropriate action. The Committee recalls that Mr. Madafferi spent a first period in the detention centre between 16 March 2001 and March 2002, and was released into home detention after a decision of the Minister in February 2002, on the basis of medical evidence. Although the Committee considers it unfortunate that the State party did not react more expeditiously in implementing the Minister's decision, which the State party has acknowledged took six weeks, it does not conclude that such delay in itself violated any of the provisions of the Covenant. Equally, the Committee does not find that the conditions of Mr. Madafferi's detention or the events surrounding the birth of his child or return into detention, amount to a violation of any of the provisions of the Covenant beyond the finding already made in the previous paragraph.

[9.5] As to whether Mr. Madafferi's rights under article 12, paragraph 4, of the Covenant were violated by being arbitrarily deprived of his right to leave his own country, the Committee must first consider whether Australia is indeed Mr. Madafferi's "own country" for the purposes of this provision. The Committee recalls its jurisprudence in the case of *Stewart v. Canada*, that a person who enters a State under the State's immigration laws, and subject to the conditions of those laws, cannot normally regard that State as his "own country", when he has not acquired its nationality and continues to retain the nationality of his country of origin. An exception might only arise in limited circumstances, such as where unreasonable impediments are placed on the acquisition of nationality. No such circumstances arise in the present case, and neither are the other arguments advanced by the authors sufficient to trigger the exception. In the circumstances, the Committee concludes that Mr. Madafferi cannot claim that Australia is his "own country", for purposes of article 12, paragraph 4, of the Covenant. Consequently, there cannot be a violation of this provision in the current case.

[9.6] As to a violation of article 17, the Committee notes the State party's arguments that there is no "interference", as the decision of whether other members of the Madafferi family will accompany Mr. Madafferi to Italy or remain in Australia, is an issue for the family and is not influenced by the State party's actions. The Committee reiterates its jurisprudence that there may be cases in which a State party's refusal to allow one member of a family to remain in its territory would involve interference in that person's family life. However, the mere fact that one member of the family is entitled to remain in the territory of a State party does not necessarily mean that requiring other members of the family to leave involves such interference.¹⁷

[9.7] In the present case, the Committee considers that a decision by the State party to deport the father of a family with four minor children and to compel the family to choose whether they should accompany him or stay in the State party is to be considered "interference" with the family, at least in circumstances where, as here, substantial changes to long-settled family life would follow in either case. The issue thus arises whether or not such interference would be arbitrary and thus contrary to article 17 of the Covenant. The Committee observes that in cases of imminent deportation the material point in time for assessing this issue must be that of its consideration of the case. It further observes that in cases where one part of a family must leave the territory of the State party while the other part would be entitled to remain, the relevant criteria for assessing whether or not the specific interference with family life can be objectively justified must be considered, on the one hand, in light of the significance of the State party's reasons for the removal of the person concerned and, on the other, the degree of hardship the family and its members would encounter as a consequence of such removal. In the present case, the Committee notes that the State party justifies the removal of Mr. Madafferi by his illegal presence in Australia, his alleged dishonesty in his relations with the Department of Immigration and Multicultural Affairs, and his "bad character" stemming from criminal acts committed in Italy twenty years ago. The Committee also notes that Mr. Madafferi's outstanding sentences in Italy have been extinguished and that there is no outstanding warrant for his arrest. At the same time, it notes the considerable hardship that would be imposed on a family that has been in existence for 14 years. If Mrs. Madafferi and the children were to decide to emigrate to Italy in order to avoid separation of the family, they would not only have to live in a country they do not know and whose language the children (two of whom are already 13

and 11 years old) do not speak, but would also have to take care, in an environment alien to them, of a husband and father whose mental health has been seriously troubled, in part by acts that can be ascribed to the State party. In these very specific circumstances, the Committee considers that the reasons advanced by the State party for the decision of the Minister overruling the Administrative Appeals Tribunal, to remove Mr. Madafferi from Australia are not pressing enough to justify, in the present case, interference to this extent with the family and infringement of the right of the children to such measures of protection as are required by their status as minors. Thus, the Committee considers that the removal by the State party of Mr. Madafferi would, if implemented, constitute arbitrary interference with the family, contrary to article 17, paragraph 1, in conjunction with article 23, of the Covenant in respect of all of the authors, and additionally, a violation of article 24, paragraph 1, in relation to the four minor children due to a failure to provide them with the necessary measures of protection as minors.

[9.8] In the light of the Committee's finding of a violation of article 17 in conjunction with articles 23 and 24 of the Covenant, partly related to the Minister's decision to overrule the AAT, the Committee considers that it need not address separately the claim that the same decision was arbitrary, in violation of article 26 of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party has violated the rights of Mr. Francesco Madafferi under articles 10, paragraph 1, of the Covenant. Moreover, the Committee considers that the removal by the State party of Mr. Madafferi would, if implemented, constitute arbitrary interference with the family, contrary to article 17, paragraph 1, in conjunction with article 23, of the Covenant in respect of all of the authors, and additionally, a violation of article 24, paragraph 1, in relation to the four minor children due to a failure to provide them with the necessary measures of protection as minors.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective and appropriate remedy, including refraining from removing Mr. Madafferi from Australia before he has had the opportunity to have his spouse visa examined with due consideration given to the protection required by the children's status as minors. The State party is under an obligation to avoid similar violations in the future.

12. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has

¹⁷ *Winata v. Australia*, Case No. 930/2000.

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, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

APPENDIX

Individual opinion of Committee member Nisuke Ando

I am not opposed to the adoption of the Committee's Views in this case. However, because of the irregularities that I perceive in the procedure leading to their adoption, I do not participate in the consensus by which the Committee adopted the Views.

Individual opinion of Committee member, Ruth Wedgwood (partly dissenting)

In Australia, visa applications are judged against a statutory standard of "public interest". In this assessment, "the person's past criminal conduct" and "the person's general conduct" may be considered as evidence of a lack of "good character". Any visa denial by a lower-level official can be reviewed by an administrative appeals tribunal of the Department of Immigration and Multicultural Affairs.

Ultimately, however, the administrative appeals process is not dispositive. The Minister of Immigration retains independent statutory authority to set aside a favourable decision of a lower-level official or the tribunal. The Minister may do so when he "reasonably suspects that the person does not pass the character test", he is not satisfied to the contrary by the applicant, and he finds that the refusal of a visa is "in the national interest". This set-aside is not so subjective as it sounds, for a "substantial criminal record" is a statutory basis for finding a lack of good character, and any "term of imprisonment of 12 months or more" constitutes a "substantial criminal record".

The co-author of this communication, Mr. Francesco Madafferi, was subject to such visa disapproval by the Australian Minister of Immigration, based on his extensive criminal record. The Australian administrative appeals tribunal was inclined to accord him more leniency than did the Minister, but the appeals tribunal also reported a criminal record that goes well beyond what is noted by the Committee in its Views, see footnote 2 supra.¹⁸

¹⁸ In 1980, according to the appeals tribunal, Mr. Madafferi took part as a "bag man" in a violent extortion scheme -- unknown persons exploded a bomb in the home of three brothers and demanded payment,

Invoking Article 17 of the Covenant on Civil and Political Rights, the Committee now seeks to preclude the Minister's decision to deport Francesco Madafferi. Article 17 forbids "arbitrary or unlawful interference" with family life. But the State party's ultimate decision in regard to Mr. Madafferi is neither arbitrary or unlawful. The human sympathy that may be felt for a visa applicant and his family does not create a licence to disregard reasonable criteria for the grant or denial of visas. States are entitled to exclude persons who have a serious history of criminal conduct. Mr. Madafferi's prior convictions and jail sentences amply fulfill the statutory requirement for a "substantial criminal record" as a basis for the Australian Minister's decision.

The Committee has no evident warrant to assign its own chosen weight to the relative importance of protecting against recidivist criminal conduct versus minimizing family burdens. There are millions of immigration decisions each year, and we are not entitled to "reverse" state governments simply because we might weigh the balance differently. Nor does the record show any permanent hardship in Mr. Madafferi's return to Italy. Italy was his home country until the age of 18. His family is entitled to reside in Italy with him. He has three sisters in Italy, according to the findings of the Australian administrative tribunal, and his relatively young children understand the Italian language, as used in the family home, although they speak English. Mr. Madafferi has the capacity to run a small business, as he did in Australia. Upon his return to Italy, Mr. Madafferi does not face incarceration or detention. Obviously, the State party could not deport him unless he is medically fit to travel at the time.

Australia follows the principle of *jus solis*, awarding citizenship to every child born on its territory. But the birth of a child does not, by itself, shield a parent from the

Mr. Madafferi went on their behalf to pick up the extortion payment of 3 million lire at a pre-arranged spot, and was promised 500,000 lire for his trouble. He received a suspended sentence of 22 months' imprisonment. In another incident in 1980, he was found to have inflicted multiple stab wounds to the back and abdomen of a victim in Seregno, Italy, and was sentenced to 30 months' imprisonment, though his sentence was later quashed as part of an amnesty. In 1982, he stabbed a man during a fight with the man's older brother, and was convicted of causing malicious personal injuries with aggravating circumstances, with a sentence of eight months. In the same incident, he was found to have in his possession 321 milligrams of heroin, 45 milligrams of monoacetylmorphine, and 107 milligrams of cocaine, and he was sentenced to 40 months in jail, with a 5 million lire fine. In 1984, while the latter charges were pending, he again took part in an extortion scheme, demanding money and making threats by telephone against another victim. He was sentenced to 30 months' imprisonment and a fine of 1.5 million lire. The sentence was later reduced to two years' imprisonment and 1 million lire. All of these convictions were entered in Italy, in the presence of the defendant. In addition, he had two convictions for receipt of stolen property and assault of a fellow prisoner which were reached in absentia, which have since been set aside by Italian authorities.

consequences of his illegal entry, and a rule to the contrary would provide a significant challenge to the enforcement of immigration laws. Here there is no inevitable separation between members of a family, nor any demonstrated difficulty in sustaining Australian citizenship for the children. As noted by the several

dissenters in *Winata v. Australia*, Communication No. 930/2000, Article 17 of the Covenant is not identical to the European Convention on Human Rights, and the test of “substantial changes to long-settled family life” may not be suitable to a universal covenant that speaks of “arbitrary or unlawful interference” with family life.

Communication No. 1015/2001

Submitted by: Paul Perterer (represented by Alexander H. E. Morawa)

Alleged victim: The author

State party: Austria

Date of adoption of Views: 20 July 2004 (eighty-first session)

Subject matter: Unfair treatment of complainant in disciplinary proceedings

Procedural issues: State party reservation - Compatibility *ratione materiae* - Non-substantiation of claims - Exhaustion of domestic remedies - Lack of prospect of success of remedies

Substantive issues: Notion of “impartial tribunal” - Equality of arms - Adequate time and facilities to prepare one’s defence - Undue delay - Equality before the courts

Articles of the Covenant: 14, paragraph 1

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

Finding: Violation (article 14, paragraph 1)

1. The author of the communication is Mr. Paul Perterer, an Austrian citizen. He claims to be a victim of violations by Austria¹ of articles 14, paragraph 1, and 26 of the Covenant. He is represented by counsel.

The facts as submitted by the author

2.1 In 1980, the author was employed by the municipality of Saalfelden in the province of Salzburg. In 1981, he was appointed head of the administrative office of the municipality. On 31 January 1996, the mayor of Saalfelden filed a disciplinary complaint against the author with the Disciplinary Commission for Employees of Municipalities of the Province of Salzburg alleging, *inter alia*, that the author had failed to attend hearings on building projects, that he had used office resources for private purposes, that he had been absent during office hours, and other professional

shortcomings. Moreover, the mayor claimed that the author had lost his reputation and the confidence of the public because of his private conduct.

2.2 On 29 February 1996, the trial senate of the Disciplinary Commission initiated proceedings against the author, and on 28 May 1996, suspended him from office, reducing his salary by 1/3. On 4 June 1996, the author challenged the chairman of the senate, Mr. Guntram Maier, pursuant to section 124, paragraph 3,² of the Federal Civil Servants Service Act. During a hearing held in June 1996, the chairman himself dismissed the challenge, arguing that the Salzburg Civil Servants of Municipalities Act,³ as well as the Federal Civil Servants Act

² Section 124, paragraph 3, of the Federal Civil Servants Act provides: “With the order instituting proceedings (*Verhandlungsbeschluss*), the accused shall be notified the composition of the senate, including replacement members. The accused may challenge, without stating reasons, a member of the senate within one week after the order has been served. Upon request of the accused, up to three civil servants may be present during the hearing. The hearing shall otherwise be held *in camera*.”

³ Section 12 of the Salzburg Civil Servants of Municipalities Act reads, in pertinent parts: “(1) A Disciplinary Commission for Employees of Municipalities is established at the Office of the Provincial Government to conduct first instance disciplinary trials. (2) The Disciplinary Commission is composed of a chairperson, deputy chairpersons, and the necessary number of members. (3) The Provincial Government shall appoint for a period of three years the chairperson and the deputy chairpersons, who have to be chosen from among the civil servants with legal training employed by the Office of the Provincial Government or the Regional Administrative Authorities and the members – with the exception of those members delegated by the municipalities pursuant to paragraph 5 – who have to be chosen from among the civil servants employed by the municipalities governed by the present Act. (4) The Disciplinary Commission tries and decides cases in senates composed of a chairperson and four members. The chairperson and two members chosen

¹ The Covenant and the Optional Protocol to the Covenant entered into force for the State party respectively on 10 December 1978 and 10 March 1988.

(Federal Act), permitted a challenge only with respect to members, but not the chairperson of the senate.

2.3 After the author had submitted a medical report by a neurologist to the Disciplinary Commission, stating that he was unfit to stand trial, this report was forwarded, allegedly by the chairman of the trial senate, to the Regional Administrative Authority in Zell am See which, on 7 August 1996, summoned the author to undergo a medical examination to assess his aptness to drive a vehicle. The author subsequently brought criminal charges against the chairman, Mr. Maier, for breach of confidentiality in public office. This complaint was later dismissed.

2.4 On 4 July 1996, the trial senate of the Disciplinary Commission dismissed the author. By decision of 25 September 1996, the Disciplinary Appeals Commission for Employees of Municipalities (*Disziplinaroberkommission für Gemeindebedienstete*), on the author's appeal, referred the case back to the Disciplinary Commission, on the basis that the participation of the chairman constituted a violation of the author's right to a fair trial, since the right to challenge a member of the senate also extended to its chairperson.

2.5 On 26 March 1997, the trial senate of the Disciplinary Commission, presided by Mr. Michael Cecon, initiated a second set of proceedings against the author. During a hearing in April 1997, the author challenged the composition of the trial senate, arguing that the two members nominated by the municipality of Saalfelden lacked independence and impartiality due to their status as municipal officials or employees. The senate dismissed the challenges and, on 1 August 1997, again dismissed the author from service. In an undated decision, the Appeals Commission upheld the dismissal. On 2 December 1997, the municipality of Saalfelden terminated the payment of the author's reduced salary as well as his coverage under the public health insurance scheme.

2.6 On 7 January 1998, the author complained against the decision of the Appeals Commission to the Austrian Constitutional Court, alleging breaches of his right to a fair trial before a tribunal established by law. On 11 March 1998, the Court refused leave to appeal and referred the case to the Administrative Court which, on 10 February 1999, set aside the decision of the Appeals Commission, holding that

from among the civil servants employed by municipalities are appointed by the Provincial Government. (5) Two further members of the senates are delegated by the municipality which is a party to the proceedings. If the municipality fails to delegate two members or replacement members [...] within a period of three days after a written request, the chairperson shall select civil servants of the Provincial Government as additional members. [...]"

the author had been unlawfully deprived of his right to challenge members of the trial senate of the Disciplinary Commission.

2.7 After the Appeals Commission had referred the matter back to the Disciplinary Commission, the trial senate, by procedural decision of 13 July 1999, initiated a third set of proceedings, again suspending the author from office. The author subsequently challenged the senate chairman, Michael Cecon, and two other members appointed by the Provincial Government for lack of impartiality, since they had participated in the second set of proceedings and had voted for his dismissal. By procedural decision of 3 August 1999, the chairman of the senate was replaced by the substitute chairman, Guntram Maier, who had chaired the trial senate in the first set of proceedings, and who had refused to desist when challenged by the author, and against whom the author had brought criminal charges. The author then reiterated his challenge, specifically challenging Mr. Maier, as being *prima facie* biased because of his previous role. On 16 August 1999, the chairman informed the author that Mr. Cecon would resume chairmanship.

2.8 The author subsequently filed complaints against the procedural decisions of 13 July and 3 August 1999 with the Constitutional Court, alleging breaches of his right to a trial before a tribunal established by law because of the composition of the trial senate, at the same time requesting the Court to review the constitutionality of the Salzburg Civil Servants of Municipalities Act (Salzburg Act), insofar as it provided for the participation of members delegated by the interested municipality. On 28 September 1999, the complaints were rejected by the Constitutional Court and, on 21 June 2000, by the Administrative Court, after the matter had been referred to it.

2.9 Meanwhile, on 23 September 1999, the Disciplinary Commission had dismissed the author from service, after it had rejected a formal request to summon defence witnesses and to admit further evidence. On 11 October 1999, the author lodged an appeal against his dismissal with the Appeals Commission, which confirmed the trial senate's decision on 6 March 2000, without a hearing and after the author had challenged its chairman (who was later replaced) and the two members appointed by the Provincial Government due to their participation in previous decisions in his case. On 14 March 2000, the municipality of Saalfelden once again terminated the payment of the author's reduced salary, as well as his public health insurance coverage.

2.10 On 25 April 2000, the author filed a complaint against the decision of 6 March 2000 of the Appeals Commission with the Administrative

Court, challenging the composition of the trial and appeal senates, the trial senate's refusal to hear defence witnesses and to admit further evidence, and other procedural irregularities. On 29 November 2000, the Court dismissed the author's complaint as unfounded. By reference to a previous decision concerning a different case, the Court rejected the author's objection to Mr. Cecon's repeated chairmanship during the third set of proceedings.

The complaint

3.1 The author alleges violations of his rights under article 14, paragraph 1, read in conjunction with article 25, and under article 26 of the Covenant, as his trial was neither "fair" nor "public" nor concluded expeditiously, but was unduly delayed and conducted by bodies biased against him. He argues that proceedings concerning employment matters are "suits at law" within the meaning of article 14, paragraph 1, irrespective of the status of one of the parties.⁴

3.2 The author concedes that States parties may establish specialized tribunals to deal with, *inter alia*, employment disputes for civil servants, as long as such establishment is based on reasonable and objective criteria and to the extent that such tribunals are independent and impartial. But as, pursuant to section 12, paragraph 5, of the Salzburg Act, two members of the senates had been delegated by the interested municipality and merely served for one specific trial, the principle that a tribunal must be independent from the executive and legislative branches, as well as from the parties to the proceedings, was violated. The author also argues that the duration of office terms is a relevant factor when assessing the independence of tribunal members.⁵

3.3 The author contends that his right to a public hearing under article 14, paragraph 1, was violated, because the hearings before the trial senates of the Disciplinary Commission were held *in camera*, pursuant to article 124, paragraph 3, of the Federal Act, and since neither the Appeals Commission nor the Constitutional or Administrative Courts held any hearings in his case. No "exceptional circumstances"⁶ justified the exclusion of the public.

⁴ The author refers to Communications No. 112/1981, *Y. L. v. Canada*, decision on admissibility adopted on 8 April 1986, and No. 203/1986, *Rubén Toribio Muñoz Hermoza v. Peru*, Views of 4 November 1988.

⁵ The author refers to CCPR, 21st Sess. (1984), General Comment 13: *Equality before the courts and the right to a fair and public hearing by an independent court established by law (article 14)*, at para. 3.

⁶ Reference is made to *ibid.*, at para. 6.

3.4 The author submits that, contrary to the principle that judges must not harbour preconceptions about the matter before them, several members of the trial senate during the third set of proceedings were of necessity partial, considering that they either continued to work as municipal employees of Saalfelden, or that they had previously been challenged by the author. In particular, the fact that Mr. Cecon resumed chairmanship after having been challenged by the author and replaced by Mr. Maier, whom the author, in turn, challenged because of his role during the first set of proceedings, established "understandable, verifiable and legitimate" cause to suspect that both available chairmen were biased against the author because of the challenges.

3.5 According to the author, the trial senate promoted the interests of the other party by furnishing witnesses for the prosecution with copies of their testimonies given during the first and second proceedings, by allowing them to quote from their previous statements, and by rejecting the author's requests to call witnesses as well as to admit further evidence. The trial senate allegedly manipulated the transcript of the 1999 hearing so as to make it appear as if the prosecutorial witnesses had actually given original testimony.

3.6 The manipulated transcript was allegedly only transmitted to his counsel two and a half weeks after the deadline for appealing the Disciplinary Committee's decision of 23 September 1999 to dismiss him, thereby depriving him of an opportunity to discover the procedural irregularities and to bring them to the attention of the Appeals Commission. These irregularities, as well as the trial senate's decision exclusively to hear prosecutorial witnesses, also violated his right to equality of arms, guaranteed by article 14, paragraph 1, of the Covenant.

3.7 The author submits that the length of the proceedings, which caused him expenses of 1.2 million ATS in legal fees and lasted for almost 5 years, starting with the filing of the disciplinary complaint against him by the mayor of Saalfelden on 31 January 1996, and ending on 8 January 2001 when he received the final decision of the Administrative Court, amounts to an unreasonable delay, in violation of his right to a fair hearing under article 14, paragraph 1. He argues that the subject matter of the proceedings, while being of particular importance to him, was not complex, which was underlined by the fact that the decision of the trial senate of 23 September 1999 was taken after only one hour of deliberations and amounted to only five pages. The following delays totalling three years were attributable to the State party, given that the first two sets of proceedings were null and void, as they had been conducted by trial senates composed in obvious breach of domestic procedural law: (a) from 4 June 1996, when the chairman of the trial

senate in the first set of proceedings refused to relinquish chairmanship, until 26 March 1997, when a new trial senate was constituted; and (b) from 8 April 1997, when the author challenged members of the trial senate in the second set of proceedings, until 13 June 1999, when the trial senate was constituted in the third set of proceedings.

3.8 The author submits that he has exhausted domestic remedies and that the same matter is not being examined under another procedure of international investigation or settlement.

State party's observations on admissibility

4.1 By note verbale of 26 November 2001, the State party challenged the admissibility of the communication, arguing that it is incompatible with article 14, paragraph 1, of the Covenant, and that the author has failed to exhaust domestic remedies.

4.2 The State party submits that the author has failed to raise his claims related to the lack of publicity of the proceedings, as well as the alleged irregularities regarding the transcript of the 1999 hearing, before the domestic tribunals. While his failure to assert the latter claim before the Appeals Commission might be justified by "a potentially delayed service" of the transcript, this was not the case with respect to his later complaints to the Constitutional and Administrative Courts. Similarly, the author had raised the issues that two members of the trial senate in the third set of proceedings had been nominated by the municipality of Saalfelden and that the witnesses for the prosecution had been provided with copies of their previous testimonies only in his appeal to the Appeals Commission, without asserting this claim in his subsequent complaint to the Administrative Court.

4.3 The State party contends that the only procedural flaws which the author raised in his appeal to the Administrative Court of 25 April 2000 related to the rejection of his requests to hear defence witnesses and to admit further evidence, the alleged bias of the members of the Disciplinary Commission, the failure of the Appeals Commission to hold an oral hearing, and to the length of proceedings. With respect to the latter, the author had failed to exhaust domestic remedies in relation to his claim that the proceedings had been unreasonably delayed, as he had only challenged this delay retroactively, without availing himself of the possibilities to file a request for transfer of competence (*Devolutionsantrag*), enabling individuals to bring a case before the competent higher authority if no decision is taken within six months, or to file a complaint about the administration's failure to take a decision within due time (*Säumnisbeschwerde*), with the Administrative Court, in order to reduce the length of the proceedings.

4.4 The State party asserts that the author should have claimed a violation of his right to a fair trial by invoking the constitutionally guaranteed ban of arbitrariness before the Constitutional Court, instead of appealing the decision of 6 March 2000 of the Appeals Commission before the Administrative Court, whose competence was limited to reviewing the lawfulness of administrative decisions under ordinary law. It concludes that the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

4.5 Lastly, the State party argues that the communication is inadmissible *ratione materiae* under article 3 of the Optional Protocol, since article 14, paragraph 1, of the Covenant does not apply to disputes between administrative authorities and civil servants exercising powers intrinsic to the nature of the public service, concerning their admission, career or termination of employment under public law.⁷

Author's comments on State party's admissibility observations

5.1 By letter of 27 January 2001, the author argues that the State party itself concedes that he raised the partiality of the trial senate in the third set of proceedings, its rejection of his requests to hear defence witnesses and to admit further evidence, the Appeals Commission's failure to hold an oral hearing and the unreasonable delay of the proceedings before the Administrative Court, and thus admitted that he had exhausted domestic remedies with regard to these claims.

5.2 The author challenges the State party's objection that he had failed to claim a violation of his right to a fair trial before the Constitutional Court by invoking the constitutionally guaranteed arbitrariness ban, stating that he had brought the complaint against his dismissal in the third set of proceedings directly to the Administrative Court only because the Constitutional Court had previously refused to deal with his substantially similar complaints relating to his dismissal in the second set of proceedings and to the procedural decisions of 13 July and 3 August 1999, referring them to the Administrative Court. In these complaints, he had alleged breaches of his right to a fair trial, in particular to a trial before a tribunal established by law, and, in one case, had requested the Constitutional Court to review the constitutionality of the Salzburg Act, insofar as it provided for the

⁷ The State party refers to the judgements of the European Court of Human Rights in Applications No. 28541/95, *Pellegrin v. France*, 8 December 1999, at paras. 64 *et seq.*, and No. 39564/98, *G. K. v. Austria*, 14 March 2000.

participation of members delegated by the municipality. By reference to the Committee's jurisprudence, the author argues that he is not required to submit a complaint to the domestic authorities over and over again, if the same matter has been rejected earlier.⁸

5.3 The author contests the State party's argument that he failed to challenge the manipulation of the transcript of the third trial hearing domestically, arguing that the transcript was withheld from his counsel so that the manipulations of the witnesses' testimonies were only discovered on review of the case file by counsel for the present communication. The failure to transmit the transcript to him in due time was attributable to the State party, which therefore should be precluded from asserting non-exhaustion of domestic remedies in that regard. The author concludes that the State party had the opportunity to remedy the alleged violations, since all complaints submitted to the Committee were in substance raised before the Austrian Constitutional and Administrative Courts.

5.4 As to the State party's *ratione materiae* objection, the author submits that, according to the Committee's jurisprudence,⁹ article 14, paragraph 1, applies to proceedings relating to the dismissal of civil servants. This followed from the principle that human rights treaties must be interpreted in the manner most favourable to the individual,¹⁰ as well as from a "contextual" analysis in the light of article 25 of the Covenant, which had no equivalent in the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) and indicated that the scope of article 14, paragraph 1, was wider than that of article 6, paragraph 1, ECHR. Moreover, he suggests that the Committee should not follow the restrictive and artificial approach taken by the European Court in *Pellegrin v. France*, which excluded civil servants who "wield a portion

of the State's sovereign power" from the protection of article 6, paragraph 1, ECHR.¹¹

5.5 Lastly, the author submits that the State party's argument that he could have accelerated the proceedings by requesting a transfer of competence (*Devolutionsantrag*) or by lodging a complaint about undue delay of proceedings (*Säumnisbeschwerde*) related to the merits rather than the admissibility of his complaint that the proceedings had been unreasonably delayed. On the merits, he argues that none of the individual stages of the three sets of proceedings exceeded the duration of six months necessary for the above remedies. Moreover, while State parties were required to ensure expeditious proceedings, no corresponding obligation existed for individuals charged with disciplinary charges. On the contrary, individuals had a right to resort to whatever remedies to defend themselves against such charges, even if these remedies contributed to a delay.

State party's additional submissions on admissibility and observations on merits

6.1 By note verbale of 27 March 2002, the State party further elaborated on its objections to admissibility and submitted its observations on the merits of the communication. On admissibility, it reiterates that the author failed to exhaust domestic remedies, adding that the dismissal of his earlier complaints by the Constitutional Court did not absolve him from specifically challenging the alleged deficiencies of the third set of proceedings. It maintains that the author's request for constitutional review of section 12, paragraph 5, of the Salzburg Act was based on an alleged lack of clarity of that provision rather than the alleged lack of independence of the members of the Disciplinary Commission delegated by the municipality of Saalfelden.

6.2 While conceding that the transcript of the 1999 trial was served on the author only two weeks after the deadline for appealing to the Appeals Commission had expired, the State party submits that, under the applicable law, the author could have raised any deficiencies in the transcript throughout the appeal proceedings and in his subsequent appeal to the Administrative Court.

6.3 The State party maintains that, similar to article 6, paragraph 1, ECHR, article 14, paragraph 1, of the Covenant does not apply to disputes between the administrative authorities and civil servants directly participating in the exercise of

⁸ The author refers to Communications Nos. 210/1986 and 225/1987, *Earl Pratt and Ivan Morgan v. Jamaica*, Views adopted on 6 April 1989.

⁹ Reference is made, *inter alia*, to Communication No. 824/1998, *Nicolov v. Bulgaria*, Decision on admissibility adopted on 24 March 2000, para. 8.3; Communication No. 468/1991, *Angel N. Oló Bahamonde v. Equatorial Guinea*, Views adopted on 20 October 1993; and Communication No. 203/1986, *Rubén Toribio Muñoz Hermoza v. Peru*.

¹⁰ The author refers, *inter alia*, to the Advisory Opinion of the Inter-American Court in *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5.

¹¹ See European Court of Human Rights, Application No. 28541/95, *Pellegrin v. France*, judgement of 8 December 1999, at para. 65.

public powers,¹² such as the author, as reflected in the convergence of both provisions and, in particular, in the identical wording of their pertinent parts in the French authentic versions. The only exception recognized by the European Court of Human Rights concerned cases in which the claims relate to an essentially economic right. That the author's dismissal may ultimately have had a financial impact did not as such turn his case into a matter of civil rights and obligations.¹³ Nor did the disciplinary proceedings constitute a determination of a criminal charge against the author, in the absence of a penalty equivalent to a criminal sanction.

6.4 Subsidiarily, the State party submits that, even if article 14, paragraph 1, was applicable, the Committee would be limited to a review of whether the alleged irregularities in the disciplinary proceedings amounted to a denial of justice or were otherwise arbitrary. This was not the case because domestic authorities had carefully examined compliance with the procedural rules and only confirmed the author's dismissal after having conducted three sets of proceedings. Similarly, the assessment of the relevance and value of requested evidence was a matter to be determined by the national courts, subject only to an abuse control. The author's evidentiary requests were dismissed on legitimate grounds, as they related to issues on which he had already provided documentary evidence.

6.5 The State party argues that the author failed to substantiate his claim concerning the alleged bias of members of the trial senate, which could not automatically be inferred from their participation in the previous proceedings. The participation of members who had been challenged without reasons did not as such call into question the impartiality of the tribunal, since the right to challenge senate members without stating reasons had to be distinguished from challenging a senate member for bias.

6.6 The State party submits that the author's right to appear before an independent and impartial tribunal was safeguarded by the freedom from instruction of the Disciplinary Commission's members (section 12, paragraph 6, of the Salzburg

Act). Moreover, decisions of the Disciplinary Commission are subject to appeal to the Appeals Commission as well as the Administrative Court, which are both independent tribunals competent to examine questions of fact and law and, in the case of the Appeals Commission, composed of members not delegated by the interested municipalities and appointed for three-year-terms. Without prejudice to the fact that the State party considers the Disciplinary Committee a tribunal within the meaning of article 14, paragraph 1, it argues that the author's right to be heard by an independent and impartial tribunal would therefore be secured even if the Disciplinary Commission were denied the quality of an independent and impartial tribunal, since article 14, paragraph 1, does not require States parties to have a decision on civil rights issued by a tribunal at all stages of appeal.

6.7 The State party contends that the 1997 trial transcript was sent to the witnesses in order to provide all persons involved in the 1999 proceedings "with the same state of information regarding their previous statements and procedural steps." The convergence between the 1997 and 1999 trial records merely reflected that the witnesses had made corresponding statements in the two oral hearings. Under section 44 of the Austrian Administrative Procedure Act, transcripts of hearings need not quote witnesses' testimonies entirely; summarizing the relevant content of such testimony did not amount to a manipulation.

6.8 As to the alleged lack of publicity of the proceedings, the State party submits that the exclusion of the general public was justified in the interest of official secrecy, which is frequently an issue in disciplinary proceedings. In order to protect an accused civil servant against secret administration of justice, section 124, paragraph 3, of the Federal Act allowed for the presence of up to three civil servants nominated by the accused as persons of confidence during the oral hearings.

6.9 The State party refutes the author's claim based on the lack of an oral hearing during the appeal proceedings, arguing that no such hearing is required if the case can be determined on the basis of the files, in connection with the statement of appeal. Since the author's appeal was confined to procedural complaints, without raising any new facts, the appellate bodies justifiably decided not to conduct a new oral hearing.

6.10 The State party submits that the author himself admitted that the statutory deadline for adopting a decision was met for any of the stages of the different sets of proceedings to which he was a party; the author went through the various stages of appeal on his own initiative, without any delay caused by the authorities and courts. For the State

¹² Reference is made, *inter alia*, to the dissenting opinion of the Committee members *Graefrath, Pocar and Tomuschat* in Communication 112/1981, *Y. L. v. Canada*, at para. 3.

¹³ The State party refers to the judgements of the European Court of Human Rights in *Pierre-Bloch v. France*, judgement of 21 October 1997, at para. 51, and in *Pellegrin v. France*, judgement of 8 December 1999, at para. 60.

party, the author has failed to substantiate a violation of his rights under article 14, paragraph 1, read in conjunction with article 26 of the Covenant.

Additional comments by the author

7.1 By further submission of 14 June 2002, the author reiterates that he was not required to submit the same complaint to the Constitutional Court over and over again, given that the Court had clearly stated in its decisions of 11 March 1998 and 28 September 1999 that the author's case involved neither violations of his constitutional rights nor the application of an unconstitutional law, despite the fact that the Salzburg Act provided for the participation of two senate members delegated by the respondent party.

7.2 The author argues that, if a State decided to split the competencies of reviewing the fairness of proceedings under constitutional and ordinary law, between the two highest courts, applicants could only be required to submit a complaint to one of them. The State party was given sufficient opportunity to comply with its obligation to remedy the alleged violations, since the Administrative Court was competent to provide such a remedy upon examination of his complaint, even if "on a different formal level" than the Constitutional Court.

7.3 The author reiterates that, according to the Committee's jurisprudence,¹⁴ article 14, paragraph 1, encompasses all proceedings of a civil or criminal character, whether or not civil or public servants are parties. By contrast to article 6, paragraph 1, ECHR, article 14, paragraph 1, of the Covenant makes no distinction between categories of civil servants, and is generally applicable to employment-related disputes. This follows from the clear wording ("suits at law") of article 14, paragraph 1, which the State party tried to ignore by reference to the European Court's contradictory case law that had no bearing on the Covenant system.

7.4 The author submits that the State party implicitly concedes that the participation of two senate members delegated by the municipality of Saalfelden in the disciplinary proceedings constituted a breach of article 14, paragraph 1. The lack of independence and impartiality of the Disciplinary Commission was not cured by the review of his dismissal on facts and law at the appeal level, since neither the Appeals Commission nor the Administrative Court conducted an inquiry into the

facts on their own, being bound by the findings of fact of the first instance trial senate. In the absence of an adversarial oral hearing at the appellate stage, the author was deprived of his right to a fair and public hearing by an independent and impartial tribunal and, more specifically, of an opportunity to impeach the testimony of the prosecutorial witnesses. Moreover, the appeals senate was as partial and dependent as the trial senate.

7.5 For the author, the decision of whether or not to call witnesses cannot be left to the unlimited discretion of the national tribunals, arguing that the State party failed to refute his allegation that the trial senate had denied him equality of arms in presenting his defence. Similarly, the State party's explanations concerning the falsification of the 1999 trial transcript were illogical.

7.6 As to the length of proceedings, the author reiterates that the fact that he had been compelled to proceed to the first or second appeals levels to have clearly illegal acts of the trial senate set aside could not be attributed to him.

7.7 The author challenges that the exclusion of the general public from the trial senate hearings was justified in the interest of official secrecy, since none of the charges against him involved matters of a secret nature. Most of the counts concerned allegations of improper behaviour, while the other charges related to public rather than secret matters. In any event, the Disciplinary Commission could have dealt *in camera* with any issue requiring secrecy and could have used acronyms to ensure the privacy of third persons. The assistance of up to three civil servants in disciplinary proceedings failed to meet the standard of a "public hearing" within the meaning of article 14, paragraph 1, which also served the purpose of safeguarding the transparency of the administration of justice.

Additional observations by State party and author's comments

8. Both parties made additional submissions on 14 and 27 January 2003, respectively. The State party argued that, by failing to request an oral hearing before the Administrative Court, the author had waived his right under article 14, paragraph 1, to a fair and public hearing, since he must have been aware, on the basis of his legal representation by counsel, that without an explicit request to that effect, proceedings before the Administrative Court were usually only conducted in writing. The author considers the State party's additional observations procedurally inadmissible, on the basis that they were submitted out of time (i.e. more than six months after submission of his comments of 14 June 2002), thereby unduly prolonging the proceedings.

¹⁴ The author cites Communications No. 112/1981, *Y. L. v. Canada*; No. 203/1986, *Rubén Toribio Muñoz Hermoza v. Peru*; and No. 824/1998, *Nicolov v. Bulgaria*, as well as Communication No. 454/1991, *García Pons v. Spain*, Views adopted on 30 October 1995.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

9.2 With regard to the State party's objection *ratione materiae*, the Committee recalls that the concept of a "suit at law" under article 14, paragraph 1, is based on the nature of the right in question rather than on the status of one of the parties.¹⁵ The imposition of disciplinary measures taken against civil servants does not of itself necessarily constitute a determination of one's rights and obligations in a suit at law, nor does it, except in cases of sanctions that, regardless of their qualification in domestic law, are penal in nature, amount to a determination of a criminal charge within the meaning of the second sentence of article 14, paragraph 1. In the present case, the State party has conceded that the trial senate of the Disciplinary Commission was a tribunal within the meaning of article 14, paragraph 1, of the Covenant. While the decision on a disciplinary dismissal does not need to be determined by a court or tribunal, the Committee considers that whenever, as in the present case, a judicial body is entrusted with the task of deciding on the imposition of disciplinary measures, it must respect the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee. Consequently, the Committee declares the communication admissible *ratione materiae* insofar as the author claims to be a victim of violations of his rights under article 14, paragraph 1, of the Covenant.

9.3 As to the author's claim that the lack of an oral hearing during the appeal proceedings violated his right to a fair and public hearing under article 14, paragraph 1, the Committee has noted the State party's argument that the author could have requested an oral hearing before the Administrative Court and that, failing this, he had waived his right to such a hearing. The Committee also notes that the author has not refuted this argument in substance, and that, throughout the proceedings, he was represented by counsel. It therefore considers that the author has failed to substantiate, for purposes of

admissibility, that his right to an oral hearing has been violated. The Committee concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

9.4 The Committee has taken note of the State party's objection that the author did not exhaust domestic remedies in relation to his claims concerning the lack of independence of the two members of the trial senate delegated by the municipality of Saalfelden in the third set of proceedings, the lack of publicity of the hearings before that senate, the fact that copies of the 1997 testimonies had been sent to the prosecutorial witnesses prior to the 1999 trial hearing, and the alleged manipulation of the 1999 trial transcripts. After careful examination of the author's complaints to the Appeals Commission (complaint dated 11 October 1999) and to the Administrative Court (complaints dated 21 January and 25 April 2000), the Committee observes that the author has failed to raise these claims before the Appeals Commission or, in any event, before the Administrative Court.

9.5 Moreover, it does not appear from the file before the Committee that the author challenged the participation of the trial senate members, on the basis that they had been designated by the municipality, in his constitutional complaint challenging the trial senate's procedural decision of 13 July 1999. Consequently, the Committee concludes that the author has failed to exhaust domestic remedies with regard to these claims and that, consequently, this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

9.6 With regard to the remainder of the communication, the Committee has taken note of the State party's argument that the author should have lodged a complaint with the Constitutional Court against the confirmation of his dismissal by the Appeals Commission in the third set of proceedings, in order to have this decision reviewed not only under ordinary, but also under constitutional law. In this regard, the Committee recalls its consistent jurisprudence that article 5, paragraph 2 (b), of the Optional Protocol does not require resort to domestic remedies which objectively have no prospect of success.¹⁶ Although the author's constitutional complaint of 25 August 1999 concerned the second rather than the third set of proceedings, the allegations underlying this complaint were substantively similar to the claims raised in his complaint of 25 April 2000 to the Administrative Court. The Committee also observes that, by the time the author appealed the decision of the Appeals

¹⁵ See Communication No. 112/1981, *Y. L. v. Canada*, para. 9.2; Communication No. 441/1990, *Robert Casanovas v. France*, Views adopted on 19 July 1994, para. 5.2.

¹⁶ See Communications No. 210/1986 and 225/1987, *Earl Pratt and Ivan Morgan v. Jamaica*, at para. 12.3.

Commission of 6 March 2000, the proceedings had already extended over a period of more than four years.¹⁷ Under these circumstances, the Committee is satisfied that the author, by filing a complaint against his dismissal in the third set of proceedings with the Administrative Court, has made reasonable efforts to exhaust domestic remedies.

9.7 The Committee considers that the author has sufficiently substantiated, for purposes of admissibility, his claim that the alleged bias of the members of the trial senate in the third set of proceedings, its rejection of the author's request to hear witnesses and to admit further evidence, its delay in sending him the 1999 trial transcript, and the length of the disciplinary proceedings raise issues under article 14, paragraph 1.

9.8 To the extent that the author alleges a violation of his rights under article 26 of the Covenant, the Committee finds that he has failed to substantiate, for purposes of admissibility, any claim of a potential violation of that article. The communication is therefore inadmissible under article 2 of the Optional Protocol, insofar as article 26 is concerned.

Consideration of the merits

10.1. The issue before the Committee is whether the proceedings of the trial senate of this Commission violated article 14, paragraph 1, of the Covenant.

10.2 With regard to the author's claim that several members of the trial senate in the third set of proceedings were biased against him, either because of their previous participation in the proceedings, the fact that they had already been challenged by the author, or because of their continued employment with the municipality of Saalfelden, the Committee recalls that "impartiality" within the meaning of article 14, paragraph 1, implies that judges must not harbour preconceptions about the matter put before them, and that a trial flawed by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be fair and impartial.¹⁸ The Committee notes that the fact that Mr. Cecon resumed chairmanship of the trial senate after having been challenged by the author during the same set of proceedings, pursuant to section 124, paragraph 3, of the Federal Civil Servants Act, raises doubts about the impartial character of the third trial senate. These doubts are

corroborated by the fact that Mr. Maier was appointed substitute chairman and temporarily even chaired the senate, despite the fact that the author had previously brought criminal charges against him.

10.3 The Committee observes that, if the domestic law of a State party provides for a right of a party to challenge, without stating reasons, members of the body competent to adjudicate disciplinary charges against him or her, this procedural guarantee may not be rendered meaningless by the re-appointment of a chairperson who, during the same stage of proceedings, had already relinquished chairmanship, based on the exercise by the party concerned of its right to challenge senate members.

10.4 The Committee also notes that, in its decision of 6 March 2000, the Appeals Commission failed to address the question of whether the decision of the Disciplinary Commission of 23 September 1999 had been influenced by the above procedural flaw, and to that extent merely endorsed the findings of the Disciplinary Commission.¹⁹ Moreover, while the Administrative Court examined this question, it only did so summarily.²⁰ In the light of the above, the Committee considers that the third trial senate of the Disciplinary Commission did not possess the impartial character required by article 14, paragraph 1, of the Covenant and that the appellate instances failed to correct this procedural irregularity. It concludes that the author's right under article 14, paragraph 1, to an impartial tribunal has been violated.

10.5 With respect to the rejection by the Disciplinary Commission of the author's requests to call witnesses and to admit further evidence in his defence, the Committee recalls that, in principle, it is beyond its competence to determine whether domestic tribunals properly evaluate the relevance of newly requested evidence.²¹ In the Committee's view, the trial senate's decision that the author's evidentiary requests were futile because of the sufficient written evidence does not amount to a denial of justice, in violation of article 14, paragraph 1.

10.6 As to the trial senate's failure to transmit the 1999 trial transcript to the author before the end of the deadline for appealing the decision of the Disciplinary Commission of 23 September 1999, the Committee observes that the principle of equality of arms implies

¹⁷ Communication No. 336/1988, *Andre Fillastre and Pierre Bizouarn v. Bolivia*, Views adopted on 5 November 1991, at para. 5.2.

¹⁸ See Communication No. 387/1989, *Arvo O. Karttunen v. Finland*, Views adopted on 23 October 1992, at para. 7.2.

¹⁹ See p. 3 of the decision of 6 March 2000 of the Appeals Commission, No. 11-12294/94-2000.

²⁰ See p. 7 *et seq.* of the decision of 29 November 2000 of the Administrative Court, No. ZI. 2000/09/0079-6.

²¹ *Cf.* Communication No. 174/1984, *J. K. v. Canada*, decision on admissibility adopted on 26 October 1984, at para. 7.2.

that the parties to the proceedings must have adequate time and facilities for the preparation of their arguments, which, in turn, requires access to the documents necessary to prepare such arguments.²² However, the Committee observes that adequate preparation of one's defence cannot be equated with the adequate preparation of an appeal. Furthermore, it considers that the author has failed to demonstrate that the late transmittal of the 1999 trial transcript prevented him from raising the alleged irregularities before the Administrative Court, especially since he admits himself that the alleged manipulation of the testimonies was only discovered by counsel for the present communication. The Committee therefore concludes that the author's right to equality of arms under article 14, paragraph 1, has not been violated.

10.7 Regarding the length of the disciplinary proceedings, the Committee considers that the right to equality before the courts, as guaranteed by article 14, paragraph 1, entails a number of requirements, including the condition that the procedure before the national tribunals must be conducted expeditiously enough so as not to compromise the principles of fairness and equality of arms. The Committee observes that responsibility for the delay of 57 months to adjudicate a matter of minor complexity lies with the authorities of Austria. It also observes that non-fulfillment of this responsibility is neither excused by the absence of a request for the transfer of competence (*Devolutionsantrag*), nor by the author's failure to lodge a complaint about undue delay of proceedings

²² See General Comment 13, at para. 9.

(*Säumnisbeschwerde*), as it was primarily caused by the State party's failure to conduct the first two sets of proceedings in accordance with domestic procedural law. The Committee concludes that the author's right to equality before the courts and tribunals has been violated.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal a violation of article 14, paragraph 1, of the Covenant.

12. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including payment of adequate compensation. The State party is also under an obligation to prevent similar violations in the future.

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, that State party has undertaken to ensure all individuals within its territory or 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 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

Communication No. 1023/2001

Submitted by: Jouni Länsman, Eino Länsman and the Muotkatunturi Herdsmen's Committee
(represented by Johanna Ojala)

Alleged victim: The authors

State party: Finland

Declared admissible: 1 April 2003 (seventy-seventh session)

Date of adoption of Views: 17 March 2005 (eighty-third session)

Subject matter: Rights of reindeer herders with respect to logging operations undertaken by the State party

Procedural issue: Request for review of admissibility decision

Substantive issues: Extent to which logging may be carried out by State authorities before it will be considered to violate the rights of reindeer herders

Article of the Covenant: 27

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

Finding: No violation

1.1 The authors of the communication are Jouni E. Länsman, Eino A. Länsman, both Finnish citizens, and the Muotkatunturi Herdsmen's Committee (of which the two individual authors are part). The authors allege to be victims of a violation by Finland of article 27 of the Covenant. They are represented

by counsel. The Optional Protocol entered into force for the State party on 23 March 1976.

1.2 On 31 October 2002, under Rule 86 of its Rules of Procedure, the Committee, acting through its Chairperson, requested the State party “to refrain from conducting logging activities that would affect the exercise by Mr. Jouni Länsman et al. of reindeer husbandry in the Angeli area, while their case is under consideration by the Committee”.

Factual background

2.1 On 30 October 1996, the Committee delivered its Views in *Länsman et al. v. Finland* (“the earlier communication”).¹ The Committee found, on the evidence then before it, no violation of the rights under article 27 of the current two individual authors (and others) in the completed logging of some 250 hectares in Pyhäjärvi and the proposed logging of some further 250 hectares in Kirkko-outa (both are in the Angeli area).

2.2 The Committee went on to find:

10.6 As far as future logging activities are concerned, the Committee observes that on the basis of the information available to it, the State party’s forestry authorities have approved logging on a scale which, while resulting in additional work and extra expenses for the authors and other reindeer herdsman, does not appear to threaten the survival of reindeer husbandry. That such husbandry is an activity of low economic profitability is not, on the basis of the information available, a result of the encouragement of other economic activities by the State party in the area in question, but of other, external, economic factors.

10.7 The Committee considers that *if* logging plans were to be approved on a scale larger than that already agreed to for future years in the area in question or if it could be shown that the effects of logging already planned were more serious than can be foreseen at present, then it may have to be considered whether it would constitute a violation of the authors’ right to enjoy their own culture within the meaning of article 27. The Committee is aware, on the basis of earlier communications, that other large-scale exploitations touching upon the natural environment, such as quarrying, are being planned and implemented in the area where the Sami people live. Even though in the present communication the Committee has reached the conclusion that the facts of the case do not reveal a violation of the rights of the authors, the Committee deems it important to point out that the State party must bear in mind when taking steps affecting the rights under article 27, that

though different activities in themselves may not constitute a violation of this article, such activities, taken together, may erode the rights of Sami people to enjoy their own culture.

2.3 By 1999, all 500 hectares of the two areas at issue in the earlier communication had been logged. Moreover, in 1998, a further 110 hectares were logged in the Paadarskaidi area of the Herdsmen’s Committee (not part of the areas covered by the earlier communication).

2.4 By the date of submission of the communication, yet another logging operation in Paadarskaidi had been proposed, with minimal advance warning to the Herdsmen’s Committee and with an imminent commencement date. At that point, the Herdsmen’s Committee had yet to receive a written plan of the nature and scope of the logging operation. The National Forest & Park Service had indicated that it would send the plans to the Herdsmen’s Committee at a later date, having indicated in its previous plan that the next logging operation would be due to take place only after a year and in a different location.

The complaint

3.1 The authors allege a violation of their rights as reindeer herders under article 27 of the Covenant, both inasmuch as it relates to logging already undertaken and to logging proposed. At the outset, they complain that since the 1980s, some 1,600 hectares of the Herdsmen’s Committee’s grazing area in Paadarskaidi have been logged, accounting for some 40 per cent of lichen (utilized for feeding reindeer) in that specific area.

3.2 As to the effect of the logging on the author’s herd, it is submitted that reindeer tend to avoid areas being logged or prepared for logging. They therefore stray to seek other pastures and thereby incur additional labour for the herders. After logging, logging waste prevents reindeer grazing and compacted snow hampers digging. The logging operations result in a complete loss of lichen in the areas affected, allegedly lasting for hundreds of years.

3.3 The authors recall that after heavy snows in 1997, herders had for the first time to supply capital and labour intensive fodder for the reindeer rather than rely on lichen. The ongoing and increasing logging of fine lichen forests increases the necessity of providing fodder and threatens the economic self-sustainability of reindeer husbandry, as husbandry depends on the reindeer being able to sustain themselves.

3.4 The authors recall that the maximum number of reindeer that may be kept by the Herdsmen’s Committee is decided by the Ministry of Agriculture

¹ Case No. 671/1995.

and Forestry. The Ministry is charged by statute, in determining the maximum number of reindeer, to ensure that the number of reindeer grazing in the Herdsmen's Committee's area in the winter season does not exceed the sustainable productive capacity of the Herdsmen's Committee's winter pastures. Since the Committee's Views in the earlier communication, the Ministry has twice reduced the Herdsmen's Committee's number of animals: from 8,000 to 7,500 in 1998, and from 7,500 to 6,800 in 2000. In two administrative decisions within two years, then, the Ministry considered that the sustenance of winter pasture in Muotkatunturi was so low that the sustainable number of reindeer should be reduced by 15%. The authors allege that the principal cause of this decline in winter pastures, and particularly of horsehair lichen pastures, are the logging operations.

3.5 Despite the recent reductions in reindeer herds, the National Forest & Park Service continues to conduct logging operations, destroying the Herdsmen's Committee's pastures, and further deteriorating husbandry conditions. The authors contend that this situation violates article 27, in that forestry operations are continuing and the effects are more serious than first thought. At the same time that logging proceeds, reindeer numbers have been reduced because the pastures still available cannot support the previous number of reindeer.

3.6 The authors state that, in respect of logging at Kirkko-outa and Pyhäjärvi, all domestic remedies have been exhausted. As to the other areas, the authors invoke the Committee's Views in the earlier communication for the proposition that the domestic courts do not need to be seized afresh of the matter. These elements are said to be satisfied, since the State party itself recognizes that the effects have been more serious, while it continues both to log and to plan further logging.

State party's admissibility submissions

4.1 On 31 December 2001, the State party supplied its observations on the admissibility only of the communication. On 8 February 2002, the Committee, acting through its Chairperson, decided to separate the consideration of the admissibility and the merits of the case.

4.2 The State party informed the Committee that it "refrains from conducting logging activities in the Angeli area (paragraph 10.1)² in the Committee's

² Para 10.1 provides, as relevant: "The issue to be determined is whether logging of forests in an area covering approximately 3,000 hectares of the area of the Muotkatunturi Herdsmen's Committee (of which the authors are members) - i.e. such logging as has already

Views in case no. 671/1995 (30 October 1996) that would affect the exercise by the individual authors' reindeer husbandry while their communication is under consideration by the Committee".

4.3 The State party notes that as far as the Paadarskaidi area is concerned, the National Forest & Park Service carried out increment felling (preparative cutting) totalling some 200-300 hectares between 1998 and 2000. The distance between the Angeli area and the Paadarskaidi area is about 30 kilometres. It considers the communication inadmissible on three grounds: lack of proper standing as to one complainant, lack of exhaustion of domestic remedies, and for failure to substantiate the claims for purposes of admissibility.

4.4 While accepting the status of the individual authors, the State party rejects the ability of the Herdsmen's Committee to submit a communication. It considers that the Herdsmen's Committee does not fall within the entitlement of article 27 of the Covenant, nor is it an "individual" within the meaning of article 2 of the Optional Protocol. Under the Reindeer Herding Act, a Herdsmen's Committee consists of all herdsmen in a given area and who are not personally responsible for the performance of the Committee's duties; thus, any claim on the Herdsmen's Committee's behalf amounts to an *actio popularis*.

4.5 The State party observes that domestic remedies remain available, as shown by the decisions of the District Court, Court of Appeal and Supreme Court in the earlier communication, the effectiveness of which has not been contested. The authors did not initiate any proceedings regarding logging operations planned or carried out in either the Angeli or Paadarskaidi areas subsequent to the Committee's Views in the earlier communication.

4.6 The State party notes that in its Views on case 671/1995, the Committee merely observed that, if the logging effects were more serious or further plans were approved, it would have to be considered whether this would constitute a violation of the authors' article 27 rights. The Committee did not imply the requirement to exhaust domestic remedies could be done away with in any further complaint. This is particularly applicable when an assessment of a possible violation of article 27 requires an assessment of the relevant evidence both by the domestic courts and in turn the Committee. There is no proof that the effects of the earlier logging operations were more serious than foreseen at the time. The Ministry's decisions to reduce the Herdsmen's Committee's herd does not substantiate any claim of the effects of individual logging

been carried out and future logging - violates the authors' rights under article 27 of the Covenant."

operations. Nor may the reductions in reindeer be considered a justification for not pursuing domestic remedies, where such allegations would be examined.

4.7 Accordingly, the authors have neither exhausted domestic remedies available to them, nor demonstrated any special circumstances which might absolve them from doing so. Finally, the State party argues that the brief communication lacks sufficient material basis, including basic evidence, that would go beyond a mere allegation. Accordingly, the case is said not to have been substantiated.

Authors' comments

5.1 In comments dated 15 March 2002, the authors supplied comments, restricted to the admissibility arguments of the State party.

5.2 As to the availability of domestic remedies in respect of the other areas (not covered by the earlier communication), the authors contend that the State party's suggestion of available remedies is misplaced. No court action designed to prevent specific logging plans was successful, partly because any concrete logging tract "is always only a seemingly modest part of the overall lands [that] are used by the Sami for reindeer herding". There is no indication that a case seeking positive protection for Sami herders would be successful, and, in any event, the existing Supreme Court ruling would be a further obstacle.

5.3 For the authors, the National Forest & Park Service has been too restrictive in providing information on its logging activities affecting the life of Angeli Sami. On the issue of substantiation of claims, the authors argue that they have shown that the reductions of reindeer after the Ministry's decisions was a direct consequence of the impact of logging on pasture areas. They have detailed the State party's plans to continue logging despite the Committee's earlier Views. The authors regard this as sufficient substantiation.

5.4 Finally, the authors state that there are plans for further logging by the National Forestry and Park Service within the area already subject to court proceedings, an area known as the Kippalrova tract.

Committee's admissibility decision

6.1 During its 77th session, the Committee considered the admissibility of the communication. On the contention that the Muotkatunturi Herdsmen's Committee did not have standing to bring a claim under the Optional Protocol, the Committee referred to its constant jurisprudence that legal persons are not "individuals" able to bring such a claim.³ Neither was

there an indication that individual members of the Muotkatunturi Herdsmen's Committee had authorized it to bring a claim on their behalf, or that Jouni and/or Eino Länsman were authorized to act on behalf of the Herdsmen's Committee and its members. Accordingly, while it was uncontested that Jouni and Eino Länsman had standing to bring the communication on their own behalf, the Committee considered the communication inadmissible under article 1 of the Optional Protocol insofar as it related to the Muotkatunturi Herdsmen's Committee and/or its constituent members, other than Jouni and Eino Länsman.

6.2 On the issue of exhaustion of domestic remedies, the Committee noted that with the Supreme Court's decision of 22 June 1995 there were no further avenues available to challenge the decision to undertake logging in the Pyhäjärvi and Kirkko-outa areas (the areas at issue in the earlier communication). Accordingly, the Committee considered that the issue of whether logging of these areas has had effects, in terms of article 27, greater than anticipated by either the Finnish courts in those proceedings or by the Committee in its Views on case No. 671/1995 is one that is admissible.

6.3 Regarding the Kippalrova area in which logging was *planned*, the Committee noted that this forest tract fell within the area covered by the Supreme Court decision of 22 June 1995. Accordingly it did not appear that further judicial review of this decision was possible. Accordingly, the Committee held the issues arising from the proposal to log this area to be admissible.

6.4 As to the 1998 logging in Paadarskaidi (outside the area covered by the Supreme Court decision), the Committee noted that the domestic remedies to which the State party points are all instances that have dealt, in terms of article 27, with logging plans *prior* to those plans being executed. In such circumstances, the decision on the anticipated future effects of logging is by necessity speculative, with only subsequent events bearing out whether or not the initial assessment was correct. The Committee observed that other cases referred to by counsel have also been challenges to proposed logging in advance. The Committee considered that the State party had not demonstrated, on the information supplied, what domestic remedies might be available to the authors seeking compensation or to obtain another appropriate remedy for an alleged violation of article 27 by virtue of logging that has *already* taken place. Accordingly, the Committee considered that the question of the effects, in terms of article 27, of logging in the Paadarskaidi already carried out was admissible.

³ See, for example, *Hartikainen v. Finland*, Case No. 40/1978, Decision adopted on 9 April 1981, *JT v.*

Canada, Case No. 104/1981, Decision adopted on 6 April 1983, and *Ominayak et al. v. Canada*, op. cit.

6.5 On proposed further logging in Paadarskaidi, the Committee noted the authors' contention that no claim before the Finnish courts seeking to prevent logging taking place had been successful. While mindful of the need to examine whether the judicial remedies in question were available and effective in practical terms, the Committee had insufficient information before it in terms of the numbers of actions brought, the arguments invoked and their outcomes to conclude that the judicial remedies invoked by the State party were ineffective. Accordingly, this portion of the communication was considered inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

6.6 Taking into account the authors' contention that they had suffered a significant reduction in the number of reindeer that they are permitted to raise in their herding areas, the Committee considered that the parts of the communication that have not been found inadmissible for lack of standing or failure to exhaust domestic remedies had been substantiated, for purposes of admissibility.

6.7 On 1 April 2003, the Committee declared the communication admissible insofar as it relates to the cumulative effects on the exercise by Jouni and Eino Länsman of their rights under article 27 of the Covenant arising from the logging that had taken place in the Pyhäjärvi, Kirkko-outa and Paadarskaidi areas, along with the proposed logging in Kippalrova.

State party's merits submission

7.1 On 1 October 2003, the State party submitted comments on the merits and requested the Committee to review its previous decision on admissibility for failure to exhaust domestic remedies. It recalls that complex questions such as the issue of the alleged effects of logging proceedings in the present case must and can be thoroughly investigated, for example through expert and witness testimonies, on-site inspections and specific information on local circumstances. It is unlikely that all the necessary information could be obtained outside national court proceedings. The present case does not show any special circumstances which might have absolved the authors from the requirement of exhausting the domestic remedies at their disposal. The authors could take a civil action for damages against the State in a District Court at first instance, if necessary, on appeal in the Court of Appeal, and subject to leave to appeal in the Supreme Court.

7.2 On the merits, the State party acknowledges that the Sami community is an ethnic community within the meaning of article 27, and that the authors, as members of that community, are entitled to protection under this provision. It reviews the

Committee's jurisprudence on article 27 of the Covenant⁴ and concedes that the concept of "culture" within the meaning of article 27 covers reindeer husbandry, as an essential component of the Sami culture.

7.3 The State party admits that "culture" within the meaning of article 27 provides for protection of the traditional means of livelihood for national minorities, in so far as they are essential to the culture and necessary for its survival. Not every measure or its consequences, which in some way modify the previous conditions, can be construed as a prohibited interference with the right of minorities to enjoy their own culture. The State party refers to General Comment on article 27, adopted in April 1994, which acknowledges that the protection of rights under article 27 is directed to ensuring "the survival and continued development of the cultural, religious and social identity of the minorities concerned" (paragraph 9). It invokes the *ratio decidendi* of the Committee's Views in *Länsman et al. v. Finland*,⁵ where the Committee held that States parties may wish to encourage economic development and allow economic activity, and that measures which have a certain limited impact on the way of life of persons belonging to a minority do not necessarily violate article 27.

7.4 The State party notes that the areas referred to in the communication is owned by the State and under the administration of the National Forestry and Park Service which is entitled, *inter alia*, to log forests and construct roads at its discretion - with due regard to the relevant provisions of national legislation and international treaties. In the State party's view, due care was exercised for all logging operations carried out in State-owned forests in northern Finland. In the past few years, logging operations have mainly been carried out for the purposes of thinning forests to ensure proper growth.

7.5 The State party points out that the size of the territory administered by the Muotkatunturi Herdsmen's Committee is relevant. The surface of the land area administered by the Herdsmen's Committee is approximately 248,000 hectares, of which some 16,100 hectares of forests (about 6 per cent of the land areas administered by the Committee) are used for the purposes of forestry on State-owned lands. In fact, there have been very few logging operations in the area, the surface of the lands subject to logging amounting to approximately 1.2 per cent of the area administered by the Committee. The operations carried out in this

⁴ Views on Cases Nos. 167/1984 (*B. Ominayak and members of the Lubicon Lake Band v. Canada*), 197/1985 (*Kitok v. Sweden*) and 511/1992 (*I. Länsman v. Finland*).

⁵ *Supra*.

territory between 1983 and 2001 amounted to 152 hectares per year, whereas the planned logging operations to take place between 2003 and 2012 would amount to 115 hectares per year. In view of the total surface of forest areas, both the logging operations carried out and the planned ones are less extensive than those carried out in private forests in the area. While reindeer owners have required the National Forest and Park Service to terminate forestry activities in the land areas administered by the Committee, they did not reduce their own logging operations.

7.6 The State party denies that any new logging operations have been planned for the Angeli area (Pyhäjärvi and Kirkko-outa), nor have any such operations been carried out in or planned for the area of Kippalrova. The State party observes that as far as the admissible part of the complaint with regard to the Paadarskaidi area is concerned, the National Forest and Park Service mainly carried out increment felling (preparative cutting), in the area, amounting to approximately 110 hectares in 1998.

7.7 The logging operations in Pyhäjärvi in 1996 (170 hectares) and in 1999 (regeneration fellings over 60 hectares), as well as operations in Kirkko-outa in 1998 (regeneration fellings amounting to 70 hectares and thinning amounting to 200 hectares) were already taken into account by the Human Rights Committee on 22 November 1996. The Committee had considered the logging operations which had been carried out by the date of the decision, as well as planned future operations in the Angeli area. According to the decision, there was no violation of article 27 of the Covenant. It observes that the regeneration fellings (300 hectares) in the Angeli area constitute 0.8 percent and the thinning logging operations (200 hectares) constitute 0.5 percent of the forest, administered by the Muotkatunturi Herdsmen's Committee.

7.8 As to the effects of logging on reindeer herding, the State party notes that it has not been shown that the effects of the earlier logging operations were more than anticipated. Nor was it shown that logging operations would create long-lasting harm preventing the authors from continuing reindeer herding in the area at its present extent. It observes that the effects of forestry should not be examined in the short term or in respect of individual logging sites, but from a wider perspective. According to a statement given by the Finnish Game and Fisheries Research Institute on 31 January 2002, the operations referred to in the communication do not have any significant additional adverse effects on reindeer herding in the long term if the numbers of reindeer are maintained approximately at their present level. In view of the state of winter herding areas, the present number of reindeer is high.

7.9 The State party notes that because of the severe conditions of nature in the area administered by the Herdsmen's Committee, provisions for the purposes of preserving nature and the environment are included, among others, in section 21 of the Reindeer Herding Act, which provides that the Ministry of Agriculture and Forestry shall determine the maximum number of reindeer that the Herdsmen's Committee may keep in their herds, as well as the number of reindeer that may be owned by individual Committee members. In the determination of the maximum numbers of reindeer, the principle enshrined in section 21, subsection 2, is applied according to which the number of reindeer in the herds on the lands administered by the Committee may not exceed the sustainable productive capacity of the winter pastures.

7.10 Even after the reductions of the maximum number of reindeer by the Ministry of Agriculture and Forestry in 1998/1999 and 2000/2001, the maximum number of reindeer allowed is more than three times the numbers allowed in the 1970s. In 1973, the number was no more than 1,051, whereas the highest number in 1990 was 10,398. The State party argues that the significant increase in the number of reindeer kept in herds in the 1980s and 1990s had adverse effects on the state of winter herding pastures. The high numbers of reindeer kept by the Herdsmen's Committee in their herds and the resulting adverse effects on herding lands, increase the need for additional feeding, thereby harming the reindeer husbandry. The State party adds that apart from the number of reindeers per herd, the difficulties of reindeer herdsman and the poor state of herding lands are not so much affected by forestry as they are by other forms of forest use. For the State party, the Ministry's decision on the permitted number of reindeer does not alone constitute any substantiated evidence of the effects of certain individual loggings, but rather of the effects of the high numbers of reindeer kept in herds.

7.11 The State party submits that there has been regular contact between the authorities and the Herdsmen's Committee in the form of letters, negotiations and even various on-site visits. It notes that irrespective of whether the owner is the State or an individual citizen, the possible restrictions resulting from the right of the Sami, other Finns or nationals of other European Economic Area countries, to carry out reindeer herding cannot entirely deprive landowners of their own rights. It is also observed that reindeer herdsman's committees within the Sami often have a mixed composition of both Sami and other Finns as their members. The relevant provisions of the Finnish Constitution are based on the principle that both population groups have, as performers of professional activities, equal status before the law and neither group may be

placed in a more favourable position than the other, not even in respect of reindeer herding.

Authors' comments

8.1 On 5 December 2003, the authors commented on the State party's submission. They dispute the claim that they may institute civil proceedings for damages against the State party. According to section 1 of chapter 5 of the Finnish Damages and Tort Liability Act of 1974, "damages shall constitute compensation for the personal injury and damage to property. Where the injury or damage has been caused by an act punishable by law or in the exercise of public authority, or in other cases, where there are especially weighty reasons for the same, damages shall also constitute compensation for economic loss that is not connected to personal injury or damage to property." The National Forest and Park Service, which caused the damage, does not exercise public authority and the logging operations are not a criminal offence. Thus, compensation for financial damage could arise under the Act only if there are "especially weighty reasons". The application of the concept of "especially weighty reasons" in Finnish case law has caused problems of interpretation, and "it is by no means clear that the provision could be applied to the damage to the authors". In any event, such a process of litigation would be laborious, onerous and the costs prohibitive. The litigation would take several years to complete.

8.2 The authors contest the State party's denial that it intends to carry out logging in Kippalrova and provides a map which it purports to prove otherwise. In October 2003 the National Forest and Park Service announced that it was preparing a further logging plan in Paadarskaidi.

8.3 As to the logging operations undertaken in the entire territory, the authors submit that the territory covered by the Herdsmen's Committee is not homogeneous forest but is made up of different types of grazing land. Even though the National Forest and Park Service engages in forestry in only part of the area administered by the Committee, 35 per cent of the forest pastures in the winter grazing area and 48 percent of those in the summer grazing area are subject to forestry operations by the State and private owners. According to the current land demarcation for forestry and statements made by the National Forest and Park Service, the area in question will sooner or later be absorbed into the felling cycle. The felling cycle involves a wide range of measures, even the least invasive of which cause harm to reindeer husbandry. 9 per cent of the entire territory of the Committee is privately owned, and the owners are not subject to the same obligations as the State with respect to reindeer husbandry.

8.4 The National Forest and Park Service invited the Herdsmen's Committee on two field trips in Kippalvaara and Kippalrova in September 2001 and Savonvaara-Pontikkamäki in January 2002, at which herdsmen expressed their opposition to the logging proposals. Nevertheless, the operations started in the Savonvaara-Pontikkamäki region (not part of the current communication) in the early spring of 2002. In October 2003, the National Forest and Park Service announced that logging will take place there in the near future.

8.5 On the issue of participation of the Herdsmen's Committee, while the National Forest and Park Service arranged a hearing which the Committee members and other interested groups could attend, this hearing was, in practice, merely an exercise in opinion gathering. In the authors' view, the National Forest and Park Service determines the principles, strategies and objectives of its forestry operations exclusively according to its own needs; as its decisions are not open to appeal, this fails to ensure effective participation.

8.6 As to the effects of logging, the authors refer to several investigations, studies and Committee reports which have been prepared since the previous *Länsman* case, and which purportedly attest to the substantial damage caused by the logging operations. An inventory of Alectoria lichen was conducted in the territory of the Lapland Herdsman's Committee in 1999 to 2000, in which it confirmed that the incidence of Alectoria lichen in the logged forest areas is very low, and that logging operations cause considerable harm to reindeer husbandry. Similar results were found in other reports, including various Swedish studies published in 1998 and 2000. In addition, the Finnish Ministry of Agriculture and Forestry, in considering the maximum permissible population of reindeer per herd, acknowledged the importance and availability of winter nutrition for reindeer – Lichenes, Alectoria and Deschampsia – and that logging has reduced stocks of the former two foods.

8.7 It is submitted that after logging, as reindeer do not remain grazing on managed areas, grazing pressure comes to bear on the remaining territory. This means that the effects of logging also extend beyond the areas that are actually managed. The authors argue that the impact of logging operations are long-term, practically permanent, and that the measures employed create new damage, exacerbate existing damage, and extend the area affected by logging. Since the logging operations, the access of reindeer to winter food has become more susceptible to other variations in the Pyhäjärvi, and Kirkko-outa areas, including those arising from natural phenomena, such as heavy snow cover, delays in the arrival of spring and an increase in predators, especially wolves.

8.8 On the State party's argument that according to the Finnish Game and Fisheries Research Institute, "the loggings referred to in the communication do not have significant additional adverse effects on reindeer herding in the long term if the numbers of reindeer are maintained approximately at their same level", the authors submit that the State party omitted the last line of the opinion "...and the deterioration in pastures is compensated by feeding. If, on the other hand, the aim is to engage in reindeer husbandry based purely on natural pastures, then loggings – even those notified as relatively mild – will be of greater significance for reindeer husbandry that is already in difficulties for other reasons". The authors refer to the view of the Lapland and Kemin-Sompio Herdsmen Committee's who have previously stated that artificial feeding causes inequalities and disputes within the Herdsmen's Committee, and is regarded as a threat to the old Sami tradition and culture of reindeer husbandry. In recent years, because of the lack of natural winter food, the authors have had to rely on artificial reindeer food which requires additional income from sources other than reindeer husbandry, thereby impacting on the profitability of this form of livelihood.

8.9 The authors acknowledge that over the last two years, conditions have been favourable from the point of view of securing natural food supplies, resulting in a substantial reduction in expenses for additional feeding and the survival rate of reindeer beyond expectation. Despite these conditions, the profitability of reindeer husbandry has not improved, as the companies buying reindeer meat have reduced their prices by up to 30 per cent and have purchased less. In addition, the State collects a penalty fee if the Herdsmen's Committee exceeds its quota of reindeer per herd on account of failure to sell.

Review of admissibility

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

9.2 As to the State party's request to review admissibility on the grounds that the authors did not take a civil action for damages and thus did not exhaust domestic remedies, the Committee considers that in the present case where the issue is the effect of past logging, the State party has not demonstrated that an action for damages would be an effective remedy to address all relevant aspects of the State party's responsibility under article 27 of the Covenant to protect the right of minorities to enjoy their own culture and with respect to a claim that this culture has been or is being destroyed. For this reason, the Committee does not intend to reconsider its admissibility decision.

9.3 As to the claim, that the negative effects of the *proposed* logging in Kippalrova would interfere with their rights under article 27, the Committee recognises the commitment of the State party, expressed in its submission on the merits, not to proceed to logging in this area and therefore finds it unnecessary to consider the possibility of future logging, by the State, in this area any further.

9.4 The Committee proceeds to a consideration of the merits of the claims relating to the effects of past logging in the Pyhäjärvi, Kirkko-outa and Paadarskaidi areas.

Consideration of the merits

10.1 As to the claims relating to the *effects* of logging in the Pyhäjärvi, Kirkko-outa and Paadarskaidi areas of the territory administered by the Muotkatunturi Herdsmen's Committee, the Committee notes that it is undisputed that the authors are members of a minority within the meaning of article 27 of the Covenant and as such have the right to enjoy their own culture. It is also undisputed that reindeer husbandry is an essential element of their culture and that economic activities may come within the ambit of article 27, if they are an essential element of the culture of an ethnic community.⁶ Article 27 requires that a member of a minority shall not be denied the right to enjoy his culture. Measures whose impact amounts to a denial of the right are incompatible with the obligations under article 27. As noted by the Committee in its Views on case No. 511/1992 of *Länsman et al. v. Finland*, however, measures with only a limited impact on the way of life and livelihood of persons belonging to a minority will not necessarily amount to a denial of the rights under article 27.

10.2 The Committee recalls that in the earlier case no. 511/1992, which related to the Pyhäjärvi and Kirkko-outa areas, it did not find a violation of article 27, but stated that if logging to be carried out was approved on a larger scale than that already envisaged or if it could be shown that the effects of logging already planned were more serious than can be foreseen at present, then it may have to be considered whether it would constitute a violation of article 27. In weighing the effects of logging, or indeed any other measures taken by a State party which has an impact on a minority's culture, the Committee notes that the infringement of a minority's right to enjoy their own culture, as provided for in article 27, may result from the combined effects of a series of actions or measures

⁶ Views on Communication No. 197/1985 (*Kitok v. Sweden*), Views adopted 27 July 1988, para. 9.2; on Communication No. 511/1992 (*I. Länsman et al. v. Finland*), adopted 26 October 1994, paragraph 9.2.

taken by a State party over a period of time and in more than one area of the State occupied by that minority. Thus, the Committee must consider the overall effects of such measures on the ability of the minority concerned to continue to enjoy their culture. In the present case, and taking into account the specific elements brought to its attention, it must consider the effects of these measures not at one particular point in time – either immediately before or after the measures are carried out - but the effects of past, present and planned future logging on the authors' ability to enjoy their culture in community with other members of their group.

10.3 The authors and the State party disagree on the effects of the logging in the areas in question. Both express divergent views on all developments that have taken place since the logging in these areas, including the reasons behind the Minister's decision to reduce the number of reindeer kept per herd: while the authors attribute the reduction to the logging, the State party invoke the overall increase in reindeer threatening the sustainability of reindeer husbandry generally. While the Committee notes the reference made by the authors to a report by the

Finnish Game and Fisheries Research Institute that "loggings – even those notified as relatively mild – will be of greater significance for reindeer husbandry" if such husbandry is based on natural pastures only (supra 8.8), it also takes note of the fact that not only this report but also numerous other references in the material in front of it mention other factors explaining why reindeer husbandry remains of low economic profitability. It also takes into consideration that despite difficulties the overall number of reindeers still remains relatively high. For these reasons, the Committee concludes that the effects of logging carried out in the Pyhäjärvi, Kirkko-outa and Paadarskaidi areas have not been shown to be serious enough as to amount to a denial of the authors' right to enjoy their own culture in community with other members of their group under article 27 of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before the Committee do not reveal a breach of article 27 of the Covenant.

Communication No. 1051/2002

Submitted by: Mansour Ahani (represented by counsel)

Alleged victim: The author

State party: Canada

Date of adoption of Views: 29 March 2004

Subject matter: Deportation of complainant to a country where he risks torture or execution

Procedural issues: Incompatibility *ratione materiae*
- Level of substantiation of claim - Non-exhaustion of domestic remedies

Substantive issues: Right to life - Prohibition of deporting individuals to a country where they could face torture/death - Arbitrary arrest - Right to a fair trial by an independent and impartial tribunal - Right to challenge the legality of a detention in court

Articles of the Covenant: 2, 6, 7, 9, 13 and 14

Articles of the Optional Protocol: 1; 2; 5, paragraph 2 (b)

Finding: Violation (art. 9, paragraph 4, and art. 13, in conjunction with art 7)

1.1 The author of the communication, initially dated 10 January 2002, is Mansour Ahani, a citizen of the Islamic Republic of Iran ('Iran') and born on 31 December 1964. At the time of submission, he

was detained in Hamilton Wentworth Detention Centre, Hamilton Ontario, pending conclusion of legal proceedings in the Supreme Court of Canada concerning his deportation. He claims to be a victim of violations by Canada of articles 2, 6, 7, 9, 13 and 14 of the International Covenant on Civil and Political Rights. He is represented by counsel.

1.2 On 11 January 2002, the Committee, acting through its Special Rapporteur for New Communications, pursuant to Rule 86 of the Committee's Rules of Procedure, requested the State party, in the event that the Supreme Court's decision expected the same day would permit the author's deportation, "to refrain from deportation until the Committee has had an opportunity to consider the allegations, in particular those that relate to torture, other inhuman treatment or even death as a consequence of the deportation". By Note of 17 May 2002, the Committee, having been informed by counsel of a real risk that the State party would not comply with the Committee's request for interim measures of protection, reiterated its request. On 10 June 2002, the State party deported the author to Iran.

The facts as submitted by the author

2.1 On 14 October 1991, the author arrived in Canada from Iran and claimed protection under the Convention on the Status of Refugees and its Protocol, based on his political opinion and membership in a particular social group. He contended, on various occasions, that he had been beaten by members of the Islamic Revolutionary Committee in Iran for being intoxicated, (ii) that his return to Iran would endanger his life due to his knowledge of Iranian covert operations and personnel, knowledge which he had acquired as a forced conscript in the foreign assassins branch of the Iranian Foreign Ministry, (iii) that he had been jailed for four years as a result of refusing to carry out a drug raid which was in fact a raid on the home of an Iranian dissident, with women and children, in Pakistan, and (iv) that he had been released after pretending to repent. On 1 April 1992, the Immigration and Refugee Board determined that the author was a Convention refugee based on his political opinion and membership in a particular social group.

2.2 On 17 June 1993, the Solicitor-General of Canada and the Minister of Employment and Immigration, having considered security intelligence reports stating that the author was trained to be an assassin by the Iranian Ministry of Intelligence and Security (“MIS”), both certified, under s40 (1) of the *Immigration Act* (“the Act”), that they were of the opinion that the author was inadmissible to Canada under section 19(1) of the Act as there were reasonable grounds to believe that he would engage in terrorism, that he was a member of an organization that would engage in terrorism and that he had engaged in terrorism. On the same date, the certificate was filed with the Federal Court, while the author was served with a copy of the certificate and, pursuant to section 40 (1) (2) (b) of the Act, he was taken into mandatory detention, where he remained until his deportation nine years later.

2.3 On 22 June 1993, in accordance with the statutory procedure set out in section 40 (1) of the Act for a determination of whether the Ministers’ certificate was “reasonable on the basis of the information available”, the Federal Court (Denault J) examined the security intelligence reports *in camera* and heard other evidence presented by the Solicitor-General and the Minister, in the absence of the plaintiff. The Court then provided the author with a summary of the information, required by statute to allow the affected person to be “reasonably” informed of the circumstances giving rise to the certification while being appropriately redacted for national security concerns, and offered the author an opportunity to respond.

2.4 Rather than exercising his right to be heard under this procedure, the author then challenged the

constitutionality of the certification procedure and his detention subsequent to it in a separate action before the Federal Court. On 12 September 1995, the Federal Court (McGillis J) rejected his challenge, holding that the procedure struck a reasonable balance between competing interests of the State and the individual, and that the detention upon the Ministers’ certification pending the Court’s decision on its reasonableness was not arbitrary. The author’s further appeals against that decision were dismissed by the Federal Court of Appeal and the Supreme Court on 4 July 1996 and 3 July 1997, respectively.

2.5 Following the affirmation of the constitutionality of the section 40 (1) procedure, the Federal Court (Denault J) proceeded with the original reasonableness hearing, and, following extensive hearings, concluded on 17 April 1998 that the certificate was reasonable. The evidence included information gathered by foreign intelligence agencies which was divulged to the Court *in camera* in the author’s absence on national security grounds. The Court also heard the author testify on his own behalf in opposition to the reasonableness of the certificate. The Court found that there were grounds to believe that the author was a member of the MIS, which “sponsors or undertakes directly a wide range of terrorist activities including the assassination of political dissidents worldwide”. The Federal Court’s decision on this matter was not subject to appeal or review.

2.6 Thereafter, in April 1998, an immigration adjudicator determined that the author was inadmissible to Canada, and ordered the author’s deportation. On 22 April 1998, the author was informed that the Minister of Citizenship and Immigration would assess the risk the author posed to the security of Canada, as well as the possible risk that he would face if returned to Iran. The Minister was to consider these matters in deciding under section 53 (1) (b) of the Act¹ (which implements article 33 of the Convention on the Status of Refugees) whether the prohibition on removing a Convention refugee to the country of origin could be lifted in the author’s case. The author was accordingly given an opportunity to make submissions to the Minister on these issues.

¹ Section 53 (1) (b) reads, in relevant part: “... [N]o person who is determined ... to be a Convention refugee ... shall be removed from Canada to a country where the person’s life or freedom would be threatened for reasons of race, religion, nationality, membership in a particular social group or political opinion unless; (b) the person is a member of an inadmissible class described in paragraph 19 (1) (e), (f), (g), (j), (k) or (l) and the Minister is of the opinion that the person constitutes a danger to the security of Canada”.

2.7 On 12 August 1998, the Minister, following representations by the author that he faced a clear risk of torture in Iran, determined, without reasons and on the basis of a memorandum attaching the author's submissions, other relevant documents and a legal analysis by officials, that he (a) constituted a danger to the security of Canada and (b) could be removed directly to Iran. The author applied for judicial review of the Minister's opinion. Pending the hearing of the application, the author applied for release from detention pursuant to section 40 (1) (8) of the Act, as 120 days has passed from the issue of the deportation order against him.² On 15 March 1999, the Federal Court (Denault J), finding reasonable grounds to believe that his release would be injurious to the safety of persons in Canada, particularly Iranian dissidents, denied the application for release. The Federal Court of Appeal upheld this decision.

2.8 On 23 June 1999, the Federal Court (McGillis J) rejected the author's application for judicial review of the Minister's decision, finding there was ample evidence to support the Minister's decision that the author constituted a danger to Canada and that the decision to deport him was reasonable. The Court also dismissed procedural constitutional challenges, including to the process of the provision of the Minister's danger opinion. On 18 January 2000, the Court of Appeal rejected the author's appeal. It found that "the Minister could rightly conclude that the [author] would not be exposed to a serious risk of harm, let alone torture" if he were deported to Iran. It agreed that there were reasonable grounds to support the allegation that the author was in fact a trained assassin with the Iranian secret service, and that there was no basis upon which to set aside the Minister's opinion that he was a danger to Canada.

2.9 On 11 January 2001, the Supreme Court unanimously rejected the author's appeal, finding that there was "ample support" for the Minister to decide that the author was a danger to the security of Canada. It further found the Minister's decision that

² Section 40 (1) provides, in material part :

"(8) Where a person is detained under subsection (7) and is not removed from Canada within 120 days of after the making of a removal order relating to that person, the person may apply to the [Federal Court].

(9) On [such] an application, the [Federal Court] may, subject to such terms and conditions as the [Federal Court] deems appropriate, order that the person be released from detention if the [Federal Court] is satisfied that

(a) the person will not be removed from Canada within a reasonable time; and

(b) the person's release would not be injurious to national security or the safety of persons."

he only faced a "minimal risk of harm", rather than a substantial risk of torture, in the event of return to Iran to be reasonable and "unassailable". On the constitutionality of deportation of persons at risk of harm under section 53 (1) (b) of the Act, the Court referred to its reasoning in a companion case of *Suresh v. Canada (Minister of Citizenship and Immigration)*³ decided the same day, where it held that "barring extraordinary circumstances, deportation to torture will generally violate the principles of fundamental justice". As *Suresh* had established a *prima facie* risk of torture, he was entitled to enhanced procedural protections, including provision of all information and advice the Minister intended to rely on, receipt of an opportunity to address the evidence in writing and to be given written reasons by the Minister. In the author's case, however, the Court considered that he had not cleared the evidentiary threshold required to make a *prima facie* case and access these protections. The Court was of the view that the author, in the form of the letter advising him of the Minister's intention to consider his danger to Canada as well as the possible risks to him in the event of expulsion, "was fully informed of the Minister's case against him and given a full opportunity to respond". The process followed, according to the Court, was therefore consistent with principles of fundamental justice and not prejudicial to the author even though it had not followed the *Suresh* requirements.

2.10 The same day, the Committee indicated its request pursuant to Rule 86 of its Rules of Procedure for interim measures of protection, however the State party's authorities proceeded with arrangements to effect removal. On 15 January 2002, the Ontario Superior Court (Dambrot J) rejected the author's argument that the principles of fundamental justice, protected by the *Charter*, prevented his removal prior to the Committee's consideration of the case. On 8 May 2002, the Court of Appeal for Ontario upheld the decision, holding that the request for interim measures was not binding upon the State party. On 16 May 2002, the Supreme Court, by a majority, dismissed the author's application for leave to appeal (without giving reasons). On 10 June 2002, the author was deported to Iran.

The complaint

3.1 In his original communication (preceding expulsion), the author claims that Canada had violated, or would violate if it expelled him, articles 2, 6, 7, 9, 13 and 14 of the Covenant. Firstly, he contends that the statutory and administrative processes to which he was determined are not consistent with the guarantees of articles 2 and 14 of

³ [2002] 1 SCR.

the Covenant. In particular, the discretion of the Minister of Immigration in directing a person's return to a country may be affected by considerations adverse to human rights concerns, including negative media coverage of a case. In addition, the Minister of Immigration's role in the expulsion process is neither independent nor impartial. The author argues that the Minister initially signs a security certificate that a person presents a security threat, defends the certification before the "reasonableness" hearing in Federal Court and prosecutes against the person at the deportation inquiry, all before having to decide whether a person thereafter eligible for expulsion should be expelled. In the author's view, it should not be an elected politician, without giving reasons, making such a decision on a subjective basis, but rather an independent and impartial tribunal.

3.2 The author also argues the process is further procedurally deficient in that it provides insufficient notice of the case against the affected individual. A person is simply advised that immigration officials will recommend to the Minister that a person be subject to expulsion under section 53 (1) of the Act, without reasons provided, and is invited to make submissions. The submissions of the Minister's officials in response to those of the affected person are not provided and thus cannot be rebutted. The absence of any reasons provided in the decision makes judicial review of the decision against the submissions made to the Minister impossible.

3.3 The author further argues that the inability to apply for appeal or review of the Federal Court's "reasonableness" decision on the initial security certificate is deficient. Nor could he raise (fundamental) concerns as to the fairness of the process at the "reasonableness" hearing. He argues the Court does not test the evidence and does not hear independent witnesses. There are no national security reasons warranting a due process exception as, in the author's view, there was no evidence of either a threat by him to Canadian national security or of (even a threat of) criminal conduct in Canada. In the author's view, the security concern accordingly does not satisfy the standards set out in the 1995 *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*.⁴

3.4 The author also claims he has been subjected to arbitrary detention, contrary to article 9 of the Covenant. Since his detention in June 1993, he was only eligible for a detention review 120 days after issuance of his deportation order in August 1998. By that point, he had spent five years in detention without access to bail, detention review or *habeas corpus* (the latter unavailable to non-citizens in

respect of detention relating to a person's status in Canada). He points out that his detention under the Immigration Act was mandatory, as well as arbitrary in that while the Federal Court described his detention as "unfortunate", it did not regard it an infringement of his liberty. He regards this as an example of discriminatory treatment of non-citizens. He also argues that it is perverse and therefore arbitrary to continue a person's detention while s/he is exercising a basic human right, that is, access to court.

3.5 The author argues that expulsion would expose him to torture, in breach of article 7 of the Covenant. He refers to the Committee's General Comment 15 on aliens and 20 on article 7, as well as the decision of *Chahal v. United Kingdom*⁵ of the European Court of Human Rights, for the proposition that the principle of *non-refoulement* admits of no exceptions. He contends that the State party is thus in error in respect of both its alleged claims that (i) he is not at risk of torture, and (ii) even if he were, he may be expelled on the grounds of threat to national security.

3.6 For the proposition that he is, in fact, at risk of torture, the author refers to a variety of reports and evidence generally regarding the human rights situation in Iran, including arbitrary detention, torture and extra-judicial and summary murder of political dissidents.⁶ He contends that in his case, the senior Canadian intelligence officer who testified believed that he was afraid of what might happen to him in Iran and that he had defected. In addition, his refugee status had been recognized after a full hearing. He contends that his case has a high public profile and that he was not aware that he could seek

⁵ (1996) 23 E.H.R.R. 413.

⁶ The author refers to "Iran: Trial of Political Activists Begins – Basic Rights Violated in Secret Detentions" Human Rights Watch, 8 January 2002; "Iran: Journalists at Risk" Human Rights Watch, 22 December 2001; "Iran: Release Detainees from Iran Freedom Movement" Human Rights Watch, 10 November 2001; "Iran: Human Rights Developments" in World Report 2001 and World Report 1998, Human Rights Watch; "Iran: A Legal System that Fails to Protect Freedom of Expression & Association" Amnesty International, December 2001; "Iran: Halt the Surge of Executions" Amnesty International, 17 August 2001; "Iran: The Revolutionary Court Must End Arbitrary Arrests" Amnesty International, 11 April 2001; "Iran: Time for Judicial Reform and End to Secret Trials" Amnesty International, 16 September 1999; "Iran: Country Reports on Human Rights Practices for 2000" United States Department of State, 23 February 2001; "Iran: Country Reports on Human Rights Practices for 1997" United States Department of State, 30 January 1998; "Iran" in Annual Report for 1997, Amnesty International; "U.N. Urges Halt to Public Executions", New York Times, 23 April 1998; "U.N. Rebukes Iran Over Human Rights Violations", Toronto Star, 19 April 1998.

⁴ E/CN.4/1996/39, annex.

a closed hearing. The details of the cooperation and (confidential) information he provided to the State party's authorities, as well as his resistance to deportation, could "very likely" constitute treason in Iran, which has been monitoring his case. On either the State party's or his own account of his past relationship with the MIS, therefore, there "could not be a clearer case" of a person who could expect torture in Iran.

3.7 On the same basis, the author fears that his removal will result in his execution in Iran, breaching his rights under article 6. The author also makes a corollary claim under article 7 that his detention since June 1993 in a cell in a short-term detention facility with no programmes or gainful occupation is itself cruel.

The State party's admissibility and merits submissions

4.1 By submissions on 12 July 2002, the State party contested the admissibility and the merits of the communication, arguing that, for the reasons described below, the claims are all inadmissible as not having made out a *prima facie* claim and thus inadmissible, as well as being unfounded on the merits. In addition, certain elements of the communication are also said to be inadmissible for failure to exhaust domestic remedies.

4.2 As to the alleged violation of article 2, the State party refers to the Committee's jurisprudence that article 2 confers an accessory, rather than a freestanding, right, which arises only after another violation of the Covenant has been established. Accordingly, no *prima facie* violation is established. Alternatively, there has been no violation – the State party's constitutional *Charter of Rights and Freedoms* protects Covenant rights, and the domestic courts found no *Charter* violation. As to the contention that *Charter* rights are not equally enjoyed between citizens and non-citizens, the State party argues that most rights, including the right to life, liberty and security of the person, apply to all persons in Canada. As to freedom of expression and association, the Supreme Court held in *Suresh* that these rights do not include persons who, to use the State party's words, "are or have been associated with things directed at violence". This finding applies equally to Canadians as well as to non-Canadians.

4.3 Concerning the alleged violations of articles 6 and 7 in the event of a return to Iran, the State party argues that the facts, as determined by its courts, do not support these allegations. In addition, the author is not credible, in the light of his inconsistent accounts of his involvement MIS, the implausibility of important aspects of his story, and repeated, proven dishonesty. In addition, current human rights

abuses are directed against regime opponents in Iran, rather than persons with the author's profile.

4.4 As to the allegations of risk, the State party points out that the Minister's staff assessed any risk of harm as "minimal", a finding upheld by all federal courts up to the Supreme Court, which regarded it as "unassailable". In addition, the courts clearly determined as fact that the author was not credible, based *inter alia* on inconsistent, contradicted, embellished and repeatedly untruthful statements. They also relied upon his recognition that he had received specialized training upon recruitment into the secret service, his disclosure of the details of assassination of two dissidents and his contact with the secret service, *after* receipt of refugee status, including meeting a "known assassin" in Europe. The State party refers to the Committee's approach that it is not generally its function to weigh evidence or re-assess findings of fact such as these made by the domestic courts, and requests, should the Committee decide to review the factual conclusions, the opportunity of making further submissions.

4.5 Neither, in the State party's view, are the author's allegations of risk supported by independent evidence. The State party observes that the documents cited by the author refer primarily to arrest and trials of reformists, dissidents and other government opponents, rather than persons of the author's profile, members current or former of the MIS. Indeed, the most recent human rights report of the United States' Department of State indicates that MIS personnel are prominent agents, rather than targets, of persecution, committing "numerous serious human rights abuses".⁷ While the human rights situation remains problematic, the State party, relying on reports of Amnesty International⁸ and the U.N. Special Representative of the Commission on Human Rights on the human rights situation in Iran, identifies signs of progress towards reduced use of torture.⁹ Nor, for its part, has the case law of the Committee against Torture characterized the human rights situation in Iran as "a consistent pattern of gross, flagrant or mass violations of human rights". Thus the general human rights situation is not, *per se*, of the type or severity to support the allegations.

4.6 The State party regards the contention that he would be summarily executed for treasonous conduct in the event of a return as merely speculative and self-serving. The author has not established such an action to be the "necessary and foreseeable" consequence of deportation. The author

⁷ "Iran: Country Reports on Human Rights Practices for 2001", United States Department of State.

⁸ "Iran: Time for Judicial Reform and End to Secret Trials", *op. cit.*

⁹ A/56/278, 10 August 2001.

had full opportunity to establish this at all levels of the Canadian courts, and failed to do so. Alternatively, even if he was regarded as treasonous, he has not shown that he would fail to receive a trial and punishment consistent with the Covenant. Similarly, with respect to torture, the courts found that only a minimal risk of harm existed. The State party emphasizes that the author was recognized to be a refugee before he voluntarily travelled to Europe with a commander of MIS and came to the attention of the Canadian security service. It adds that if the author's identity as a trained operative had earlier been known, he would not have been admitted to the country. It also rejects that any awareness that Iran has of the case must imply torture, as well as any substantiation of the claim that the senior Canadian intelligence officer believed he defected. Nor has he provided any evidence of mistreatment of family, or shown why alleged cooperation with the Canadian authorities would of itself give rise to torture. As a result, these claims are unsubstantiated on even a *prima facie* basis.

4.7 As to the alleged violation of article 7 through conditions of detention, the State party argues the author did not file a *Charter* claim raising this issue before the courts, despite being advised of complaints possibilities, and thus the claim is inadmissible for lack of exhaustion of domestic remedies. In any case, the absence of activities during treatment cannot be considered cruel, and the author has not shown that his conditions of detention caused any adverse physical or mental effects.

4.8 On the issue of arbitrary detention, the author could have appealed the Federal Court of Appeal's confirmation of his detention under section 40 (1) (8) of the Act to the Supreme Court but did not do so. Nor did he file any subsequent motion for release under the section. As a result, the claims are inadmissible for non-exhaustion of domestic remedies.

4.9 In any event, there is no *prima facie* violation of article 9 as the detention was not arbitrary. Guidance may be drawn from article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"), which explicitly permits detention with a view to deportation. Indeed, in the *Chahal* case cited by the author, the European Court considered that such detention is justified as long as deportation proceedings are in progress and being pursued with due diligence. *Chahal's* detention on the basis that successive Secretaries of State had maintained he was a threat to national security was not arbitrary, in view of the process available to review the national security elements. Neither is it arbitrary, argues the State party, for it to detain a non-Canadian individual under a procedure where two Ministers determine, pursuant to law, that an

individual has a terrorist background or propensities. This determination is then expeditiously reviewed in court. Of 22 cases where this process has been followed, 11 cases were reviewed in 1 to 2 months, 3 cases in 3 to 4 months, 4 cases in 6 to 13 months and one case is ongoing.

4.10 The State party refers to the Committee's jurisprudence that an individual's insistence not to leave a State's territory is relevant to the article 9 assessment.¹⁰ Similarly, the European Commission has held that an individual cannot complain of passage of time if at no stage he requested expeditious termination of proceedings and pursued any litigation avenue he could find.¹¹ The author did not ask the Minister of Citizenship and Immigration to exercise his power under section 40 (1) (7) of the Act to release, for purposes of departure, a person named in a security certificate.

4.11 The State party argues it has exercised due diligence in pursuing the deportation proceedings, and that the author is responsible for the length of time they have taken. All of the delay prior to the section 40 (1) "reasonableness" hearing on the security certificate was due to the author's request for adjournment to challenge the constitutionality of the procedure. He let this challenge lapse for long periods without taking steps within his control necessary to advance the process. In fact, the State party details numerous steps it took in this period seeking to advance the procedure expeditiously. Similarly, after issue of the removal order, the additional delay of the removal was caused by the author's exercise of numerous remedies available to him. The State party details the steps it took to expedite the procedures described in the chronology of the case, noting that the author took no such steps of expedition.

4.12 Concerning the author's contention that *habeas corpus* is not available to non-citizens in respect of detention regarding immigration status, the State party submits that as continued detention depends on the outcome of the Federal Court's "reasonableness" hearing on the security certificate, there is no need for a separate hearing on detention. In other words, the mandatory "reasonableness" hearing is a statutory detention review, within the power of Parliament to prescribe for such purposes. The Canadian courts have also held this procedure an adequate and effective alternative remedy to *habeas corpus*. Accordingly, the State party rejects the author's contention that its courts found that his detention was "unfortunate" but not a loss of liberty:

¹⁰ *V.M.R.B. v. Canada*, Case No. 236/1987, Decision adopted on 26 July 1988.

¹¹ *Osman v. United Kingdom, Khan v. United Kingdom and Kolompar v. Belgium*.

the courts in fact held that while the certification has the immediate effect of leading to arrest and detention, a fate normally reserved to criminals, there was no violation of articles 7 and 9 of the *Charter*, both of which protect liberty interests.¹²

4.13 In term of the claim under article 13 of the Covenant, the State party argues, firstly, that, according to the Committee's jurisprudence, this provision requires that an alien is expelled according to the procedures laid down by law, unless the State had acted in bad faith or abused its power.¹³ The author has not argued, much less established, any such exception here, and thus it would be appropriate for the Committee to defer to the Canadian authorities' assessment of the facts and law. Secondly, the State party pleads national security grounds in connection with the procedures followed. In its jurisprudence, the Committee has held that "it is not for the Committee to test a sovereign State's evaluation of an alien's security rating"¹⁴ and that it would defer to such an assessment in the absence of arbitrariness.¹⁵ The State party invites the Committee to apply the same principles, emphasizing that the decision of expulsion was not summary but followed careful deliberation through full and fair procedures in which the author was legally represented and submitted extensive arguments.

4.14 Concerning the process of the Federal Court "reasonableness" hearing on the security certificate, while constitutional issues could not be raised at that hearing, which is an expedited one, they can be the subject of a separate constitutional challenge, as the author himself pursued to the level of the Supreme Court. The State party observes that the judge has a "heavy burden" of ensuring that the author is reasonably informed by way of summary of the case against him, and he can present a case in reply and call witnesses; indeed, the author himself cross-examined two Canadian security service officers.

4.15 As to the process of the Minister's risk determination, the State party points out that the Supreme Court has indicated in *Suresh* the minimum

¹² Article 7 of the Charter provides: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice", while article 9 provides: "Everyone has the right not to be arbitrarily detained or imprisoned."

¹³ *Maroufidou v. Sweden* Case No. 58/1979, Views adopted on 9 April 1981.

¹⁴ *V.M.R.B. v. Canada*, op cit., and *J.R.B. v. Costa Rica* Case No. 296/1988, Decision adopted on 30 March 1989.

¹⁵ *Stewart v. Canada*, Case No. 538/1993, Decision adopted on 18 March 1994.

requirements of fairness, including that reasons be given, applicable when a *prima facie* case of torture has been made out. As to the objection that the decision is made by a Minister previously involved in the process, the State party points out that the courts hold, through judicial review, the decision to law. While deferring to the Minister's weighing of evidence unless patently unreasonable, the courts insist that all relevant, and no irrelevant, factors are considered. The State party argues that as the procedures were fair, in accordance with law, and properly applied with the author having access to courts with legal representation and without any other factors of bias, bad faith or impropriety being present, the author has not established a *prima facie* violation of article 13.

4.16 As to the article 14 claims, the State party finds this provision inapplicable as deportation proceedings are neither the determination of a criminal charge nor a rights and obligations in a "suit at law". They are rather public law proceedings, whose fairness is guaranteed in article 13. In *Y.L. v. Canada*,¹⁶ the Committee, given the existence of judicial review, did not decide whether proceedings before a Pension Review Board came within a "suit at law", while in *V.M.R.B.*,¹⁷ the Committee did not decide whether deportation proceedings could be so characterised as in any event the claim was unsubstantiated. The State party submits that given the equivalence of article 6 of the European Convention with article 14, the Committee should find persuasive the strong and consistent jurisprudence that such proceedings fall outside the scope of this article. It follows that this claim is inadmissible *ratione materiae*.

4.17 In any event, the proceedings satisfied article 14 guarantees: the author had access to the courts, knew the case he had to meet, had a full opportunity to make his views known and to make submission throughout the proceedings and was legally represented at all stages. The State party also refers the Committee to its decision in *V.M.R.B.*, where it found the certification process under section 40 (1) of the Immigration Act consistent with article 14. There is thus no *prima facie* violation of the right claimed.

4.18 By Note of 6 December 2002, the State party, while re-iterating its view of the limited scope of the Committee's function to re-evaluate factual and evidentiary determinations, supplied extensive additional information on these issues in the event the Committee wished to do so. The State party submitted that a fair assessment of the information provided inevitably lead to the same conclusions

¹⁶ Case No. 112/1981, Decision adopted on 8 April 1986.

¹⁷ Op. cit.

reached by the domestic courts: that the author was a trained operative of the MIS, that he was at minimal risk of harm in Iran, and that his evidence was neither credible nor trustworthy.

Further issues arising in relation to the Committee's request for interim measures

5.1 By letter of 2 August 2002 to the State party's representative to the United Nations in Geneva, the Committee, through its Chairperson, expressed great regret at the author's deportation, in contravention of its request for interim protection. The Committee sought a written explanation about the reasons which led to disregard of the Committee's request for interim measures and an explanation of how it intended to secure compliance with such requests in the future. By Note of 5 August 2002, the Committee, acting through its Special Rapporteur for New Communications, pursuant to Rule 86 of the Committee's Rules of Procedure, requested the State party to monitor closely the situation and treatment of the author subsequent to his deportation to Iran and to make such representations to the Government of the Islamic Republic of Iran that were deemed pertinent in order to prevent violations of the author's rights under articles 6 and 7 of the Covenant.

5.2 By submissions dated 5 December 2002, the State party, in response to the Committee's request for explanation, argued that it fully supported the important role mandated to the Committee and would always do its utmost to cooperate with the Committee. It contended that it took its obligations under the Covenant and the Optional Protocol very seriously and that it was in full compliance with them. The State party points out that alongside its human rights obligations it also has a duty to protect the safety of the Canadian public and to ensure that it does not become a deaf haven for terrorists.

5.3 The State party noted that neither the Covenant nor the Optional Protocol provide for interim measures requests and argues that such requests are recommendatory, rather than binding. Nonetheless, the State party usually responded favourably to such requests. As in other cases, the State party considered the instant request seriously, before concluding in the circumstances of the case, including the finding (upheld by the courts) that he faced a minimum risk of harm in the event of return, that it was unable to delay the deportation. The State party pointed out that usually it responds favourably to requests its decision to do so was determined to be legal and consistent with the *Charter* up to the highest judicial level. The State party argues that interim measures in the immigration context raise "some particular difficulties" where, on occasion, other considerations may take precedence over a

request for interim measures. The particular circumstances of the case should thus not be construed as a diminution of the State party's commitment to human rights or the Committee.

5.4 As to the Committee's request to monitor the author's treatment in Iran, the State party argued that it had no jurisdiction over the author and was being asked to monitor the situation of a national of another State party on that State party's territory. However, in a good faith desire to cooperate with the Committee, the State party stated that on 2 October 2002 the Iranian authorities had advised that the author remained in Iran and was well. In addition, on 26 September 2002, the State party was contacted by a representative of the Iranian Embassy, advising that the author had called to inquire about three pieces of luggage he had left at the detention centre. The Embassy had agreed to convey the luggage back to the author. In the State party's view, this showed that the author does not fear the Iranian government, which is willing to assist him. Finally, on 10 October 2002, the author visited the State party's Embassy in Iran, met with two employees and handed over a letter. Neither the conversation nor the letter raised ill treatment issues, rather, he had difficulty obtaining employment. In the State party's view, this showed he was able to move about Teheran at will. The State party stated it had indicated to Iran that it expected it to comply fully with its international human rights obligations, including as owed to the author.

Counsel's comments

6.1 By letter of 10 September 2003, counsel for the author responded to the State party's submissions. Procedurally, counsel observed that she had received instructions from the author prior to removal that she should continue the communication if he encountered difficulties, but that she should desist pursuit of the case if the author experienced no difficulties after his return to Iran, in order not to place him at increased risk. On the basis of a telephone call one month after deportation, counsel believed that the author had been arrested upon arrival, but not mistreated, and released. A journalistic source subsequently rumoured that he had been detained or killed. Upon repeated attempts to call the family, counsel was told he was at another location and/or that he was sick. Canadian officials had indicated several contacts from the author in fall 2002, but they had reported nothing since. Similarly, Amnesty International had been unable to confirm further details. In this light, counsel assumed the author had come to harm and thus pursued the communication.

6.2 As to the substance, counsel does not wish to pursue the claim on conditions of detention, in light

of an admitted failure to exhaust domestic remedies. As to the remaining issues, she develops her argument in respect of the process followed by the State party authorities. The initial security certification was made by two elected officials (Ministers) without, any input from the author, as to whether it was “reasonable” to believe that he was a member of a terrorist organization or himself so engaged. The sole Federal Court hearing thereafter only determined whether that belief was itself reasonable. The Crown evidence was led *in camera* and *ex parte*, without being tested by the court or supported by witnesses. Counsel thus argues that the conclusion of a national security threat, which was subsequently balanced at the removal stage by one elected official (a Minister) against the risk of harm, was reached by an unfair process. The decision to remove, in turn, was reviewed by the courts only for patent unreasonableness, rather than correctness.

6.3 Counsel responds to the State party’s arguments on the author’s credibility by referring to UNHCR practice to the effect that a lack of credibility does not of itself negate a well-founded fear of persecution.¹⁸ Counsel notes that his initial application refugee claim was accepted despite variations in his account as to his past, and further that the Canadian security agencies destroyed their evidence, including interviews with the author and polygraph records, and provided only summaries. This evidence could have been tested as is the case before the Security Intelligence Review Committee, where an independent counsel, cleared on security grounds, could call witnesses and cross-examine in secret hearing.

6.4 Counsel proceeds to attack the decision of the Supreme Court handed down in the author’s case subsequent to submission of the communication. Counsel observes that Mr. Suresh, whose appeal was upheld on the basis of insufficient procedural protections, and the author, whose appeal was rejected, both underwent the *same* process. The basis of the Court’s decision in the author’s case was that he had not made out a *prima facie* risk of torture, however, the entire premise of a fair process is that an accurate determination of precisely this question can be made. Instead, all the author received was a post-decision judicial review on whether it was “reasonable” to so conclude, which, in counsel’s view, is an inappropriately low standard for a decision that could result in torture or loss of life. Counsel also recalls that the Court in Suresh envisaged some extra-ordinary situations where a person *could* be returned where a substantial risk of

torture had been made out, contrary to the absolute ban on torture in international law.

6.5 On the issue of the author’s credibility, counsel points out that the senior Canadian security officer corroborated at the security certificate hearing the author’s claim that he had defected – the only dispute with the author was whether that was to avoid joining or after first joining the MIS. Either way, his defection makes him an opponent, real or perceived, of the Iranian regime, and this was the way press coverage described him. An Iranian consular official visited him in detention prior to removal, and the Iranian government was fully aware of his claims and the nature of his case. In any event, counsel considers the reliance on credibility disingenuous, where much of the material for this conclusion was based on untested evidence led *in camera* and *ex parte*. Counsel also argues it is inaccurate to describe the author as an agent of the regime and thus not a target of abuses, as being a defector and providing security intelligence to Canada, he will more likely than not be regarded as a regime opponent. If, as is suggested, the author was simply a “discovered” undercover agent, he would not have resisted removal, in detention, for nine years. In addition, an alleged move to restrict torture in Iran must be seen against the recent admitted torture and killing of a Canadian national in that country. It is more likely that opponents will be tortured and executed, rather than be given a fair trial, which the State party provides no evidence of. Nor, according to counsel, did the State party monitor the author’s return to Iran.

6.6 On the issue of the risk of torture or other forms of cruel treatment, counsel observes that the Supreme Court found “unassailable” the conclusion that the author only faced a minimal risk in the context of paying “considerable deference” to the Minister’s decision, who considered issues “largely outside the realm of the reviewing courts”. As to the actual risk involved, counsel points out that it is impossible to “prove” what would be likely to happen to him, but rather the author has made reasonable inferences from the known facts, including the Iranian government’s interest in the case, the human rights violations in Iran against perceived regime opponents, the public knowledge of his cooperation with Canadian officials in releasing classified information, and so on.

6.7 On the issues of arbitrary detention and expulsion process within articles 9, 13 and 14, counsel argues that the author was detained for five years, under mandatory and automatic terms, before his detention review. Under the Act’s regime, security certification results in automatic detention of non-citizens until the proceedings are completed, a person is ordered deported and then remains in Canada for a further 120 days. No judge made a

¹⁸ Handbook on Procedures and Criteria for Determining Refugee Status, Office of the United Nations High Commissioner for Refugees, at para. 198 *et seq.*

decision to detain him, and *habeas corpus* was unavailable to him as a non-citizen detained under immigration legislation, while his constitutional challenge to the certification process was dismissed. Counsel points out that it was open to the State party to use other removal processes that would not have had these effects. She observes that the State party's practice belies its assertion that detention is necessary on national security grounds, as not all alleged terrorists are in fact detained. Counsel emphasizes that in *V.M.R.B.*,¹⁹ detention was, in contrast to the present regime, not automatic or mandatory, and weekly detention reviews existed. Rather, counsel refers to *Torres v. Finland* and *A v. Australia* for the proposition that non-citizens have the right to challenge, in substantive terms, the legality of detention before a court promptly and *de novo*, and then with reasonable intervals.²⁰ She observes that the European Convention, under which the *Chahal* decision referred to by the State party was adopted, specifically provides for detention for immigration purposes.

6.8 Counsel observes, with respect to the author's application under section 40 (1) (8) of the Act for release after passage of 120 days from the deportation order, that release may be ordered if the person will not be removed within a reasonable time and the release would not be injurious to national security or others' safety. The Federal Court found that the onus was on the author to show these two criteria were satisfied, however counsel points out that both the trial court and the appellate court considered he could be removed within a reasonable time were it not for his own repeated recourse to the courts, and that thus he could not satisfy this branch of the necessary requirements. The appellate court also found that as the author had been detained for security reasons, and thus would normally have to show "some significant change in circumstances or new evidence not previously available" in order to be released under the detention review mechanism – in counsel's view, this plainly does not satisfy the requirement under the Covenant for a *de novo* review of detention.

6.9 Counsel rejects the State party's argument that the security certificate "reasonableness" hearing in Federal Court was a sufficient detention review, arguing that this hearing concerned only the reasonableness of the certificate rather than the justification for detention. In addition, if this hearing was a detention review, there would be no need for a

further detention review 120 days after a deportation order. In response to the argument that the prolonged detention was caused by the author himself, counsel responds that even if the security certificate "reasonableness" hearing had been heard without interruption, it would have been months before it was completed, a deportation inquiry undertaken and 120 days passed so as to allow a detention review under section 40 (1) (8). Counsel observes that other cases less complicated than the author's have resulted in detention reviews only becoming available well after a year. Finally, counsel observes that the State party never assisted the author in finding another country to which he could depart. He had no other alternative to detention as he had no other country to which he could travel.

Supplementary State party's submission

7.1 By submission of 15 October 2003, the State party argues that the material advanced by counsel as to events subsequent to expulsion is insufficient basis for a conclusion that the author was in fact detained, disappeared, tortured or otherwise treated contrary to article 7, much less for a conclusion that a real risk thereof existed at the time of expulsion. The State party emphasizes that counsel acknowledges that he was not mistreated upon arrival, and that the reporter's rumour that he "was detained or killed" dated prior to his presentation to the State party's embassy in Tehran. The State party adds that in the week 6 to 10 October 2003, a representative of the State party in Tehran spoke with the author's mother, who indicated that he was alive and well, though receiving regular medical treatment for an ulcer. According to the State party, the author's mother had said that he was currently unemployed and leading a pretty normal existence. No details of the possible confidentiality and other arrangements of the discussion are given. The State party submits that it did not violate the author's rights under the Covenant in expelling him to Iran.²¹

7.2 The State party also disputes the reliance placed upon the decisions of the Committee and other international bodies. With respect to the *Ferrer-Mazorra* decision of the Inter-American Commission of Human Rights that Cuban nationals who Cuba refused to accept could not be indefinitely detained, the State party points out that in the present case there was no automatic and indeterminate presumption of detention. Rather than being detained on a "mere

¹⁹ Op. cit.

²⁰ Case No. 291/1998, Views adopted on 5 April 1990 and Case No. 560/1993, Views adopted on 30 April 1997. Counsel also cites, to similar effect, *Ferrer-Mazorra v. United States*, Inter-American Commission of Human Rights, Report No. 51/01 of 4 April 2001.

²¹ The State party also provided an article, dated 13 September 2003 and entitled "Deported Iranian admits he lied", from the National Post newspaper. In light of the State party's express statement that it "does not rely on [the article]", the Committee does not refer to this article further.

assumption”, he was detained upon the dual Ministers’ security certification that he was a threat to the safety and security of the Canadian public. In addition, in contrast to the Cuban case, there *had* been a decision to remove him, and his detention was appropriate and justified for that purpose.

7.3 With respect to the onus being found by the Federal Court to lie on the author to justify his release under the section 40 (1) (8) application, the State party observes that the Minister had already satisfied the onus to justify arrest, and thus the lengthy proceedings that had been undertaken would have to be repeated if onus to justify continued detention lay with the Minister. It is thus not arbitrary, having shown that there are reasonable grounds to believe an alien is a member of a terrorist group, for the onus to lie with that person to justify release. As to the court review of detention required by the Committee in *A v. Australia*, the State party submits that the Federal Court “reasonableness” hearing, providing real rather than formal review, satisfies this purpose. The length of these proceedings, during which he was detained, was reasonable in the circumstances, as delay was mainly due to the author’s own decisions, including his resistance to leaving the State party. The State party continues that the Committee, in assessing the presumptive detention not individually justified at issue in *A v. Australia*, distinguished the *V.M.R.B.* case, which case is more analogous one to the present case. In *V.M.R.B.*, as presently, an individual Ministerial assessment led to arrest of the individual in question. That detention was reasonable and necessary to deal with a person posing a risk to national security, and did not continue beyond the period for which justification could be provided.

State party’s failure to respect the Committee’s request for interim measures of protection

8.1 The Committee finds, in the circumstances of the case, that the State party breached its obligations under the Optional Protocol, by deporting the author before the Committee could address the author’s allegation of irreparable harm to his Covenant rights. The Committee observes that torture is, alongside the imposition of the death penalty, the most grave and irreparable of possible consequences to an individual of measures taken by the State party. Accordingly, action by the State party giving rise to a risk of such harm, as indicated *a priori* by the Committee’s request for interim measures, must be scrutinized in the strictest light.

8.2 Interim measures pursuant to rule 86 of the Committee’s rules adopted in conformity with article 39 of the Covenant, are essential to the Committee’s role under the Protocol. Flouting of the Rule, especially by irreversible measures such as the execution of the alleged victim or his/her deportation

from a State party to face torture or death in another country, undermines the protection of Covenant rights through the Optional Protocol.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

9.2 The Committee notes, with respect to the claim of arbitrary detention contrary to article 9, the State party’s contention that the claim is inadmissible for failure to exhaust domestic remedies in the form of an appeal to the Supreme Court with respect to his application for release under section 40 (1) (8) of the Act. The Committee observes that, by law, the author’s ability to apply for release under this section only arose in August 1998 following expiry of 120 days from the issuance of the deportation order was made, that point being a total of five years and two months from initial detention in the author’s case. In the absence of any argument by the State party as to domestic remedies which may have been available to the author prior to August 1998, the Committee considers that the author’s claim under article 9 prior to August 1998 until that time is not inadmissible for failure to exhaust domestic remedies. The author’s failure to pursue to the Supreme Court his application for release under section 40 (1) (8) however does render inadmissible, for failure to exhaust domestic remedies, his claims under article 9 related to detention after that point. These latter claims are accordingly inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

9.3 The Committee notes that counsel for the author has withdrawn the claims relating to conditions of detention on the grounds of non-exhaustion of domestic remedies, and thus does not further address this issue.

9.4 The Committee observes that the State party argues that the remaining claims are inadmissible, for, in the light of substantial argumentation going to the merits of the relevant facts and law, the claims are either insufficiently substantiated, for purposes of admissibility, and/or outside the Covenant *ratione materiae*. In such circumstances, the Committee considers that the claims are most appropriately dealt with at the merits stage of the communication.

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 As to the claims under article 9 concerning arbitrary detention and lack of access to court, the Committee notes the author's argument that his detention pursuant to the security certificate as well as his continued detention until deportation was in violation of this article. The Committee observes that, while the author was mandatorily taken into detention upon issuance of the security certificate, under the State party's law the Federal Court is to promptly, that is within a week, examine the certificate and its evidentiary foundation in order to determine its "reasonableness". In the event that the certificate is determined not to be reasonable, the person named in the certificate is released. The Committee observes, consistent with its earlier jurisprudence, that detention on the basis of a security certification by two Ministers on national security grounds does not result *ipso facto* in arbitrary detention, contrary to article 9, paragraph 1. However, given that an individual detained under a security certificate has neither been convicted of any crime nor sentenced to a term of imprisonment, an individual must have appropriate access, in terms of article 9, paragraph 4, to judicial review of the detention, that is to say, review of the substantive justification of detention, as well as sufficiently frequent review.

10.3 As to the alleged violation of article 9, paragraph 4, the Committee is prepared to accept that a "reasonableness" hearing in Federal Court promptly after the commencement of mandatory detention on the basis of a Minister's security certificate is, in principle, sufficient judicial review of the justification for detention to satisfy the requirements of article 9, paragraph 4, of the Covenant. The Committee observes, however, that when judicial proceedings that include the determination of the lawfulness of detention become prolonged the issue arises whether the judicial decision is made "without delay" as required by the provision, unless the State party sees to it that interim judicial authorization is sought separately for the detention. In the author's case, no such separate authorization existed although his mandatory detention until the resolution of the "reasonableness" hearing lasted four years and ten months. Although a substantial part of that delay can be attributed to the author who chose to contest the constitutionality of the security certification procedure instead of proceeding directly to the "reasonableness" hearing before the Federal Court, the latter procedure included hearings and lasted nine and half months after the final resolution of the constitutional issue on 3 July 1997. This delay alone is in the Committee's view too long in respect of the

Covenant requirement of judicial determination of the lawfulness of detention without delay. Consequently, there has been a violation of the author's rights under article 9, paragraph 4, of the Covenant.

10.4 As to the author's later detention, after the issuance of a deportation order in August 1998, for a period of 120 days before becoming eligible to apply for release, the Committee is of the view that such a period of detention in the author's case was sufficiently proximate to a judicial decision of the Federal Court to be considered authorized by a court and therefore not in violation of article 9, paragraph 4.

10.5 As to the claims under articles 6, 7, 13 and 14, with respect to the process and the fact of the author's expulsion, the Committee observes, at the initial stage of the process, that at the Federal Court's "reasonableness" hearing on the security certification the author was provided by the Court with a summary redacted for security concerns reasonably informing him of the claims made against him. The Committee notes that the Federal Court was conscious of the "heavy burden" upon it to assure through this process the author's ability appropriately to be aware of and respond to the case made against him, and the author was able to, and did, present his own case and cross-examine witnesses. In the circumstances of national security involved, the Committee is not persuaded that this process was unfair to the author. Nor, recalling its limited role in the assessment of facts and evidence, does the Committee discern on the record any elements of bad faith, abuse of power or other arbitrariness which would vitiate the Federal Court's assessment of the reasonableness of the certificate asserting the author's involvement in a terrorist organization. The Committee also observes that the Covenant does not, as of right, provide for a right of appeal beyond criminal cases to all determinations made by a court. Accordingly, the Committee need not determine whether the initial arrest and certification proceedings in question fell within the scope of articles 13 (as a decision pursuant to which an alien lawfully present is expelled) or 14 (as a determination of rights and obligations in a suit at law), as in any event the author has not made out a violation of the requirements of those articles in the manner the Federal Court's "reasonableness" hearing was conducted.

10.6 Concerning the author's claims under the same articles with respect to the subsequent decision of the Minister of Citizenship and Immigration that he could be deported, the Committee notes that the Supreme Court held, in the companion case of *Suresh*, that the process of the Minister's determination in that case of whether the affected individual was at risk of substantial harm and should

be expelled on national security grounds was faulty for unfairness, as he had not been provided with the full materials on which the Minister based his or her decision and an opportunity to comment in writing thereon and further as the Minister's decision was not reasoned. The Committee further observes that where one of the highest values protected by the Covenant, namely the right to be free from torture, is at stake, the closest scrutiny should be applied to the fairness of the procedure applied to determine whether an individual is at a substantial risk of torture. The Committee emphasizes that this risk was highlighted in this case by the Committee's request for interim measures of protection.

10.7 In the Committee's view, the failure of the State party to provide him, in these circumstances, with the procedural protections deemed necessary in the case of *Suresh*, on the basis that the present author had not made out a *prima facie* risk of harm fails to meet the requisite standard of fairness. The Committee observes in this regard that such a denial of these protections on the basis claimed is circuitous in that the author may have been able to make out the necessary level of risk if in fact he had been allowed to submit reasons on the risk of torture faced by him in the event of removal, being able to base himself on the material of the case presented by the administrative authorities against him in order to contest a decision that included the reasons for the Minister's decision that he could be removed. The Committee emphasizes that, as is the case for the right to life, the right not to be subjected to torture requires that the State party not only refrain from resorting to torture but take diligent steps to avoid any threat of torture by third parties to an individual.

10.8 The Committee observes further that article 13 is in principle applicable to the Minister's decision on risk of harm, being a decision leading to expulsion. Given that the domestic procedure allowed the author to provide (limited) reasons against his expulsion and to receive a degree of review of his case, it would be inappropriate for the Committee to accept that, in the proceedings before it, "compelling reasons of national security" existed to exempt the State party from its obligation under that article to provide the procedural protections in question. In the Committee's view, the failure of the State party to provide him with the procedural protections afforded to the plaintiff in *Suresh* on the basis that he had not made out a risk of harm did not satisfy the obligation in article 13 to allow the author to submit reasons against his removal in the light of the administrative authorities' case against him and to have such complete submissions reviewed by a competent authority, entailing a possibility to comment on the material presented to that authority. The Committee thus finds a violation of article 13 of the Covenant, in conjunction with article 7.

10.9 The Committee notes that as article 13 speaks directly to the situation in the present case and incorporates notions of due process also reflected in article 14 of the Covenant, it would be inappropriate in terms of the scheme of the Covenant to apply the broader and general provisions of article 14 directly.

10.10 As a result of its finding that the process leading to the author's expulsion was deficient, the Committee thus does not need to decide the extent of the risk of torture prior to his deportation or whether the author suffered torture or other ill-treatment subsequent to his return. The Committee does however refer, in conclusion, to the Supreme Court's holding in *Suresh* that deportation of an individual where a substantial risk of torture *had* been found to exist was not necessarily precluded in all circumstances. While it has neither been determined by the State party's domestic courts or by the Committee that a substantial risk of torture *did* exist in the author's case, the Committee expresses no further view on this issue other than to note that the prohibition on torture, including as expressed in article 7 of the Covenant, is an absolute one that is not subject to countervailing considerations.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal violations by Canada of article 9, paragraph 4, and article 13, in conjunction with article 7, of the Covenant. The Committee reiterates its conclusion that the State party breached its obligations under the Optional Protocol by deporting the author before the Committee's determination of his claim.

12. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including compensation. In the light of the circumstances of the case, the State party, having failed to determine appropriately whether a substantial risk of torture existed such as to foreclose the author's deportation, is under an obligation (a) to make reparation to the author if it comes to light that torture was in fact suffered subsequent to deportation, and (b) to take such steps as may be appropriate to ensure that the author is not, in the future, subjected to torture as a result of the events of his presence in, and removal from, the State party. The State party is also under an obligation to avoid similar violations in the future, including by taking appropriate steps to ensure that the Committee's requests for interim measures of protection will be respected.

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 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

APPENDIX

Individual opinion (dissenting) by Committee member Nisuke Ando

I am unable to share the Committee's conclusion that the facts in the present case reveals violations by the States party of article 9, paragraph 4, as well as article 13 in conjunction with article 7.

With respect to article 13 of the Covenant, the Committee states "[i]t would be inappropriate for the Committee to accept that, in the proceedings before it, 'compelling reasons of national security' existed to exempt the State party from its obligation under that article to provide the procedural protections in question." (10.7). In the Committee's view, the author should have been provided with the same procedural protections as those provided to Suresh, another Iranian in a similar situation. However, the reason why the author has not been provided with the same procedural protections is that, while Suresh successfully made out a prima facie case for risk of torture upon his return to Iran, the author failed to establish such a case. Considering that the establishment of such a case is the precondition for the procedural protection, the Committee's conclusion that the author should have been provided the same procedural protection is tantamount to the argument that the cart should be put before the horse, which is logically untenable in my opinion.

With respect to article 9, paragraph 4, the Committee admits that a substantial part of the delay of the proceedings in the present case is attributable to the author who chose to contest the constitutionality of the security certification instead of proceeding to the "reasonableness" hearing before the Federal Court. And yet, the Committee concludes that the reasonableness hearing itself lasted nine and a half months and such a long period does not meet the requirement of article 9, paragraph 4, that the court may decide the lawfulness of detention "without delay". (10.3) Nevertheless, the process of the Federal Court's reasonableness hearing imposed a heavy burden on the judge to ensure that the author would be reasonably informed of the cases against him so that he could prepare himself for reply and call witnesses if necessary. Furthermore, considering that the present case concerned expulsion of an alien due to "compelling reasons of national security" and that the court had to assess various facts and evidence, the period of nine and a half months does not seem to be unreasonably prolonged. It might be added that the Committee fails to clarify why it is inappropriate for the Committee to accept that "compelling reasons of national security" existed for the State party in the present case (10.7), since the existence of those reasons primarily

depends on the judgment of the State party concerned unless the judgment is manifestly arbitrary or unfounded, which is not the case in my opinion.

Individual opinion by Committee Member Christine Chanet

I share the standing position of the Committee that the issue of an administrative detention order on national security grounds does not result ipso facto in arbitrary detention.

Nevertheless, if such detention is not to be regarded as arbitrary, it must be in conformity with the other requirements of article 9 of the Covenant, failing which the State commits a violation of the first sentence of article 9, paragraph 1, by failing to guarantee the right of everyone to liberty and security of person.

Article 9 is not the only provision of the Covenant which, in my view, should be given such an interpretation.

For example, the execution of a pregnant woman, a flagrant breach of article 6, paragraph 5, constitutes a violation of the right to life as set forth in article 6, paragraph 1.

The same applies in the case of a person who is executed without having been able to exercise the right to seek pardon, in breach of article 6, paragraph 4, of the Covenant.

This reasoning is also applicable to the articles in the Covenant which begin in the first paragraph by setting forth a principle and, in the body of the article, identify the means required to guarantee the right (article 10); these means take the form either of positive steps that the State must take, such as ensuring access to a judge, or of prohibitions, as in article 6, paragraph 5.

Consequently, when a female prisoner has not had prompt access to a judge, as required by article 9, paragraph 4 of the Covenant, there has been a failure to comply with the first sentence of article 9, paragraph 1.

Individual opinion (dissenting) of Committee members, Nigel Rodley, Roman Wieruszewski, and Ivan Shearer

We do not agree with the Committee's finding of a violation of article 9, paragraph 4. The Committee seems to accept, albeit in language implying some uncertainty, that the first four years of the author's detention did not involve a violation of article 9, paragraph 4, since it was the author's choice not to avail himself of the 'reasonableness' hearing procedure pending the constitutional challenge (paragraph 10.4 above). The Committee accepts that the 'reasonableness' hearing meets the requirements of article 9, paragraph 4. Accordingly, its finding of a violation is based on the narrow ground that the 'reasonableness' hearing lasted nine and a half months and that of itself involved a violation of the right to a judicial determination of the lawfulness of the detention without delay. It offers no explanation of why that period violated the provision. Nor is there anything on the record it could have relied on. There is no evidence that the proceedings were unduly prolonged or, if they were, which party bears the responsibility. In the absence of such information or any other explanation of the Committee's reasoning, we cannot join in its conclusion.

Communication No. 1069/2002

Submitted by: Ali Aqsar Bakhtiyari and Roqaiha Bakhtiyari (represented by Nicholas Poynder)

Alleged victims: The authors and their five children, Almadar, Mentazer, Neqeina, Sameina and Amina Bakhtiyari

State party: Australia

Date of adoption of Views: 29 October 2003 (seventy-ninth session)

Subject matter: Prolonged detention during proceedings relating to visa request

Procedural issues: Request for interim measures of protection - Exhaustion of domestic remedies - Effective remedy - Hypothetical nature of claims - Non-substantiation of claims

Substantive issues: Arbitrary detention - Inability judicially to challenge detention - Protection of minor - Family separation - Deportation

Articles of the Covenant: 7; 9, paragraphs 1 and 4; 17; 23, paragraph 1; and 24, paragraph 1

Articles of the Optional Protocol and Rules of Procedure: 2; 5, paragraph 2 (b); rule 86

Finding: Violation (articles 9, paragraphs 1 and 4, and 24, paragraph 1, and, potentially, of articles 17, paragraph 1, and 23, paragraph 1)

1.1 The authors of the communication, initially dated 25 March 2002, are Ali Aqsar Bakhtiyari, an alleged national of Afghanistan born on 1 January 1957, his wife Roqaiha Bakhtiyari, an alleged national of Afghanistan born in 1968, and their five children Almadar Hoseen, Mentazer Medi, Neqeina Zahra, Sameina Zahra and Amina Zahra, all alleged nationals of Afghanistan, born in 1989, 1991, 1993, 1995 and 1998, respectively. At the time of submission, Mr. Bakhtiyari was resident in Sydney, Australia, while Mrs. Bakhtiyari and the children were detained at Woomera Immigration Detention Centre, South Australia. The authors claim to be victims of violations by Australia of articles 7; 9, paragraphs 1 and 4; 17; 23, paragraph 1; and 24, paragraph 1, of the International Covenant on Civil and Political Rights. The authors are represented by counsel.

1.2 On 27 March 2002, the Committee, acting through its Special Rapporteur for New Communications, pursuant to Rule 86 of the Committee's Rules of Procedure, requested the State party to refrain from deporting Mrs. Bakhtiyari and her children, until the Committee had had the opportunity to consider their claims under the Covenant, in the event of a negative decision by the Minister for Immigration on their request in October 2001 to exercise his discretion to allow them to remain in Australia. Following the Minister's

adverse decision and advice that Mrs. Bakhtiyari and her children had applied to the High Court of Australia, this request to refrain from deportation was adjusted by the Special Rapporteur on New Communications, on 13 May 2002, to be conditional on an adverse decision on the application by the High Court.

The facts as submitted by the authors

2.1 In March 1998, Mr. Bakhtiyari left Afghanistan for Pakistan where he was subsequently joined by his wife, their five children, and Mrs. Bakhtiyari's brother. Rather than being smuggled to Germany as he had understood, Mr. Bakhtiyari was instead smuggled by an unidentified smuggler to Australia through Indonesia, losing contact with his wife, children and brother-in-law. He arrived unlawfully in Australia by boat on 22 October 1999. On arrival, he was detained in immigration detention at the Port Hedland immigration detention facility. On 29 May 2000, he lodged an application for a protection visa. On 3 August 2000, he was granted a protection visa on the basis of Afghan nationality and Hazara ethnicity.

2.2 Apparently unknown to Mr. Bakhtiyari, Mrs. Bakhtiyari, her children and her brother were also subsequently brought to Australia by the same smuggler, arriving unlawfully by boat on 1 January 2001 and were taken into immigration detention at the Woomera immigration detention facility. On 21 February 2001, they applied for a protection visa, which was refused by a delegate of the Minister of Immigration and Multicultural and Indigenous Affairs ('the Minister') on 22 May 2001 on the ground that language analysis suggested that she was Pakistani rather than Afghan, as claimed by her, and she was unable to give adequate response to questions concerning Afghanistan. On 26 July 2001, the Refugee Review Tribunal ('RRT') dismissed their application for review of the refusal. The RRT accepted that Mrs. Bakhtiyari was Hazara, but was not satisfied that she was an Afghan national, finding her credibility "remarkably poor" and her testimony "implausible" and "contradictory".

2.3 Some time after July 2001, Mr. Bakhtiyari found out from an Hazara detainee who had been released from the Woomera detention facility that

his wife and children had arrived in Australia and were being held at Woomera. On 6 August 2001, the Department of Immigration and Multicultural and Indigenous Affairs ('the Department'), as a matter of standard procedure following an unsuccessful appeal to the RRT, assessed the case in the light of the Minister's public interest guidelines,¹ which include consideration of international obligations, including the Covenant. It was decided that Mrs. Bakhtiyari and the children did not meet the test of the guidelines. In October 2001, Mrs. Bakhtiyari applied to the Minister for Immigration requesting that he exercise his discretion under s.417 of the *Migration Act* to substitute, in the public interest, a more favourable decision for that of the RRT, on the basis of the family relationship with Mr. Bakhtiyari.

2.4 In a widely reported incident on 26 January 2002, Mrs. Bakhtiyari's brother deliberately injured himself at the Woomera facility in order to draw attention to the situation of Mrs. Bakhtiyari and her children. On 25 March 2002, the present communication was lodged with the Human Rights Committee.

2.5 On 2 April 2002, the Minister declined to exercise his discretion in Mrs. Bakhtiyari's favour. On 8 April 2002, an application was made to the High Court of Australia in its original jurisdiction constitutionally to review the decisions of government officials. The application challenged (i) the RRT's decision on the ground that it should have been aware of Mr. Bakhtiyari's presence on a protection visa, and (ii) the Minister's decision under s. 417 of the *Migration Act*. The application sought to require the Minister to grant a visa to Mrs. Bakhtiyari and her children based on the visa already granted to Mr. Bakhtiyari.

2.6 On 12 April 2002, after receiving information that Mr. Bakhtiyari was not an Afghan farmer, as he had claimed, but rather a plumber and electrician from Quetta, Pakistan, the Department of Immigration and Multicultural and Indigenous Affairs ('the Department') issued him a notice of intention to consider cancellation of his visa and provided him with an opportunity to comment on the

allegations. On 26 April 2002, Mrs. Bakhtiyari made a further request to the Minister under s.417 of the *Migration Act*, but was informed that such matters were generally not referred to the Minister while litigation was underway.

2.7 On 11 June 2002, the High Court granted an Order Nisi in respect of the application of Mrs. Bakhtiyari and her children, finding an arguable case to have been established. On 27 June 2002, some 30 detainees, amongst them the eldest sons of Mrs. Bakhtiyari, Almadar and Mentazer, escaped from the Woomera facility. On 16 July 2002, Mrs. Bakhtiyari again made a request to the Minister under s.417 of the *Migration Act*, but was again informed that such matters were generally not referred to the Minister while litigation was under way. On 18 July 2002, the two boys who had escaped gave themselves up at the British Consulate in Melbourne, Australia, and sought asylum. The request was refused and they were returned to the Woomera facility.

2.8 On 2 August 2002, an application was filed with the Family Court in Adelaide on behalf of Almadar and Montazer, seeking orders against the Minister under s.67ZC of the *Family Law Act 1975*² for the release of the boys from detention and for them to be made available for examination by a psychologist.

2.9 On 30 August 2002, following Mr. Bakhtiyari's institution of legal proceedings to compel the Department to release to him details of his alleged visa fraud, the Department informed him of the additional information obtained in relation to his identity and nationality, including an application by him for Pakistani identification documentation in 1975, family registration documents of 1973 and 1982 listing his birthplace, citizenship and permanent residence as Pakistani. The letter also referred to pieces of investigative journalism published in major Australian newspapers, where journalists were unable to find any person in the Afghan area from where he claimed to be who knew him, or any further evidence that he had lived there. On 20 September 2002, Mr. Bakhtiyari replied to these issues.

2.10 On 9 October 2002, the Family Court (Dawe J) dismissed the application made to it, finding it had

¹ The Guidelines, provided by the authors, provide that "public interest" factors may arise in a number of circumstances, including where there are circumstances that provide a sound basis for a significant threat to a person's personal security, human rights or human dignity upon return to their country of origin, where there are circumstances that may bring the State party's obligations under the Covenant, the Convention on the Rights of the Child or the Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment into consideration, or where there are unintended but particularly unfair or unreasonable consequences of the legislation.

² Section 67ZC provides:

"(1) In addition to the jurisdiction that a court has under this Part in relation to children, the court also has jurisdiction to make orders relating to the welfare of children.

(2) In deciding whether to make an order under subsection (1) in relation to a child, a court must regard the best interests of the child as the paramount consideration."

no jurisdiction to make orders in respect of children in immigration detention. On 5 December 2002, Mr. Bakhtiyari's protection visa was cancelled, and he was taken into custody at the Villawood immigration detention facility, Sydney. The same day he lodged an application for review of this decision with the RRT, as well as an application with the Department for bridging visa seeking his release pending determination of the RRT proceedings. On 9 December 2002, a Minister's delegate refused the request for a bridging visa. On 18 December 2002, the Migration Review Tribunal upheld the decision to refuse a bridging visa.

2.11 Following damage to Woomera in early January 2003, Mrs. Bakhtiyari and the children were transferred to the newly commissioned Baxter immigration detention facility, near Port Augusta. After the failure of his challenges in the Federal Court against his transfer, on 13 January 2003, Mr. Bakhtiyari was transferred from Villawood to the Baxter facility, to be with his wife and children.

2.12 On 4 February 2003, the High Court, by a majority of five justices against two, refused the application of Mrs. Bakhtiyari and her children to be granted a protection visa on account of Mr. Bakhtiyari's status. The Court found that as the Minister was under no obligation to make a new decision, no object would be served in setting aside his decision, and in any event it was not tainted by illegality, impropriety or jurisdictional error. Likewise, the RRT's decision on their appeal was not tainted by any jurisdictional error.

2.13 On 4 March 2003, the RRT affirmed the decision to cancel Mr. Bakhtiyari's protection visa. On 22 May 2003, the Federal Court (Selway J) dismissed the author's application for judicial review of the RRT's decision, finding its conclusion open to it on the evidence. He lodged an appeal from this decision to the Full Bench of the Federal Court.

2.14 On 19 June 2003, the Full Bench of the Family Court held, by a majority, that the Court did have jurisdiction to make orders against the Minister, including release from detention, if that was in the best interests of the child. The case was accordingly remitted for hearing as a matter of urgency as to what orders would be appropriate in the particular circumstances of the children. On 8 July 2003, the Full Bench of the Family Court granted the Minister leave to appeal to the High Court, but rejected the Minister's application for a stay on the order for rehearing as a matter of urgency. On 5 August 2003, the Family Court (Strickland J) dismissed an application for interlocutory relief, that is, that the children be released in advance of the trial of the question of what final orders would be in their best interests. On 25 August 2003, the Full Bench of the Family Court allowed an appeal and ordered the

release of all of the children forthwith, pending resolution of the final application. They were released the same day and have resided with carers in Adelaide since.

2.15 On 30 September and 1 October 2003, the High Court heard the appeal of the Minister against the decision of the Full Court of the Family Court that it had jurisdiction to make welfare orders for children in immigration detention. The Court reserved its decision.

The complaint:

3.1 The authors argue that the State party is in actual or potential breach of article 7. They argue that, as it had become apparent that the RRT was in error in finding that Mrs. Bakhtiyari and her children were not Afghan nationals, they would be sent on to Afghanistan if returned to Pakistan. In Afghanistan, they fear that they would be exposed to torture or cruel, inhuman or degrading treatment or punishment. They invoke the Committee's General Comment 20 on article 7, as well as the Committee's jurisprudence,³ for the proposition that the State party's responsibility would arise for a breach of article 7 if, as a necessary and foreseeable consequence of, directly or indirectly, deporting Mrs. Bakhtiyari and the children to Afghanistan, they would be exposed to torture or to cruel, inhuman or degrading treatment or punishment.

3.2 The authors also submit that the prolonged detention of Mrs Bakhtiyari and her children violates articles 9, paragraphs 1 and 4, of the Covenant. They point out that under section 189 (1) of the *Migration Act*, unlawful non-citizens (such as the authors) must be arrested upon arrival. They cannot be released from detention under any circumstances short of removal or being granted a permit, and there is no provision for administrative or judicial review of detention. No justification has been provided for their detention. Thus, applying the principles set out by the Committee in *A v. Australia*,⁴ the authors consider their detention contrary to the Covenant, and they seek adequate compensation.

3.3 The authors claim that deportation of Mrs. Bakhtiyari and her children would violate articles 17 and 23, paragraph 1. The authors compare these provisions to the corresponding articles (12 and 8) of the European Convention on Human Rights, and consider the Covenant rights to be

³ *A.R.J. v. Australia* Communication No. 692/1996, Views adopted on 11 August 1997, and *T. v. Australia*, Communication No. 706/1996, Views adopted on 4 November 1997.

⁴ Communication No. 506/1993, Views adopted on 4 March 1993.

expressed in stronger and less restricted terms. As a result, the individual's right to respect for family life is paramount over any right of the State to interfere, and thus the "balancing exercise" and "margin of appreciation" characteristic of decisions of the European organs will be of lesser importance in cases arising under the Covenant. Against this background, the authors invite the Committee to follow the approach of the European Court of Human Rights to the effect of being restrictive to those seeking entry to a State to create a family, but more liberal to non-citizens in existing families already present in a State.⁵

3.4 In Covenant terms, the removal of Mrs. Bakhtiyari and her children, which will separate them from Mr. Bakhtiyari, amounts to an "interference" with the family. While the interference is lawful, it should also, according to the Committee's General Comment 16 on article 17, be reasonable in the particular circumstances of the case. In the authors' view, to return Mrs. Bakhtiyari and her children to Afghanistan in circumstances where Mr. Bakhtiyari, an Hazara, is unable to return safely to that country in the light of the uncertain situation, would be arbitrary.

3.5 The authors finally argue a violation of article 24, paragraph 1, which should be interpreted in the light of the Convention on the Rights of the Child. No justification has been provided for the prolonged detention of the children, in "clear" violation of article 24. No consideration has been given to whether it would be in their best interests to have spent over a year in an isolated detention facility, or to be released; detention has been a measure of first, rather than last, resort. It is no answer to say that the best interests of the children were served by collocating them with Mrs. Bakhtiyari as no justification for her prolonged detention has been supplied, and there is no reason why she could not have been released with the children pending determination of their asylum claims. In any event, as soon as it became known that Mr. Bakhtiyari had been granted a permit and was residing in Sydney, the children should have been released into his care.

3.6 As to issues of admissibility, the authors observe that while Mrs. Bakhtiyari and her children could have sought judicial review in the Federal Court of the RRT's decision affirming the refusal of a protection visa, they did not do so because there was no identifiable error of law which would have given rise to a claim that the RRT's decision should be set aside, and thus such an application would have

been futile. The RRT's decision was based on an error of fact, that Mrs. Bakhtiyari and her children were not Afghan nationals. This, according to the authors, was clearly wrong, as Mr. Bakhtiyari had, unbeknown to the RRT, satisfied the State party's immigration authorities at the time that he had applied for a protection visa that he *was* an Afghan national, entitled to protection. However, it is well-established under the State party's law that wrong findings of fact are not reviewable by the courts.⁶ In any event, the mistake of fact only came to light after the non-extendable 28-day time limit for applications to the Federal Court had passed.

3.7 The authors contend that it may have been possible to apply to the High Court under its original jurisdiction to review decisions of government officials, however any prospects of success in such proceedings were removed by the entry into force on 27 September 2001 of the *Migration Amendment (Judicial Review)* Act 2001, which provided that RRT decisions are final and conclusive, and cannot be challenged, appealed against, reviewed, quashed or called into question in any court. (On this point, in a subsequent submission of 9 April 2002, the authors' counsel stated that he had been unaware of the possibility of an arguable case before the High Court, as was in fact subsequently lodged after receipt of additional legal advice from other sources. Given the novelty of the application, there was "considerable doubt" at the time that the application would succeed.) In terms of the Minister's power to exercise his discretion under section 417 of the *Migration Act*, a refusal to so act cannot be appealed or reviewed in any court.

3.8 The authors state that the same matter has not been submitted for examination under another procedure of international investigation or settlement.

Subsequent request for interim measures of protection

4.1 On 8 May 2002, the authors provided the Committee with a psychologist's report dated 2 December 2001, a report of the South Australian State government's Department of Human Services dated 23 January 2002, and a report of an Australian Correctional Management Youth Worker dated 24 January 2002. These reports found that ongoing detention was causing deep depressive effects upon the children, and the two boys Almadar and Mentazer. The reports referred to a number of instances of self-harm, including instances where the two boys stitched their lips together (Almadar on two occasions), slashed their arms (Almadar also cut the word "Freedom" into his forearm), voluntarily starved themselves and behaved in numerous erratic ways,

⁵ The authors refer to Lambert, H.: "The European Court of Human Rights and the Right of Refugees and Other Persons in Need of Protection to Family Reunion", (1999) 11 (3) *International Journal of Refugee Law* 427.

⁶ *Waterford v. Commonwealth* (1987) 163 CLR 54.

including drawing disturbed pictures. In addition, the children witnessed Mrs. Bakhtiyari's lips sewn shut. The Department for Human Services strongly recommended as a result that Mrs. Bakhtiyari and the children have ongoing assessment *outside* the Woomera facility.

4.2 On 13 May 2002, the Committee, acting through its Special Rapporteur on New Communications, pursuant to Rule 86 of the Committee's Rules of Procedure, requested that the State party inform the Committee within 30 days of the measures it had taken on the basis of evaluation by the State party's own expert authorities that, as a result of incidents of self harm inflicted by at least two of the children upon themselves, Mrs. Bakhtiyari and her children should have ongoing assessment outside of Woomera detention centre, in order to ensure that further such acts of harm were not suffered.

4.3 By submission of 18 June 2002, the State party responded to the Committee's request. The State party observed that the family is closely monitored, and that individual care and case management plans are in place and regularly reviewed. It points out that the standard of medical care available at the Woomera facility is "very high", including continuous cover by a general medical practitioner and nurses, including a psychiatric nurse, as well as availability of psychologists and counsellors, dentists and an optometrist. A range of recreational and educational facilities are available to assist in the maintenance of mental health and to foster individual development.

4.4 As to the issue of release from detention, the State party did not consider such a course would be appropriate. Detailed consideration was being given to the family situation, and their circumstances were known to the Minister and to the Department. The State party pointed out that its processes had determined that it did not owe protection obligations to Mrs. Bakhtiyari and her children. In addition, the Minister personally considered the case, *inter alia* in the light of the State party's obligations including the Covenant, and decided that it would not be in the public interest to substitute a more favourable decision. In addition, as Mr. Bakhtiyari's visa was under consideration for cancellation for alleged fraud, it would not be considered appropriate to release Mrs. Bakhtiyari and the children at that time.

4.5 On 8 July 2002, the authors responded to the State party's observations pursuant to the Committee's request, contesting that the standard of medical care provided was as contended by the State party. Reference was made to evidence provided to the (then) ongoing National Inquiry into Children in Immigration Detention conducted by the Human Rights and Equal Opportunities Commission, where

a variety of State departments were sharply critical of the level of health services and staffing provided, including concerning mental health and development needs, dental and nutritional issues. There was also considerable criticism of educational facilities, from preschool level onwards, falling well short of services provided to Australian children, and of scarce access to recreational programmes.⁷

4.6 As to the State party's contention that Mrs. Bakhtiyari and her children should not be released as it had been determined that no protection obligations were owed, the authors pointed out that the requirement not to detain a person arbitrarily did not depend on the existence of an obligation to provide protection, but rather on whether there were sound grounds justifying detention. In any event, legal proceedings continued to challenge the decision not to grant a protection visa. Moreover, the principle of family unity required that they, as dependents of Mr. Bakhtiyari, who had been granted a protection visa, should be released to join him. As to the move to cancel Mr. Bakhtiyari's visa on the basis of allegations that he was from Pakistan and a linguistic analysis of dialect, counsel stated that the State party had refused repeated requests for access to the allegations and the analysis, and that this information was being sought by legal action. In addition, a language analysis carried out by his own expert, as well as statements from people that knew him in Afghanistan, confirmed his original evidence.

4.7 By letter of 12 September 2002, the authors provided the Committee with an Assessment Report, dated 9 August 2002, of the Department of Human Services (Family and Youth Services). The assessment was requested by the Department of Immigration and Multicultural and Indigenous Affairs in order to advise on what would be the best living situation for the family. The report recommended, *inter alia*, that Mrs. Bakhtiyari and her children be released into the community in order to prevent further social and emotional harm being done to the children, especially the boys. Ideally, this would be via a temporary bridging visa, but release as a total family unit to a residential housing option would also be an improvement. If the family had to remain in detention, the family should be transferred to the Villawood facility in Sydney for easier access to Mr. Bakhtiyari. In addition, increased and better-focussed health, education and recreational resources should be provided, as well as greater care taken to protect and shield children from situations of danger and trauma within the compound. This report was tabled in the South Australian parliamentary House of Assembly, with the Premier requesting the federal

⁷ These submissions are available online at www.hreoc.gov.au/human_rights/children_detention/index.html

government to respond and act upon the recommendations.

State party's submissions on admissibility and merits

5.1 By submission of 7 October 2002, the State party contests both the admissibility and the merits of the communication. In the first instance, the State party submits that the entire communication should be dismissed for failure to exhaust domestic remedies, as at that point the authors' High Court action, which could have resulted in a full remedy, was still pending. In addition, with respect to article 9, the State party argues that an action in *habeas corpus* under the *Constitution* Act 1901 would provide a means by which the lawfulness of any detention, administrative or otherwise, may effectively be judicially tested.

5.2 As to the claims under article 7, the State party argues that this aspect of the communication should be declared inadmissible for lack of sufficient substantiation. The authors simply assert, without any explanation, that if deported to Pakistan, they will be sent on to Afghanistan and face treatment contrary to article 7.

5.3 Firstly, the State party points out that both the original decision maker and the RRT made findings of fact that Mrs. Bakhtiyari and the children were not from Afghanistan. The original decision maker noted that she was unable to name the Afghan currency, any of the larger towns or villages around her home village, any of the names of the provinces surrounding her home or which she had passed through on her way out of the country, or a river or mountain near her village. In drawing adverse inferences concerning her veracity, the decision maker made explicit allowance for her age, level of education, gender and life experience in determining the level of knowledge she could be reasonably expected to have, acknowledging limitations suffered by her as a woman in a Muslim country. The RRT also noted, *inter alia*, that the results of linguistic analysis showed a distinct Pakistani accent, and that she could name neither the Afghan currency nor the years in the Afghan calendar in which her children were born. While she had been unable to provide any information to the original decision-maker concerning her travel route from Afghanistan, by the time she reached the RRT her story had, in the RRT's words, "considerably evolved" and it took the view that she had clearly been coached in the intervening months.

5.4 The State party invites the Committee to follow its approach to fraudulent nationality in *J.M. v. Jamaica*,⁸ where the State party, in response to a

claim of denial of passport, presented information to the effect that at no stage was the author a Jamaican or had possessed a Jamaican passport; moreover, he was unable to provide the most basic information about Jamaica despite having claimed to live there before losing his passport. The Committee accordingly found he had failed to establish he was a Jamaican citizen and thus failed to substantiate his claims of violation of the Covenant. In the instant case, two decision-makers found, as fact, that Mrs. Bakhtiyari and her children were not Afghan nationals, and no new contrary evidence has been provided by the authors; thus, there is no basis for the claim that they would be sent on to Afghanistan, if returned to Pakistan.

5.5 Secondly, even if they were from Afghanistan, they have not substantiated, for purposes of admissibility, that they would be exposed to torture or other cruel, inhuman or degrading treatment or punishment. The onus lies on the authors to show a risk of such treatment. The State party points out that UNHCR estimates that 70-80 per cent of Afghanistan is safe for returnees, and there is nothing to suggest that the Bakhtiyaris would not be in such safe areas. UNHCR also confirms a substantial positive change in the situation for Hazaras, with significantly less discrimination against them. Accordingly, the claims under article 7 have not been sufficiently substantiated.

5.6 The State party separately argues, with respect to the article 7 claims, that they should be dismissed for failure to disclose an "actual grievance". In *A.R.S. v. Canada*,⁹ for example, the Committee found a communication inadmissible under articles 1 and 2 of the Optional Protocol on the grounds that it was merely hypothetical. In the present case, as Mrs. Bakhtiyari and her children had initiated actions in the High Court as well as the Family Court, consideration had not been given to whether they would be removed from Australia, and, if so, where. These issues would await the outcome of the legal processes which were pending. Thus, the claims regarding return to Afghanistan, and consequential breach of article 7, are hypothetical and inadmissible.

5.7 As to the merits of the communication, the State party argues that no violation of the Covenant is disclosed. Concerning the claims under article 7, the State party refers to its arguments on the admissibility of this claim, pointing out that, having been found not to be Afghan nationals, there is no evidence that Mrs Bakhtiyari and her children would be sent on to Afghanistan from Pakistan, much less

⁸ Communication No. 165/1984, decision adopted on 26 March 1986.

⁹ Communication No. 91/1981, decision adopted on 28 October 1981.

face, as a necessary and foreseeable consequence, a particular or real risk of torture or cruel, inhuman or degrading treatment or punishment there.

5.8 Regarding the claim under article 9, paragraph 1, the State party considers that the detention is reasonable in all the circumstances and continues to be justified, given the factors of the particular family situation. Mrs. Bakhtiyari and her children arrived unlawfully, and were required to be detained under the *Migration Act*. That being so, it was appropriate that the children remain with their mother in detention, rather than be housed in alternative arrangements. The purposes of detention of unlawful arrivals is to ensure availability for processing protection claims, to enable essential identity, security, character and health checks to be carried out, and to ensure availability for removal if protection claims are denied. These purposes reflect the State party's sovereign right under international law to regulate admittance of non-citizens, and accordingly the detention is not unjust, inappropriate or improper; rather, it is proportionate to the ends identified.

5.9 The State party emphasises that while in detention, individuals are provided with free legal advice to apply for protection visas, and considerable resources have been invested to provide for more rapid processing of claims, and correspondingly shorter durations of detention. In the present case, the claims were promptly processed: Mrs. Bakhtiyari's application, made on 21 February 2001, was refused by the original decision maker on 22 May 2001. She was informed of the RRT's decision on her appeal on 26 July 2001. Thereupon, the Minister denied her request for discretionary action under section 417 of the *Migration Act*. That Act now requires Mrs. Bakhtiyari to be removed as soon as "reasonably practicable". However, as they themselves petitioned the Minister and subsequently engaged legal action, the usual steps concerning removal have been delayed pending the outcome.

5.10 The State party rejects the claim that the children should have been released into their father's care. At the time of the submissions, his visa was liable to cancellation on the basis of fraud, namely that he too was a Pakistani national, and his response to the adverse information was before the Department. Cancellation of the visa would result in being placed in immigration detention, and thus it was not considered appropriate to release the children into his care.

5.11 As to the claim under article 9, paragraph 4, the State party observes that the Committee found in *A v. Australia* that arbitrary detention contrary to article 9, paragraph 1, should be able to be tested before a court. The State party however reiterates its position in response to the Committee's Views in *A v. Australia* that there was nothing in the Covenant to indicate that the word "lawful" was intended to

mean "lawful at international law" or "not arbitrary". Where lawful is otherwise utilised in the Covenant, it clearly refers to domestic law (arts. 9 (1), 17 (2), 18 (3) and 22 (2)). Nor do the Committee's General Comments, nor the *travaux préparatoires* to the Covenant suggest any such notion. If article 9, paragraph 4, were to have extended meaning beyond domestic law, it would have been a simple matter for the drafters to add "arbitrary" or "in breach of the Covenant". At least, such a broad interpretation would be expected to be reflected in the debate and discussion preceding the agreement on the text, but the *travaux* show that this provision "did not give rise to much discussion". In the present case, recourse to the *habeas corpus* jurisdiction of the High Court, possibly funded by legal aid, gives the authors the right to challenge the lawfulness of their detention, consistent with article 9, paragraph 4. While they have failed to take advantage of this right, they cannot be said to have been denied recourse to it.

5.12 As to the claims under articles 17 and 23, paragraph 1, the State party argues, firstly, that "interference" refers to acts that have the result of *inevitably* separating the family unit. In this respect, the State party considers the individual opinion of four members of the Committee in *Winata v. Australia*¹⁰ to reflect correctly the prevailing view of international law when they stated that: "It is not all evident that actions of a State party that result in changes to long-settled family life involve interference with the family, when there is no obstacle to maintaining the family's unity." In the present case, Mr. Bakhtiyari is free to leave with his wife and children, and travel arrangements will be facilitated if needed. If he chooses to remain, that is his own decision rather than that of the State party. The State party thus rejects that, in enforcing its immigration law, it is interfering with the family unit in this case.

5.13 In any event, any interference is not arbitrary. The State party rejects that its laws concerning removal of unlawful non-citizens could be characterized as arbitrary; aliens do not, under international law, have the right to enter, live, move freely and not be expelled.¹¹ The laws are reasonable, being based upon sound public policy principles consistent with the State party's standing as a sovereign nation and with its international obligations, including under the Covenant. The laws are predictable, in that information about them is

¹⁰ Communication No. 930/2000, Views adopted on 26 July 2001.

¹¹ C. Tiburcio: "The Human Rights of Aliens under International and Comparative Law", *International Studies in Human Rights*, Vol. 65 (Nijhoff, 2001), at 20.

widely available, and they are applied in consistent fashion, without discrimination. If these laws are applied to Mrs. Bakhtiyari and her children, it will be the predictable and foreseeable operation, that has been explained to them, of having exhausted the available application and appeals processes, which give extensive consideration to their individual circumstances and to the State party's *non-refoulement* obligations.

5.14 As to article 23, paragraph 1, the State party refers to Nowak's characterization of this obligation as requiring the establishment of marriage and family as special institutions in private law and their protection against interference by State as well as private actors.¹² There is a comprehensive federal system of family law, complemented by rigorous child protection laws in States and Territories, which are backed up by State and Territory departments and specialist units with police services. These laws apply to persons in immigration detention (except as inconsistent with federal law). The State has introduced programs and policies to support families in immigration detention, prescribing appropriate standards for the relevant service providers. Medical staff, including nurses, counsellors and welfare officers, support and assist parents to care for children and meet parental responsibilities. State child welfare agencies also provide appropriate parenting skills training. The State party thus rejects that it has failed to protect the family as an institution; it has put in place laws, practices and policies designed to protect and support families, including those in immigration detention.

5.15 In terms of the claims under article 24, paragraph 1, the State party, as a preliminary matter, rejects that this provision should be interpreted in a similar way to the Convention on the Rights of the Child (CRC). The Committee has noted that it is not competent to examine allegations of violations of other instruments,¹³ and should thus restrict its consideration to Covenant obligations. It is clear, in any event, that article 24, paragraph 1, is different in nature to CRC rights and obligations, being, as described by Nowak, a comprehensive duty to guarantee that all children within a State party's jurisdiction are protected,¹⁴ whether through support for the family, through support for corresponding private facilities for children, or other measures. The obligation is not complete, extending only to such

¹² Nowak, M.: *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, Kehl, 1993), at 402.

¹³ The State party refers to *K.L. v. Denmark* Communication No. 59/1979, decision adopted on 26 March 1980.

¹⁴ Nowak, op. cit., at 426.

protective measures as required by the child's status as a minor.

5.16 The State party submits this obligation has been met with respect to the Bakhtiyari children. It refers to the information on the level of medical, educational and recreational services outlined in its response to the Committee's request for information pursuant to rule 86 of its rules of procedure.¹⁵ In addition, all staff in detention facilities must advise local child protection authorities if they consider a child is at risk of harm; to this effect, concerning the Woomera facility, an arrangement was formalized between the Department and the South Australian State Department of Human Services on 6 December 2001.

5.17 Within immigration detention, as generally in the State party, child supervision is a parental responsibility and thus, while general statements can be made about services and facilities available, attendance records are not usually kept. Following the concern about the Bakhtiyaris' well-being, however, special protective measures were implemented. An officer has been specifically assigned to monitor the children's participation in educational and recreational activities, and to work with Mrs. Bakhtiyari to encourage these ends. Records indicate that the two eldest boys attend school regularly, use computer facilities, play soccer regularly and attend exercise classes. They attend regular pool excursions and enjoy watching television, while Muntazar has actively taught other children cycling. Of the other children, the school-aged girls attend school and participate in recreational activities, including sewing with their mother.

5.18 Following concerns about the family, the Department requested the local child welfare authorities (under the auspices of the South Australian State Department of Human Services) to assess the family at the facility. The family did not cooperate with the August 2002 assessment, and Mrs. Bakhtiyari did not allow the authorities to speak to the two eldest sons, which compromised the assessment. An independent psychologist made an assessment on 2 and 3 September 2002, and made recommendations the Department is considering.

5.19 The State party argues that consideration has been given to whether the children should remain in detention. In October 2001, when Mrs. Bakhtiyari applied to the Minister under section 417 of the *Migration Act*, it was known that Mr. Bakhtiyari was in the community. However, there was also information to suggest that he may have committed visa fraud. The Minister considered all these factors in reaching his decision not to substitute a more

¹⁵ See para 4.3, *infra*.

favourable decision for that of the RRT. As Mr. Bakhtiyari's visa was, at the stage of the State party's submission, under consideration for cancellation, it would be inappropriate to release the children to his custody.

5.20 The State party observes, in closing, that efforts have been made to ensure Mrs. Bakhtiyari and the children have access to the most comfortable facilities. In August 2002, they were offered a transfer to the new Baxter facility, having contended that the Woomera facility was isolated and too harsh for children. The Baxter facility possesses a family compound, as well as superior educational facilities in a purpose-built school. As at the time of submissions, they had refused to move despite lengthy discussions with staff, preferring to remain at the Woomera facility. The option to transfer nonetheless remained open.

Authors' comments on State party's submissions

6.1 By letter of 31 March 2003, the authors responded to the State party's submissions, observing that, as at that point, with the High Court's dismissal of their application, Mrs. Bakhtiyari and the three youngest children had no further legal options by which they could remain in Australia, and would be detained until deportation. Success for the two sons Alamdar and Montazer before the Family Court could result in their release from detention. Mr. Bakhtiyari's only prospect to remain in the State party was if he was successful in his application to the Federal Court to overturn the RRT's affirmation of his visa cancellation.

6.2 In response to the State party's submissions, the authors contend that Mr. Bakhtiyari's detention for nine months until the grant of his visa breached article 9, paragraphs 1 and 4. He disclaims any submission as to his current detention pending deportation. Mrs. Bakhtiyari and her children had been (at the time of the comments) in detention for two years and four months, in violation of articles 9, paragraphs 1 and 4, and 24, paragraph 1. A remedy of *habeas corpus* is of no assistance as the detentions were, and are, lawful under the State party's law and thus would be bound to fail. As to the children, the forthcoming decision of the Family Court does not detract from their claims of violations to date.

6.3 The authors emphasize the "universal condemnation" of the State party's attempts to justify mandatory detention for all unauthorized arrivals.¹⁶ No justification has been advanced for the prolonged

¹⁶ The authors refer to a report of the Human Rights and Equal Opportunities Commission "Those who've come across the seas: Detention of unauthorized arrivals", available online at www.hreoc.gov.au/pdf/human_rights/asylum_seekers/h5_2_2.pdf.

detention of Mrs. Bakhtiyari and the children, and the actual or alleged nationality of the family is irrelevant to this issue. The case is factually indistinguishable from the Committee's Views in *A v. Australia* and *C v. Australia*;¹⁷ if anything, the detention of children makes the breaches more serious.

6.4 To the extent that the family has now been reunited in allegedly unlawful detention and that any removal is likely to involve the whole family, the allegation that the removal of Mrs. Bakhtiyari and the children would be in breach of articles 17 and 23, paragraph 1, was at that point no longer maintained.

Supplementary submissions by the parties

7.1 On 7 May 2003, the authors provided the Committee with a letter of 28 April 2003 from the Australian Government Solicitor to the Chief Justice of the Family Court, advising the Court of developments. In particular, as Mrs. Bakhtiyari and her children had no outstanding legal proceedings, the Minister considered himself under a duty, pursuant to section 198 (6) of the *Migration Act*, to remove them as soon as "reasonably practicable", and efforts were being made to secure the necessary documentation to enable their removal. As Mr. Bakhtiyari had an outstanding application for review of the cancellation of his visa (which was subsequently dismissed) as well as an outstanding application for a permanent protection visa (which did not include Mrs. Bakhtiyari or the children), the obligation to remove him had not yet arisen and removal was not imminent.

7.2 The authors considered that removal of Mrs. Bakhtiyari and her children in these circumstances would amount to a breach of articles 7, 17, 23, paragraph 1, and 24 of the Covenant. As a result, on 8 May 2003, the Committee, acting through its Special Rapporteur, pursuant to Rule 86 of the Committee's Rules of Procedure, recalled and renewed the request made not to expel Mrs. Bakhtiyari and her children, pending the Committee's decision in the case.

7.3 On 22 July 2003, during the Committee's 78th session, the State party made additional submissions, informing that Mrs. Bakhtiyari and the three daughters were currently resident in the Woomera Residential Housing Project, a facility aimed at special needs of women and children. Their residence was one of eight standard houses in Woomera township, considered to be an alternate place of detention by the Department. Mrs. Bakhtiyari and her three daughters are able to leave the house provided they are escorted by correctional officers. Mr. Bakhtiyari and the two sons remain at the Baxter Immigration Reception

¹⁷ Case No. 900/1999, Views adopted on 28 October 2002.

and Processing Centre. The sons are over the age limit for release into the Residential Housing Project because of “cultural sensitivities and security”. Mr. Bakhtiyari is able to visit his wife and daughters at the Housing Project twice a week.

7.4 By letter of 8 October 2003, the authors responded to the State party’s submissions, updating the Committee on the history of proceedings in the Family Court and High Court, with respect to the children, and in the Federal Court with respect to Mr. Bakhtiyari. They argued that in the event the appeal to the High Court was resolved against them, that the children would be returned to detention. They observed that Mrs. Bakhtiyari remains in immigration detention, though currently in Adelaide hospital pending birth of a child. Mr. Bakhtiyari remained in the Baxter facility. If Mrs. Bakhtiyari and her children were to be deported imminently, they would be separated from him.

Issues and proceedings before the Committee

Considerations of admissibility

8.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

8.2 As to the State party’s argument that domestic remedies have not been exhausted, the Committee refers to its practice that it decides the question of exhaustion of domestic remedies, in contested cases, at the point of its consideration of the communication, not least for the reason that a communication in respect of which domestic remedies had been exhausted after submission could be immediately re-submitted to the Committee if declared inadmissible for that reason. Upon that basis, the Committee observes that the proceedings brought by Mrs. Bakhtiyari and her children in the High Court have, in the intervening period, been adversely concluded. As to the proposed remedy of *habeas corpus*, the Committee observes, as it has done previously, that as the State party’s law provides for mandatory detention of unlawful arrivals, a *habeas corpus* application could only test whether the individuals in fact possess that (uncontested) status, rather than whether the individual detention is justified. Accordingly, the proposed remedy has not been shown to be an effective one, for the purposes of the Optional Protocol. The Committee thus is not precluded under article 5, paragraph 2 (b), of the Optional Protocol from considering the communication.

8.3 As to the State party’s argument that the removal of Mrs. Bakhtiyari and her children is hypothetical and thus there is not an “actual grievance” for the purposes of the Optional Protocol,

the Committee observes that, whatever the position might have been at the time the State party lodged its submissions, according to recent information, the State party regards itself under a duty to remove Mrs. Bakhtiyari and her children as soon as is “reasonably practicable” and is taking steps to that end. Accordingly, the claims based on threat of removal of Mrs. Bakhtiyari and her children are not inadmissible for reason of being of hypothetical nature.

8.4 Referring to the arguments that Mrs. Bakhtiyari and her children, if removed to Afghanistan, would be in fear of being subjected to treatment contrary to article 7 of the Covenant, the Committee observes that as the authors have not been removed from Australia, the issue before the Committee is whether such removal if implemented at the present time would entail a real risk of treatment contrary to article 7 as a consequence. The Committee also observes that the State party’s authorities, in the proceedings to date, have determined, as a matter of fact, that the authors are not from Afghanistan, and hence they do not stand in fear of being returned to that country by the State party. The authors on the other hand have failed to demonstrate that if returned to any other country, such as Pakistan, they would be liable to be sent to Afghanistan, where they would be in fear of treatment contrary to article 7. Much less have the authors substantiated that even if returned to Afghanistan, directly or indirectly, they would face, as a necessary and foreseeable consequence, treatment contrary to article 7. The Committee accordingly takes the view that the claim that, if the State party returns them at the present time, Mrs. Bakhtiyari and her children would have to face treatment contrary to article 7, has not been substantiated before the Committee, for purposes of admissibility, and is inadmissible under article 2 of the Optional Protocol.

8.5 As to the claims under articles 17 and 23 deriving from a separation of the family unit, the Committee observes that while these claims were withdrawn on the assumption that once Mr. Bakhtiyari was placed with his family, they would be dealt with together, the most recent information suggests that the State party is moving to remove Ms. Bakhtiyari and her children, while proceedings in relation to Mr. Bakhtiyari are in process. Consequently, the Committee regards these claims still to be relevant, and considers these and the remaining claims to be sufficiently substantiated, for purposes of admissibility.

Consideration of the merits

9.1 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.

9.2 As to the claims of arbitrary detention, contrary to article 9, paragraph 1, the Committee recalls its jurisprudence that, in order to avoid any characterization of arbitrariness, detention should not continue beyond the period for which a State party can provide appropriate justification.¹⁸ In the present case, Mr. Bakhtiyari arrived by boat, without dependants, with his identity in doubt and claiming to be from a State suffering serious internal disorder. In light of these factors and the fact that he was granted a protection visa and released two months after he had filed an application (some seven months after his arrival), the Committee is unable to conclude that, while the length of his first detention may have been undesirable, it was also arbitrary and in breach of article 9, paragraph 1. In the light of this conclusion, the Committee need not examine the claim under article 9, paragraph 4, with respect to Mr. Bakhtiyari. The Committee observes that Mr. Bakhtiyari's second period of detention, which has continued from his arrest for purposes of deportation on 5 December 2002 until the present may raise similar issues under article 9, but does not express a further view thereon in the absence of argument from either party.

9.3 Concerning Mrs. Bakhtiyari and her children, the Committee observes that Mrs. Bakhtiyari has been detained in immigration detention for two years and ten months, and continues to be detained, while the children remained in immigration detention for two years and eight months until their release on interim orders of the Family Court. Whatever justification there may have been for an initial detention for the purposes of ascertaining identity and other issues, the State party has not, in the Committee's view, demonstrated that their detention was justified for such an extended period. Taking into account in particular the composition of the Bakhtiyari family, the State party has not demonstrated that other, less intrusive, measures could not have achieved the same end of compliance with the State party's immigration policies by, for example, imposition of reporting obligations, sureties or other conditions which would take into account the family's particular circumstances. As a result, the continuation of immigration detention for Mrs. Bakhtiyari and her children for length of time described above, without appropriate justification, was arbitrary and contrary to article 9, paragraph 1, of the Covenant.

9.4 As to the claim under article 9, paragraph 4, related to this period of detention, the Committee

refers to its discussion of admissibility above and observes that the court review available to Mrs. Bakhtiyari would be confined purely to a formal assessment of whether she was a "non-citizen" without an entry permit. The Committee observes that there was no discretion for a domestic court to review the justification of her detention in substantive terms. The Committee considers that the inability judicially to challenge a detention that was, or had become, contrary to article 9, paragraph 1, constitutes a violation of article 9, paragraph 4.

9.5 As to the children, the Committee observes that until the decision of the Full Bench of the Family Court on 19 June 2003, which held that it had jurisdiction under child welfare legislation to order the release of children from immigration detention, the children were in the same position as their mother, and suffered a violation of their rights under article 9, paragraph 4, up to that moment on the same basis. The Committee considers that the ability for a court to order a child's release if considered in its best interests, which subsequently occurred (albeit on an interim basis), is sufficient review of the substantive justification of detention to satisfy the requirements of article 9, paragraph 4, of the Covenant. Accordingly, the violation of article 9, paragraph 4, with respect to the children came to an end with the Family Court's finding of jurisdiction to make such orders.

9.6 As to the claim under articles 17 and 23, paragraph 1, the Committee observes that to separate a spouse and children arriving in a State from a spouse validly resident in a State may give rise to issues under articles 17 and 23 of the Covenant. In the present case, however, the State party contends that, at the time Mrs. Bakhtiyari made her application to the Minister under section 417 of the *Migration Act*, there was already information on Mr. Bakhtiyari's alleged visa fraud before it. As it remains unclear whether the attention of the State party's authorities was drawn to the existence of the relationship prior to that point, the Committee cannot regard it as arbitrary that the State party considered it inappropriate to unite the family at that stage. The Committee observes, however, that the State party intends at present to remove Mrs. Bakhtiyari and her children as soon as "reasonably practicable", while it has no current plans to do so in respect of Mr. Bakhtiyari, who is currently pursuing domestic proceedings. Taking into account the specific circumstances of the case, namely the number and age of the children, including a newborn, the traumatic experiences of Mrs. Bakhtiyari and the children in long-term immigration detention in breach of article 9 of the Covenant, the difficulties that Mrs. Bakhtiyari and her children would face if returned to Pakistan without Mr. Bakhtiyari and the absence of arguments by the State party to justify removal in these circumstances, the Committee takes

¹⁸ *A. v. Australia and C v. Australia, op.cit.*

the view that removing Mrs. Bakhtiyari and her children without awaiting the final determination of Mr. Bakhtiyari's proceedings would constitute arbitrary interference in the family of the authors, in violation of articles 17, paragraph 1, and 23, paragraph 1, of the Covenant.

9.7 Concerning the claim under article 24, the Committee considers that the principle that in all decisions affecting a child, its best interests shall be a primary consideration, forms an integral part of every child's right to such measures of protection as required by his or her status as a minor, on the part of his or her family, society and the State, as required by article 24, paragraph 1, of the Covenant. The Committee observes that in this case children have suffered demonstrable, documented and ongoing adverse effects of detention suffered by the children, and in particular the two eldest sons, up until the point of release on 25 August 2003, in circumstances where that detention was arbitrary and in violation of article 9, paragraph 1, of the Covenant. As a result, the Committee considers that the measures taken by the State party had not, until the Full Bench of the Family Court determined it had welfare jurisdiction with respect to the children, been guided by the best interests of the children, and thus revealed a violation of article 24, paragraph 1, of the Covenant, that is, of the children's right to such measures of protection as required by their status as minors up to that point in time.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal violations by Australia of articles 9, paragraphs 1 and 4, and 24, paragraph 1, and, potentially, of articles 17, paragraph 1, and 23, paragraph 1, of the Covenant.

11. 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. As to the violation of article 9, paragraphs 1 and 4, continuing up to the present time with respect to Mrs. Bakhtiyari, the State party should release her and pay her appropriate compensation. So far as concerns the violations of articles 9 and 24 suffered in the past by the children, which came to an end with their release on 25 August 2003, the State party is under an obligation to pay appropriate compensation to the children. The State party should also refrain from deporting Mrs. Bakhtiyari and her children while Mr. Bakhtiyari is pursuing domestic proceedings, as any such action on the part of the State party would result in violations of articles 17, paragraph 1, and 23, paragraph 1, of the Covenant.

12. 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 expects to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

APPENDIX

Individual Opinion (dissenting in part) of Committee member Sir Nigel Rodley

For the reasons I gave in my separate opinion in *C. v. Australia* (Case No. 900/1999, Views adopted on 28 October 2002), I concur with the Committee's finding of a violation of article 9, paragraph 1, but not with its finding of a violation of article 9, paragraph 4.

Communication No. 1077/2002

Submitted by: Jaime Carpo, Oscar Ibao, Warlito Ibao and Roche Ibao (represented by Ricardo A. Sunga III)

Alleged victim: The authors

State party: Philippines

Date of adoption of Views: 28 March 2003

Subject matter: Mandatory death penalty for murder

Procedural issue: Request for interim measures

Substantive issues: Murder as “most serious” crime - Mandatory imposition of the death penalty - Right to have one’s conviction and sentence reviewed by a higher tribunal

Articles of the Covenant: articles 6, paragraph 2, and 14, paragraph 5

Article of the Optional Protocol and Rules of Procedure: rule 86

Finding: Violation (article 6, paragraph 1)

1.1 The authors of the communication, dated 6 May 2002, are Jaime Carpo, his sons Oscar and Roche Ibao, and his nephew Warlito Ibao, all Filipino nationals detained at the New Bilibid Prison, Muntinlupa City. The authors claim to be victims of violations by the Philippines of articles 6, paragraph 2, and 14, paragraph 5, of the Covenant. The authors are represented by counsel. The Covenant entered into force for the State party on 23 January 1987, and the Optional Protocol on 22 November 1989.

1.2 On 14 May 2002, the Human Rights Committee, acting through its Special Rapporteur on New Communications, requested the State party pursuant to Rule 86 of its Rules of Procedure not to carry out the death sentence against the authors whilst their case was before the Committee.

Factual background

2.1 Prior to 1987, the death penalty existed in the Philippine legal system, with numerous crimes, including murder, that were punishable by death. On 2 February 1987, a new Constitution took effect following approval by the Filipino people consulted by plebiscite. That Constitution, in article 3 (19) (1), abolished the death penalty in the following terms:

“Executive fines shall not be imposed, nor cruel, degrading or inhuman punishment inflicted. Neither shall the death penalty be imposed, unless for compelling reasons involving heinous crimes, the Congress hereafter provides for it. Any death penalty already imposed shall be reduced to reclusion perpetua.”

2.2 On 13 December 1993, the Philippine Congress, by way of Republic Act No. 7659, re-introduced the death penalty by electrocution in respect of “certain heinous crimes”, including murder in various circumstances.¹ The substance of the offence of murder remained unchanged.

2.3 In the evening of 25 August 1996, a grenade was hurled into the bedroom of the Dulay family. The explosion killed Florentino Dulay, as well as his daughters Norwela and Nissan, and wounded a further daughter, Noemi. On 25 October 1996 and 9 December 1996, the authors Jaime Carpo and Roche Ibao, respectively, were arrested. Thereupon, the remaining authors Oscar and Warlito Ibao gave themselves up.

2.4 On 22 January 1998, the Regional Court of Tayug, Pangasinan, convicted the authors of “multiple murder with attempted murder”, sentenced them to death and fixed the sum of civil liability at P600,000. On 4 April 2001, on automatic review of the authors’ case, a 15 judge bench of the Supreme Court affirmed the conviction after extensive review

¹ Section 6 of said Act amended article 248 of the Revised Penal Code to read as follows:

“Art. 248. *Murder* - Any person who, not falling within the provisions of article 246 [parricide], shall kill another, shall be guilty of murder and shall be punished by *reclusion perpetua*, to death if committed with any of the following attendant circumstances:

1. With treachery, taking advantage of superior strength, with the aid of armed men, or employing means to weaken the defence or of means or persons to insure or afford impunity.

2. In consideration of a price, reward or promise.

3. By means of inundation, fire, poison, explosion, shipwreck, stranding of vessel, derailment or assault upon a railroad, fall of an airship, or by means of motor vehicles, or with the use of any other means involving great waste and ruin.

4. On occasion of any of the calamities enumerated in the preceding paragraph, or of an earthquake, eruption of a volcano, destructive cyclone, epidemic, or other public calamity.

5. With evident premeditation.

6. With cruelty, by deliberately and inhumanly augmenting the suffering of the victim, or outraging or scoffing at his person or corpse.”

of the facts, and reduced the civil liability to P330,000. As to the sentence of death, the Court considered the case to fall within article 48 of the Revised Penal Code, according to which the most serious penalty for the more serious of several crimes had to be imposed.² As the maximum penalty for the most serious crime committed by the authors, i.e. murder, was death, the Court considered article 48 applied, and required the death penalty. The judgement also noted that while four justices of the court maintained their position that the Republic Act No. 7659, insofar as it prescribed the death penalty, was unconstitutional, those justices submitted to the majority ruling of the Court that Republic Act No. 7659 was constitutional, and accordingly that the death penalty should be imposed in the authors' case.

2.5 The Supreme Court also ordered that the complete records of the case be forwarded to the Office of the Philippine President for possible exercise of executive clemency. To date, the President has not granted any form of executive clemency.

The complaint

3.1 The authors argue that re-imposition of the death penalty and its application to them is inconsistent with the first sentence of article 6, paragraph 2, permitting the imposition of the death penalty in States "which have not abolished the death penalty". Furthermore, the authors argue that as "murder" was not punishable by death before the re-introduction of the death penalty, it cannot constitute a "most serious crime" (to which article 6, paragraph 2, permits application of the death penalty) after the re-introduction of the death penalty, when the offence of murder remained otherwise wholly unchanged in terms of its substantive definition.

3.2 As to the complaint under article 14, paragraph 5, the authors contend that, under the automatic review procedure, they received "no real review in the Supreme Court". They claim that they had "no real opportunity to be heard", since the Court did not allow any oral argument and "practically foreclosed the presentation of any new evidence". Therefore, according to the authors, the automatic review by the Supreme Court was neither genuine nor effective in enabling a determination of

² Article 48 of the Revised Penal Code provides as follows: "*Penalty for complex crimes.* - When a single act constitutes two or more grave or less grave felonies, or when an offence is a necessary means for committing the other, the penalty for the most serious crime shall be imposed, the same to be applied in its maximum period."

the sufficiency, or soundness, of the conviction and sentence.

3.3 The authors state that the same matter has not been submitted for examination under any other procedure of international investigation or settlement.

State party's submissions on admissibility and merits

4.1 By submission of 8 July 2002, the State party argued that the communication was unsubstantiated and inadmissible in respect of all claims advanced.

4.2 Concerning article 6, paragraph 2, the State party considers the argument advanced to be "a normative one" that cannot be considered by the Committee. It is said to be purely an argument on the wisdom of imposing the death penalty for certain offences, while the determination of which crimes should so qualify is purely a matter of domestic discretion. According to the State party, the Covenant does not purport to limit the right of the State party to determine for itself the wisdom of a law that imposes the death penalty. The State party contends that the constitutionality of the death penalty law was a matter for the State party itself to decide, and noted that its Supreme Court had upheld the constitutionality of the law in question.³ The State party further argues that it does not fall to the Committee to interpret a State party's constitution for purposes of determining that State party's compliance with the Covenant.

4.3 The State party distinguishes between States that presently have death penalty laws and those that have re-imposed the death penalty after abolition or suspension. It points to the specific provision in the constitutional article abolishing the death penalty that provides for the possibility of Congress to re-impose it. The Covenant does not prevent such a re-imposition, for article 6, paragraph 2, refers simply to countries that have existing death penalty statutes. The requirement of the Covenant is rather that the death penalty be imposed following strict respect for due process rules. In this case, there is no argument that the State party has failed to comply with its own domestic processes.

4.4 Concerning the authors' argument that the death penalty was imposed for crimes that are not the "most serious", the State party notes that States have a wide discretion in interpreting this provision in the light of culture, perceived necessities and other factors, as the notion "most serious crimes" is not defined any more explicitly in the Covenant. The State party finds fallacious the authors' reasoning that as the death penalty could not be imposed on

³ *People v. Echegaray* (GR No. 117472, judgement of 7 February 1997).

any crime before re-imposition, no crime could be deemed a “most serious” one that could be punished by the death penalty after re-imposition - the crime of murder remained, and remains, amongst the most serious in the domestic order, including as measured by gravity of possible punishment then available.

4.5 As to article 14, paragraph 5, the State party rejects the author’s arguments, for each person sentenced to death automatically receives an appeal. Moreover, the failure to grant a hearing on oral argument does not indicate lack of genuine review, for the long-standing practice of the Court is only to hear oral argument in cases presenting novel questions of law. As to executive clemency, the State party notes that, under its law, this prerogative remains within the purely discretionary power of the President. While any such request for clemency will be received and acted upon, the substance of the outcome remains within the President’s discretion.

Author’s comments

5.1 By letter of 24 November 2002, the authors responded to the State party’s submissions. They observe that by becoming party to the Covenant and the Optional Protocol, the State party accepted the ability of the Committee to assess whether its actions are consistent with the provisions of those instruments. By reference to article 6, paragraph 6, of the Covenant, the authors identify an “abolitionist stance” in the Covenant that does not envisage a retreat from abolition, as made by the State party. As to the State party’s alleged discretion to determine the content of the notion of “most serious crimes”, the authors note that international consensus restricts these to crimes not going beyond intentional crimes with lethal or other extremely grave consequences.⁴ The authors note, by contrast, that the lengthy list of offences punishable by death in the State party includes such crimes as kidnapping, drug-related offences, plunder and qualified bribery.

5.2 Regarding article 14, paragraph 5, the authors note that the absence of oral argument in the authors’ case prevented the Supreme Court from making its own assessment of witness testimony and required it to rely on the assessment of the lower court. The authors argue that no effective review is possible where the Court has to weigh the credibility of the accused against that of the victim without being able to hear the testimony of key witnesses.

5.3 The authors refer to subsequent developments, including a newspaper article, suggesting that even though the President had in

⁴ Economic and Social Council resolution 1984/50 of 25 May 1984, as endorsed by General Assembly resolution 39/118 of 14 December 1984.

early October 2002 announced a ban on executions until further notice in order to provide the Congress with an opportunity to pass abolition legislation, preliminary preparations for the authors’ execution had already been taken. While the President had recently granted reprieves to some convicts scheduled for execution, to date the authors had not received any such notice. Additionally, execution of the authors would appear to be unlawful under domestic law, as it would come after the 18 month period prescribed by law as the maximum time that may elapse without execution after judgement has become final.

Subsequent exchanges with the parties

6. Despite invitations to do so by reminders of 27 November 2002 and 8 January 2003, the State party has not added further submissions on the merits to those supplied concerning admissibility.

Issues and proceedings before the Committee

Considerations of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee notes that the State party’s only contention as to the admissibility of the authors’ claims is that they are unsubstantiated, in the light of a variety of argumentation going to the merits of the claim. Accordingly, the Committee considers it more appropriate to deal with the issues raised at that point. In the absence of any further obstacles to admissibility, therefore, the Committee finds the authors’ claims admissible.

Consideration of the merits

8.1 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.

8.2 As to the claim under article 6, paragraph 2, of the Covenant, the Committee observes at the outset, in response to the State party’s argument that the Committee’s function is not to assess the constitutionality of a State party’s law, that its task rather is to determine the consistency with the Covenant alone of the particular claims brought before it.

8.3 The Committee notes that the offence of murder in the State party’s law entails a very broad

definition, requiring simply the killing of another individual. In the present case, the Committee observes that the Supreme Court considered the case to be governed by article 48 of the Revised Penal Code, according to which, if a single act constitutes at once two crimes, the maximum penalty for the more serious crime must be applied. The crimes committed by a single act being three murders and an attempted murder, the maximum possible penalty for murder - the death penalty - was imposed automatically by operation of the provisions of article 48. The Committee refers to its jurisprudence that mandatory imposition of the death penalty constitutes arbitrary deprivation of life, in violation of article 6, paragraph 1, of the Covenant, in circumstances where the death penalty is imposed without regard being able to be paid to the defendant's personal circumstances or the circumstances of the particular offence.⁵ It follows that the automatic imposition of the death penalty upon the authors by virtue of article 48 of the Revised Penal Code violated their rights under article 6, paragraph 1, of the Covenant.

8.4 In the light of the above finding of a violation of article 6 of the Covenant, the Committee need not address the authors' remaining claims which all concern the imposition of capital punishment in their case.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 6, paragraph 1, of the Covenant.

10. 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 and appropriate remedy, including commutation. The State party is under an obligation to avoid similar violations in the future.

11. Bearing in mind that, by becoming a State 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, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

⁵ *Thompson v. St Vincent and the Grenadines*, Communication No. 806/1998, Views adopted on 18 October 2000; and *Kennedy v. Trinidad and Tobago*, Communication No. 845/1998, Views adopted on 26 March 2002.

Individual opinion (dissenting) by Committee member Nisuke Ando

I am unable to agree to the majority Views' statement that "[t]he Committee refers to its jurisprudence that mandatory imposition of the death penalty constitutes arbitrary deprivation of life, in violation of article 6, paragraph 1, of the Covenant, in circumstances where the death penalty is imposed without regard being able to be paid to the defendant's personal circumstances or the circumstances of the particular offence" (para. 8.3).

Firstly, I doubt if it is the established jurisprudence of the Committee that "mandatory imposition of the death penalty constitutes arbitrary deprivation of life, in violation of article 6, paragraph 1, of the Covenant". The majority Views is based on the Committee's Views in Case No. 806/1998, adopted on 18 October 2000 (*Thompson v. St. Vincent and the Grenadines*). (The Committee adopted a similar decision in Case No. 845/1998 *Kennedy v. Trinidad and Tobago*, but the relevant facts in the two cases are different.) However, I must point to the fact that two dissenting opinions were appended to the Views by five members (one by Lord Colville; another by Messrs. Kretzmer, Amor, Yalden and Zakhia). I happened to be absent when the Views were adopted and was unable to express my opinion. Had I been participating in the decision, I would have co-signed both of the dissenting opinions.

In any event, as emphasized by Mr. Kretzmer et al as well as by Lord Colville, the Committee's Views in the Thompson case were a departure from the then existing practice of the Committee. Prior to that decision, the Committee had dealt with many communications from persons sentenced to death under legislation which makes a death sentence for murder mandatory. However, in none of them had the Committee stated that the mandatory nature of the sentence involved a violation of article 6 or any other provision of the Covenant. In addition, in fulfilling its function under article 40 of the Covenant, the Committee has considered reports from States parties whose domestic legislation provides for mandatory imposition of the death sentence for murder, but the Committee has never stated in its Concluding Observations that a mandatory death sentence for murder is incompatible with the Covenant. Moreover, in its General Comment No. 6 on article 6, the Committee gives no indication that mandatory death sentences are incompatible with article 6. Of course, as Mr. Kretzmer et al point out, the Committee is not bound by its previous jurisprudence. Nevertheless, if the Committee wishes to change its jurisprudence, it should explain its reasons for change to the State party and person concerned. Unfortunately, such an explanation was lacking in the Committee's Views in the Thompson case. Nor is it supplied in its Views in the present case.

Secondly, Lord Colville clearly states that, under common law jurisdictions, courts have to take into account factual and personal circumstances in sentencing to the death penalty in homicide cases. According to him, factors such as self-defence, provocation by the victim, proportionality of the response by the accused and the accused's state of mind are scrutinized by courts, and a

charge of murder may be reduced to that of manslaughter. Likewise, in civil law jurisdictions, various aggravating or extenuating circumstances such as self-defence, necessity, distress and mental capacity of the accused need to be considered in reaching criminal conviction/sentence in each case of homicide. These points must have been dealt with before the relevant courts of the Philippines rendered their decisions in the present case, but the majority Views refers to none of them, merely noting that “the offence of murder in the State party’s law entails a very broad definition, requiring *simply the killing of another individual*” (paragraph 8.3; emphasis supplied).

However, as footnote 1 (para. 2.2) indicates, article 248 of the Revised Penal Code of the Philippines defines “murder” as follows: “Any person who ... shall kill another, shall be guilty of murder and shall be punished ... to death if committed with any of the following attendant circumstances” such as “[w]ith treachery, taking advantage of superior strength, with the aid of armed men, or employing means to weaken the defence or of means or persons to insure or afford impunity” or “[b]y means of inundation, fire, poison, explosion, shipwreck, stranding of vessels, derailment or assault upon a railroad, fall of an airship, or by means of motor vehicles, or with the use of any other means involving great waste and ruin”. Obviously, the courts in the Philippines looked into these provisions, in addition to the aggravating and extenuating circumstances as described above.

The majority Views state that “the Supreme Court [of the Philippines] considered the case to be governed by article 48 of the Revised Criminal Code, according to which, if a single act constitutes at once two crimes, the maximum penalty for the more serious crime must be applied. The crimes committed by a single act being three murders and an attempted murder, the maximum possible penalty for murder - the death penalty - was imposed *automatically* by operation of the provisions of article 48” (paragraph. 8.3; emphasis supplied). It seems to me that the quoted provisions of article 48 are standard ones which can be found in the criminal codes of very many States. And yet, the majority Views continues, “It follows that the *automatic* imposition of the death penalty upon the authors by virtue of article 48 of the Revised Criminal Code violated their rights under article 6, paragraph 1, of the Covenant” (paragraph. 8.3; emphasis supplied). The crimes committed by the authors are certainly “the most serious crimes in accordance with the law in force at the time of the commission of the crimes” in the Philippines, and the application of article 48 to them is indeed normal criminal procedure. Considering all the relevant circumstances, I must conclude that to describe the imposition of the death penalty to the authors in the present case as “mandatory” or “automatic” is not at all warranted.

Thirdly, I wonder if the majority Views are justifiable only on the assumption that the death penalty is per se an arbitrary deprivation of life. However, such an assumption is contradictory to the structure of the Covenant, which admits the death penalty for the most serious crimes (art. 6, para. 2). It is equally contradictory to the fact that the Protocol aiming at the abolition of the death penalty is “Optional”. The provision of article 6, paragraph 6, suggests that the abolition of the death penalty is desirable, but that desirability does not make the abolition

a legal obligation. It is true that, in certain regions of the globe, most States have abolished the death penalty. At the same time, it is also true that, in the other regions of the globe, most States have retained the death penalty. In my opinion, the Human Rights Committee, which is based on the global community of States, should take into account this situation when interpreting and applying any provisions of the International Covenant on Civil and Political Rights.

Individual opinion (dissenting) by Committee member Ruth Wedgwood

The Human Rights Committee has concluded that the State party has injured the four authors of this communication by subjecting them to a “mandatory imposition of the death penalty” that “constitutes arbitrary deprivation of life, in violation of article 6, paragraph 1” of the International Covenant on Civil and Political Rights. See Views of the Committee, paragraph 8.3. The Committee asserts that the death penalty was “imposed without regard being able to be paid to ... the circumstances of the particular offence”. *Ibid.*, paragraph 8.3.

The posture in which the Committee considers this issue is problematic at best. The authors’ communication did not put forward any complaint concerning supposedly mandatory sentencing, and thus the State party has been deprived of any ability at all to comment on the argument which the Committee now raises on its own motion. The communication from the authors is dated 6 May 2002, well after publication of this Committee’s earlier opinions on the question of mandatory death penalties,* and the authors had the advice of professional legal counsel in declining to raise any similar claims before the Committee. The Committee has not referred the issue of mandatory sentencing to the State party for comment, even though the issue may turn crucially on a construction of the Philippine statutes on murder and so-called multiple offences. Indeed, the Committee’s decision has been undertaken even without a copy of the trial court opinion in hand.

The Committee’s earlier jurisprudence disputing death sentences as “mandatory” occurred in cases concerning felony murder (where an unanticipated death occurred in the course of commission of a felony) and an undifferentiated murder statute (in which all intentional killings were subject to the death penalty).* It is far more radical to suppose that a democratically-adopted criminal code which carefully specifies the aggravating factors that must accompany a murder before the death penalty can be imposed somehow falls afoul of an implied prohibition on mandatory sentencing under article 6 of the International Covenant on Civil and Political Rights. Indeed, the

* *Thompson v. St Vincent and the Grenadines*, Communication No. 806/1998, Views adopted on 18 October 2000; and *Kennedy v. Trinidad and Tobago*, Communication No. 8465/1998, Views adopted on 26 March 2002. I share the doubts expressed by Mr. Ando concerning these prior decisions, but will take them as a starting point in the instant case.

omission of the claim from the authors' petition may reflect the view that such a claim is unpersuasive in these circumstances.

In its review of the convictions and sentences in this case, the Philippines Supreme Court noted that the revised Philippine murder statute provides for the death penalty only if one or more aggravating circumstances has been proven - here, a wilful murder through "treachery". The authors were convicted of the murder of Florentino Dulay and his two daughters, and for the attempted murder of a third daughter. The crimes were accomplished by "hurling a grenade in the bedroom of the Dulays" during the evening hours, while the children lay in their beds. See Opinion of the Philippines Supreme Court, 4 April 2001, at page 13. The motive, according to the opinion of the Supreme Court, was to prevent Florentino Dulay from testifying against one of the authors of the communication in a separate murder trial. The youngest victim was a 5-year-old girl, killed by shrapnel from the grenade. The defendants were identified by an eyewitness who was long acquainted with them, and the trial court rejected their proffered alibis as implausible. The Philippines Supreme Court reviewed the conviction *en banc*, and though four members of the Supreme Court registered their position that the death penalty is inconsistent with the national constitution, they agreed to "submit to the ruling of the Court, by a majority vote, that the law is constitutional and that the death penalty should be accordingly imposed". (Opinion, at page 16). No claim was made to the Philippines Supreme Court that the death penalty was mandatory and thereby improper.

Article 248 of the Revised Penal Code provides for the imposition of the death penalty only if an aggravating circumstance is found, including "treachery" or "explosion" in the commission of the murder. The statutory definition of treachery was met, noted the Supreme Court, for it consists of "taking advantage of superior strength, with the aid of armed men, or employing means to weaken the defence or of means or persons to ensure or afford impunity". Here, "the victims were sleeping when the grenade was suddenly thrown into their bedroom" and "they were not given a chance to defend themselves or repel the assault. Obviously, the assault was done without any risk to any of the accused arising from the defence which the victims may make". Opinion at page 12, note 23. The Supreme Court remarked that the aggravating factor of "explosion" could also have fit the case, though it was not alleged in the criminal information.

The Committee does not challenge the legitimacy of article 248 in se. Rather, the Committee supposes that there is a mandatory quality to the death sentence because the case was also sentenced under a so-called "multiple crimes" provision found in article 48 of the Revised Penal Code. This is because the conviction included attempted

murder as well as multiple murders. Article 48 provides that "When a single act constitutes two or more grave or less grave felonies ... the penalty for the most serious crime shall be imposed, the same to be applied in its maximum period".

Article 48 is apparently designed to avoid the problem of so-called "multiplicity", that is, the potential multiplication of charges and sentences arising from a single culpable action. The straightforward solution was to provide for the imposition of "the penalty for the most serious crime ... the same to be applied in its maximum period". It is syntactically doubtful that the phrase "maximum period" references the death penalty.* But in any event, there is nothing in article 48 that obviates or lessens the separate requirement under the murder statute, article 248, that a court must find an aggravating circumstance before a death penalty is proper.

In other words, the sentence of death properly imposed for a murder with treachery does not become mandatory merely because it was accompanied by an additional conviction of attempted murder. The Committee gives no persuasive basis for its conclusion that the death penalty was imposed "automatically" or "without regard being able to be paid to ... the circumstances of the particular offence".

* The Committee asserts without explanation that article 48 always requires "*the most serious* penalty of the more serious of several crimes". View of the Committee, paragraph 2.4 (emphasis added). But the language of article 48 actually reads "*the penalty* for the most serious crime ... the same to be applied in its *maximum period*". (Emphasis added.) Again, one might have wished to solicit the State party's views on this interpretive question of local law. There are varying views on the admissibility of the death penalty in modern societies. article 6 (2) of the Covenant by which this Committee is governed provides that "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious of crimes in accordance with the law in force at the time of the commission of the crime ..." Perhaps wisely, the Committee has not accepted the authors' invitation to conclude that the murder of sleeping children by the explosion of a grenade is not a "most serious crime". Nor has the Committee had occasion to address the authors' claim that the ameliorative constitutional change in the Philippines - limiting the death penalty to "heinous crimes" - somehow constitutes a forbidden "re-imposition" of the death penalty allegedly barred by article 6 (2). In its attempt to raise a claim that the parties themselves have avoided, the Committee has relied upon a doubtful construction of Filipino law and misconstrues the import of its own past decisions.

Communication No. 1080/2002

Submitted by: David Michael Nicholas (represented by John Podgorelec)

Alleged victim: The author

State party: Australia

Date of adoption of Views: 19 March 2004

Subject matter: Conviction of author for acts that did not constitute an offence at the time of their commission

Procedural issues: Level of substantiation of claim

Substantive issues: “Nullum crimen sine lege” - Retroactive criminalization of previously non-criminal conduct

Article of the Covenant: 15, paragraph 1

Article of the Optional Protocol: 2

Finding: No violation

1. The author of the communication, dated 24 April 2002, is David Nicholas, born in 1941 and currently serving sentence of imprisonment at Port Phillip Prison. He claims to be the victim of a violation by Australia of article 15, paragraph 1, of the Covenant. Without specifying articles of the Covenant, he also alleges that medical treatment he is provided in detention falls short of appropriate standards. He is represented by counsel. The Covenant and the Optional Protocol entered into force for the State party on 13 November 1980 and 25 December 1991.

The facts as presented

2.1 On 23 September 1994, Thai and Australian law enforcement officers conducted a “controlled importation” of a substantial (trafficable) quantity of heroin. A Thai narcotics investigator and a member of the Australian Federal Police (AFP) travelled from Bangkok, Thailand, to Melbourne, Australia, to deliver heroin which had been ordered from Australia. After arrival, the Thai investigator, operating in conjunction with the AFP, made a variety of calls arranging for handover of the narcotics, which were duly collected by the author and a friend.

2.2 On 24 September 1994, the author and his friend were arrested shortly after handover of the narcotics, and charged on a variety of federal offences under the Customs Act, as well as State offences. An ingredient of the federal offences was that the narcotics were imported into Australia “in contravention of [the federal *Customs Act*]”.¹ In

¹ Section 233B(1)(c) of the Customs Act provides: “Any person who:

April 1995, the High Court of Australia handed down its decision in the unrelated case of *Ridgeway v. The Queen*,² concerning an importation of narcotics in 1989, where it held that that evidence of importation should be excluded when it resulted from illegal conduct on the part of law enforcement officers.

2.3 At arraignment and re-arraignment in October 1995 and March 1996, the author pleaded not guilty on all counts. It was uncontested that the law enforcement officers had imported the narcotics into Australia in contravention of the *Customs Act*.

2.4 In May 1996, at a pre-trial hearing, the author sought a permanent stay of the proceedings on the federal offences, on the basis that (as in *Ridgeway v. The Queen*) the law enforcement officers had committed an offence in importing the narcotics. On 27 May 1996, the stay was granted, however leaving the State offences unaffected.

2.5 On 8 July 1996, the federal *Crimes Amendment (Controlled Operations) Act* 1996, which was passed in response to the High Court’s decision in *Ridgeway v. The Queen*, entered into force. Section 15X³ of the Act directed the courts to disregard past illegal conduct of law enforcement authorities in connection with the importation of narcotics. On 5 August 1996, the Director of Public

(c) without reasonable excuse (proof whereof shall lie upon him) has in his possession any prohibited imports to which this section applies which have been imported into Australia in contravention of this Act:...

shall be guilty of an offence”.

² (1995) 184 CLR 19 (High Court of Australia).

³ The full text of section 15X of the Act provides, in material part:

“In determining, for the purposes of a prosecution for an offence against section 233B of the Customs Act 1901 or an associated offence, whether evidence that narcotic goods were imported into Australia in contravention of the Customs Act 1901 should be admitted, the fact that a law enforcement officer committed an offence in importing the narcotic goods, or in aiding, abetting, counseling, procuring, or being in any way knowingly concerned in their importation, is to be disregarded, if:

(a) the law enforcement officer, when committing the offence, was acting in the course of duty for the purposes of a [duly exempted] controlled operation ...”

Prosecutions applied for the stay order to be vacated. In turn, the author challenged the constitutionality of section 15X of the Act. On 2 February 1998, the High Court, by a majority of five justices to two, upheld the constitutional validity of the amending legislation as well as the validity of lifting the stay on prosecution in the author's case. The matter was thus remitted to the County Court for further hearing.

2.6 As a result, on 1 October 1998, the County Court lifted the stay order and directed that the author be tried. On 27 November 1998, he was convicted of one count of possession of a trafficable quantity of heroin and one count of attempting to obtain possession of a commercial quantity of heroin. The Court sentenced him to 10 years' imprisonment on the first count and 15 years' imprisonment concurrently on the second count. The total effective sentence was thus 15 years' imprisonment, with possibility of release on parole after 10 years. On 7 April 2000, the Victoria Court of Appeal rejected the author's appeal against conviction, but reduced the sentence to 12 years' imprisonment, with a possibility of release on parole after 8 years. On 16 February 2001, the High Court refused the author special leave to appeal.

The complaint

3.1 The author complains that he is the victim of an impermissible application of a retroactive criminal law, in violation of article 15, paragraph 1, of the Covenant. Were it not for the introduction of the retroactive legislation, he would have continued to enjoy the effect of a permanent stay in his favour. The effect of the legislation was to direct courts, to the detriment of the author, to disregard a past fact that in *Ridgeway v. The Queen* was determinative of a decision to exclude evidence. The author points out that, for all material purposes, the relevant illegal conduct in *Ridgeway v. The Queen* was identical to his own subsequent conduct. The violation is exacerbated in that, during his trial after withdrawal of the stay, a central element of the offence for which he was convicted was criminal conduct on the part of law enforcement authorities.

3.2 The author refers to jurisprudence of the European Court of Human Rights for the proposition that a law cannot be retroactively applied to an accused's detriment.⁴ Similarly, national jurisdictions have found impermissible the removal, whether by the courts or by legislation, after the date of a criminal act, of a defence available at the time

the offence was committed.⁵ By contrast, in Australian law, the presumption against retrospective operation of criminal law is confined to substantive matters, and does not extend to procedural issues, including issues of the law of evidence.

3.3 The author thus argues that the prohibition against retroactive criminal laws covers not only the imposition, aggravation or re-definition of criminal liability for earlier conduct so liable, but also laws that adjust the evidentiary rules required to secure a conviction. Alongside these classes of laws are fundamental requirements that there be certainty in the law, and that an accused ought not be deprived of a benefit of a law to which he was previously entitled. These elements are necessary in order to secure the individual adequate protection against arbitrary prosecution and conviction, and any deprivation thereof would constitute a breach of article 15, paragraph 1, of the Covenant.

3.4 As a result of the above, the author requests that the Committee require Australia to provide him with an effective remedy for the violation suffered, including immediate release, compensation for the violation suffered, and to take steps to ensure that similar violations do not occur in the future.

3.5 The author further contends, without raising any articles of the Covenant, that during his incarceration (four years at the time of submission of the communication) he has suffered serious health problems: these included an attack of bacterial endocarditis (on an already defective heart valve) and removal of an arachnoid cyst resulting in a prostatic enlargement requiring careful treatment to avoid further bacterial attack. As his first attack of endocarditis occurred in the Port Phillip Prison medical unit, he submits that his desire not to be treated there is warranted.

3.6 As to admissibility of the communication, he argues that all domestic remedies reasonably open to him have been exhausted and points out that the principles of article 15 have neither constitutional nor common law protection in the State party. He argues that any application to the Human Rights and Equal Opportunity Commission would be futile and ineffective as it cannot afford binding relief in case of a violation; it can only offer non-binding recommendations. Alternatively, the author argues that any application of a domestic remedy would be unduly prolonged. He also confirms that the same matter has not been submitted for examination under any other procedure of international investigation or settlement.

⁴ *Ecer et al. v. Turkey Applns.* 29295/95 and 29363/95; judgment of 27 February 2001 and *Kokkinakis v. Greece* Series A No. 260-A, 22; judgment of 25 May 1993.

⁵ *Kring v. Missouri* (107 US 221), *Dobbert v. Florida* (432 US 282) and *Bouie v. Columbia* (378 US 347) (United States Supreme Court).

The State party's admissibility and merits submissions

4.1 The State party, by submissions of 20 November 2002, disputes the admissibility and merits, respectively, of the communication. As to a factual clarification, the State party points out that the “controlled operation” conducted in the author’s case took place, as was the then current practice, in accordance with the terms of a 1987 ministerial agreement relating to such operations and with detailed Australian Federal Police guidelines. In advance of an operation, a request was made from the Customs Service to the Federal Police to exempt law enforcement officers from detailed customs scrutiny. It was understood, at the time, that such an approach would not jeopardize prosecutions of alleged narcotics traffickers as such evidence of illegal importation had been held to be admissible evidence in other common law jurisdictions.

4.2 The State party argues that the communication is inadmissible *ratione materiae*. It argues that the plain meaning of article 15, paragraph 1, is to proscribe laws seeking retrospectively to make acts criminal that were not offences at the time they were committed. However, as the situation was interpreted by the High Court, the author was convicted under the criminal offence of section 233 (1) (b) of the *Customs Act*, a provision that existed at the time of his arrest and trial.

4.3 The State party argues that section 15X of the amending legislation is not a criminal offence, imposing liability for any behaviour. No person can be charged or convicted with an offence against it, nor does it alter any elements of a criminal offence; rather, it is a procedural law regulating the conduct of trials. The State party refers to the Committee’s deference to the national courts on questions of the proper interpretation of domestic law,⁶ and argues that if the Committee accepts (as it would be appropriate to do) the High Court’s classification of the amending law as a procedural act not going to the elements of any offence, then no issues under article 15, paragraph 1, are raised.

4.4 The State party rejects the author’s contention that article 15, paragraph 1, extends beyond a prohibition on retrospective criminal laws to cover *any* laws operating retrospectively to the disadvantage or detriment of an accused. It submits that this interpretation is not supported by the ordinary meaning of the text of the article, which prohibits laws that seek retrospectively to make acts or omissions *criminal* (that is, punishable by law), when those acts or omissions were not *criminal* at

the time they were committed. Nor is the author’s view supported by the *travaux préparatoires* of the Covenant, which suggest that the objects and purposes of this provision were to prohibit the extension of the criminal law by analogy, to prohibit the retrospective creation of criminal offences, and to ensure that criminal offences were clearly stated in law.⁷ Equally, in the case of *Kokkinakis v. Greece* cited by the author, the European Commission referred specifically to “criminal law”, rather than any law, being covered by article 7 of the European Convention on Human Rights when it stated that the “retrospective application of the criminal law where it is to the accused’s detriment” is prohibited. As the amending law in the present case does not amount to such a criminal law, the author’s case raises no issue under article 15, paragraph 1.

4.5 As to the merits, the State party refers to the arguments made above with respect to the admissibility of the case, in particular that the relevant “criminal offence” remained at all times the unchanged provisions of section 233 (1) (b) of the *Customs Act*, and advances further contentions for the proposition that no violation of article 15, paragraph 1, of the Covenant has occurred. The State party contends that the amending legislation, as a procedural law, merely affected the admissibility of certain evidence in the author’s trial.

4.6 The State party further argues that the decision in *Ridgeway v. The Queen* did not create or recognize any “defence”; rather, it concerned the exercise of a court’s discretion to exclude certain forms of evidence on public policy grounds. The exercise of a court’s discretion to exclude certain evidence may affect a prosecution’s outcome, but an evidentiary rule is not the same as a “defence”, which is an issue of law or fact that, if proved, relieves a defendant of liability. It follows that if the judgment in *Ridgeway v. The Queen* did not introduce or recognize a defence, then the amending legislation did not remove or vary the existence of any defence.

4.7 The State party also points out that after the amending legislation the courts retain a discretion to exclude evidence which would be unfair to an accused or to the trial process. It also notes that its High Court rejected the notion that the amending

⁶ *Maroufidou v. Sweden*, Communication No. 58/1979, Views adopted on 9 April 1981.

⁷ The State party refers to proceedings in the Third Committee (1960), where “Many representatives were in favour of the text submitted by the Commission on Human Rights. The draft article embodies the principle *nullum crimen sine lege*, and prohibited the retroactive application of criminal law. It was pointed out that there could be no offences other than those specified by law, either national or international.” M Bossuyt: *Guide to the Travaux Préparatoires* of the International Covenant on Civil and Political Rights, 1987, at 323.

legislation was directed at the author, with the judgment of the Chief Justice observing that it did not direct the court to find any particular person guilty or innocent, and that its effect was merely to increase the amount of evidence available to the court.

4.8 As to the author's health concerns, the State party disputes the relevance of these issues to the claim under article 15. The State party observes that the St Vincent Correctional Health Service, supplying extensive primary and secondary medical care to Port Phillip prison, provides *inter alia* 24 hour availability of medical and nursing staff, a 20-bed in-patient ward at the prison, resuscitative facilities (including defibrillation), bi-weekly visits by a consultant physician, and ready availability of transfer in the event of major cardiac problems to St Vincent's Hospital (possessing a purpose-built 10-bed in-patient ward). These health services comply with all Australian standards, and the State party refutes any suggestion the author is receiving any less than the utmost care and professional treatment.

Author's comments and State party's further submission

5.1 By letter of 28 March 2003, the author disputed the State party's submissions. In response to the State party's invitation to the Committee to defer to the High Court's assessment of domestic law, the author argues (i) that the Court's powers are circumscribed by Australian law inconsistent with the Covenant, (ii) that the High Court dealt a question of constitutional interpretation rather than the issues under the Covenant presently before the Committee, and (iii) that the authors are not contending that domestic law had been improperly applied, as in *Maroufidou v. Sweden*,⁸ but rather that domestic law is inconsistent with the Covenant.

5.2 The author disputes that, on the plain meaning of article 15, paragraph 1, no issue arises under the Covenant. Due to the illegal conduct of the police, an essential element of the offence (an "act or omission" in the terms of the article) could not, based on the criminal law applicable at the time of the offence, be made out. Thus, his conduct did not and could not constitute a criminal offence at the time of the commission of the alleged offence and article 15, paragraph 1, comes into play.

5.3 The author points out that, in contrast to his own submissions, the State party has advanced no international law to support its narrow construction of article 15, paragraph 1, as applicable solely to the offence described in section 233B of the Customs Act. The author emphasizes that if the legislature is

barred from enacting retroactive criminal laws, it must also be barred from achieving the same result in practice by criminal laws that are labelled "procedural".

5.4 In the author's view, it is "artificial" in view of the actual effect on the author and in ignorance of the legislative intent lying behind the amending legislation to deny the existence of a retrospective criminal effect in circumstances where otherwise inadmissible evidence of an essential element of the offence is brought into play. Such an argument impermissibly elevates form over substance, for, on any view, the amending legislation – while ignoring the illegal acts of the State party's officers – changed a criminal law to the accused's detriment (whether by altering the law relating to the elements of the offence or by attempting to legalise otherwise illegal police conduct).

5.5 The author argues that Covenant safeguards should be rigorously applied in the light of the serious consequences for the individual and the possibilities for abuse. Because under Australian law, the seriousness of an offence and the concomitant sentence are partly determined by the quantity of drugs involved, State officers on "controlled operations" can pre-determine the potential offences and sentencing range by importing specific amounts. This is particularly significant in the author's case, as despite no evidence of communications or orders placed by him, he was sentenced to a serious penalty of 12 years' imprisonment, clearly influenced by the amounts of narcotics involved.

5.6 As to health issues, the author states that he recently completed radiotherapy treatment for mid-range prostate cancer, and is awaiting the results. If positive, he will then be operated upon for a hernia and hydrocele condition.

5.7 In a subsequent submission of 6 August 2003, the State party provided certain additional comments on the author's submissions. This new submission was received on the very day that the Committee, at its 78th session, was discussing its Views in the case. In order to provide the author with an opportunity to respond to the State party's new submission, the consideration of the case was deferred. No further comments have been received from the author.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its Rules of Procedure, decide whether or not the complaint is admissible under the Optional Protocol to the Covenant.

⁸ Op. cit.

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

6.3 As to the issues of the standard of medical care provided to the author, the Committee, taking into account the responses of the State party to the points advanced by the author, considers that the author has failed to substantiate, for the purposes of admissibility, the contention that the nature of medical treatment provided to him raises an issue under the Covenant. This aspect of the communication is accordingly inadmissible under article 2 of the Optional Protocol.

6.4 As to the arguments relating to exhaustion of domestic remedies that have been advanced by the author, the Committee observes that, given the absence of the State party's invocation of any such ground of inadmissibility, it need not further address these issues.

6.5 Regarding the State party's argument that the communication falls outside the scope of article 15, paragraph 1, of the Covenant, properly construed, and is thus inadmissible *ratione materiae*, the Committee observes that this argument raises complex questions of fact and law which are best dealt with at the stage of the examination of the merits of the communication.

6.6 In the absence of any other obstacles to the admissibility of the claim under article 15, paragraph 1, of the Covenant, the Committee declares this portion of the communication admissible and proceeds to its consideration of the merits of the claim.

Consideration of the merits

7.1 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.

7.2 Before addressing the merits of the author's claim under article 15, paragraph 1, of the Covenant, the Committee notes that the issue before it is not whether the possession by the author of a quantity of heroin was or could under the Covenant permissibly be subject to criminal conviction within the jurisdiction of the State party. The communication before the Committee and all the arguments by the parties are limited to the issue whether the author's conviction under the federal Customs Act, i.e. for a crime that was related to the import of the quantity of heroin into Australia, was in conformity with the said provision of the Covenant. The Committee has noted that the author was apparently also charged

with some state crimes but it has no information as to whether these charges related to the same quantity of heroin and whether the author was convicted for those charges.

7.3 As to the claim under article 15, paragraph 1, the Committee observes that the law applicable at the time of that the acts in question took place, as subsequently held by the High Court in *Ridgeway v. The Queen*, was that the evidence of one element of the offences with which the author was charged, that is to say, the requirement that the prohibited materials possessed had been "imported into Australia in contravention of the *Customs Act*", was inadmissible as a result of illegal police conduct. As a result, an order staying the author's prosecution was entered, which was a permanent obstacle to the criminal proceedings against the author on the (then) applicable law. Subsequent legislation, however, directed that the evidence of illegal police conduct in question be regarded as admissible by the courts. The two issues that thus arise are, firstly, whether the lifting of the stay on prosecution and the conviction of the author resulting from the admission of the formerly inadmissible evidence is a retroactive criminalization of conduct not criminal, at the time it was committed, in violation of article 15, paragraph 1, of the Covenant. Secondly, even if there was no proscribed retroactivity, the question arises whether the author was convicted for an offence, the elements of which, in truth, were not all present in the author's case, and that the conviction was thus in violation of the principle of *nullum crimen sine lege*, protected by article 15, paragraph 1.

7.4 As to the first question, the Committee observes that article 15, paragraph 1, is plain in its terms in that the offence for which a person is convicted to be an offence at the time of commission of the acts in question. In the present case, the author was convicted of offences under section 233B of the *Customs Act*, which provisions remained materially unchanged throughout the relevant period from the offending conduct through to the trial and conviction. That being so, while the procedure to which the author was subjected may raise issues under other provisions of the Covenant which the author has not invoked, the Committee considers that it therefore cannot conclude that the prohibition against retroactive criminal law in article 15, paragraph 1, of the Covenant was violated in the instant case.

7.5 Turning to the second issue, the Committee observes that article 15, paragraph 1, requires any "act or omission" for which an individual is convicted to constitute a "criminal offence". Whether a particular act or omission gives rise to a conviction for a criminal offence is not an issue which can be determined in the abstract; rather, this question can only be answered after a trial pursuant to which evidence is adduced to demonstrate that the

elements of the offence have been proven to the necessary standard. If a necessary element of the offence, as described in national (or international) law, cannot be properly proven to have existed, then it follows that a conviction of a person for the act or omission in question would violate the principle of *nullum crimen sine lege*, and the principle of legal certainty, provided by article 15, paragraph 1.

7.6 In the present case, under the State party's law as authoritatively interpreted in *Ridgeway v. The Queen* and then applied to the author, the Committee notes that it was not possible for the author to be convicted of the act in question, as the relevant evidence of the unlawful import of narcotics by the police was inadmissible in court. The effect of the definitive interpretation of domestic law, at the time the author's prosecution was stayed, was that the element of the crime under section 233B of the Customs Act that the narcotics had been imported illegally, could not be established due to the fact that although the import had been based on a ministerial agreement between the authorities of the State party exempting import of narcotics by the police from customs scrutiny, its illegality had not technically been removed and the evidence in question was hence inadmissible.

7.7 While the Committee considers that changes in rules of procedure and evidence after an alleged criminal act has been committed, may under certain

circumstances be relevant for determining the applicability of article 15, especially if such changes affect the nature of an offence, it notes that no such circumstances were presented in the author's case. As to his case, the Committee observes that the amending legislation did not remove the past illegality of the police's conduct in importing the narcotics. Rather, the law directed that the courts ignore, for the evidentiary purposes of determining admissibility of evidence, the illegality of the police conduct. Thus, the conduct of the police was illegal, at the time of importation, and remained so ever since, a fact unchanged by the absence of any prosecution against the officers engaging in the unlawful conduct. In the Committee's view, nevertheless, all of the elements of the crime in question existed at the time the offence took place and each of these elements were proven by admissible evidence by the rules applicable at the time of the author's conviction. It follows that the author was convicted according to clearly applicable law, and that there is thus no violation of the principle of *nullum crimen sine lege* protected by article 15, paragraph 1.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of article 15, paragraph 1, of the Covenant.

Communication No. 1086/2002

Submitted by: Sholam Weiss (represented by counsel, Mr. Edward Fitzgerald)

Alleged victim: The author

State party: Austria

Date of adoption of Views: 3 April 2003 (seventy-seventh session)

Subject matter: Arrest of fugitive further to an international arrest warrant and extradition

Procedural issues: Request for interim measures - Exhaustion of domestic remedies in case of irreparable harm - State party reservation - Same matter having been already "examined"

Substantive issues: Conviction *in absentia* - Pronouncement of author's conviction and sentence in another State - Equality before the law - Right to an effective and enforceable remedy

Articles of the Covenant: 2, paragraph 3; 7; 9; 10, paragraph 1; and 14, paragraphs 1 and 5

Articles of the Optional Protocol and Rules of Procedure: 5, paragraph 2 (a) and (b); rule 86

Finding: Violation (article 14, paragraph 1 (first sentence), taken together with article 2, paragraph 3)

1.1 The author of the communication, initially dated 24 May 2002, is Sholam Weiss, a citizen of the United States of America and Israel, born on 1 April 1954. At the time of submission, he was detained in Austria pending extradition to the United States of America ("the United States"). He claims to be a victim of violations by Austria of article 2, paragraph 3, article 7, article 10, paragraph 1, and article 14, paragraph 5, of the International Covenant on Civil and Political Rights. He also claims to be a victim of a violation of his right to be free from unlawful detention and of his right to "equality before the law", possibly raising issues under articles 9, and 14, paragraph 1, respectively. Subsequently, as a result of his extradition, he claims to be a victim of a violation of article 9, paragraph 1, of the Covenant, as well as of articles 1 and 5 of the Optional Protocol. The author is represented by counsel.

1.2 On 24 May 2002, the Committee, acting through its Special Rapporteur for New Communications, pursuant to Rule 86 of the Committee's Rules of Procedure, requested the State party not to extradite the author until the Committee had received and addressed the State party's submission on whether there was a risk of irreparable harm to the author, as alleged by counsel. On 9 June 2002, the State party, without having made any submissions to the Committee, extradited the author to the United States.

1.3 Upon ratification of the Optional Protocol, the State party entered a reservation in the following terms: "The Republic of Austria ratifies the Optional Protocol ... on the understanding that, further to the provisions of article 5 (2) of the Protocol, the Committee ... shall not consider any communication from an individual unless it has ascertained that the same matter has not been examined by the European Commission of Human Rights established by the European Convention for the Protection of Human Rights and Fundamental Freedoms."

The facts as submitted by the author

2.1 In a trial beginning on 1 November 1998 in the District Court of Florida, the author was tried on numerous charges of fraud, racketeering and money laundering. He was represented throughout the trial by counsel of his choice. On 29 October 1999, as jury deliberations were about to begin, the author fled the courtroom and escaped. On 1 November 1999, the author was found guilty on all charges. Following submissions from the prosecution, and the author's counsel in opposition, as to whether sentencing should proceed in his absence, the Court ultimately sentenced him in absentia on 18 February 2000 to 845 years' imprisonment (with possibility to reduce it, in the event of good behaviour, to 711 years (sic)) and pecuniary penalties in excess of US\$ 248 million.

2.2 The author's counsel lodged a notice of appeal within the 10-day time limit stipulated by law. On 10 April 2000, the United States Court of Appeals for the Eleventh Circuit rejected the motion of the author's counsel to defer dismissal of the appeal, and dismissed it on the basis of the "fugitive disentitlement" doctrine. Under this doctrine, a court of appeal may reject an appeal lodged by a fugitive on the sole grounds that the appellant is a fugitive. With that decision, the criminal proceedings against the author were concluded in the United States.¹

¹ The author relies for this proposition on a decision of another United States District Court in *United States v. Bakhtiar* 964 F Supp 112. That case held that, when a person was extradited on fewer charges than s/he had been

2.3 On 24 October 2000, the author was arrested in Vienna, Austria, pursuant to an international arrest warrant, and on 27 October 2000 transferred to extradition detention. On 18 December 2000 the United States submitted a request to the Austrian authorities for the author's extradition. On 2 February 2001, the investigating judge of the Vienna Regional Criminal Court ("*Landesgericht für Strafsachen*") recommended that the Vienna Upper Regional Court ("*Oberlandesgericht*"), being the court of first and last instance concerning the admissibility of an extradition request, hold the author's extradition admissible.

2.4 On 25 May 2001, the Vienna Upper Regional Court sought the advice of the United States authorities as to whether it remained open to the author to challenge his conviction and sentence. Thereupon, on 21 June 2001 the United States Attorney lodged an emergency motion to reinstate the author's appeal with the United States Court of Appeals for the Eleventh Circuit. The author's counsel explicitly took no position on the motion, but questioned the State's standing to file such an application on the author's behalf. On 29 June 2001 that court denied the motion. On 5 July 2001, the United States prosecutor filed another emergency motion with the United States District Court for the Middle District of Florida, which sought to vacate that court's judgement concerning the author. On 6 July 2001 the Court refused the motion and confirmed that its judgement was unimpeachable.

2.5 On 13 August 2001, the author applied to the European Court of Human Rights ("the European Court"), alleging that his extradition would violate the following provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention"): article 3, in that he would have to serve a mandatory life sentence; article 6, and article 2 of Protocol No. 7, on the basis that his conviction and sentence were pronounced in absentia and no appeal was available to him; article 5 in that his detention with a view to extradition was unlawful; and article 13.

2.6 On 11 September 2001, the Vienna Upper Regional Court refused the United States request for the author's extradition. The sole ground for refusal was that the author's extradition without an assurance that he would be entitled to a full appeal would be contrary to article 2 of Protocol No. 7 to the European Convention.²

convicted of, the original conviction and sentence remained intact, but an application for habeas corpus would lie against the executive once sentence had been served in respect of the extraditable offences. (See further paragraphs 4.5 (final sentence) and 5.4.)

² "Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or

2.7 The State Prosecutor (who alone has standing to lodge such an appeal) appealed the Upper Regional Court's decision to the Supreme Court ("*Oberster Gerichtshof*"). On 9 April 2002, the Supreme Court held that the Upper Regional Court's decision was a nullity because it had no jurisdiction to consider the right to an appeal under article 2 of Protocol No. 7 to the European Convention. The Upper Regional Court could only consider the specific aspects listed in the extradition statute (whether the author had enjoyed a fair trial and whether his punishment would amount to cruel, inhuman or degrading treatment or punishment); by contrast, the Minister of Justice was the sole authority with the competence to consider any further issues (including the right to an appeal) when s/he subsequently decided whether or not to extradite a person whose extradition had judicially been found to be admissible. The Upper Regional Court's judgement was accordingly set aside, and the case was remitted.

2.8 On 8 May 2002, the Upper Regional Court, upon reconsideration, found that the author's extradition was admissible on all counts except that of "perjury while a defendant" (for which the author had been sentenced to 10 years' imprisonment). In conformity with the Supreme Court's decision, the Court concluded that the author had enjoyed a fair trial and that his sentence would not be cruel, inhuman or degrading. It did not address the issue of the author's right to an appeal. On 10 May 2002, the Minister of Justice allowed the author's extradition to the United States, without reference to any issues as to the author's human rights.³

2.9 On 10 May 2002, the European Court of Human Rights indicated interim measures, staying the author's extradition. On 16 May 2002, following representations of the State party, the Court decided not to prolong the application of the interim measures. On the author's application, the Constitutional Court ("*Verfassungsgerichtshof*") issued an injunction on 17 May 2002 staying (until 23 May 2002) execution of the author's extradition.

sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law."

³ The author provides the terms of the Treaty which provide: "Convictions in absentia. If the person sought has been found guilty in absentia, the executive authority of the Requested State may refuse extradition unless the Requesting State provides it with such information or assurances as the Requested State considers sufficient to demonstrate that the person was afforded an adequate opportunity to present a defence or that there are adequate remedies or additional proceedings available to the person after surrender."

2.10 On 23 May 2002, the Constitutional Court refused to accept the author's complaint for decision, on the basis that it had insufficient prospects of success and was not excluded from the competence of the Administrative Court ("*Verwaltungsgerichtshof*"). The Court accordingly terminated the injunction. On the same day, the author again applied to the European Court of Human Rights for the indication of interim measures, an application that was denied.

2.11 On 24 May, the author informed the European Court that he wished to withdraw his application "with immediate effect". On the same day, he petitioned the Administrative Court, challenging the Minister's decision to extradite him and seeking an injunction to stay the author's extradition, pending decision on the substantive challenge. The stay was granted and referred to the Ministry of Justice and the Vienna Regional Criminal Court.

2.12 On 26 May, an attempt was made to surrender the author. After a telephone call by the ranking officer of the airport police to the president of the Administrative Court, the author was returned to a detention facility in light of the stay issued by the Administrative Court and the author's poor health. On 6 June 2002, the investigating judge of the Vienna Regional Criminal Court considered the Administrative Court to be "incompetent" to entertain any proceedings or to bar implementation of the extradition, and directed that the author be surrendered. On 9 June 2002, the author was transferred by officials of the author's prison and of the Ministries of Justice and the Interior, to the jurisdiction of United States military authorities at Vienna airport, and returned to the United States.

2.13 At the time the author was extradited, two sets of proceedings remained pending before the Constitutional Court, neither of which had suspensive effect under the State party's law. Firstly, on 25 April 2002, the author had lodged a constitutional motion attacking the constitutionality of various provisions of the State party's extradition law, as well as of the extradition treaty with the United States, in particular its treatment of judgement in absentia. Secondly, on 17 May 2002, he had lodged a "negative competence challenge" ("*Antrag auf Entscheidung eines negativen Kompetenzkonfliktes*") to resolve the question whether the issue of a right to an appeal must be resolved by administrative decision or by the courts, as both the Upper Regional Court as well as the Minister of Justice had declined to deal with the issue.

2.14 On 13 June 2002, the Administrative Court decided, given that the author had been removed in violation of the Court's stay on execution, that the proceedings had been deprived of any object and suspended them. The Court observed that the

purpose of its order to stay extradition was to preserve the rights of the author pending the main proceedings, and that as a result no action could be taken to the author's detriment on the basis of the Minister's challenged decision. As a consequence, the author's surrender had no sufficient legal basis.

2.15 On the same day, the European Court of Human Rights noted that the author wished to withdraw his application. After setting out the facts and the complaint, the Court considered that respect for human rights as defined in the Convention and its Protocols did not require continuation of its examination of the case irrespective of the applicant's wish to withdraw it, and struck out the application.⁴

2.16 On 12 December 2002, the Constitutional Court decided in the author's favour, holding that the Upper Regional Court should examine all admissibility issues concerning the author's human rights, including issues of a right to an appeal. Thereafter, the Minister's formal decision to extradite should consider any other issues of human dignity that might arise. The Court also found that the author's inability, under the State party's extradition law, further to challenge a decision of the Upper Regional Court finding his extradition admissible was contrary to rule of law principles and unconstitutional.

The complaint

3.1 In his original communication (preceding extradition), the author claims that extradition to the United States would deprive him of the ability to be present in the State party for the vindication of his claims in that jurisdiction. In particular, he would be unable to enjoy the benefits of the remedies flowing from the Constitutional Court's determination of the "negative competence" challenge as to which court or administrative authority should consider his argument of a denial of a right to a fair trial/appeal, as well as the consideration thereafter by the competent authority of this issue, as required by articles 14, paragraph 5, and 2, paragraph 3, read together. Extradition would prevent him enjoying remedies such as barring of extradition altogether, extradition for a sentence equivalent to that which

⁴ Article 37 of the European Convention provides, so far as is material, "1. The Court may decide at any stage of the proceedings to strike an application out of its list of cases where the circumstances lead to the conclusion that:

(a) the applicant does not intend to pursue his application; ...

However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires."

would be imposed in the State party, or extradition subject to full rights of appeal. He argues that neither the State party's courts nor administrative authorities have ever substantively addressed the issue of his alleged denial, in the United States, of a right to a fair trial/appeal.

3.2 The author also claims that the State party, if it extradited him, would abet and adopt the violation of his right under article, 14, paragraph 5, already allegedly suffered in the United States. In light of the finality of the criminal proceedings in the United States, his extradition to the United States would be unlawful, firstly as his conviction was pronounced and his sentence imposed in absentia and, secondly, as he had and has no effective opportunity to appeal against conviction or sentence under the fugitive disentitlement doctrine. Specifically, he cannot appeal in respect of the fact that his conviction was pronounced and his sentence was imposed in absentia. The author argues that the right to a fair trial/appeal in the Covenant is mandatory, and, if not complied with, this would render an extradition unlawful.

3.3 The author claims a violation of his right to "equality before the law". Only the State Prosecutor has the ability to lodge an appeal to the Supreme Court against a decision of the Upper Regional Court, subject to the proviso under the State party's domestic law, that such an appeal cannot operate to the detriment of the person whose case is appealed, as that person is unable to avail themselves of such an appeal. In the present case, the Supreme Court reversed the Upper Regional Court's decision that the author could not be extradited, and returned the case for a reconsideration that did not take into account the author's rights to a fair trial/appeal.

3.4 The author claims that his sentence for a period of 845 years without opportunity for release until at least 711 years have been served is an "exceptional and grotesque punishment" that is "inhuman" and amounts to the most serious form of incarceration short of actual torture. He argues that there is a "clear and irreversible" breach of article 10, paragraph 1, of the Covenant, because of the excessive length of the sentence and the absence of any possibility of release within a lifetime, or of any appeal. The State party is responsible for the failure of its courts and/or administrative authorities to consider this issue.

3.5 Finally, the author complains that he is unlawfully detained. He argues that as his extradition is unlawful because he was denied a fair trial/appeal, any detention with a view to extradition must also be unlawful.

3.6 As to the admissibility of his complaint, the author argues that with the Constitutional Court's

judgement against him, all effective remedies were exhausted. He submits that the complaints raised in the communication are not “being examined”, in terms of article 5, paragraph 2, of the Optional Protocol, under the European (or any other) procedure of international investigation or settlement. Nor does the State party’s reservation to article 5, paragraph 2, of the Optional Protocol preclude the Committee from considering the communication.

3.7 The author argues, firstly, that there was never any formal decision of the European Court on the admissibility or merits of the application to the European Court, but merely procedural decisions. In view of the interpretation given by the Committee to the word “examined” in the Austrian reservation in the case of *Pauger v. Austria*,⁵ it is submitted that these procedural steps did not constitute an “examination” of the case. Secondly, while it remained pending, the application was not communicated to the State party for its observations on either the admissibility and/or merits. Thirdly, in any event, the communication relates in part to rights (such as articles 2, paragraph 3, and 10, paragraph 1, of the Covenant) which are not protected under the European Convention.

3.8 By submission of 19 June 2002 (post-extradition), the author argued that his removal neither prevents the Committee from examining the communication, nor affected the interim measures requested by the Committee. The author refers to the Committee’s public discussion of a State party’s obligations in a previous case in which a request for interim measures had not been complied with.⁶ He invokes the jurisprudence of the PCIJ to the effect that participation in a system of international adjudication implies that the State party accepts an obligation to abstain from “any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and, in general, not to allow any step of any kind to be taken which might aggravate or extend the dispute”.⁷ Similarly, the International Court of Justice has decided that its provisional measures are binding upon the parties to a dispute before it.⁸

3.9 In the specific case, the author argues that the jurisprudence of the Committee suggests that the

⁵ Communication No. 716/1996, Views adopted on 30 April 1999.

⁶ CCPR/C/SR.1352 (discussing at a preliminary stage *Ashby v. Trinidad and Tobago*, Communication No. 580/1994, Views adopted on 21 March 2002).

⁷ *Electricity Company of Sofia and Bulgaria*, PCIJ Series A/B No. 79, at p. 199.

⁸ *Germany v. United States (La Grand)*, judgement of 27 June 2001.

author would suffer a risk of irreparable harm. In *Stewart v. Canada*,⁹ interim measures were requested in circumstances where it was unlikely that the author would be able to return to his adopted homeland, Canada, while, in the present case, there is no possibility of release from prison.

3.10 The author recalls that his case is not one where the gap between the request for interim measures (24 May 2002) and the action sought to be prevented (9 June 2002) was short. Accordingly, he requests that the Committee direct the State party to explain the factual basis of his removal, whether and how the request for interim measures was taken into account by the State party in removing him, and how the State party proposed to fulfil its continuing obligations.

State party’s submissions on admissibility and merits

4.1 By submissions of 24 July 2002, the State party contested both the admissibility and the merits of the communication. It argues that the author has not exhausted domestic remedies. While accepting that the Committee has not usually required domestic proceedings to have been concluded at the time of submission of the communication, it argues that they have to have been concluded by the time the Committee considers the communication.¹⁰ In view of the proceedings that were, at the time of the State party’s submission, still pending before the Constitutional Court, the State party argues that this requirement has not been satisfied.

4.2 The State party invokes its reservation to article 5, paragraph 2, of the Optional Protocol and argues that a complaint already submitted to the European organs may not be submitted to the Committee. It contends that the complaint was “examined” by the European Court on the merits - after seeking observations from the State party, the Court clearly made a merits assessment of the case. In requesting withdrawal of the case from the Court’s list before presenting it to the Committee, the author makes clear that he raises essentially the same concerns before both organs.

4.3 On the merits, the State party points out that extradition as such is outside the scope of the Covenant, so that the issue is whether the State party would subject the author to treatment contrary to the Covenant in a State not party to the Optional

⁹ Communication No. 538/1993, Views adopted on 16 December 1996.

¹⁰ *Asensio López v. Spain*, Communication No. 905/2000, Decision adopted on 23 July 2001; *Wan Kuok Koi v. Portugal*, Communication No. 925/2000, Decision adopted on 22 October 2001.

Protocol by virtue of extradition.¹¹ In terms of domestic proceedings, the State party argues that the ordinary as well as the highest courts, as well as the administrative authorities, carefully examined the author's submissions, and he was legally represented throughout. The State party recalls that extradition proceedings, according to the jurisprudence of the European Court, do not necessarily enjoy the same procedural guarantees as criminal proceedings on which the extradition is based.¹²

4.4 As to the alleged violation of article 14, paragraph 5, on the ground that the author was found guilty and sentenced in absentia, the State party recalls the Committee's jurisprudence that a trial in absentia is compatible with the Covenant only if the accused is summoned in a timely manner and informed of the proceedings against him.¹³ In the present case, the author does not contend that these requirements were not fulfilled - he fled after all evidentiary proceedings had concluded and the jury had retired to deliberate, and did not return thereafter to participate in further proceedings. He was therefore not convicted in absentia, and that sentencing occurred subsequently does not change this conclusion.

4.5 As to the second alleged violation of article 14, paragraph 5, in conjunction with article 2, paragraph 3, arising from the denial of a fair appellate hearing in the United States due to his absence, the State party points out that article 14, paragraph 5, guarantees a right to appeal "according to law". The State party in question is thus free to define in greater detail the substantive and procedural content of the right, including, in this case, the formal requirement that an appellant must not be a fugitive when an appeal is filed. The author was legally represented and aware of the legal situation in the United States, and thus it can be reasonably assumed from his overall conduct, including his flight from the United States, that he renounced his right to appeal. The State party notes that the author did not support the motion of the United States Attorney to reinstate his appeal, in order to prevent his extradition to the United States. He never submitted an appeal, and his notice of appeal remains without content. As to his future treatment in this respect, the State party observes that its Minister of Justice sought assurances of the

¹¹ *Ng v. Canada*, Communication No. 469/1991, Views adopted on 5 November 1993; *Cox v. Canada*, Communication No. 539/1993, Views adopted on 31 October 1994.

¹² *Raf v. Spain*, Appl. No. 53652/00, judgement of 21 November 2001, and *Eid v. Italy*, Appl. No. 53490/99, judgement of 22 January 2002.

¹³ *Maleki v. Italy*, Communication No. 699/1996, Views adopted on 15 July 1999.

competent United States authorities, which were provided, that new proceedings for determining a sentence would be open to the author on *all* counts.

4.6 As to the allegation that the author's life-long imprisonment violates article 10, paragraph 1, the State party argues that this provision refers solely to the conditions of detention, rather than its duration. It refers to the Committee's jurisprudence that the mere fact of deprivation of liberty does not imply a violation of human dignity.¹⁴ The State party argues that the 845-year sentence is not disproportionate or inhuman taking into account the numerous property offences and the losses suffered by pension holders. It also notes that the sentencing court did not exclude conditional release, provided the author pays restitution of US\$ 125 million and a fine of US\$ 123 million. The State party also points out that, while the European Court has suggested that lifetime imprisonment may raise issues under article 3 of the European Convention, it has not yet made such a finding.¹⁵

4.7 For the State party, nothing in the Covenant prevents extradition to a State where an offence carries a more severe sentence (short of corporal punishment). Any contrary position would deprive the instrument of extradition of its utility in terms of international cooperation in the administration of justice and denial of impunity, a purpose the Committee has itself stressed.¹⁶

Issues arising in relation to the Committee's request for interim measures

5.1 By letter of 2 August 2002 to the State party's representative to the United Nations in Geneva, the Committee, through its Chairperson, expressed great regret at the author's extradition, in contravention of its request for interim protection. The Committee sought a written explanation about the reasons which led to disregard of the Committee's request for interim measures and an explanation of how it intended to secure compliance with such requests in the future. By Note of the same date, the Committee's Special Rapporteur on New Communications requested the State party to monitor closely the situation and treatment of the author subsequent to his extradition, and to make such representations to the Government of the

¹⁴ *Vuolanne v. Finland*, Communication No. 265/1987, Views adopted on 7 April 1989.

¹⁵ In *Einhorn v. France*, Appl. No. 71555/01, judgement of 16 October 2001, the Court stated: "... it is not to be excluded that the extradition of an individual to a State in which he runs the risk of being sentenced to life imprisonment without any possibility of early release may raise an issue under Article 3 of the Convention".

¹⁶ *Cox v. Canada*, Op. cit., para. 10.3.

United States that were deemed pertinent to prevent irreparable harm to the author's Covenant rights.

5.2 By submissions dated 15 October 2002, the State party, in response to the Committee's request for explanation, explains that following receipt of the Committee's request for interim measures, the Federal Minister of Justice on 25 May 2002 ordered the Vienna Public Prosecutor's Office ("*Staatsanwaltschaft*") to file a request with the investigating judge of the Vienna Regional Criminal Court seeking suspension of the extradition. The same day, the Court refused to comply with this request, on the basis that Rule 86 of the Committee's Rules of Procedure may neither invalidate judicial orders or restrict the jurisdiction of an independent domestic court. On 6 June 2002, the investigating judge ordered the author's surrender.

5.3 As to the legal issues arising, the State party argues that Rule 86 of the Committee's Rules of Procedure does not oblige States parties to amend their constitutions so as to provide for direct domestic effect of requests for interim measures. A request under Rule 86 "does not as such have any binding effect under international law". A request made under Rule 86 cannot override a contrary obligation of international law, that is, an obligation under the extradition treaty between the State party and the United States to surrender a person in circumstances where the necessary prerequisites set out in the treaty were followed. The State party points to the extensive consideration of the author's case by its courts and the European Court.

5.4 As to the current situation, the State party observes that the United States Attorney has applied to the United States District Court for the author to be re-sentenced (such that he would not serve sentence for the offence of "perjury while a defendant in respect of which extradition was denied"). According to information supplied to the State party, re-sentencing would provide the author with a full right of appeal against the (new) sentence, and against the original conviction itself. The State party will continue to seek information from the United States authorities in an appropriate manner about the progress of proceedings in the United States courts.

Author's comments

6.1 By letter of 8 December 2002, the author claimed a breach of article 9, paragraph 1, of the Covenant since he was surrendered to the United States in breach of the Committee's request for interim measures. He invokes the Committee's Views in *Piandiong v. The Philippines*.¹⁷

¹⁷ Communication No. 869/1999, Views adopted on 19 October 2000.

6.2 By letter of 21 January 2003, the author rejected the State party's contention that the Committee's request under rule 86 gave way to the international obligation to extradite found in its extradition treaty with the United States. The author notes that the treaty itself, as well as the State party's domestic law, provide for refusal of extradition on human rights grounds. In any event, mandatory obligations under human rights treaties owed *erga omnes*, including under the Covenant, take precedence over any inter-State treaty obligations.

6.3 The author submits there is an express obligation under international law, the Covenant and the Optional Protocol for the State party to respect a request under rule 86. This obligation can be derived both from article 2, paragraph 3, of the Covenant, and from the recognition, upon adherence to the Optional Protocol, of the Committee's competence to determine violations of the Covenant, which must also imply, subsidiarily, respect for the Committee's properly promulgated Rules of Procedure.

6.4 The author relies on the Committee's jurisprudence for the proposition that the exposure of a person, to an irreversible measure prior to examination of a case defeats the purpose of Optional Protocol and deprives that person of the effective remedy the Covenant obliges a State party to provide.¹⁸ Thus the findings of the Vienna Regional Criminal Court (see paragraph 5.2 above) ignored direct obligations under articles 1 and 5 of the Optional Protocol. The Committee is invited to direct the State party to indicate what steps it proposes to take to remedy this breach, including by means of diplomatic representation to the United States, to restore the status quo ante.

6.5 As to the State party's admissibility arguments, the author argues that the proceedings pending in the courts were neither timely, real nor effective, as he was removed before they were completed. In any event, with the Constitutional Court's decision of 12 December 2002, domestic remedies are now exhausted. He rejects the contention that the European Court had "examined" his case within the meaning of the State party's reservation to article 5, paragraph 2, of the Optional Protocol, for the decision to strike the case from its lists "clearly did not involve any determination of the merits".

6.6 On the merits, the author maintains he suffered a violation of article 14, paragraph 5, in that he was deprived, through the "fugitive disentitlement" doctrine, of appellate review of

¹⁸ *Ashby v. Trinidad and Tobago*, Op. cit.; *Mansaraj et al. v. Sierra Leone*, Communication No. 839/1998, Views adopted on 16 July 2001; *Piandiong et al. v. The Philippines*, op. cit.

conviction or sentence in the United States. This doctrine also served to deny the United States motion to reinstate his appeal. The author challenges the notion that he “renounced” his appeal, as the appellate court rejected his (counsel’s) motion to defer dismissal of the appeal. In Austria, this violation was adopted, as no court with effective jurisdiction considered this aspect of his case before he was removed. The Constitutional Court’s recognition that the lower courts should have done so came too late to provide an effective remedy.

6.7 As to the claim of a violation of articles 7 and 10, the author submits that an 845-year sentence for offences of fraud is grossly disproportionate, an element that amounts to inhuman punishment.¹⁹ The author rejects the State party’s reliance on *Vuolanne v. Finland*,²⁰ observing that that case concerned a deprivation of liberty of 10 days, scarcely comparable to his own sentence. He further submits that a life sentence (without parole) for a non-violent offence is per se an inhuman sentence. He invokes a decision of the German Constitutional Court finding a life sentence for murder unconstitutional without provision for parole rehabilitation and conditional release.²¹ *A fortiori*, a life sentence for an offence of no irreparable physical or psychological harm and with a possibility of restitution would be inhuman. The sentence is an affront to human dignity and, since it is devoid of rehabilitative possibility, violates article 10, paragraph 1.

6.8 The author rejects the State party’s argument that extradition to a country where a possibly more serious penalty looms than is applicable in the extraditing State is unobjectionable as being inherent in the nature of extradition, for at some point the more serious penalty becomes so inhuman that it is inhuman to so extradite someone. The author relies on the Committee’s Views in *Ng v. Canada*²² for this proposition, and also refers to the jurisprudence of the European Court suggesting that a wholly disproportionate custodial penalty such as an irreducible life sentence (as distinct from physical or

psychological torture) could also rise to such a level of inhumanity.²³

The State party’s failure to respect the Committee’s request for interim measures of protection

7.1 The Committee finds, in the circumstances of the case, that the State party breached its obligations under the Protocol, by extraditing the author before the Committee could address the author’s allegation of irreparable harm to his Covenant rights. In particular, the Committee is concerned by the sequence of events in this case in that, rather than requesting interim measures of protection directly upon an assumption that irreversible harm could follow the author’s extradition, it first sought, under Rule 86 of its Rules of Procedure, the State party’s views on the irreparability of harm. In so doing, the State party could have demonstrated to the Committee that extradition would not result in irreparable harm.

7.2 Interim measures pursuant to rule 86 of the Committee’s rules adopted in conformity with article 39 of the Covenant, are essential to the Committee’s role under the Protocol. Flouting of the Rule, especially by irreversible measures such as the execution of the alleged victim or his/her deportation from the country, undermines the protection of Covenant rights through the Optional Protocol.

Issues and proceedings before the Committee

Considerations of admissibility

8.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

8.2 As to the State party’s argument that domestic remedies have not been exhausted, the Committee observes that the remedy of petitioning the Constitutional Court has been exhausted since the State party’s submission. Furthermore, the Committee observes that in a case where it has requested interim measures of protection, it does so because of the possibility of irreparable harm to the victim. In such cases, a remedy which is said to subsist after the event which the interim measures sought to prevent occurred is by definition ineffective, as the irreparable harm cannot be reversed by a subsequent finding in the author’s favour by the domestic remedies considering the case. In such cases, there remain no effective

¹⁹ The author refers to the jurisprudence of the European Court for the proposition that disproportionate sentences can be inhuman: *Weeks v. United Kingdom* (1988) 10 EHRR 293; *Hussain v. United Kingdom* (1996) 22 EHRR 1.

²⁰ *Op. cit.*

²¹ *Detlef* 45 BVerfGE 187 (1977). To similar effect, the Namibian Supreme Court determined in *State v. Tcoeb* (1996) 7 BCLR 996 that life sentence without parole was unconstitutional.

²² *Op. cit.* (death by gas asphyxiation) and further *Soering v. United Kingdom* 11 EHRR 439 (death row phenomenon).

²³ *Altun v. Germany*, App. No. 10308/83 DR 209; *Nivette v. France*, judgement of 3 July 2001; *Einhorn v. France*, *op. cit.*

remedies to be exhausted after the event sought to be prevented by the request for interim measures takes place; specifically, no appropriate remedy is available to the author now detained in the United States should the State party's domestic courts decide in his favour in the proceedings still pending after his extradition. The Committee thus is not precluded by article 5, paragraph 2 (b), from considering the communication.

8.3 Concerning the State party's argument that its reservation to article 5, paragraph (a), of the Optional Protocol precludes the Committee's consideration of the communication, the Committee notes that the State party's reservation refers to claims submitted to the European Commission on Human Rights. Assuming *arguendo* that the reservation does operate in respect of complaints received, in place of the former European Commission, by the European Court of Human Rights, the Committee refers to its jurisprudence that where the European Court has gone beyond making a procedural or technical decision on admissibility, and has made an assessment of the merits of the case, then the complaint has been "examined" within the terms of the Optional Protocol, or, in this case, the State party's reservation.²⁴ In the present case, the Committee notes that the Court considered that respect for human rights did not require continued consideration of the case, and struck it out. The Committee considers that a decision that a case is not of sufficient importance to continue its examination after an applicant's action to withdraw the complaint, does not amount to a real assessment of its substance. Accordingly, the complaint cannot be said to have been "examined" by the European Court and the Committee is not precluded by the State party's reservation from considering the claims that were presented under the European Convention but later withdrawn by the author. In the absence of any further obstacles to admissibility, the Committee concludes that the issues raised in the communication are admissible.

Consideration of the merits

9.1 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.

9.2 As to the author's claim that the pronouncement *in absentia* of his conviction and sentence resulted in a violation of article 14 of the Covenant, the Committee notes that in the present

case, the author and his legal representatives were present throughout the trial, as arguments and evidence were advanced, and that thus the author self-evidently had notice that judgement, and in the event of a conviction, sentence would be passed. In such circumstances, the Committee, referring to its jurisprudence,²⁵ considers that no question of a violation of the Covenant by the State party can arise on the basis of the pronouncement of the author's conviction and sentence in another State.

9.3 As to the author's claim that by operation of the "fugitive disentitlement" doctrine he was denied a full appeal, the Committee notes that, on the information before it, it appears that the author - by virtue of being extradited on fewer than all the charges for which he was initially sentenced - will, according to the rule of specialty, be re-sentenced. According to information supplied to the State party, such a re-sentencing would entitle the author fully to appeal his conviction and sentence. The Committee thus need not consider whether the "fugitive disentitlement" doctrine is compatible with article 14, paragraph 5, or whether extradition to a jurisdiction where an appeal had been so denied gives rise to an issue under the Covenant in respect of the State party.

9.4 As to whether the State party's extradition of the author to serve a sentence of life imprisonment without possibility of early release violates articles 7 and 10 of the Covenant, the Committee observes, as set out in its preceding paragraph, that the author's conviction and sentence are not yet final, pending the outcome of the re-sentencing process which would open the possibility to appeal against the initial conviction itself. Since conviction and sentence have not yet become final, it is premature for the Committee to decide, on the basis of hypothetical facts, whether such a situation gave rise to the State party's responsibility under the Covenant.

9.5 In the light of these findings, it is unnecessary to examine the author's additional claims which are based on either of the above elements having been found to be in violation of the Covenant.

9.6 Concerning the author's claim that, in the proceedings before the State party's courts, he was denied the right to equality before the law, the Committee observes that the author obtained, after submission of the case to the Committee, a stay from the Administrative Court to prevent his extradition until the Court had resolved the author's challenge to the Minister's decision directing his extradition. The Committee observes that although the order to stay was duly communicated to the relevant officials, the author was transferred to United States jurisdiction

²⁴ See, for example, *Linderholm v. Croatia*, Communication No. 744/1997, decision adopted on 23 July 1999.

²⁵ See, for example, *Maleki v. Italy*, *op. cit.*

after several attempts, in violation of the Court's stay. The Court itself, after the event, observed that the author had been removed from the country in violation of the Court's stay on execution and that there was no legal foundation for the extradition; accordingly, the proceedings had become moot and deprived of object in the light of the author's extradition, and would not be further pursued. The Committee further notes that the Constitutional Court found that the author's inability to appeal an adverse judgement of the Upper Regional Court, in circumstances where the Prosecutor could, and did, appeal an earlier judgement of the Upper Regional Court finding the author's extradition inadmissible, was unconstitutional. The Committee considers that the author's extradition in breach of a stay issued by the Administrative Court and his inability to appeal an adverse decision of the Upper Regional Court, while the Prosecutor was so able, amount to a violation of the author's right under article 14, paragraph 1, to equality before the courts, taken together with the right to an effective and enforceable remedy under article 2, paragraph 3, of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal violations by Austria of article 14, paragraph 1 (first sentence), taken together with article 2, paragraph 3, of the Covenant. The Committee reiterates its conclusion that the State party breached its obligations under the Optional Protocol by extraditing the author before allowing

the Committee to address whether he would thereby suffer irreparable harm, as alleged.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. In the light of the circumstances of the case, the State party is under an obligation to make such representations to the United States authorities as may be required to ensure that the author does not suffer any consequential breaches of his rights under the Covenant, which would flow from the State party's extradition of the author in violation of its obligations under the Covenant and the Optional Protocol. The State party is also under an obligation to avoid similar violations in the future, including by taking appropriate steps to ensure that the Committee's requests for interim measures of protection will be respected.

12. 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 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

Communication No. 1090/2002

Submitted by: Tai Wairiki Rameka et al. (represented by Tony Ellis)

Alleged victim: The authors

State party: New Zealand

Date of adoption of Views: 6 November 2003

Subject matter: Alleged absence of a sufficient periodic review of an indeterminate prison sentence - Cruel, inhuman, or degrading treatment

Procedural issues: Status of "victim" - Level of substantiation of claim - Non exhaustion of domestic remedies

Substantive issues: Inhuman treatment/torture - Arbitrary detention - Court control over legality of detention - Conditions of detention - Presumption of innocence

Articles of the Covenant: 7, 9, paragraphs 1 and 4, 10, paragraphs 1 and 3, and 14, paragraph 2

Articles of the Optional Protocol: 1; 2; 5, paragraph 2 (b)

Finding: Violation (article 9, paragraph 4)

1. The authors of the communication, dated 9 March 2002, are Messrs. Tai Wairiki Rameka, Anthony James Harris and Tai Rangi Tarawa, all New Zealand nationals currently detained serving criminal sentences. They claim to be victims of violations by New Zealand of articles 7, 9, paragraphs 1 and 4, 10, paragraphs 1 and 3, and 14, paragraph 2, of the Covenant. They are represented by counsel.

The facts as presented by the authors

Mr. Rameka's case

2.1 On 29 March 1996, Mr. Rameka was found guilty in the High Court at Napier of two charges of sexual violation by rape, one charge of aggravated burglary, one charge of assault with intent to commit rape, and indecent assault. Pre-sentence and psychiatric reports provided to the court referred inter alia to the author's previous sexual offences, his propensity to commit sexual offences, his lack of remorse and his use of violence, concluding that there was a 20% likelihood of further commission of sexual offences.

2.2 In respect of the first charge of rape, he was sentenced to preventive detention (that is, indefinite detention until release by the Parole Board) under section 75 of the Criminal Justice Act 1985,¹ concurrently to 14 years' imprisonment in respect of the second charge of rape, to two years' imprisonment in respect of the aggravated burglary and to two years' imprisonment for the assault with

¹ Sections 75, 77 and 89 Criminal Justice Act 1985 provide as follows:-

75. Sentence of preventive detention

"(1) This section shall apply to any person who is not less than 21 years of age, and who either-

(a) Is convicted of an offence against section 128 (1) [sexual violation] of the Crimes Act 1961; or

(b) Having been previously convicted on at least one occasion since that person attained the age of 17 years of a specified offence, is convicted of another specified offence, being an offence committed after that previous conviction.

(2) Subject to the provisions of this section, the High Court, if it is satisfied that it is expedient for the protection of the public that an offender to whom this section applies should be detained in custody for a substantial period, may pass a sentence of preventive detention. ...

(3A) A court shall not impose a sentence of preventive detention on an offender to whom subsection (1)(a) of this section applies unless the court-

(a) Has first obtained a psychiatric report on the offender; and

(b) Having regard to that report and any other relevant report,

Is satisfied that there is a substantial risk that the offender will commit a specified offence upon release."

77. Period of preventive detention indefinite

"An offender who is sentenced to preventive detention shall be detained until released on the direction of the Parole Board in accordance with this Act."

89. Discretionary release on parole

"(1) Subject to subsection (2) of this section, an offender who is subject to an indeterminate sentence is eligible to be released on parole after the expiry of 10 years of that sentence."

intent to commit rape. He was convicted and discharged in respect of the remaining indecent assault charge, as the sentencing judge viewed it as included in the other matters dealt with. He appealed against the sentence of preventive detention as being both manifestly excessive and inappropriate, and against the sentence of 14 years' imprisonment for rape as being manifestly excessive.

2.3 On 18 June 1997, the Court of Appeal dismissed the appeal, finding that the sentencing judge was entitled to conclude, on the evidence, that there was a "substantial risk" that Mr. Rameka would offend again in an aggressive and violent manner upon release, and that there was "a high level of future dangerousness" from which the community had to be protected. The Court supported its conclusion by reference to Mr. Rameka's repeated use of a knife and violence in the context of sex-related offences, and his lengthy detention of his victim in each instance. It also found, with respect to the sentence for rape, that the 14-year term of imprisonment was "well within" the discretion of the sentencing judge.

Mr. Harris' case

2.4 On 12 May 2000, Mr. Harris was found guilty by the High Court at Auckland, following pleas of guilty, of 11 counts of sexual offences occurring over a period of 3 months against a boy who turned 12 during the period in question. They comprised two charges of sexual violation involving oral genital contact and nine charges of indecent assault or inducing indecent acts in respect of a boy under 12. He had previously been convicted of two charges of unlawful sexual connection with a male under 16 and one of indecently assaulting a male under 12, all in respect of an 11-year-old boy. On the two unlawful sexual connection counts, he was sentenced to six years' imprisonment, and concurrently to four years' on the remaining counts.

2.5 The Solicitor-General, for the Crown, sought leave to appeal on the basis that preventive detention, or at least a longer finite sentence, should have been imposed. On 27 June 2000, the Court of Appeal agreed, and substituted a sentence of preventive detention in respect of each count. The Court referred to the warning of serious consequences given by the court sentencing the author for his previous offences, his failure to amend his behaviour following a sexual offenders' course in prison, the features of breach of a child's trust in offending, the failure to heed police warnings provided to the author against illicit contact with the child victim, as well as the comprehensive psychiatric report defining him as a homosexual paedophile attracted to pre-pubescent boys and the risk factors analysed in the report. While observing that the case would warrant a finite sentence of "not

less” than seven and a half years, the Court however concluded, in the circumstances, that no appropriate finite sentence would adequately protect the public, and that preventive detention, with its features of continuing supervision after release and amenability to recall, was the appropriate sentence.

Mr. Tarawa’s case

2.6 On 2 July 1999, Mr. Tarawa was found guilty of sexual violation by rape, two charges of sexual violation by unlawful sexual connection, indecent assault, burglary, two charges of aggravated burglary, two charges of kidnapping, being an accessory after the fact, three charges of aggravated robbery, demanding with menaces, and unlawfully entering a building. Previously, he had committed multiple offences in three earlier incidents, involving breaking into homes and engaging in sexually-motivated violence, including two rapes. Subsequently, he committed further burglary and assault. The sentencing judge found a consistent pattern of predatory conduct, planned and executed with professionalism, exacerbated by the fact that some offences were committed while on bail. After considering the nature of the offending, its gravity and timespan, the nature of the victims, the response to previous rehabilitative efforts, the time since previous offending, the steps taken to avoid reoffending, the (non-)acceptance of responsibility, the pre-sentence report, the psychological report and the psychiatric assessment of a very high risk of reoffending along with the relevant risk factors, the judge sentenced him to preventive detention in respect of the three sexual violation charges, and encouraged him to make use of the counselling and rehabilitative services available in prison. He was concurrently sentenced to 4 years’ imprisonment on the aggravated burglary charge, 6 years for the kidnapping, 3 years for demanding with menaces, 3 years for aggravated burglary and aggravated robbery, 18 months for burglary and being an accessory after the fact, 6 years for a further kidnapping and 5 years for a further aggravated robbery, 6 months for indecent assault and 9 months for unlawful entry.

2.7 On 20 July 2000, the Court of Appeal, examining the appeal on the basis of the author’s written submissions, considered the pattern of circumstances of each set of offences and found, on the entire background of the appellant, his unsuccessful rehabilitation efforts as well as the presentence, psychiatric and psychological reports, that the conclusions of substantial risk requiring the protection of the public were open to the sentencing judge, who had properly weighed the available alternatives of finite sentences.

2.8 On 19 September 2001, the Judicial Committee of the Privy Council rejected all three authors’ applications for special leave to appeal.

The complaint

3.1 The authors complain, firstly, that the leading case of *R v. Leitch*,² where a Full Court of the Court of Appeal laid out the principles applicable to sentences of preventive detention, was wrongly decided. The authors contend that this decision does not offer meaningful guidance as to how the courts should determine the existence of “substantial risk” of a future offence. In the authors view, this element should be demonstrated to the criminal level of proof beyond all reasonable doubt, as applied by Canadian courts in the context of preventive detention. They further contend that the elements set out in section 75 (2) of the Criminal Justice Act are excessively vague and arbitrary.³ They argue in addition that the *Leitch* decision wrongly analyses “expedient for the protection of the public” and incorrectly overruled the previous jurisprudence of the “last resort test”. They contend that the Court did not analyse arguments in that case that preventive detention was inconsistent with the Covenant.

3.2 Secondly, the authors contend that it was arbitrary to impose a discretionary sentence on the basis of evidence of future dangerousness, as such a conclusion cannot satisfy the statutory tests of “substantial risk of reoffending” or “expedient for the protection of the public” in the individual case. They point to several writers who caution about the difficulties of predicting of future criminal behaviour and relying on statistical classes and patterns.⁴ In any event, they argue that on the facts none of them fit the statutory tests of being a “substantial risk”, or that preventive detention was “expedient for protection of the public”.

3.3 Thirdly, the authors argue that they were sentenced without regard being paid, by the sentencing court or on appeal, to issues of (i) *arbitrary detention*, in terms of article 10, paragraphs 1 and 3, of the Covenant, ss. 9 and 23 (5) of the New Zealand Bill of Rights Act 1990, the Magna Carta, and or the Bill of Rights 1689 (Imp.); (ii) *presumption of innocence*, in terms of articles 9 and/or 14, paragraph 2, of the Covenant, as interpreted by the Committee, (iii) (the alleged absence of sufficient) *periodic review* of an indeterminate sentence, in terms of article 9, paragraph 4, of the Covenant and (iv) *cruel, unusual, inhuman or degrading punishment* under article 7 of the Covenant or the Bill of Rights 1689.

² [1998] 1 NZLR 420.

³ See footnote 1, *supra*.

⁴ Cobley: *Sex Offenders: Law, Policy and Practice* (Jordans, Bristol, 2000) at 196; Brown & Pratt: *Dangerous Offenders, Punishment & Social Order* (Routledge, London, 2000) at 82 and 93.

3.4 As to the issue of arbitrary detention, the authors argue that there is insufficient regular review of their future “dangerousness”, and that they are effectively being sentenced for what they might do when released, rather than what they have done. The authors refer to jurisprudence of the European Court of Human Rights⁵ and academic writings⁶ in support of the proposition that a detainee has the right to have renewed or ongoing detention that is imposed for preventive or protective purposes to be tested by an independent body with judicial character. The authors observe that under the State party’s scheme, there is no possibility for release until ten years have passed and the Parole Board may consider the case. Concerning the presumption of innocence, the authors contend that preventive detention should be seen as a punishment for crimes which have not yet been, and which may never be, committed, and thus in breach of article 14, paragraph 2.

3.5 In respect of the above two issues, the authors also refer to concerns expressed by the Committee upon its consideration of the State party’s third periodic report, concerning the compatibility of the scheme of preventive detention with articles 9 and 14.⁷

3.6 As to issues under articles 7 and 10, the authors argue that due to the 10 year non-parole period applicable to their sentences, potential treatments of sexual offenders aimed at reducing their risk and dangerousness are not made available until close to the expiry of the 10 year period. They also appear to object, in general, to the 10 year non-parole period. This fails to treat persons so sentenced with humanity and dignity, as required by article 10, paragraph 1, fails to take into account the essential aim of reformation and social rehabilitation required by article 10, paragraph 3, and amounts to cruel, unusual, degrading and disproportionately severe punishment, contrary to article 7.

3.7 The authors also make several case-specific claims. Mr. Rameka contends that the Court

should not have accepted that an identified 20% risk of reoffending amounted to a substantial risk within the meaning of the statute, and that imposing a concurrent finite sentence at the same time as sentence of indefinite detention was wrong in principle. In the case of Mr. Tarawa, it is claimed that the denial of legal aid for his appeal (resulting in Mr. Tarawa preparing his own appeal papers) was wrong. Finally, Mr. Harris contends that his sentence was manifestly excessive, and that the Court of Appeal improperly considered eligibility for recall, that is to say, the liability of offender who has been released prior to serving full sentence but who commits a further offence to be recalled to serve out a full sentence, to be a relevant factor in favour of a sentence of preventive detention.

State party’s admissibility and merits submissions

4.1 By submissions of 19 February 2003, the State party contests the admissibility and merits of the communication, describing at the outset the general features of the scheme of preventive detention. It observes that such detention is only imposed on persons aged 21 or above after they have been convicted, following a trial with full rights of fair trial and appeal, in respect of certain designated offences.⁸ The sentence is imposed for *past acts* of serious offending, where it is the appropriate and proportional penalty to respond to the nature of that offending. That assessment of penalty is considered in the context of the offender’s past and other information about him/her, including the likelihood of future offending.

4.2 The sentence may arise in two circumstances: firstly, where a person has previous similar convictions for specific serious (mainly sexual) offences, and has again offended. This has existed for some 100 years, and generally is imposed after a last warning from a sentencing judge sentencing the offender, upon an earlier occasion, to a finite term of imprisonment. Secondly, as a result of a 1993

⁵ The authors cite *Van Droogenboeck v. Belgium* (1982) 4 EHRR 443 (administrative detention ‘at the Government’s disposal’ following a two-year sentence for theft) and *Weeks v. United Kingdom* (1988) 10 EHRR 293 (discretionary life sentence for armed robbery with release on licence when no longer a threat).

⁶ The authors cite Harris, O’Boyle & Warbrick: *Law of the European Convention on Human Rights* (Butterworth’s, London, 1995) at 108-9, 146, 151-152 and 154, and Wachenfeld “The Human Rights of the Mentally Ill in Europe under the European Convention on Human Rights”, *Nordic Journal of International Law* 60 (1991) at 174-175.

⁷ CCPR/C/79/Add.47; A/50/40, paras. 179 and 186 (3 October 1995).

⁸ The offences are (i) if committed against a child under 16, incest (s.130 Crimes Act 1961), sexual intercourse with a girl under care or protection (s.131), sexual intercourse with a girl under 12 (s.132), indecency with a girl under 12 (s.133), sexual intercourse or indecency with a girl between 12 and 16 (s.134), indecency with a boy under 12 (s.140), indecency with a boy between 12 and 16 (s.140A), indecent assault on a man or boy (s.141), performing or attempting anal intercourse on a person under 16 or severely subnormal (s.142), and (ii) sexual violation (s.128), attempt to commit sexual violation (s.129), compelling an indecent act with an animal (s.142A), attempted murder (s.173), wounding with intent (s.188), injuring with intent to cause grievous bodily harm (s.189 (1)), aggravated wounding or injury (s.191), and throwing of acid with intent to injure or disfigure (s.199).

amendment, a person can be sentenced to preventive detention in respect of an offence of sexual violation, independently of previous offences. In this case, however, additional safeguards are built in: the Court must seek a psychiatric report and be satisfied that there is a substantial risk of commission of a further specified offence upon release.

4.3 Safeguards are incorporated both at the imposition stage of the sentence, as well as the administration stage. The only court able to impose such a sentence is the highest court of original jurisdiction, the High Court. There is a right of appeal to the Court of Appeal, which is exercised by most sentenced to preventive detention. Only specific offences give rise to liability to the sentence. Psychiatric reports are, in practice, always sought. The courts consider whether protective purposes could be adequately served by a finite sentence of years. If the High Court does, after consideration of the full facts of the case, impose a preventive sentence, the Court of Appeal may instead substitute a finite sentence (as, for example, occurred in *R v. Leitch*). According to the criteria set out in *Leitch*, the sentencing court must consider: the nature of the offences, their gravity and time span, the category of victims and the impact on them, the offender's response to previous rehabilitation efforts, the time elapsed since relevant previous offences and steps taken to avoid reoffending, acceptance of responsibility and remorse for the victims, proclivity to offending (taking into account professional risk assessment), and prognosis for the outcome of available rehabilitative treatment. Even if the statutory tests are met, the sentence remains discretionary rather than mandatory.

4.4 Turning to the administration stage, there is a generally a minimum non-parole period of 10 years, subject to the discretion of an independent Parole Board to consider the case before that point (s.97 (5)). Thereafter, there are compulsory reviews of the detention undertaken at least annually by the Parole Board, which is authorised to release the prisoner at its discretion (s.97 (2)). The reviews may take place even more frequently if the Parole Board so requires, or the prisoner so requests and the Board agrees (s.97 (3)). The decisions of the Parole Board may themselves be reviewed in the High Court.

4.5 The State party observes that preventive detention is by no means unique to New Zealand, and that, while no communications have yet been brought to the Committee on this issue, the European Court of Human Rights has addressed it in several relevant cases. In *V v. United Kingdom*,⁹ the Court held that the sentence of "detention during Her Majesty's pleasure" was neither arbitrary, inhuman

nor degrading. The respondent State party had pointed out that such a sentence enables consideration of the offender's individual circumstances, with release occurring once it is determined to be safe for the public to do so. Similarly, in *T v. United Kingdom*,¹⁰ the Court, recalling States' duty to take measures for the protection of the public from violent crime, considered that the Convention did not prohibit States subjecting an individual to an indeterminate sentence, where considered necessary for protection of the public.

4.6 The State party submits that it is within its discretion to resort to sentences such as preventive detention, while acknowledging the obligation that such sentences are carefully restricted and monitored, with appropriate review mechanisms in place to ensure that continued detention is justified and necessary. The European Court recognizes that once the purpose of detention has shifted from punishment to detention for prevention purposes, detention can become unlawful if there are no adequate systems of renewal in place at that point. Regular review before a body properly empowered to determine the validity of ongoing detention must be in place. The State party argues that its Parole Board has all these characteristics: it is independent, chaired by a former High Court judge, follows a settled procedure, and has full powers to release prisoners. It examines a case at least annually after ten years have passed, and possibly earlier and more frequently. In addition, habeas corpus remains available.

4.7 While regarding the scheme under which the authors were sentenced as fully consistent with the Covenant, the State party observes that the scheme has since been modified to reduce the ten year non-review period to five years, and the sentencing Court has to set an appropriate non-parole period individually.

4.8 As to admissibility, the State party argues that the authors are not victims within the meaning of the Optional Protocol, concerning the aspect of the claim relating to the non-reviewability period. Further, one author has not exhausted domestic remedies. While the authors are currently serving sentences, the State party observes that they have not yet served the period that they would have had to serve had they been sentenced to a finite sentence.¹¹ Rather, they are currently serving the ordinary deterrent part of their sentence, and the preventive aspect has yet to arise. For Messrs. Rameka and Tarawa, any finite sentence would have been at least the equal of the

⁹ (1999) 30 EHRR 121.

¹⁰ Application 24724/94.

¹¹ See paras. 4.20 (Mr. Rameka), 4.24 (Mr. Tarawa), and 4.30 (Mr. Harris), *infra*.

10-year non-review period (when compulsory annual review begins). Not having served the minimum period necessary for the offending, they are not yet “victims” in respect to the claims concerning preventive detention.

4.9 As to Mr. Harris, while he may have received a finite sentence of less than ten years, the State party submits that he is currently far short of the point where the preventive aspect of detention arises. Further, at that point, the Parole Board can consider his case, and refusal to do so (which could then make him a “victim” of preventive detention) could be reviewed by the courts. Accordingly, none of the authors are at the present time victims of an “actual grievance”, within the meaning of the Optional Protocol, arising from any of the particular features of the scheme of preventive detention complained of. The State party invokes the Committee’s jurisprudence in *A.R.S. v. Canada*,¹² where the Committee considered inadmissible, on this basis, the author’s complaint concerning a mandatory supervision system that was not yet applicable to him.

4.10 As to Mr. Tarawa, the State party submits that domestic remedies have not been exhausted. On 10 December 2001, the Crimes (Criminal Appeals) Amendment Act 2001 entered into force, providing the author with a right to apply for a full re-hearing of sentence. While leave must be obtained, the Court of Appeal has made plain that applications for re-hearing by persons such as Mr. Tarawa will be granted as a matter of course.¹³ The current position for Mr. Tarawa is that if he asks, he will have a fresh appeal against his sentence; however he has not yet applied to do so. His claim is thus inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

4.11 As to the merits, the State party argues that all the authors’ claims are unfounded. Regarding the claims under article 9, the State party argues that it can justify continued detention because the sentence is imposed as punishment for, and response to, proven criminal offending and because as the prevention component increases in focus, appropriate review mechanisms (as described above) concurrently become available. It is however first and foremost a penalty in the same way as discretionary life imprisonment is.

4.12 The State party argues that there are many writers who accept that there are factors and characteristics that make it more likely that a person will reoffend; paedophilia being one

example where it is generally accepted that persons with this condition are much more likely to reoffend against children. There are many actuarial models used to assist risk prediction, which assign a scale of increasing values to a number of typically ten to twelve relevant factors such as previous offending, underlying mental conditions, previous rehabilitative success, and the like. The key question is where the cut-off position is then set. A variety of these models, to which New Zealand has contributed, are in operation around the world. There is common acceptance that risk prediction based on a combination of actuarial models and clinical assessments produces the best results. Thus, the State party submits there is no basis in literature to support the view that predicting future offending in a limited range of offences is so arbitrary that sentence cannot have a preventive component.

4.13 Regarding the claims of the alleged failure of the courts to address international standards and jurisprudence, the State party argues that if the challenges to the consistency with the Covenant are not valid, then the courts cannot be criticized for failure to have regard to alleged inconsistencies. The courts’ task is to interpret and apply the law, having regard to international obligations in the case of lack of clarity or ambiguity. In *Leitch*, the authors criticize the court for failing to address these issues, but as the appellant was successful and the sentence of preventive detention quashed, there was no need to address the broader international issues. Subsequent to the filing of the current communication, counsel for the authors addressed similar arguments to the Court of Appeal in *R v. Dittmer*.¹⁴ The Court there observed that the *Leitch* court, against the background of the State party’s obligations, had set out the Crown’s submissions on Covenant issues with approval and pointed out that the relationship of the new regime with the Covenant had been considered in the Justice and Electoral parliamentary committee, and found to be consistent.

4.14 In response to the authors’ criticisms of the Court of Appeal’s decision in *Leitch*, the State party refers to the Committee’s constant jurisprudence that matters of domestic law, and its application to particular facts, are issues for the domestic courts.¹⁵ It points out that the issues involved are very much matters of fact, e.g. “dangerousness”, and the scope of particular provisions of domestic law. These issues were fully ventilated at all levels of the

¹² Case No. 91/1981, Decision adopted on 28 October 1981. See also *T. v. United Kingdom*, op.cit.

¹³ *R v. Smith* CA 315/96, 19 December 2002.

¹⁴ CA258/01, judgment of 24 October 2002.

¹⁵ The State party refers, by way of example, to *A v. New Zealand*, Case No. 754/1997, Views adopted on 15 July 1999, at paragraph 7.3.

domestic court system. As to the Court's interpretation that notions such as "beyond reasonable doubt" were inapt further to qualify the meaning of "expediency", the State party points out that this term has always been interpreted in this manner. To the extent that the authors may be suggesting that the Covenant imposes a standard of "beyond reasonable doubt", the State party argues that this is relevant to the *offence*, where guilt was established beyond reasonable doubt. It is not an appropriate concept to the determination of the appropriate *sentence*, which has always been recognized as an area of assessment and judicial discretion.

4.15 As to the authors' challenge to the Court's interpretation of "expediency", the State party observes that they seem to argue that an insufficiently high threshold has been set. The State party contends that this is very much a challenge of the application of a test to the particular facts, and it was open to the sentencing judge to find that the sentence in each case was expedient, and for the superior courts to agree. The Court of Appeal's approach that "expedient" had a standard legislative meaning was orthodox, and its listing of the detailed set of factors that a sentencing court should consider before imposing preventive detention¹⁶ was appropriate.

4.16 On the right to presumption of innocence, the State party submits that there can be no breach, because the authors have not been charged with any further criminal offence. There are no fresh charges or allegations to which the presumption can attach. They were sentenced to preventive detention as the result of being convicted of a nominated offence through a trial that fully respected the presumption of innocence, and satisfying many other requirements. As such, the proper focus is not on whether the law can allow sentencing to take into account the need to protect society based on past offending (the State party submits that it can), but rather whether the review mechanisms in place are adequate to enable proper assessment of the need for continued detention once the prisoner has served the appropriate minimum period.

4.17 As to the alleged violation of article 10, paragraphs 1 and 3, through the provision and the timing of remedial courses, the State party observes that what is claimed in the present case falls well short of what the Committee has generally regarded as a violation of these provisions. It points out that in prison, a large range of courses is available to prisoners, all aiming to improve the skills and understanding of a prisoner to help rehabilitate him

or her and thus reduce the risk of reoffending. Some are specifically targeted to sexual offenders, aiming at assisting a prisoner with learning to manage themselves in the community, avoid risk situations and thus minimize likelihood of reoffending. The rule is that a prisoner takes such courses near to release, as their focus is managing the prisoner's conduct once released into the community. They are therefore most effectively undertaken near the time of release. These courses have nothing to do with access to psychiatric and psychological services and treatment, or the range of general courses, which are all available throughout the duration of the sentence. The State party doubts whether the authors have demonstrated themselves personally to be victims, as the authors have not specified which courses and/or treatment they have had, or any specific inadequacies of them.

Mr. Rameka

4.18 Turning to the particular cases, the State party points out that, for Mr. Rameka, the numerous serious charges all arose from one incident. He knew where the victim lived, decided to rape her, broke into the house wearing a mask, acquired a knife from the victim and subjected her to a four hour ordeal, raping her twice as well as committing further offences. As someone convicted of sexual violation, Mr. Rameka was eligible for preventive detention if a psychiatric assessment was first obtained, and the sentencing judge was satisfied there was a substantial risk of commission of specified offence following release and further that preventive detention was expedient for the protection of the public. Even if so satisfied, the sentencing judge still had the discretion whether or not to impose the sentence. The psychiatric assessment unusually quantified the risk in a specific way ("20%") rather than, as is usual, generally describing the risk as "high" or "very high". The State party stresses that the question of substantial risk was not decided simply on the basis of this figure. Rather, after analyzing the report and its reasoning and underlying factors, as well as the circumstances of Mr. Rameka's previous and present offences, the judge considered preventive detention warranted. The Court of Appeal agreed, noting inter alia the various indices in the psychiatric report, the similarities to the previous offending involving a knife and sustained detention, and the worrying factors of the present offending.

4.19 As to the finite sentence of 14 years' imprisonment for the second rape imposed alongside the sentence of preventive detention, the State party finds it difficult to identify any objectionable aspect to this issue. It is important to recognize the individual crimes committed, not least for the community and in symbolic terms,

¹⁶ See para 4.3, supra.

even if the sentence is served concurrently. Moreover, concurrent finite terms can assist the Parole Board in determining the seriousness of other offences committed at the time of the primary offending.

4.20 Concerning his non-parole period, the State party points out that as a result of the 14 year sentence for the second rape, according to local regulation, he would have to serve a total of 9 years 4 months in prison on that offence alone. Adding punishment for the other offences, there is little doubt that a finite sentence requiring him to serve at least 10 years in prison would have been inevitable. Thus the 10 year non-review period arising under the preventive detention would have been the case without any such sentence, meaning that this claim is not only inadmissible but also unfounded, as he will then be eligible for annual review.

Mr. Tarawa

4.21 As to Mr. Tarawa, the State party observes he pleaded guilty to five separate incidents giving rise to fifteen charges, with the main charge from the preventive detention viewpoint being a rape committed after breaking into a woman's home. Thereafter, the woman was subjected to further sexual indignities, abducted and taken to a money machine in order to withdraw money for the assailant. The further incidents included breaking into a home (holding the resident couple at gunpoint and assaulting one before they escaped), burglary of a house, assault and robbery of a 76-year old woman, and burglary of a farmhouse (threatening the female occupant with a knife, forcing her to undress and tying her up before she escaped).

4.22 The sentencing judge considered Mr. Tarawa's earlier offending, where on two occasions he broke into houses where there was a woman. On the first occasion, he forced her to undress at knifepoint but she was able to escape. The second time the victim was raped twice. The judge considered that the present offence was a replica of the earlier incident, but with more signs of professionalism. There then followed further offending, release on bail, and the final three incidents during release on bail. Two of these were robberies and the third another burglary of a home that had the same hallmarks of a targeted woman with the same sexual focus.

4.23 In the High Court, both a psychologist and psychiatrist separately identified significant risks of reoffending, with any prospects of rehabilitation dependent upon change in a person up to then seen to have a low motivation to improve. In the State party's view, the author poses a risk of the highest

magnitude, particularly to women, and the Court of Appeal did not differ from the High Court's sentence.

4.24 Concerning the non-parole period, the judge noted that he would have imposed a finite sentence of 15 to 16 years for the rape if he had not imposed preventive detention, with the result that under local parole laws, he would have had to serve at least 10 years before being eligible for release. Thus, the non-review period is the same as if he had not been sentenced to preventive detention, and, apart from being inadmissible, no Covenant claim arises.

4.25 The issue of legal aid is particular to Mr. Tarawa. At the time, his appeal against sentence was determined by an ex parte system on the papers, where the Court of Appeal determined whether would-be appellants would receive legal aid for the appeal. When the Court decided an appeal was so lacking in merit that aid should not be given, it was faced with the dilemma of deciding what to do with appellants in custody who could not be present in court and who had no lawyer. Accordingly, the Court developed a system of determining these appeals on the papers, giving the appellants an opportunity to file written submissions. This ex parte system was subsequently held unlawful for want of statutory authority by the Privy Council,¹⁷ and thus the State party accepts Mr. Tarawa was wrongly denied legal aid. Since then, remedial legislation has assigned the task of determining legal aid to an independent body with more safeguards for appeals on the papers. At the same time, the legislation provided for all whose appeals had been determined by a method held unlawful to seek a new appeal, which this author has not yet done. The State party submits the option of a fresh appeal is sufficient to redress this claim.

Mr. Harris

4.26 The State party observes, in respect of this author, that he was convicted of 11 counts of sexual offending against a young boy. The sentencing judge sentenced him to a finite term of six years' imprisonment. The Crown appealed against the sentence, arguing that preventive detention should have been imposed, or that the finite sentence was manifestly inadequate and the Court of Appeal agreed. The State party points out that this represents an example of the usual preventive detention case – the author had previous paedophile convictions, served a jail term for them, and on previous sentencing was warned about the likely imposition of preventive detention if he committed a repeat offence.

¹⁷ *R. v. Taito* (2002) 6 HRNZ 539.

4.27 In the present case, the author ingratiated himself with a young boy, inducing him to engage in various sexual activities. Police warned him to stay away from the boy after suspicions were aroused, but despite the warning the author was unable to resist further contact and committed further offences. The psychiatric report confirmed that he was a homosexual paedophile with an interest in pre-pubescent boys. Previous rehabilitation efforts, including the State party's specialized sex offender programme, had not worked, and such was his predilection to this offending that he continued despite a warning and knowledge that he was being observed by police. Balancing these factors, the Court of Appeal considered that a finite sentence would not adequately protect the public and that preventive detention was required.

4.28 In response to the author's argument that his sentence was manifestly excessive, the State party submits that the Court of Appeal's conclusion, upheld by the Privy Council, was plainly open to it. The author represents a serious risk to the public, with a finite sentence resulting in release providing inadequate protection. If the author manages to change, he can then be released with appropriate safeguards but until that point, the community and particularly young boys should not be exposed to his predatory conduct.

4.29 As to his eligibility for review of detention, the State party observes that the Court of Appeal would have imposed a finite sentence of seven and a half years on the author as being appropriate punishment, were it not for the need to protect the public. Unlike Mr. Tarawa, the author can theoretically argue that as a result of preventive detention he is subject to longer non-parole period than if a finite sentence had been imposed. However, the State party submits that once the author reached the point where parole eligibility would have arisen under the applicable finite sentence, he can apply for release to the Parole Board (which has discretionary jurisdiction to consider requests prior to ten years of preventive detention elapsing). Only in the event of the refusal of such a claim by the Parole Board, itself subject to judicial review, could the author claim to be a victim of the non-parole period.

Counsel's comments on State party's submission

5.1 The authors, in reply, argue that the Covenant is not directly implemented in domestic law, and that the leading case of *R v. Leitch* only pays lip service to the Covenant. They consider that the advice of the State party's authorities to Parliament assessing that the amendments to the preventive detention legislation were consistent with the Covenant was self-serving.

5.2 The authors observe that in the European Court cases of *V v. United Kingdom*¹⁸ and *T v. United Kingdom*¹⁹ a specific "tariff" period had been set for each individual period, representing the term of punishment during which release was precluded. Only thereafter did the preventive aspect of further detention arise. The authors contend that they do not contest the lawfulness of their preventive sentences per se, but rather that an individualized "tariff" period, followed by regular reviews, should have been set in each case. In the authors' cases, the blanket ten year non-parole period applies to all of them before the reviews begin. They argue that there has been no instance of the exercise of the Parole Board's discretionary power to review a case earlier than after ten years; this possibility is therefore illusory. They also allege that habeas corpus and judicial review applications would most likely be unsuccessful, and in any case these remedies would only arise after the ten year non-parole period had passed.

5.3 Concerning the assessment of their future "dangerousness", the authors adduce academic studies and writings suggesting flaws or imprecisions in common methods of calculation of risk prediction. They contend that the individual psychiatric assessments in their case were inadequate, that the courts were to ready to rely upon them and that thus their resulting detention became arbitrary, and refer to Canadian domestic case law on that State's preventive detention regime, where, according to them, "dangerousness" must be shown beyond reasonable doubt, a week's notice must be provided prior to hearing, two psychiatrists must be heard, and reviews of "dangerousness" occur after three years and then every two years.

5.4 As to the provision of courses in prison, the authors clarify that they only refer to the non-provision of courses related to their "dangerousness" until near the time of release. They therefore claim that they have no opportunity to cease to be "dangerous" earlier in their sentence, which should occur as early as possible. This is said to be cruel and unusual, lacking humanity and not in line with the notion of rehabilitation. Moreover, early parole requests may be adversely affected by failing to have undergone treatment.

5.5 As to the admissibility of Mr. Tarawa's case on the question of appeal possibilities, it is contended that the new appeal only became possible as a result of the recent decision of the Court of Appeal in *R v. Smith*,²⁰ subsequent to the submission

¹⁸ Op. cit.

¹⁹ Ibid.

²⁰ Op. cit.

of the communication. In any case, it would be futile as a recent appeal against preventive detention was dismissed in another case.²¹

5.6 As to the issue in Mr. Rameka's case of imposition of a finite sentence, alongside preventive detention, the author rejects the State party's argument that there is no authority in objection to such a practice. He refers, by analogy, to English criminal practice, which regards the imposition of a finite sentence alongside a life sentence as mistaken.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 As to whether the authors can claim to be victims of a violation of the Covenant concerning preventive detention, as they have not yet served the amount of time that they would have had to have served to become eligible for release on parole under finite sentences applicable to their conduct, the Committee observes that the authors, having been sentenced to and begun to serve such sentences, will become effectively subject to the preventive detention regime after they have served 10 years of their sentence. As such, it is essentially inevitable that they will be exposed, after sufficient passage of time, to the particular regime, and they will be unable to challenge the imposition of the sentence of preventive detention upon them at that time. This situation may be contrasted with that in *A.R.S. v. Canada*,²² where the future application of the mandatory supervision regime to the prisoner in question was at least in part dependent on his behaviour up to that point, and thus speculative at an earlier point of time in the imprisonment. The Committee accordingly does not consider it inappropriate that the authors argue the compatibility of their sentence with the Covenant at an earlier point, rather than when ten years' imprisonment have elapsed. The communication is thus not inadmissible for want of a victim of a violation of the Covenant.

6.3 As to Mr. Tarawa's case, the Committee observes that after flaws in the earlier system of disposing appeals on the papers after a denial of legal aid became apparent, the State party passed the Crimes (Criminal Appeals) Amendment Act 2001

entitling those affected, including Mr. Tarawa, to apply for re-hearing of dismissed appeals (in Mr. Tarawa's case, the Court of Appeal's dismissal on 20 July 2000 of his conviction and sentence of 2 July 1999). Such an appeal could have challenged the appropriateness, as a matter of domestic law, of imposing preventive detention in view of the particular facts of his case, independently of appellate decisions on the penalty applicable to the facts of other cases. Accordingly, the Committee observes that Mr. Tarawa failed to exhaust a domestic remedy available to him to challenge his sentence at the time of submission of the communication. Thus, his claims relating to the imposition of preventive detention and consequential claims are inadmissible under article 5, paragraph 2 (b), of the Optional Protocol. As to the residual claim concerning the earlier denial of legal aid, the Committee observes that for the same reasons, this claim was deprived of object before the submission of the communication upon the provision of the new ability to appeal coupled with a fresh assessment of legal aid; as a result, this claim is inadmissible under article 2 of the Optional Protocol.

6.4 As to the contention that certain rehabilitation courses were not available to the authors in prison, contrary to articles 7 and 10 of the Covenant, the Committee notes that the authors have not specified in any detail which courses they claim they should be entitled to undertake at an earlier point of imprisonment, and that the State party has observed that all standard courses are available throughout the term of imprisonment, while certain courses of immediate relevance to post-release situations are conducted prior to release in order to enhance the appropriateness of timing. The Committee accordingly considers that the authors have failed to substantiate, for the purposes of admissibility, that the timing and content of courses made available in prison, give rise to claims under articles 7 and 10 of the Covenant.

6.5 As to whether the imposition of preventive detention in the cases of Messrs. Harris and Rameka ('the remaining authors') is consistent with the Covenant, the Committee considers this claim to have been sufficiently substantiated, for purposes of admissibility, under articles 7, 9, paragraphs 1 and 4, 10, paragraphs 1 and 3, and 14, paragraph 2, of the Covenant.

Consideration of the merits (cases of Messrs. Rameka and Harris)

7.1 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.

²¹ *R. v. Dittmer*, op. cit.

²² Op. cit.

7.2 The Committee observes at the outset that Mr. Harris would have been subjected, according to the Court of Appeal, to a finite sentence of “not less than” seven and a half years with respect to his offences. Accordingly, Mr. Harris will serve two and a half years of detention, for preventive purposes, before the non-parole period arising under his sentence of preventive detention expires. Given that the State party has demonstrated no case where the Parole Board has acted under its exceptional powers to review *proprio motu* a prisoner’s continued detention prior to the expiry of the non-parole period, the Committee finds that, while Mr. Harris’ detention for this period of two and a half years is based on the State party’s law and is not arbitrary, his inability for that period to challenge the existence, at that time, of substantive justification of his continued detention for preventive reasons is in violation of his right under article 9, paragraph 4, of the Covenant to approach a “court” for a determination of the ‘lawfulness’ of his detention over this period.

7.3 Turning to the issue of the consistency with the Covenant of the sentences of preventive detention of both the remaining authors, Messrs. Rameka and Harris, once the non-parole period of ten years expires, the Committee observes that after the ten-year period has elapsed, there are compulsory annual reviews by the independent Parole Board, with the power to order the prisoner’s release if they are no longer a significant danger to the public, and that the decisions of the Board are subject to judicial review. The Committee considers that the remaining authors’ detention for preventive purposes, that is, protection of the public, once a punitive term of imprisonment has been served, must be justified by compelling reasons, reviewable by a judicial authority, that are and remain applicable as long as detention for these purposes continues. The requirement that such continued detention be free from arbitrariness must thus be assured by regular periodic reviews of the individual case by an independent body, in order to determine the continued justification of detention for purposes of protection of the public. The Committee is of the view that the remaining authors have failed to show that the compulsory annual reviews of detention by the Parole Board, the decisions of which are subject to judicial review in the High Court and Court of Appeal, are insufficient to meet this standard. Accordingly, the remaining authors have not demonstrated, at the present time, that the future operation of the sentences they have begun to serve will amount to arbitrary detention, contrary to article 9, once the preventive aspect of their sentences commences.

7.4 Furthermore, in terms of the ability of the Parole Board to act in judicial fashion as a “court”

and determine the lawfulness of continued detention under article 9, paragraph 4, of the Covenant, the Committee notes that the remaining authors have not advanced any reasons why the Board, as constituted by the State party’s law, should be regarded as insufficiently independent, impartial or deficient in procedure for these purposes. The Committee notes, moreover, that the Parole Board’s decision is subject to judicial review in the High Court and Court of Appeal. In the Committee’s view, it also follows from the permissibility, in principle, of preventive detention for protective purposes, always provided that the necessary safeguards are available and in fact enjoyed, that detention for this purpose does not offend the presumption of innocence, given that no charge has been laid against the remaining authors which would attract the applicability of article 14, paragraph 2, of the Covenant.²³ As the detention in the remaining authors’ cases for preventive purposes is not arbitrary, in terms of article 9, and no suffering going beyond the normal incidents of detention has been suggested, the Committee also finds that the remaining authors have not made out any additional claim under article 10, paragraph 1, that their sentence of preventive detention violates their right as prisoners to be treated with respect for their inherent dignity.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 9, paragraph 4, of the Covenant with respect to Mr. Harris.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Harris with an effective remedy, including the ability to challenge the justification of his continued detention for preventive purposes once the seven and a half year period of punitive sentence has been served. The State party is under an obligation to avoid similar violations in the future.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognised 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 recognised in the Covenant, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee’s Views.

²³ See also *Wilson v. The Philippines*, Case No. 868/1999, Views adopted on 30 October 2003, paragraph 6.5.

APPENDIX

Individual Opinion of Committee members Prafullachandra Natwarlal Bhagwati, Christine Chanet, Maurice Glèlè Ahanhanzo and Hipólito Solari Yrigoyen (partly dissenting)

In stating, in paragraph 7.2 of the decision, that Mr. Harris' detention is based on the State party's law and is not arbitrary, the Committee proceeds by assertion and not by demonstration.

In our view, the arbitrariness of such detention, even if the detention is lawful, lies in the assessment made of the possibility of the commission of a repeat offence. The science underlying the assessment in question is unsound. How can anyone seriously assert that there is a "20% likelihood" that a person will reoffend?

To our way of thinking, preventive detention based on a forecast made according to such vague criteria is contrary to article 9, paragraph 1, of the Covenant.

However far any checks made when considering parole may go to prevent violations of article 9, paragraph 4, of the Covenant, it is the very principle of detention based solely on potential dangerousness that I challenge, especially as detention of this kind often carries on from, and becomes a mere and, it would not be going too far to say, an "easy" extension of a penalty of imprisonment.

While often presented as precautionary, measures of the kind in question are in reality penalties, and this change of their original nature constitutes a means of circumventing the provisions of articles 14 and 15 of the Covenant.

For the defendant, there is no predictability about preventive detention ordered in such circumstances: the detention may be indefinite. To rely on a prediction of dangerousness is tantamount to replacing presumption of innocence by presumption of guilt.

Paradoxically, a person thought to be dangerous who has not yet committed the offence of which he/she is considered capable is less well protected by the law than an actual offender.

Such a situation is a source of legal uncertainty and a great temptation to judges who may wish to evade the constraints of articles 14 and 15 of the Covenant.

Individual Opinion (partly dissenting) of Committee member Walter Kälin

The Committee concludes, in paragraph 7.2 of its Views, that Mr. Harris will serve two and a half years of detention, for preventive purposes, before he can approach the Parole Board after a total of ten years of detention and that the denial of access to a "court" during this period amounts to a violation of his right under article 9, paragraph 4, of the Covenant. This finding is based on the assumption that Mr. Harris would have been subjected, according to the Court of Appeal, to a finite sentence of "not less" than seven and a half years with respect of his offences. While the Court of Appeal did, indeed, observe

that the case would warrant a finite sentence of "not less" than seven and a half years, it did not impose such a finite sentence, but rather substituted a sentence of preventive detention from the outset. Finite sentences are to be proportionate to the seriousness of the crime and the degree of guilt, and they serve multiple purposes, including punishment, rehabilitation and prevention. In contrast, as is clearly spelled out in section 75 of the State party's Criminal Justice Act 1985, preventive detention does not contain any punitive element, but serves the single purpose of protecting the public against an individual in regard to whom the court is satisfied "that there is a substantial risk that [he] will commit a specified offence upon release." Although preventive detention is always triggered by the commission of a serious crime, it is not imposed for what the person concerned did in the past, but rather for what he is, i.e. for being a dangerous person who might commit crimes in the future. While preventive detention for the purpose of protecting the public against dangerous criminals is not prohibited as such under the Covenant and its imposition sometimes cannot be avoided, it must be subject to the strictest procedural safeguards, as provided for in article 9 of the Covenant, including the possibility for periodic review, by a court, of the continuing lawfulness of such detention. Such reviews are necessary as any human person has the potential to change and improve, i.e. to become less dangerous over time (e.g. as a consequence of inner growth or of a successful therapy, or as a result of an ailment reducing his physical abilities to commit a specific category of crimes). In the present circumstances, Mr. Harris did not receive any finite sentence aimed at sanctioning past conduct, but was detained for the sole reason of protection of the public. Therefore, I conclude that his right to "take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful" (article 9, paragraph 4) was not only violated during the last two and a half years of the first ten years of preventive detention, but also during that whole initial period. For the same reasons, I would find that the detention over the same initial period of 10 years prior to review by the Parole Board would also be in violation of article 9, paragraph 4, with respect to Mr. Rameka.

Individual Opinion of Committee member Rajsoomer Lallah (dissenting)

I am unfortunately unable to join the majority in the Committee in their conclusion that there has been no violation of the Covenant except in the case of Mr. Harris where a violation was found in respect of article 9, paragraph 4, of the Covenant (paragraph 7.2 of the Committee's Views). Nor do I agree, for the reasons explained in Paragraph 2 of this Separate Opinion, that the Committee should have declared the communication admissible only in respect of articles 7, 9, paragraphs 1 and 4, 10, paragraphs 1 and 3, and, finally, 14, paragraph 2, of the Covenant (paragraph 6.5 of the Views), and not articles 14 and 15, paragraph 1.

Admittedly, the authors would appear, from paragraph 1 of the Views, to have mentioned particular provisions of the Covenant. However, under the Optional Protocol, authors need only aver facts and offer

submissions and arguments in support of their complaint so that the State party may be given an opportunity to address them. Indeed, many authors have done so in the past. And it is in the province of the Committee to consider and determine, in the light of all the information provided by the authors and the State party, which particular provisions of the Covenant are or are not relevant. In any event, in considering the application or interpretation of particular provisions of the Covenant, it may be necessary to consider the impact of other provisions of the Covenant, provided always that both sides have been given the opportunity of addressing the particular facts, submissions or arguments put forward by the other party.

The complaint of the authors covers a number of issues. The most important among these is, in my view, their contention that preventive detention in their case is inconsistent with the Covenant, in particular, in that they were effectively being sentenced and punished for what they might do when released, rather than for what they have done, that is to say, they were being punished for crimes which had not been, and which might never be, committed. This complaint requires, in my view, consideration of the application of articles 14 and, also, 15, paragraph 1, of the Covenant.

With respect, the majority in the Committee would appear to have simply assumed that the “preventive detention” prescribed in New Zealand law expressly as a “sentence” or penalty for certain criminal offences is legitimate under article 9 of the Covenant. Undoubtedly, the provision in the second sentence of article 9, paragraph 1, of the Covenant leaves it to States parties to determine the grounds, and the procedure in accordance with which, a person may be deprived of his liberty

As the Committee has pointed out as far back as 1982 in General Comment No. 8 in relation to article 9 of the Covenant, paragraph 1 of that article is applicable to all deprivations of liberty, whether in criminal cases or such other cases as mental illness, vagrancy, drug addiction, educational purposes and immigration control, etc. However, both the grounds and the procedure required to be prescribed by law under article 9, paragraph 1, must be consistent with the other rights recognized in the Covenant.

It is axiomatic, therefore, that where one of the grounds relied upon is a certain type of conduct, in particular circumstances, which is created into a criminal offence and sanctioned by law by deprivation of liberty, then not only must the particular offence created but its sanction as well must comply with the guarantees provided in article 15, paragraph 1, of the Covenant. In my view, two important features, among others, characterise article 15, paragraph 1. Firstly, a criminal offence relates only to past acts. Secondly, the penalty for that offence can only relate to those past acts. It cannot extend to some future psychological condition which might or might not exist in the offender some ten years thereafter and which might or might not lead an offender who has already purged the punitive part of his sentence to be exposed to the risk of further detention. Further, the trial for such offences and the sanction to be imposed must also satisfy the requirements of a fair trial guaranteed under article 14 of the Covenant.

Rape is undoubtedly a serious offence and violence against women requires the adoption of all appropriate

measures by a State party to deal with the problem, including penalisation, which meets the guarantees of articles 14 and 15 of the Covenant, and treatment, reformation and social rehabilitation of offenders which the State party is under an obligation to undertake in pursuance of article 10, paragraph 3, of the Covenant. There is further nothing which would prevent a State party from adopting measures to supervise and effectively monitor, administratively or by the Police, the behaviour of past offenders on release, in circumstances where there are reasonable and good grounds for apprehending their reoffending.

Now, according to the information provided by the authors and the State party, it would seem that that the minimum period of preventive detention was legislatively fixed at the relevant time to 10 years and has now been reduced to 5 years, but is not subject to a maximum period. This maximum period of detention is thus removed from the jurisdiction of the trial Court and is left to a Parole Board, with the result that the trial Court is legislatively prevented from passing a finite sentence. The State party considers that the legislatively fixed minimum period of 10 years is the punitive part of the sentence, the Parole Board being entrusted with the competence of periodically determining the finality of the sentence, on the reasoning that the sentence becomes preventive and, in principle, without a maximum limit. This in itself would clearly raise a serious question of proportionality.

I note that the material before the Committee indicates that the detention following the so-called punitive period continues in prison. In these circumstances, the “punitive” and “preventive” parts of the sentence become, in reality, a distinction without a difference. When stripped of the colourable statutory device which purportedly confers power to sentence on the trial Court, the reality is that, in substance and in practice, it is only part of the sentence which is left to the trial Court (and that too at a legislatively fixed minimum over which the trial Court has no control or discretion). The rest of the sentence is left in the hands of an administrative body, without the due process guarantees of article 14. There is of course nothing wrong in legal measures enabling early release, but enabling an administrative body to determine in effect the duration of the sentence beyond the statutory minimum is another matter.

I would thus conclude as follows:

(i) While it is legitimate to consider past conduct, good or bad, as a relevant factor in determining sentence, a violation of article 15, paragraph 1, of the Covenant has occurred, because that article only permits the criminalization and sanctioning, by law, of past acts but not acts which it is feared might occur in the future.

(ii) A violation of article 15, paragraph 1, has occurred, also because the law does not prescribe a finite sentence to be imposed by the trial Court.

(iii) A violation of article 14, paragraph 1, has occurred in that a fair trial requires that the Court before which a trial is conducted must have the jurisdiction to pass a definitive sentence and not one that is legislative fixed to a minimum of years. Furthermore, the law of the State party, in effect, delegates this jurisdiction to an administrative body which will determine the length of the

sentence at some time in the future, without the due process guarantees prescribed under article 14 of the Covenant.

(iv) A violation of article 14, paragraph 2, has also occurred because an anticipatory assessment of what may happen after a lapse of 10 years or so, even before the benefits of treatment, reformation and social rehabilitation required under article 10, paragraph 3, of the Covenant have taken place, could not conceivably meet the essential burden of proof required. In this regard, though relevant in determining sentence, even previous convictions concerning past criminal conduct require to be proved beyond reasonable doubt where these are disputed by the person accused.

(v) It is not correct, therefore, to find a violation of article 9, paragraph 4, of the Covenant, as it is inapplicable in the light of the above approach. If a finding of a violation of article 9 is at all necessary, then it would be article 9, paragraph 1, because the State party has failed to construe it in the light of other applicable provisions of the Covenant, in particular articles 14 and 15 of the Covenant. But a violation of these latter articles or relevant provisions of those articles has already been found.

Individual Opinion (partly dissenting) of Committee members Ivan Shearer and Roman Wieruszewski, in which Committee member Nisuke Ando joins

In our view, the reasons for deciding that the State party is not in violation of the Covenant in respect of the sentence of preventive detention imposed on Mr. Rameka, with which we agree, apply equally to the case of Mr. Harris. The ground of distinction between the cases of the two remaining authors, drawn by the Committee, is that in the case of Mr. Rameka a finite sentence of fourteen years imprisonment was imposed on one count of the indictment to be served concurrently with the sentence of preventive detention imposed on another count. In the case of Mr. Harris, the concurrent finite sentence would have been seven and a half years, had the Court of Appeal not decided that a sentence of preventive detention was justified for the protection of the community thus leaving a gap of two and a half years between the expiry of that potential sentence and the end of the non-parole period of the sentence of preventive detention (at ten years).

The author himself did not advance any argument before the Committee based upon an actual or hypothetical non-review “gap” period.

It is not appropriate, in our opinion, to separate indefinite preventive detention into punitive and preventive segments. Unlike finite sentences, which are based on the traditional purposes of imprisonment – to punish and to reform the offender, to deter the offender and others from future offending, and to vindicate the victim and the community – sentences of preventive

detention are designed solely to protect the community against future dangerous conduct by an offender in respect of whom past finite sentences have manifestly failed to achieve their aims.

Under the State party’s law applicable to the authors a sentence of preventive detention runs for ten years before the sentence may be reviewed by the Parole Board (whose decisions are subject to judicial review). As a result of a recent amendment to that law, the non-review period has been shortened to five years. Even the longer period cannot be regarded as arbitrary or unreasonable in the light of the conditions governing the imposition of such a sentence. We consider that the State party’s law in respect of preventive detention cannot be regarded as contrary to the Covenant. In particular, article 9, paragraph 4, of the Covenant cannot be construed so as to give a right to judicial review of a sentence on an unlimited number of occasions.

Individual Opinion (partly dissenting) of Committee member Nisuke Ando

I concur fully with the opinion of Messrs. Shearer and Wieruszewski. Moreover, I would like to add the following:

The majority Views seem to find a violation of article 9, paragraph 4, in the case of Mr. Harris on the assumption that the period of imprisonment under the relevant New Zealand law should be divided into a punitive detention part, which consists of a definite or fixed time-period (non-parole period) and a preventive detention part, which consists of indefinite or flexible time-period. In my view, this assumption of a division is artificial and not valid.

In many other States parties to the Covenant, domestic courts often sentence a convict to imprisonment for flexible time-period (e.g. five to ten years) so that, while he/she must be imprisoned for the shorter time-period (five years), he/she can be released before the longer time-period (ten years) depending on his/her conditions of improvement or amelioration. In substance, this sentencing of imprisonment for a flexible period of time is comparable to the regime of preventive detention under the New Zealand law.

The term “preventive detention” may give an impression that it is primarily detention of administrative nature as opposed to detention of judicial nature. However, the Committee should look into not the name but the substance of any institution of law of a State party in determining its legal character. In other words, if the Committee considers the sentencing of imprisonment for a flexible period of time to be compatible with the Covenant, there is no reason why it should not do the same with preventive detention under the New Zealand law. In fact, article 31, paragraph 2, of the Covenant requires that the Committee should represent “the principal legal systems” of the world.

Communication No. 1095/2002

Submitted by: Bernardino Gomariz Valera (represented by counsel)

Alleged victim: The author

State party: Spain

Date of adoption of Views: 22 July 2005 (eighty-fourth session)

Subject matter: Trial with proper safeguards

Procedural issues: Substantiation of the alleged violation - Exhaustion of domestic remedies

Substantive issues: Right to be tried without undue delay - Right not to be compelled to testify against oneself or to confess guilt - Right to have one's conviction and sentence reviewed by higher tribunal according to law

Article of the Covenant: 14, paragraph 3 (c) and (g), and paragraph 5

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

Finding: Violation (14, paragraph 5)

1. The author of the communication, dated 4 September 1997, is Bernardino Gomariz Valera, a Spanish national born in 1960. He claims to be a victim of violations by Spain of article 14, paragraph 3 (c) and (g), and paragraph 5 of the Covenant. The Optional Protocol entered into force for Spain on 25 April 1985. The author is represented by counsel, Mr. José Luis Mazón Costa.

Factual background

2.1 The author worked in sales promotion for the company Coloniales Pellicer S.A. in Murcia. On 20 January 1989, the author signed a private document acknowledging a debt to the company. Having signed the document, the author continued working for the company until May 1990, when he was dismissed. The author and the company signed a conciliation agreement before labour court No. 4 in Murcia, terminating the employment contract, and the money owed to the author in terms of salary and redundancy pay was deducted from the total debt he had acknowledged in January 1989.

2.2 The company lodged a complaint against the author for misappropriation. On 16 May 1996, the judge of criminal court No. 2 in Murcia acquitted the author. The company lodged an appeal. On 16 September 1996, the Provincial High Court sentenced the author to five months' imprisonment for misappropriation, disqualified him from public employment or office, suspended his right to vote and ordered him to pay costs.

2.3 The author lodged an *amparo* application before the Constitutional Court, which was rejected on 29 January 1997. In the application, the author alleged both violation of his right not to be compelled to testify against himself, given that the only evidence on which he was convicted was his acknowledgement of a debt to the company, and violation of his right to be tried without undue delay. Although the author had made this last claim at the beginning of the oral proceedings, in accordance with the rules governing criminal procedure, the Constitutional Court ruled that the author's claim had been lodged out of time, when the delays had ended. As to the alleged violation of the right not to confess guilt, it is clear from the Constitutional Court ruling submitted by the author that the Court concluded that the probative force of the acknowledgement of the debt had in no way affected his right not to confess guilt, given that the acknowledgment had taken place prior to the trial, and that the author did not claim to have been coerced in any way into acknowledging the debt.

The complaint

3.1 The author claims a violation of his right not to be compelled to testify against himself (article 14, paragraph 3 (g), of the Covenant) on the grounds that the only evidence on which his conviction was based was the acknowledgment of debt that he signed long before the criminal proceedings began. He claims that he was tricked into acknowledging the debt as a way of regularizing his position in the company.

3.2 The author claims a violation of his right to be tried without undue delay (article 14, paragraph 3 (c), of the Covenant), given that 3 years, 4 months and 29 days elapsed between the start of proceedings and the day of the court hearing. The complexity of the case was insufficient to justify such a delay.

3.3 The author claims a violation of article 14, paragraph 5, of the Covenant, on the grounds that he was initially convicted at second instance, by the appeal court, and was denied the right to request a review of that conviction by a higher court. Although he did not include this claim in his *amparo* application before the Constitutional Court, the author believes that it would have been futile to do so, since the rules governing criminal procedure do not envisage the possibility of appealing against a

sentence that was passed by the appeal court, when that court was the first to convict the accused. According to the practice of the Constitutional Court, *amparo* applications against legal norms are inadmissible when they are brought by individuals, as opposed to the bodies authorized by the Constitution to challenge the constitutionality of laws. Furthermore, the author cited the Constitutional Court ruling of 26 June 1999, which established that a conviction by an appeal court following an acquittal by the court of first instance did not violate the right to review.

State party's submissions on admissibility and merits

4.1 In respect of the facts reported by the author, the State party points out that the document acknowledging the debt records that the author put aside 4,725,369 pesetas without the company's knowledge or consent, and that he continued working at the company in order to pay off the debt. The author subsequently reported the theft from his house of 7 million pesetas - which he had been paid by clients of the company. The company consequently lost faith in the author, who was dismissed on 4 February 1991. A criminal investigation against him was opened thereafter.

4.2 The State party argues that domestic remedies were not exhausted in regard to the alleged violation of article 14, paragraph 3 (c), of the Covenant. It maintains that the right to trial without undue delay is protected in two ways in Spain: (i) by means of specific relief. In the case of undue delay, the person affected can complain to the court that is handling the matter. If the delay continues, the person can appeal to the Constitutional Court, which will decide whether the complaint is well-founded. If so, the Court will order an immediate end to the delay; (ii) by means of compensation. The person affected should request compensation for injury suffered as a result of the delay, in accordance with the procedure set out in the law. The European Court of Human Rights has stated repeatedly that compensation is a valid and effective domestic remedy, and the fact that use was not made of it would imply that the claim is inadmissible on the grounds that domestic remedies were not exhausted.¹ In the case of the author, the State party maintains that while the case was being investigated (3 years and 11 days), the author did not make any request for specific relief. Following the investigation, at the beginning of the trial the author invoked the alleged undue delay in the investigation, which had, by that point, ended. Given that the delay was no longer ongoing, the

author should have pursued the option of compensation. Since he did not do so, his claim is inadmissible on the grounds that he did not exhaust domestic remedies.

4.3 As to the alleged violation of article 14, paragraph 3 (g), the State party maintains that the document in which the author acknowledges having appropriated the company's money pre-dates the criminal case, which is the only context in which a person's right not to be compelled to testify against himself is recognized. The author signed the document freely, and did not claim to have made the declaration in the document under any constraint or compulsion whatsoever. The document and its contents were used to acquit the author in the lower court, as the judge regarded the document as proof that the author had not intended to steal the money. The Provincial High Court set aside that ruling and concluded that there had in fact been intent to steal. The State party maintains that since the document was used in support of acquittal, it is illogical to reject it in the case of a conviction, particularly bearing in mind the author's subsequent conduct. The State party argues that this part of the complaint is inadmissible in accordance with article 3 of the Optional Protocol, and failing that, that no violation took place.

4.4 With regard to the alleged violation of article 14, paragraph 5, of the Covenant, the State party asserts that it is inadmissible on the grounds that domestic remedies were not exhausted. The State party points out that the author should have lodged an *amparo* application before the Constitutional Court. The State party adds that the author's claim that an individual cannot lodge an *amparo* application alleging that legal norms are unconstitutional is not accurate. The law clearly provides for applications for *amparo* proceedings from individuals who consider their fundamental rights to have been violated. As to the substance of this claim, the State party points out that the right to have a conviction reviewed by a higher tribunal cannot be invoked *ad absurdum*, providing the right to a third, fourth, or fifth hearing, and cites article 2, paragraph 2, of Protocol No. 7 to the European Convention on Human Rights. According to the Convention, a person's right to have his conviction reviewed by a higher tribunal may be subject to exceptions in cases in which the person was convicted following an appeal against acquittal at first instance. The State party adds that article 14, paragraph 5, of the Covenant cannot be interpreted as forbidding the prosecution to lodge appeals. The purpose of the right referred to in article 14, paragraph 5, is to avoid a breach of the right to a defence. The author's right of defence was not breached, since his claims were considered and ruled upon in accordance with the law by two separate

¹ European Court of Human Rights, complaint No. 39521/98, *Jesús María González Marín v. Spain*, decision on admissibility, 5 October 1999.

judicial bodies. It is therefore not true to say that no review was carried out.

4.5 The State party further notes that the original claim made in September 1997 did not include the alleged violation of article 14, paragraph 5, of the Covenant, which the author first referred to in December 1999. On 23 April 2001, the author cited the Constitutional Court ruling of 28 June 1999, made two years after the original claim, to allege that it was not necessary to lodge an *amparo* application before the Constitutional Court. The State party maintains that the Constitutional Court ruling does not override the requirement to exhaust domestic remedies, enshrined in article 5, paragraph 2, of the Optional Protocol. The State party concludes that the author's claim should be declared inadmissible on the grounds that at no time did he invoke the substance of the alleged violation of article 14, paragraph 5, before the domestic courts.

Author's comments on State party's observations

5.1 As to the alleged violation of article 14, paragraph 3 (c), of the Covenant, the author contends that the period of time that elapsed between the submission of the claim and the ruling - over three years - clearly goes against the right to be tried without undue delay.

5.2 With regard to the alleged violation of article 14, paragraph 3 (g), the author maintains that the right not to be compelled to confess guilt has implications that go beyond the prohibition of such action during the trial. The author was convicted solely on the grounds that he had, 17 months prior to making his claim, acknowledged a debt, in an attempt to resolve his differences with the company. Neither the company nor the public prosecutor brought direct evidence that the offence of misappropriation had been committed. It is clear that the document was drawn up in a climate of trust, in an effort to regularize a number of debts the author had incurred. The confession of guilt made outside the trial, in the context of a relationship of trust, cannot be the only basis on which the defendant is convicted. If it were, it would contravene the right not to be compelled to testify against oneself or to confess guilt, which includes the right not to be tricked into testifying against oneself.

5.3 As to the alleged violation of article 14, paragraph 5, of the Covenant, the author emphasizes that he was first convicted by a court of appeal. He maintains that, unlike other States parties, when Spain ratified the Covenant, it did not make a reservation that would have excluded cases in which defendants were convicted after appeals had been filed against their acquittal. He adds that the State party is obliged to guarantee a person's right to have his conviction reviewed when the first conviction is

handed down at second instance. The author accepts that, owing to an error in the initial communication, he maintained that individuals could not bring *amparo* applications alleging the unconstitutionality of laws that violate fundamental rights. However, lodging an *amparo* application would have been futile because, according to the practice of the Constitutional Court, the right to review is not violated when it is the court of appeal that hands down the first conviction.

Issues and proceedings before the Committee

Admissibility considerations

6.1 In accordance with rule 93 of its rules of procedure, before examining the claims made in a communication, the Human Rights Committee must decide whether or not the communication is admissible under the Optional Protocol to the International Covenant on Civil and Political Rights.

6.2 Regarding the alleged violation of article 14, paragraph 3 (g), the Committee notes that the author admits to having signed the document acknowledging his debt of his own free will,² before the trial against him began. In that document, he acknowledged that he had kept money belonging to the company without the company's knowledge or consent. The Committee recalls its jurisprudence that the wording of article 14, paragraph 3 (g) - i.e., that no one shall "be compelled to testify against himself or to confess guilt" - must be understood in terms of the absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt.³ As to the author's allegation that the document acknowledging the debt, which was obtained outside the judicial process, was the only evidence on which his conviction was based, the Committee notes that the court's ruling based the author's responsibility on his conduct before, during and after the document was signed. In the court's opinion, the author's conduct proved his intent to deceive. In accordance with the Committee's settled jurisprudence, it is not for the Committee to examine the manner in which facts and evidence have been evaluated by domestic courts, unless it was clearly arbitrary or amounted to a denial of justice, which was not the case here. The Committee concludes that the author has not substantiated the alleged violation of article 14, paragraph 3 (g), of the Covenant for purposes of admissibility, and that this part of the communication is inadmissible under article 2 of the Optional Protocol.

² See paragraph 5.2 above.

³ Communication No. 253/1987, *Kelly v. Jamaica*, decision of 8 April 1991, paragraph 5.5.

6.3 As to the claim that the procedure was unduly prolonged, the Committee takes note of the State party's contention that the author could have applied for specific relief to put an end to the delay, and for compensation once the delay had ended. The Committee notes that the author has neither disputed nor dismissed the State party's assertion that recourse to compensation is an effective remedy. It therefore considers that this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.⁴

6.4 As to the alleged violation of article 14, paragraph 5, of the Covenant, the Committee takes note of the author's argument that lodging an *amparo* application before the Constitutional Court would have been futile because, according to the practice of the Court, the right to review is not violated when it is the court of appeal that hands down the first conviction. In this regard, the Committee recalls its jurisprudence that it is only necessary to exhaust those remedies that have a reasonable prospect of success, and it reiterates that when the highest domestic court has ruled on the matter in dispute, thereby eliminating any prospect that a remedy before the domestic courts may succeed, the author is not obliged to exhaust domestic remedies for the purposes of the Optional Protocol.⁵ In the present case, that ruling came in a slightly later case, but it tended to confirm that resort to this remedy would have been futile.

6.5 The Committee therefore declares that the author's claims under article 14, paragraph 5, are admissible, and turns to consideration of the merits.

Consideration of the merits

7. Article 14, paragraph 5, of the Covenant stipulates that everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. The Committee points out that that expression "according to law" is not intended to leave the very existence of a right of review to the discretion of the States parties. On the contrary, what must be understood by "according to law" is the modalities by which the review by a higher tribunal is to be carried out.⁶ Article 14, paragraph 5, not only

⁴ With regard to the issue of placing the burden of proof on the author when the State party has properly demonstrated that effective remedies are available, see communication No. 1084/2002, *Bochaton v. France*, decision of 1 April 2004, paragraph 6.3.

⁵ See, for example, communication No. 511/1992, *Länsman et al. v. Finland*, decision on admissibility, 14 October 1993, paragraph 6.3.

⁶ Communication No. 1073/2002, *Terrón v. Spain*, decision of 5 November 2004, paragraph 7.4;

guarantees that the judgement will be placed before a higher court, as happened in the author's case, but also that the conviction will undergo a second review, which was not the case for the author. Although a person acquitted at first instance may be convicted on appeal by the higher court, this circumstance alone cannot impair the defendant's right to review of his conviction and sentence by a higher court, in the absence of a reservation by the State party. The Committee accordingly concludes that there has been a violation of article 14, paragraph 5, of the Covenant with regard to the facts submitted in the communication.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, paragraph 5, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is required to furnish the author with an effective remedy, including the review of his conviction by a higher tribunal.

10. By becoming a party to the Optional Protocol, Spain recognized the competence of the Committee to determine whether there has been a violation of the Covenant. 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 furnish them with an effective and applicable remedy should it be proven that a violation has occurred. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

APPENDIX

Individual opinion (dissenting) by Committee members Elisabeth Palm, Nisuke Ando and Michael O'Flaherty

We regret that we cannot agree with the majority's finding that the author was not obliged to exhaust domestic remedies in the present case.

The author claims that it would have been futile to lodge an *amparo* in his case. The State party is of the opposite view. I note that the author's original claim in September 1997 did not include the alleged violation of article 14, paragraph 5, of the Covenant, which the author first referred to in December 1999. In his submission on 23 April 2001, the author cited the Constitutional Court ruling of 28 June 1999 to allege that it was not necessary to lodge an *amparo* application before the Constitutional Court.

communication No. 64/1979, *Salgar de Montejó v. Colombia*, decision of 24 March 1982, paragraph 10.4.

According to the Committee's jurisprudence an author only has to exhaust those remedies that have a reasonable prospect of success. Where there is a settled case law which indicates that an appeal would have been futile it is not necessary to exhaust that remedy. In the present case it was open to the author to lodge an application for *amparo* proceedings before the Constitutional Court, claiming that his fundamental right had been violated in that the rules governing criminal procedures did not envisage the possibility of appealing against a sentence that was passed by the appeal court when that court was the first to convict the accused. However, the author failed to lodge an *amparo*.

At the time when the author's case was finally decided on 29 January 1997 there existed no case law by the Constitutional Court. It was not until 26 June 1999 that the Constitutional Court ruled that a conviction by an appeal court following an acquittal by the court of first instance did not violate the right to review.

In our opinion the author cannot, for the purpose of exhaustion of domestic remedies, rely on a ruling by the Constitutional Court which was delivered nearly 2 and half years after his case was finally decided. As at the time there was no settled practice or case law on the issue the author should have lodged an *amparo*. He failed to do so. Accordingly, we find that he has not exhausted domestic remedies regarding his claim under article 14, paragraph 5, of the Covenant.

Individual opinion by Committee member Ruth Wedgwood

I join my colleagues in doubting the propriety of reaching the merits of the author's claim under Article 14 (5) of the Covenant, because of the author's failure to exhaust domestic remedies. When the author lodged an application for *amparo* before the Constitutional Court of Spain in late 1996, he failed to include, within the stated grounds of his petition, any semblance of his current claim to the Human Rights Committee. In particular, he declined to put to the Constitutional Court any complaint that Spain's law of criminal procedure is deficient insofar as it fails to grant a full appeal from convictions rendered in a second-instance court. Indeed, the author did not address such a claim to the Human Rights Committee in his original communication in September 1997, adding the issue only in 1999.

The ruling of the Constitutional Court, in a different and later case, even if it is assumed to be dispositive on the issue, should not make a difference in regard to exhaustion. For one thing, many legal systems properly decline to give retroactive effect to a new rule unless a party has previously raised the issue in the domestic courts. It is up to a party to preserve his claim by putting the issue in a timely fashion. Here, the author is represented by legal counsel, and this further justifies the ordinary application of exhaustion as a prerequisite.

Additionally, the merits of the author's claim under Article 14 (5) of the Covenant may be more problematic than the Views of the Committee suggest. The Committee holds *tout courtte*, see Paragraph 7.1 *supra*, that "Although a person acquitted at first instance may be convicted on appeal by the higher court, this circumstance alone cannot impair the defendant's right to review of his conviction

and sentence by a [yet] higher court." This is new ground for the Committee, and its rule, widely applied, could disrupt the court systems of many civil-law countries.

To be sure, in the legal tradition of common-law countries, an appellate court cannot disturb an acquittal below, and indeed to do so, would pose serious constitutional questions. The historic independence of the common-law jury has protected its verdicts of acquittal from any review.

But in civil law countries, including such states as Austria, Belgium, Germany, Luxemburg, and Norway, an acquittal by a court of first instance may apparently be vacated in favour of conviction, by a second-instance court sitting in review – and there may be no further appeal, as of right, from that second-instance court. The international war crimes tribunals created by the United Nations Security Council for the trial of war crimes in the former Yugoslavia and Rwanda also create the same capacity in the appellate chamber, with no further right of review.

The five European countries cited above have entered formal reservations to the International Covenant on Civil and Political Rights to preserve their right to institute convictions at the appellate stage, without further review. But as Judge Mohamed Shahabuddeen has remarked in another setting, "some of those statements lean towards interpretative declarations,"⁷ i.e., they are worded as clarifications as to what the Covenant is assumed to mean in the first place.

In addition, the Committee should take account of Protocol 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which came into force on November 1, 1988. Article 2 (1) of the Protocol guarantees to any person convicted of a criminal offence "the right to have his conviction or sentence reviewed by a higher tribunal." But Article 2 (2) of the Protocol also notes, as an allowable "exception" to further appeal, those cases "in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal."

Of course, the European Convention does not govern the jurisprudence of the United Nations Human Rights Committee. And the language of Article 2 (2) of Protocol 7 goes beyond the text of the International Covenant on Civil and Political Rights in Article 14 (5). But it is hard to imagine, as Judge Shahabuddeen has wisely remarked, that the 35 [now 36] states parties to Protocol 7 of the European Convention "intended to act at variance with any obligations under article 14 (5) of the ICCPR." In reaching its decision today, the Committee has not paused to survey to what extent the practice of those 36 states, or other signatories of the Covenant, may be at variance with the standard we apply.

In a matter so fundamental to the structure of national court systems in civil-law countries, we should give some consideration to the views of the States parties, as well as their widespread practice. This is especially so in

⁷ See Separate Opinion of Mohamed Shahabuddeen, in *Prosecutor v. Rutaganda*, Case No. ICTR 96-3-A (International Criminal Tribunal for Rwanda, Appeals Chamber, May 26, 2003).

construing the language of a Covenant provision whose drafting history is itself ambiguous, and where some states have explicitly preserved their right to continue these practices, without objection by other States parties.

Indeed, this Committee has previously opined that there is “no doubt about the international validity” of a reservation to Article 14 (5) in the case of a conviction rendered in the Italian Constitutional Court, sitting as a

court of first instance, with no further appeal. *See Fanali v. Italy*, No. 75/1980, paragraph 11.6. The Committee interpreted the Italian reservation to apply to parties not specifically mentioned within its text.

Hence, I would treat today’s decision as limited to the facts and parties before us, and its rule as worthy of examination in a more comprehensive fashion at a later date.

Communication No. 1096/2002

Submitted by: Safarmo Kurbanova

Alleged victim: The author’s son, Mr. Abduali Kurbanov

State party: Tajikistan

Date of adoption of Views: 6 November 2003

Subject matter: Alleged violation of the right to life of an individual sentenced to death, following an unfair trial and use of torture during preliminary investigation

Procedural issue: Level of substantiation of claim

Substantive issues: Arbitrary deprivation of life - Prohibition of torture - Right to be informed of the charges against oneself at the time of arrest - Obligation to bring arrested before a judge - Arbitrary detention - Right to a fair trial - Defence rights - Right to be assisted by an interpreter - Right to have one’s conviction/ sentence reviewed by a higher tribunal

Articles of the Covenant: 6; 7; 9, paragraphs 2, and 3; 10; article 14, paragraphs 1, 3 (a) and (g), and 5

Articles of the Optional Protocol: 2

Finding: Violation (6; 7; 9, paragraphs 2 and 3; 10; 14, paragraphs 1 and 3 (a) and (g))

1.1 The author of the communication is Safarmo Kurbanova, a Tajik citizen born in 1929. She submits the communication on behalf of her son - Abduali Ismatovich Kurbanov, also Tajik citizen, born in 1960 and sentenced to death on 2 November 2001 by the Military Chamber of the Supreme Court of Tajikistan. He is at present awaiting execution in the Detention Centre No. 1 in Dushanbe. The author claims that her son is a victim of violations by Tajikistan¹ of articles 6, 7, 9 and 10, as well as paragraphs 1, 3 (a) and (g), and 5 of article 14 of the International Covenant on Civil and Political Rights. The communication also appears to raise issues

under article 14, paragraph 3 (d), of the Covenant, although this provision is not directly invoked. The author is not represented by counsel.

1.2 On 16 July 2002, in accordance with rule 86 of its rules of procedure, the Human Rights Committee, acting through its Special Rapporteur for New Communications, requested the State party not to carry out the death sentence of Mr. Kurbanov while his case is pending before the Committee. No reply has been received from the State party in this regard.

The facts as presented by the author

2.1 According to the author, Mr. Kurbanov went to the police on 5 May 2001 to testify as a witness. He was detained for seven days in the building of the Criminal Investigation Department of the Ministry of the Interior, where according to the author he was tortured. Only on 12 May 2001, a formal criminal charge of fraud was made against him, an arrest warrant was issued for him, and he was transferred to an investigation detention centre. He was forced to sign a declaration that he renounced the assistance of a lawyer.

2.2 On 9 June 2001, a criminal investigation was opened in relation to the triple murder of Firuz and Fayz Ashurov and D. Ortikov, which had occurred in Dushanbe on 29 April 2001. In addition to the initial fraud charge, the author’s son was, on 30 July 2001, charged with the murders and with illegal possession of firearms.² The author claims that her son was tortured before he accepted to write down his confession under duress; during her visits, she noted scars on her son’s neck and head, and as well as

¹ The Optional Protocol entered into force for Tajikistan on 4 April 1999.

² It transpires from documents later submitted by the State party that the author’s son was on 11 June 2001 initially informed that he was suspected of the murders.

broken ribs. She adds that one of the torturers – investigation officer Rakhimov – was charged in August 2001 with having received bribes and with abuse of power in 13 other cases also related to the use of torture; he was later sentenced to 5 years and six months of imprisonment.

2.3 The investigation was concluded on 4 August 2001, and the case was sent to court. On 2 November 2001, the Military Chamber of the Supreme Court sentenced the author's son to death (with confiscation of his property). On 18 December 2001 the judgment was confirmed by the Supreme Court, following extraordinary appeal proceedings.

2.4 The judgment of 2 November 2001 by the Military Chamber of the Supreme Court was submitted to the Committee by the author in Tajik; an unofficial English translation was provided subsequently. The judgment includes neither an account of the prosecution's case nor a transcript of the actual trial. It begins with a description of the facts as established by the court, then moves to the testimonies of the three accused persons and some witnesses, and finally addresses the issues of the conviction and sentencing. It does not transpire from this judgment how the Military Chamber of the Supreme Court was constituted, e.g. whether one or more of its judges were military officers. However, it transpires that Mr. Kurbanov was tried together with one Mr. Ismoil and Mr. Nazmudinov, who was a major in the service of the Ministry of National Security. According to the facts established by the court, Mr. Kurbanov killed, on 29 April 2001 three persons in the car of one of the victims, using an unregistered pistol. Later, he hid the bodies by burying them in the immediate vicinity of his garage and left the pistol with Mr. Ismoil, after telling him that he had killed three persons. On 8 May 2001, Mr. Ismoil delivered the pistol to Mr. Nazmedinov who in turn failed to deliver it to the authorities. Instead, the gun was found on 12 June 2001 in Mr. Nazmedinov's apartment.

2.5 According to the same judgment, Mr. Kurbanov confessed to the killings and admitted to burying his own clothes and the car's licence plate together with the bodies. Neither the two co-accused nor any of the witnesses heard by the court testified they had seen Kurbanov commit the killings. One witness, Mr. Hamid, testified that he learned on 5 May 2001 that Kurbanov had been detained for fraud and that he had later on directed the investigators to the site where Kurbanov was building a garage. The judgment refers to Hamid saying that "he was present when the three bodies of the dead were dug out from the pit of the garage and found out that the murderer was Kurbanov." Another witness, Mr. Mizrobov, testified that he was present on 5 May 2001 when Kurbanov was taken to the authorities. He was also present on 8 or 9 June 2001

when the bodies of the three victims, "Kurbanov's clothes" and the car licence plate were found. The judgment mentions that there was ballistic evidence linking the pistol found on 12 June 2001 in Mr. Nazmedinov's apartment to the crime. However, no forensic evidence linking Mr. Kurbanov to the clothes found with the bodies is mentioned, and only the confessions of the three co-defendants linked Mr. Kurbanov to the gun.

2.6 At the end of the trial, Mr. Kurbanov was sentenced to death and confiscation of his property, whereas Mr. Ismoil and Mr. Nazmedinov were both sentenced to four years' imprisonment, on account of their involvement with the crime weapon, and then immediately pardoned and released by the same court.

The complaint

3.1 The author claims that her son was detained for seven days without arrest warrant. During this time, he was unable to see his family or a lawyer. The fact that her son was illegally arrested and detained for one week without being promptly informed of the charges against him, constitutes, according to the author, a violation of article 9, paragraphs 1 and 2, of the Covenant.

3.2 Article 7 and article 14, paragraph 3 (g), of the Covenant are said to be violated as Mr. Kurbanov allegedly was subjected to torture and beatings by means of kicks and with batons, strangulation, torture with electricity during the investigation, to make him confess. During a pre-trial cross-examination with the father of one of the murder victims – Mr. Ortikov – the author's son was beaten by the father in presence of the investigators.

3.3 The author contends that article 14, paragraph 1, of the Covenant was violated, as the court proceedings were partial. She alleges that the court proceedings were unfair from the beginning, as the families of the victims exercised pressure on the judges. All requests of the defence were rejected.

3.4 The author claims that when her son was charged with murder, she requested, due to her financial situation, a lawyer be assigned to him *ex officio*, but she was informed that the law provided no such possibility.

3.5 The author also claims that according to the case file, a lawyer assisted her son as of 20 June 2001, but in fact she hired a lawyer for her son only in July 2001. She adds that the lawyer visited her son only two or three times during the investigation, and this was always in the presence of an investigator. After the judgment, her son was unable to see the lawyer and benefit from his assistance. According to the author, the lawyer failed to appeal for cassation. Her son had no opportunity to consult the court's

judgment, as no interpreter was provided to him. Mr. Kurbanov prepared a cassation appeal himself, but this was denied, because the deadline for filing the appeal had passed. The author's own cassation appeal was denied on the ground that she was not a party to the criminal case. The extraordinary appeal proceedings which her son availed himself of with the assistance of his lawyer were unsuccessful; they do not, according to author, provide an effective means of judicial protection. Article 14, paragraph 5, of the Covenant allegedly was violated because the author's son was deprived of his right to appeal.

3.6 During the investigation, the author's son was not assisted by an interpreter, nor was he offered a qualified interpreter during the trial, despite the fact that he is a Russian speaker and some of the court documents were in Tajik. This is said to be in violation of article 14, paragraph 3 (f), of the Covenant.

3.7 The author's son is said to be detained in inhuman conditions. The cells have no water; toilets are in a corner of the cells, but they cannot be used because of the lack of water. In winter, the cells are very cold, and in summer extremely hot. Air circulation is limited because of the tiny size of the cells and of the windows. They are infested with insects because of the lack of hygiene. Prisoners are allowed to leave their cell for a walk only for half an hour per day. These conditions are said to amount to a violation of article 10, of the Covenant.

3.8 Finally, the author claims that her son's right to life protected by article 6, paragraphs 1 and 2, was violated, because the violations of article 14 resulted in an illegal and unfair death sentence, which was pronounced by an incompetent tribunal.

State party's admissibility and merits submission and author's comments

4.1 By Note verbale of 16 September 2002, the State party observed that pursuant to information from the Governmental Commission on implementation of the international obligations of Tajikistan in the field of human rights, Mr. Kurbanov was sentenced to death by the Military Chamber of the Supreme Court on 2 November 2001. The criminal proceedings against the author's son were initiated on 12 May 2001. He was ordered arrested on the same day, and he signed a written statement that he did not need legal representation during the preliminary investigation.

4.2 The State party contends that on 29 April 2001, Mr. Kurbanov killed three persons, and that on 9 June 2001 a criminal investigation was opened in this regard. The State party points out that Mr. Kurbanov provided a written and full confession of his guilt, and explained the circumstances of the

crime in presence of the lawyer, Mr. Nizomov. In the State party's view, the author's allegations about the use of illegal methods of interrogation including violence and torture against her son should be considered unsubstantiated, as neither during the investigation nor in court, were such allegations raised by Mr. Kurbanov.

4.3 The State party also dismisses as unsubstantiated the author's contention that her son was not provided with an interpreter during the investigation and during the court proceedings. Mr. Kurbanov is Tajik, and upon closure of the investigation, when he consulted the case file, he declared that he did not need an interpreter. Court proceedings were conducted in the presence and with the participation of an interpreter.

4.4 The State party finally observes that the Supreme Court noted that in his cassation appeal, the author's son did not challenge the judgment of the court nor the actions of the court and the investigators, but asked for commutation of the death sentence to a long prison term. The State party concludes that on the basis of its investigations into the case, no violations of the Covenant occurred.

5.1 By letters of 25 November 2002, 13 January, 27 March, and 21 July 2003, the author presented further information. She reaffirms that her son was arrested on 5 May 2001 at around 3 pm when he voluntarily went to the police to testify as a witness. On 7 May, the author complained in writing to the Office of the Prosecutor-General; that same day, officers from that Office went to the Ministry of the Interior, to inquire about the whereabouts of her son. They were unable to find him because, as he had been beaten and was covered with blood, he was hidden in a locked office, in the presence of the policeman who had beaten him.

5.2 The author notes that the State party's submission includes copies of interrogation record sheets, with a specific field reserved for the need for interpretation, where it is mentioned that Mr. Kurbanov does not need interpretation, and that he would make his deposition in Russian. For the author, this proves that her son's mother tongue is Russian. The investigation was conducted in Russian. Some of the proceedings, such as cross-examination, were however held in Tajik; in spite of her son's request for interpretation, the investigator refused to provide for it, explaining that Mr. Kurbanov was a Tajik national and was presumed to be proficient in Tajik. The trial was also held in Tajik. Some of the hearings benefited from interpretation, but according to the author, the interpreter was unqualified, and it was often difficult to understand him.

5.3 As to the authenticity of her son's written confession, the author states that her son does not

deny the authenticity of his signature on the record sheets, but that he claims to have signed them under torture. The author reiterates that her son bears marks of torture on his body, and that this was brought to the attention of the State party on several occasions.

5.4 As Mr. Kurbanov was provided with services of a lawyer only on 23 July 2001, all proceedings during this period (including interrogations), were conducted without any legal representation. This facilitated the torture of her son, and he could not complain, *inter alia*, because he did not know to whom to complain.

5.5 The author reiterates that upon his arrest, her son was not promptly been informed of the reasons for his arrest, nor later, of the sentence he risked for the crime he had been charged with.

5.6 Between 5 and 12 May 2001, the author's son was detained in the building of the Criminal Investigation Department and was prevented from receiving food and items brought to him.

5.7 Regarding the State party's argument that Mr. Kurbanov is Tajik and should be presumed to master Tajik the author notes that her son speaks only basic Tajik because his schooling was in Russian, moreover he had lived in Russia for a long time. He is not in a position to understand legal terminology and literary phrases in Tajik. For that reason he could not understand the charges or the sentence during the court procedures.

5.8 The author acknowledges that no specific complaint about the use of torture was made, but affirms that this allegation was raised in court and was also conveyed to numerous governmental and non-governmental organizations. Thus, in the author's opinion, the authorities were fully aware of the allegations relating to her son's torture. Yet, no inquiry was initiated.

5.9 The author reiterates that the entire investigation in her son's case was partial and not objective. The case file initially contained a complaint about fraud from the wife of one Khaidar Komilov. The investigators, however, removed all reference to that person at latter stage, calling him the "unknown Khaidar". According to the author, by doing so, the investigators eliminated from the proceedings a potentially important witness.

5.10 By letter of 21 July 2003, the author submits that because of the anguish arising out of the prospect of his execution, her son's psychological condition has deteriorated significantly.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claims contained in a communication, the Human Rights Committee must,

in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

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

6.3 With regard to the requirement of exhaustion of domestic remedies, the Committee notes that although the author failed to file a normal appeal after conviction, his case was nevertheless reviewed through extraordinary appeal by the Supreme Court and that the State party has not challenged the admissibility of the communication on this ground. It therefore considers that the author has met the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

6.4 With regard to the author's allegation under article 14, paragraph 1, that the trial was partial due to the pressure exerted by the audience, the Committee considers that the author has not substantiated this claim, for the purposes of admissibility. Hence, this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.5 As to the author's claims that her son was denied the assistance of a lawyer during the pre-trial investigation and that even at later stages the assistance of his lawyer remained limited, the Committee notes that these allegations could raise issues under article 14, paragraphs 3 (b) and (d), and recalls its jurisprudence that, particularly in cases involving capital punishment, it is axiomatic that the accused is effectively assisted by a lawyer³ at all stages of the proceedings. However, the Committee notes that the author's son was assisted by a privately hired lawyer from 23 July 2001 onwards, including the actual trial and the extraordinary appeal procedure, and that the author has not given any date for the so-called cross-examination arranged as a part of the pre-trial investigation. Furthermore, the Committee notes that although the author might have been suspected of the murders since the discovery of the bodies, he was informed of his status as a suspect on 11 June 2001 and formally charged with the murders on 30 July 2001, *i.e.* at a time when he already was assisted by a lawyer. Even though the Committee will have to address on the merits the conduct of the State party's authorities under article 9, paragraph 2, and article 14, paragraph 3 (a), it considers in the circumstances,

³ See, for example, *Aliiev v. Ukraine*, Communication No. 781/1997, *Robinson v. Jamaica*, Communication No. 223/1987, and *Brown v. Jamaica*, Communication No. 775/1997.

that no issue under article 14, paragraph 3 (b) and (d) has been substantiated, for the purposes of admissibility.

6.6 Similarly, the Committee considers that the author has not substantiated, for purposes of admissibility, that article 14, paragraph 3 (f) was violated due to the limitations on, and the insufficient quality of, interpretation provided to her son. Noting, in particular, that the presence of an interpreter appears from the judgment of 2 November 2001, the Committee concludes that this claim is inadmissible under article 2 of the Optional Protocol.

6.7 As to the author's claim that her son was denied the right of appeal, the Committee notes that Mr. Kurbanov was represented by privately obtained counsel, who did not file a regular cassation appeal. It is not clear why this was not done, but as a result, Mr. Kurbanov's conviction could only be reviewed by way of an extraordinary appeal. In these particular circumstances, the Committee considers that although the review might have been more limited than in normal appeal proceedings, the author has failed to substantiate, for purposes of admissibility, her claim under article 14, paragraph 5. Accordingly, this part of the communication is inadmissible under article 2, of the Optional Protocol.

6.8 The Committee considers that the remainder of the author's claims have been sufficiently substantiated for purposes of admissibility, and proceeds to their examination on the merits.

Examination of the merits

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

7.2 The Committee has taken note of the author's claim that her son was detained on a Saturday (5 May 2001), and detained for seven days without a charge. To support her claim, she provides a copy of the police register which displays a record entered on 7 May 2001 relating to her son's arrest, allegedly for fraud. She filed a complaint about the allegedly illegal detention of her son with the Office of the Procurator General on the same day. Furthermore, the Committee notes that according to the judgment of 2 November 2001 by the Military Chamber of the Supreme Court, the author was detained on 5 May 2001. This information is not refuted by the State party's contention that an arrest warrant was issued on 12 May 2001. In the absence of any further explanations from the State party, the Committee concludes that Mr. Kurbanov was detained for seven

days without an arrest warrant and without being brought before a judge. The Committee concludes that his rights under article 9, paragraphs 2 and 3, of the Covenant have been violated.

7.3 Furthermore, the documents submitted by the State party show that Mr. Kurbanov was, after being detained since 5 May 2001 on other grounds, informed on 11 June 2001 that he was suspected of the killings of 29 April 2001 but charged with these crimes only on 30 July 2001. During his detention from 5 May 2001 onwards, he was, except for the last week starting on 23 July 2001, without the assistance of a lawyer. The Committee takes the view that the delay in presenting the charges to the detained author's son and in securing him legal assistance affected the possibilities of Mr. Kurbanov to defend himself, in a manner that constitutes a violation of article 14, paragraph 3 (a), of the Covenant.

7.4 The Committee has noted the author's fairly detailed description of beatings and other ill-treatment that her son was subjected to. She has furthermore identified by name some of the individuals alleged to have been responsible for her son's ill-treatment. In reply, the State party has confined itself to stating that these allegations were neither raised during the investigation nor in court. The Committee recalls,⁴ with regard to the burden of proof, that this cannot rest alone with the author of a communication, especially considering that the author and the State party do not always have equal access to evidence and that frequently the State party alone has access to relevant information. Further, the mere fact that no allegation of torture was made in the domestic appeal proceedings cannot as such be held against the alleged victim if it is proposed, as in the present case, that such an allegation was in fact made during the actual trial but was neither recorded nor acted upon. In the light of the details given by the author on the alleged ill-treatment, the unavailability of a trial transcript and the absence of any further explanations from the State party, due weight must be given to the author's allegations. Noting in particular that the State party has failed to investigate the author's allegations, which were brought to the State party's authorities' attention, the Committee considers that the facts as submitted disclose a violation of article 7 of the Covenant.

7.5 In the light of the above finding and the fact that the author's conviction was based on his confession obtained under duress, the Committee concludes that there was also a violation of article 14, paragraph 3 (g), of the Covenant.

⁴ See, for example, Communication No. 161/1983, *Herrera Rubio v. Colombia*.

7.6 As to the author's claim that her son's rights under article 14, paragraph 1 were violated through a death sentence pronounced by an incompetent tribunal, the Committee notes that the State party has neither addressed this claim nor provided any explanation as to why the trial was conducted, at first instance, by the Military Chamber of the Supreme Court. In the absence of any information by the State party to justify a trial before a military court, the Committee considers that the trial and death sentence against the author's son, who is a civilian, did not meet the requirements of article 14, paragraph 1.

7.7 The Committee recalls⁵ that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant. In the current case, the sentence of death was passed in violation of the right to a fair trial as set out in article 14 of the Covenant, and thus also in breach of article 6.

7.8 The State party has not provided any explanations in response to the author's fairly detailed allegations of the author's son's condition of detention after conviction being in breach of article 10 of the Covenant. In the absence of any explanation from the State party, due weight must be given to the author's allegations according to which her son's cell has no water, is very cold in the winter and hot in the summer, has inadequate ventilation and is infested with insects, and that the author's son

⁵ See *Conroy Levy v. Jamaica*, communication No. 719/1996, and *Clarence Marshall v. Jamaica*, communication No. 730/1996.

is allowed to leave his cell only for half an hour a day. With reference to the United Nations Standard Minimum Rules for the Treatment of Prisoners, the Committee finds, that the conditions as described amount to a violation of article 10, paragraph 1, in respect of the author's son.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of the rights of Mr. Kurbanov under article 7, article 9, paragraphs 2 and 3, article 10, article 14, paragraph 1 and paragraph 3 (a) and (g), and of article 6 of the Covenant.

9. Under article 2, paragraph 3 (a), of the Covenant, the author's son is entitled to an effective remedy entailing compensation and a new trial before an ordinary court and with all the guarantees of article 14, or, should this not be possible, release. The State party is under an obligation to take measures to prevent similar violations in the future.

10. 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 or 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 90 days, information about the measures taken to give effect to these Views. The State party is also requested to publish the Committee's Views.

Communication No. 1107/2002

Submitted by: Loubna El Ghar (not represented)

Alleged victim: The author

State party: Libyan Arab Jamahiriya

Date of adoption of Views: 2 November 2004

Subject matter: State party's refusal to issue a passport to a national residing abroad

Procedural issues: Exhaustion of domestic remedies

Substantive issues: Right to leave any country, including one's own

Articles of the Covenant: 12, paragraph 2

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

Finding: Violation (article 12, paragraph 2)

1.1 The author of the communication is Loubna El Ghar, a Libyan citizen born on 2 September 1981 in Casablanca and residing in Morocco. She claims to be a victim of violations by the Socialist People's Libyan Arab Jamahiriya. She does not refer to any particular provisions of the Covenant, but her allegations would seem to give rise to questions under article 12 thereof. She is not represented by counsel.

1.2 The Covenant and its Optional Protocol entered into force for the Socialist People's Libyan

Arab Jamahiriya on 23 March 1976 and 16 August 1989, respectively.

The facts as submitted by the author

2.1 The author, of Libyan nationality, has lived all her life in Morocco with her divorced mother and holds a residence permit for that country. As a student of French law at the Hassan II University faculty of law in Casablanca, she wished to continue her studies in France and to specialize in international law. To that end, she has been applying to the Libyan Consulate in Morocco for a passport since 1998.

2.2 The author claims that all her applications have been denied, without any lawful or legitimate grounds. She notes that although she is an adult, she attached to her application form an authorization from her father, who is resident in the Libyan Arab Jamahiriya, that was certified by the Libyan Ministry of Foreign Affairs in order to obtain any official document required. She adds that in September 2002 the Libyan consul stated, without giving any details, that on the basis of the pertinent regulations he could not issue her a passport, but could only provide her with a temporary travel document allowing her to travel to the Libyan Arab Jamahiriya.

2.3 The author also contacted the French diplomatic mission in Morocco to ascertain whether it would be possible to obtain a laissez-passer for France, a request which the French authorities were unable to comply with.

2.4 Since she had no passport, the author was unable to enrol in the University of Montpellier I in France.

The complaint

3. The author claims that the refusal by the Libyan Consulate in Casablanca to issue her with a passport prevents her from travelling and studying and constitutes a violation of the Covenant.

State party's submission

4.1 In its observations of 15 October 2003, the State party provides the following information. Having been informed of the author's communication, the Passport and Nationality Department contacted the Brotherhood Bureau in Rabat, which indicated that as at 1 September 1999 it had not received any official application for a passport from the author.

4.2 On 6 September 2002, the Passport and Nationality Department asked the Consulate-General to inform it whether the author had submitted an application for a passport, given that it had no record of any information concerning Ms. El Ghar.

4.3 On 13 October 2002, the Passport and Nationality Department sent a telegram to the Consulate-General in Casablanca requesting that the author's application should be forwarded, in the event it had been received, together with all the documents required for the issuing of a passport.

4.4 The State party alleges that it is clear from the foregoing that the Libyan authorities concerned are giving the matter due attention and that the delay is caused by the fact that the author did not go to the Brotherhood Bureau in Morocco at the proper time. The State party points out that there is nothing in the legislation in force to prevent Libyan nationals from obtaining travel documents when they meet the necessary requirements and submit the documents requested.

4.5 Lastly, the State party explains that instructions were sent on 1 July 2003 to the Brotherhood Bureau in Rabat to issue a passport to Ms. Loubna El Ghar. Moreover, the author was contacted at home by telephone and told that she could go to the Libyan Consulate in Casablanca to collect her passport.

Author's comments

5.1 In her comments of 24 November 2003 concerning the official date of the submission of her passport application, the author points out that she had initiated procedures as early as 1998, when her mother went to Libya to seek her father's permission to obtain a passport (see para. 2.2). She adds that the actual date of her official application for a passport was 25 February 1999.

5.2 With regard to the Passport and Nationality Department and the date of 6 September 2002 mentioned by the State party (see para. 4.2), the author recalls that on 18 September 2002, during one of her visits to the Libyan Consulate-General to find out the status of her application, the Libyan officials had indicated that they were unable to give her a passport but would give her a laissez-passer for Libya. The laissez-passer, which was issued that very day and has been submitted by the author, clearly states that "in view of the fact that she is a native of Morocco and has not obtained a passport, this travel document is issued to enable her to return to national territory".

5.3 The author confirms that she received a telephone call on 1 August 2003 from the Libyan Ambassador to the United Nations Office at Geneva informing her that she could go to the Libyan Consulate-General in Casablanca to collect her passport, a communiqué to that effect having been sent by the Passport Department. On the same day the author went to the Consulate with all the documents likely to be needed for the collection of her passport. However, the Libyan officials denied

having received the above-mentioned communiqué. Upon her return home, the author called the Libyan Ambassador to the United Nations in Geneva to tell her what had happened, and two days later returned to the Consulate. The author explains that the consul himself told her that there was no need for her to go there each time, and that she would be contacted as soon as the communiqué in question was received. Since then the author has been unable to obtain a passport and thus go abroad to continue her studies.

5.4 The author adds that it is impossible for her to request legal aid with a view to bringing court proceedings against the Libyan authorities from Morocco, and that she cannot lodge an appeal alleging an abuse of authority.

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 As it is obliged to do so pursuant to article 5, paragraph 2 (a), of the Optional Protocol, the Committee ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 Having taken note of the author's arguments concerning the exhaustion of domestic remedies, namely the obstacles standing in the way of any request for legal aid and of an appeal against the decision of the Libyan authorities from Morocco, and given the absence of any relevant objection to the admissibility of the communication by the State party, the Committee considers that the provisions of article 5, paragraph 2 (b), of the Optional Protocol do not preclude it from considering the communication.

6.4 The Committee considers that the author's claim may give rise to issues under article 12, paragraph 2, of the Covenant and therefore proceeds to consider them on the merits, in accordance with article 5, paragraph 2, of the Optional Protocol.

Consideration of the merits

7.1 The Human Rights Committee has considered this communication in the light of all the written information made available to it by the parties, in accordance with article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee notes that to date the author has been unable to obtain a passport from the Libyan consular authorities even though, according to the authorities' own statements, her official application dates back at least to 1 September 1999. Moreover, it

is clear that initially, on 18 September 2002, the Libyan consul had indicated to the author that it was not possible to issue her a passport but that she could be given a laissez-passer for Libya, by virtue of a regulation that was explained neither orally nor on the laissez-passer itself. The passport application submitted to the Libyan Consulate was thus rejected without any explanation of the grounds for the decision, the only comment being that since the author "is a native of Morocco and has not obtained a passport, this travel document [laissez-passer] is issued to enable her to return to national territory". The Committee considers that this laissez-passer cannot be considered a satisfactory substitute for a valid Libyan passport that would enable the author to travel abroad.

7.3 The Committee notes that subsequently, on 1 July 2003, the Passport Department sent a communiqué to the Libyan consular authorities in Morocco with a view to granting the author a passport; this information was certified by the State party, which produced a copy of the document. The State party alleges that the author was contacted personally by telephone at home and told to collect her passport from the Libyan Consulate. However, it appears that thus far, despite the author's two visits to the Libyan Consulate, no passport has been issued to her, through no fault of her own. The Committee recalls that a passport provides a national with the means "to leave any country, including his own", as stipulated in article 12, paragraph 2, of the Covenant, and that owing to the very nature of the right in question, in the case of a national residing abroad, article 12, paragraph 2, of the Covenant imposes obligations both on the individual's State of residence and on the State of nationality, and that article 12, paragraph 1, of the Covenant cannot be interpreted as limiting Libya's obligations under article 12, paragraph 2, to nationals living in its territory. The right recognized by article 12, paragraph 2, may, by virtue of paragraph 3 of that article, be subject to restrictions "which are provided by law [and] are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant". Thus there are circumstances in which a State may, if the law so provides, refuse to issue a passport to one of its nationals. In the present case, however, the State party has not put forward any such argument in the information it has submitted to the Committee but has actually assured the Committee that it issued instructions to ensure that the author's passport application was successful, a statement that was not in fact followed up.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the

International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 12, paragraph 2, of the Covenant insofar as the author was denied a passport without any valid justification and subjected to an unreasonable delay, and as a result was prevented from travelling abroad to continue her studies.

9. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to ensure that the author has an effective remedy, including compensation. The Committee urges the State party to issue the author with a passport without further delay. The State party is also under an obligation to take effective measures to ensure that similar violations do not recur in future.

10. The Committee recalls that by becoming a State party to the Optional Protocol, the Socialist People's Libyan Arab Jamahiriya 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 ensure an effective and enforceable remedy when a violation has been disclosed. The Committee therefore wishes to receive from the State party, within 90 days following the submission of these Views, information about the measures taken to give effect to them. The State party is also requested to publish the Committee's Views.

Communication No. 1119/2002

Submitted by: Mr. Jeong-Eun Lee (represented by Seung-Gyo Kim)

Alleged victim: The author

State party: Republic of Korea

Date of adoption of Views: 20 July 2005

Subject matter: Conviction of complainant for membership in an "anti-State organization"

Procedural issues: Substantiation of claim; exhaustion of domestic remedies - Applicability of State party's reservation to art. 22

Substantive issues: Freedom of thought and conscience - Freedom of opinion; freedom of expression - Permissibility of restrictions on freedom of association - Right to equality before the law and to equal protection of the law

Articles of the Covenant: 18 paragraph 1; 19, paragraphs 1 and 2; 22 and 26

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

Finding: Violation (articles 18, paragraph 1; and 19)

1. The author of the communication is Mr. Jeong-Eun Lee, a citizen of the Republic of Korea, born on 22 February 1974. He claims to be a victim of violations by the Republic of Korea¹ of

articles 18, paragraph 1, 19, paragraphs 1 and 2, 22, paragraph 1, and 26 of the International Covenant on Civil and Political Rights ("the Covenant"). He is represented by counsel, Mr. Seung-Gyo Kim.

Factual background

2.1 In March 1993, the author began his studies at the faculty of architecture of Konkuk University. In his fourth year, he was elected Vice-President of the General Student Council of Konkuk University. As such, he automatically became a member of the Convention of Representatives, the highest decision-making body of the Korean Federation of Student Councils (*Hanchongnyeon*), a nationwide association of university students established in 1993, comprising 187 universities (as of August 2002), including Konkuk University, and pursuing the objectives of democratization of Korean society, national reunification and advocacy of campus autonomy.

2.2 In 1997, the Supreme Court of the Republic of Korea ruled that *Hanchongnyeon* was an "enemy-benefiting group" and an anti-State organization within the meaning of article 7, paragraphs 1 and 3,²

¹ The Covenant and the Optional Protocol thereto entered into force for the Republic of Korea on 10 July 1990. Upon ratification, the State Party entered reservations/declarations: "The Government of the Republic of Korea [declares] that the provisions of paragraph 5 [...] of article 14, article 22 [...] of the

Covenant shall be so applied as to be in conformity with the provisions of the local laws including the Constitution of the Republic of Korea."

² Article 7 (1) of the National Security Law reads: "Any person who praises, incites or propagates the activities of an anti-State organization, a member thereof, or a person who has received an order from it, or who acts

of the National Security Law, because the platform and activities of the fifth-year³ *Hanchongnyeon* were said to support the strategy of the Democratic People's Republic of Korea (DPRK) to achieve national unification by "communizing" the Republic of Korea.

2.3 In 2001, the author became a member of the Convention of Representatives of the ninth year *Hanchongnyeon*. On 8 August 2001, he was arrested and subsequently indicted under article 7 of the National Security Law. By judgment dated 28 September 2001, the East Branch Division of the Seoul District Court sentenced him to one year imprisonment and a one-year "suspension of eligibility". His appeal was dismissed by the Seoul High Court on 5 February 2002. On 31 May 2002, the Supreme Court dismissed his further appeal.

2.4 The courts rejected the author's defence that the ninth year *Hanchongnyeon* had revised its platform to endorse the "June 15 North-South Joint Declaration" (2000) on national reunification agreed to by both leaders of North and South Korea and that, even if the programme of *Hanchongnyeon* was to some extent similar to North Korean ideology, this alone did not justify its characterization as an "enemy-benefiting group".

2.5 At the time of the submission of the communication, the author was serving his prison term at Gyeongju Correctional Institution.

The complaint

3.1 The author claims that his conviction for membership in an "enemy-benefiting group" violates his rights to freedom of thought and conscience (article 18, paragraph 1), to freedom of opinion (article 19, paragraph 1) and expression (article 19, paragraph 2), to freedom of association (article 22, paragraph 1), and to equality before the law and equal protection of the law (article 26).

3.2 He submits that his conviction simply because he was a representative of *Hanchongnyeon* violated his right under article 18 to freedom of thought and

in concert with it, or propagates or instigates a rebellion against the State, with the knowledge of the fact that it may endanger the existence and security of the State or democratic fundamental order, shall be punished by imprisonment for a term not exceeding seven years."

Article 7 (3) of the National Security Law reads: "Any person who forms or joins an organization aiming at the acts referred to in paragraph (1) shall be punished by imprisonment for a term of one year or more."

³ The Convention of Representatives of *Hanchongnyeon* establishes committees on a yearly basis to carry out the organization's activities.

conscience, since his membership in the association was based on his free will and conscience.

3.3 By reference to the Committee's jurisprudence,⁴ the author argues that the fact that he was convicted for membership in an "enemy-benefiting group" also violated his rights under article 19 to hold opinions without interference and to freedom of expression, as his conviction was based on the organization's ideological inclination, rather than the actual activities of the ninth year *Hanchongnyeon*. He emphasizes that the Committee itself has criticized article 7 of the National Security Law as being incompatible with the requirements of article 19, paragraph 3.⁵

3.4 For the author, his right to freedom of association was breached because he was punished for joining *Hanchongnyeon* as an *ex officio* representative. Moreover, his conviction amounted to discrimination on the ground of political opinion, in violation of article 26, given that *Hanchongnyeon* had never carried out any activities that would have directly benefited the DPRK.

3.5 The author requests the Committee to recommend to the State party to rescind paragraphs 1 and 3 of article 7 of the National Security Law and that, pending annulment, these provisions should no longer be applied and that the author be acquitted through retrial and compensated for the damages sustained.

3.6 On admissibility, the author submits that the same matter is not being examined under another procedure of international investigation or settlement and that he has exhausted all available domestic remedies.

State party's admissibility and merits submission

4.1 In its observations dated 8 May 2003, the State party only challenged the merits of the communication, arguing that the author's conviction under article 7, paragraphs 1 and 3, of the National Security Law was justified by the necessity to protect its national security and democratic order. It submits that, in accordance with the limitation clauses in articles 18, paragraph 3, 19, paragraph 3, and 22, paragraph 2, of the Covenant, article 37, paragraph 2, of the Constitution of the Republic of Korea provides that the freedoms and rights of

⁴ The author refers to Communications No. 628/1995, *Tae Hoon Park v. Republic of Korea*, Views adopted on 20 October 1998, and No. 574/1994, *Keun-Tae Kim v. Republic of Korea*, Views adopted on 3 November 1998.

⁵ See Concluding observations of the Human Rights Committee on the second periodic report of the Republic of Korea, 1 November 1999, at paras. 8-9.

citizens may be restricted by law for the protection of national security, maintenance of law and order, or public welfare. Article 7, paragraph 1 and 3, of the National Security Law, which had been enacted to protect national security and the democratic order against the threat posed by North Korea's revolutionary aim to "communize" the Republic of Korea, had repeatedly been declared compatible with the Constitution by the Supreme Court and the Constitutional Court. The State party concludes that the author's conviction, in a fair trial before independent tribunals, based on the proper application of article 7, paragraphs 1 and 3, of the National Security Law, was consistent with both the Covenant and the Constitution.

4.2 The State party dismisses the author's defence that the ninth year *Hanchongnyeon* revised its agenda and that it could not be considered an anti-State organization, merely because some of its objectives resembled North Korean ideology. It argues that the organization's programme, rules and documents reveal that *Hanchongnyeon* is "benefiting an anti-State organization and endangering the national security and liberal democratic principles of the Republic of Korea."

4.3 Lastly, the State party denies that the author was discriminated against based on his political opinion. It submits that the laws of the Republic of Korea, including the National Security Law, were applied equally to all citizens. The author was not prosecuted because of his political opinion, but rather because his actions constituted a threat to society.

5. On 13 May 2003, the State party's submission was sent to counsel for comments. No comments were received, despite three reminders dated 8 October 2003, 26 January and 13 July 2004.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a), of the Optional Protocol, and that the author has exhausted domestic remedies, as required by article 5, paragraph 2 (b), of the Optional Protocol.

6.3 The Committee considers that the author has not substantiated, for purposes of admissibility, his claim that his conviction amounted to discrimination

on the ground of his political opinion, in violation of article 26 of the Covenant. It follows that this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.4 As regards the alleged violation of article 22 of the Covenant, the Committee notes that the State party has referred to the fact that relevant provisions of the National Security Law are in conformity with its Constitution. However, it has not invoked its reservation *ratione materiae* to Article 22 that this guarantee only applies subject "to the provisions of the local laws including the Constitution of the Republic of Korea." Thus, the Committee does not need to examine the compatibility of this reservation with the object and purpose of the Covenant and can consider whether or not article 22 has been violated in this case.

6.5 The Committee therefore declares the communication admissible insofar as it appears to raise issues under articles 18, paragraph 1, 19 and 22, of the Covenant.

Consideration of the merits

7.1 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.

7.2 The issue before the Committee is whether the author's conviction for his membership in *Hanchongnyeon* unreasonably restricted his freedom of association, thereby violating article 22 of the Covenant. The Committee observes that, in accordance with article 22, paragraph 2, any restriction on the right to freedom of association to be valid must cumulatively meet the following conditions: (a) it must be provided by law; (b) it may only be imposed for one of the purposes set out in paragraph 2; and (c) it must be "necessary in a democratic society" for achieving one of these purposes. The reference to a "democratic society" indicates, in the Committee's view, that the existence and functioning of a plurality of associations, including those which peacefully promote ideas not favourably received by the government or the majority of the population, is one of the foundations of a democratic society. Therefore, the existence of any reasonable and objective justification for limiting the freedom of association is not sufficient. The State Party must further demonstrate that the prohibition of the association and the criminal prosecution of individuals for membership in such organizations are in fact necessary to avert a real, and not only hypothetical danger to the national security or democratic order and that less intrusive measures would be insufficient to achieve this purpose.

7.3 The author's conviction was based on article 7, paragraphs 1 and 3, of the National Security Law. The decisive question which must therefore be considered is whether this measure was necessary for achieving one of the purposes set out in article 22, paragraph 2. The Committee notes that the State party has invoked the need to protect national security and its democratic order against the threat posed by the DPRK. However, it has not specified the precise nature of the threat allegedly posed by the author's becoming a member of *Hanchongnyeon*. The Committee notes that the decision of the Supreme Court of the Republic of Korea, declaring this association an "enemy-benefiting group" in 1997, was based on Article 7, paragraph 1, of the National Security Law which prohibits support for associations which "may" endanger the existence and security of the State or its democratic order. It also notes that the State party and its courts have not shown that punishing the author for his membership in *Hanchongnyeon*, in particular after its endorsement of the "June 15 North-South Joint Declaration" (2000), was necessary to avert a real danger to the national security and democratic order of the Republic of Korea. The Committee therefore considers that the State party has not shown that the author's conviction was necessary to protect national security or any other purpose set out in article 22, paragraph 2. It concludes that the restriction on the author's right to freedom of association was incompatible with the requirements of article 22, paragraph 2, and thus violated article 22, paragraph 1, of the Covenant.

7.4 In the light of this finding, the Committee need not address the question whether the author's conviction also violated his rights under articles 18, paragraph 1, and 19 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal a violation of article 22, paragraph 1, of the Covenant.

9. In accordance with article 2, paragraph 3, of the Covenant, the author is entitled to an effective remedy, including appropriate compensation. The Committee recommends that the State party amend article 7 of the National Security Law, with a view to making it compatible with the Covenant. The State party is under an obligation to ensure that similar violations do not occur in the future.

10. 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, that State party has undertaken an obligation to ensure to all individuals within its territory or 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 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

Communication No. 1128/2002

Submitted by: Rafael Marques de Morais (represented by the Open Society Institute and Interights)

Alleged victim: The author

State party: Angola

Date of adoption of Views: 29 March 2005

Subject matter: Conviction of journalist for critique of the State party's head of State

Procedural issues: State party's failure to cooperate; level of substantiation of claim - Compatibility *ratione materiae* - Exhaustion of domestic remedies

Substantive issues: Liberty and security of person - Right to be informed of reasons for arrest - Right to a fair trial - Right to be brought promptly before a judge - Unlawful detention - Compensation for unlawful detention - Freedom of movement - Freedom of speech

Articles of the Covenant: 9 (1) to (5), 14 (1), (3) (a), (b), (d), (e), and (5), 12 and 19

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

Finding: Violation (articles 9, paragraphs 1- 4; 12; 19).

1. The author of the communication is Rafael Marques de Morais, an Angolan citizen, born on 31 August 1971. He claims to be a victim of violations by Angola¹ of articles 9, 12, 14 and 19 of the International Covenant on Civil and Political

¹ The Covenant and the Optional Protocol to the Covenant entered into force for the State party on 10 April 1992.

Rights (the Covenant). The author is represented by counsel.

Factual background

2.1 On 3 July, 28 August and 13 October 1999, the author, a journalist and the representative of the Open Society Institute in Angola, wrote several articles critical of Angolan President *dos Santos* in an independent Angolan newspaper, the *Agora*. In these articles, he stated, *inter alia*, that the President was responsible “for the destruction of the country and the calamitous situation of State institutions” and was “accountable for the promotion of incompetence, embezzlement and corruption as political and social values.”

2.2 On 13 October 1999, the author was summoned before an investigator at the National Criminal Investigation Division (DNIC) and questioned for approximately three hours before being released. In an interview later that day with the Catholic radio station, *Radio Ecclésia*, the author reiterated his criticism of the President and described his treatment by the DNIC.

2.3 On 16 October 1999, the author was arrested at gunpoint by 20 armed members of the Rapid Intervention Police and DNIC officers at his home in Luanda, without being informed about the reasons for his arrest. He was brought to the Operational Police Unit, where he was held for seven hours and questioned before being handed over to DNIC investigators, who questioned him for five hours. He was then formally arrested, though not charged, by the deputy public prosecutor of DNIC.

2.4 From 16 to 26 October 1999, the author was held incommunicado at the high security Central Forensic Laboratory (CFL) in Luanda, where he was denied access to his lawyer and family and was intimidated by prison officials, who asked him to sign documents disclaiming responsibility of the CFL or the Angolan Government for eventual death or any injuries sustained by him during detention, which he refused to do. He was not informed of the reasons for his arrest. On arrival at the CFL, the chief investigator merely stated that he was being held as a UNITA (National Union for the Total Independence of Angola) prisoner.

2.5 On or about 29 October 1999, the author was transferred to *Viana* prison in Luanda and granted access to his lawyer. On the same day, his lawyer filed an application for *habeas corpus* with the Supreme Court, challenging the lawfulness of the author’s arrest and detention, which was neither acknowledged, nor assigned to a judge or heard by the Angolan courts.

2.6 On 25 November 1999, the author was released from prison on bail and informed of the

charges against him for the first time. Together with the director, A. S., and the chief editor, A. J. F., of *Agora*, he was charged with “materially and continuously committ[ing] the crimes characteristic of defamation and slander against His Excellency the President of the Republic and the Attorney General of the Republic...by arts. 44, 46 all of Law no 22/91 of June 15 (the Press Law) with aggravating circumstances 1, 2, 10, 20, 21 and 25, all of articles 34 of the Penal Code.” The terms of bail obliged the author “not to leave the country” and “not to engage in certain activities that are punishable by the offence committed and that create the risk that new violations may be perpetrated – Art 270 of the Penal Code”. Several requests by the author for clarification of these terms were unsuccessful.

2.7 The author’s trial began on 21 March 2000. After thirty minutes, the judge ordered the proceedings to continue *in camera*, since a journalist had tried to photograph the proceedings.

2.8 By reference to article 46² of Press Law No. 22/91 of June 15 1991, the Provincial Court ruled that evidence presented by the author to support his defence of the ‘truth’ of the allegations and the good faith basis upon which they were made, including the texts of speeches of the President, Government resolutions and statements of foreign State officials, was inadmissible. In protest, the author’s lawyer left the courtroom, stating that he could not represent his client in such circumstances. When he returned to the courtroom on 25 March, the trial judge prevented him from resuming his representation of the author and ordered that he be disbarred from practising as a lawyer in Angola for a period of six months. The Court then appointed as *ex officio* defence counsel an official of the General Attorney’s Office working at the Provincial Court’s labour tribunal, who allegedly was not qualified to practise as a lawyer.

2.9 On 28 March 2000, a witness testifying on behalf of the author was ordered to leave the court and to stop his testimony after asserting that the law under which the author had been charged had been unconstitutional. The Court also refused to allow the author to call two other defence witnesses, without giving reasons.

2.10 On 31 March 2000, the Provincial Court convicted the author of abuse of the press³ by

² Article 46 of the Press Law reads: “If the person defamed is the President of the Republic of Angola, or the head of a foreign State, or its representative in Angola, then proof of the veracity of the facts shall not be admitted.”

³ The crime of abuse of the press is defined as follows in article 43 of the Press Law: “(1) For purposes of this law, an abuse of the press shall be deemed to be any act or behavior that injures the juridical values and interests

defamation,⁴ finding that his newspaper article of 3 July 1999, as well as the radio interview, contained “offensive words and expressions” against the Angolan President and, albeit not raised by the accusation and therefore not punishable, against the Attorney-General in their official and personal capacities. The Court found that the author had “acted with intention to injure” and based the conviction on the combined effect of articles 43, 44, 45 and 46 of Press Law No. 22/91, aggravated by item 1 of article 34 of the Penal Code (premeditation). It sentenced the author to six months’ imprisonment and a fine of 1,000,000.00 Kwanzas (Nkz.) to “discourage” similar behaviour, at the same time ordering the payment of NKz. 100,000.00 compensatory damages to “the offended” and of a court tax of NKz. 20,000.00.

2.11 On 4 April 2000, the author appealed to the Supreme Court of Angola. On 7 April 2000, the Supreme Court issued a public notice criticizing the Bar Association for having qualified the trial judge’s suspension of the author’s lawyer as null and void for lack of jurisdiction, in a decision of its National Council adopted on 27 March 2000.⁵

2.12 On 26 October 2000, the Supreme Court quashed the trial court’s judgment on the defamation count, but upheld the conviction for abuse of the press on the basis of injury⁶ to the President,

protected by the criminal code, effected by publication of texts or images through the press, radio broadcasts or television. (2) The criminal code is applicable to the aforementioned crimes as follows: (a) The court shall apply the punishment set forth in the incriminating legislation, which punishment may be aggravated pursuant to general provisions. (b) If the agent of the crime has not previously been found guilty of any abuse of the press, then the punishment of imprisonment may be replaced by a fine of not less than NKz. 20,000.00.”

⁴ Article 407 of the Criminal Code describes the crime of defamation as follows: “If one person defames another publicly, de viva voce, in writing, in a published drawing, or in any public manner, imputing to him something offensive to his hono[u]r and dignity, or reproduces this, then he shall be condemned to a prison term of up to four months and a fine [.....].”

⁵ The translation of the Supreme Court’s public notice reads, in pertinent parts: “It does not make sense, therefore, for a single courtroom incident, resulting from a decision handed down by the Judge in question in open court, a decision which may be cured by a higher court in the legal process, and which is subject to an inter-institutional decision, to have caused such an inflammatory and unnecessary public notice from the Bar Association, creating an unjustly suspicious climate and discrediting [the judiciary] both domestically and abroad, and causing distorted proclamations by individuals, institutions, and even governmental officials.”

⁶ The crime of injury is defined in article 410 of the Criminal Code: “The crime of injury, without imputation

punishable by item No. 3 of article 45,⁷ of Press Law No. 22/91. The Court considered that the author’s acts were not covered by his constitutional right to freedom of speech, since the exercise of that right was limited by other constitutionally recognized rights, such as one’s honour and reputation, or by “the respect that is due to the organs of sovereignty and to the symbols of the state, in this case the President of the Republic.” It affirmed the prison term of six-month, but suspended its application for a period of five years, and ordered the author to pay a court tax of NKz. 20,000.00 and NKz. 30,000.00 damages to the victim. The judgment did not refer to the pre-existing bail conditions imposed on the author.

2.13 On 11 November 2000, the author unsuccessfully sought to obtain a declaration confirming that his bail restrictions were no longer applicable.

2.14 On 12 December 2000, the author was prevented from leaving Angola for South Africa to participate in an Open Society Institute conference; his passport was confiscated. Despite repeated requests, his passport was not returned to him until 8 February 2001, following a court order of 2 February 2001 based on Amnesty Law 7/00 of 15 December 2000,⁸ which was declared applicable to the author’s case. Regardless of this amnesty, on 19 January 2002, the author was summoned to the Provincial Court and ordered to pay compensation of Nkz. 30,000 to the President, which he refused to pay, and legal costs, for which he paid.

The complaint

3.1 The author claims that his arrest and detention were not based on sufficiently defined provisions, in violation of article 9, paragraph 1, of the Covenant.

of any determined fact, if committed against any person publicly, by gestures, de viva voce, by published drawing or text, or by any other means of publication, shall be punished with a prison term of up to two months and a fine [...].

In an accusation for injury, no proof whatsoever of the veracity of the facts to which the injury may refer shall be admissible.”

⁷ Article 45 No. 3 reads: “Providing the veracity of the facts of the offence, once admitted by the author, shall render it exempt from punishment. Otherwise, the violator would be punished as a slanderer and sentenced to a prison term of up to 2 years and the corresponding fine, in addition to damages to be determined by a court, but in no case less than NKz. 50,000.00.”

⁸ Amnesty Law 7/00 applies to “crimes against security which were committed [...] within the sphere of the Angolan conflict, as long as its agents have presented themselves or may come to present themselves to the Angolan authorities [...].”

In particular, article 43 of the Press Law on ‘abuse of the press’ and article 410 of the Criminal Code on ‘injury’ lacked specificity and were overly broad, making it impossible to ascertain what sort of political speech remained permissible. Moreover, the authorities relied upon different legal bases for the author’s arrest and throughout the course of his subsequent indictment, trial and appeal. Even assuming that his arrest was lawful, his continued detention for a period of 40 days was neither reasonable nor necessary in the circumstances of his case.⁹

3.2 The author claims a violation of article 9, paragraph 2, as he was arrested without being informed of the reasons for his arrest or the charges against him. His 10-day incommunicado detention,¹⁰ without access to his lawyer or family, the denial of his constitutional¹¹ right to be brought before a judge during the entire 40 days of his detention, and the authorities’ failure to release him promptly pending trial, despite the absence of a risk of flight (as reflected by his cooperative attitude, e.g. when he reported to the DNIC on 13 October 1999), violated his rights under article 9, paragraph 3. The fact that he was prevented from challenging the lawfulness of his detention while detained incommunicado also violated article 9, paragraph 4, as did the Angolan courts’ failure to address his habeas corpus application. Under article 9, paragraph 5, the author claims compensation for his unlawful arrest and detention.

3.3 The author contends that the exclusion of the press and the public from his trial was not justified by any of the exceptional circumstances enumerated in article 14, paragraph 1, since the disruptive photographer could have been deprived of his camera or excluded from the courtroom.¹²

3.4 The fact that the author did not receive the formal charges against him until 40 days after his arrest is said to violate his right under article 14,

⁹ The author refers to Communication No. 305/1988, *van Alphen v. The Netherlands*, Views adopted on 23 July 1990, at para. 5.8.

¹⁰ By reference to Communication No. 277/1988, *Terán Jijón v. Ecuador*, Views adopted on 26 March 1992, at para. 3, the author submits that incommunicado detention as such gives rise to a violation of article 9, paragraph 3, of the Covenant, since it negatively impacts on the exercise of the right to be brought before a judge.

¹¹ Article 38 of the Constitution of Angola provides: “Any citizen subjected to preventive detention shall be taken before a competent judge to legalise the detention and be tried within the period provided for by law or released.”

¹² It appears that this issue was not however raised in the Supreme Court.

paragraph 3 (a), to be informed promptly of the nature and cause of the charge against him. He argues that this delay was not justified by the complexity of the case. Moreover, his conviction of more serious crimes (articles 43 and 45 of the Press Law) than the ones for which he was originally charged (articles 44 and 46 of the Press Law) breached his right to adequate facilities for the preparation of his defence (article 14, paragraph 3 (b), of the Covenant). His conviction on these additional charges should have been quashed by the Supreme Court, which instead held that a Provincial Court “may sentence a defendant for an infraction different from the one that he was accused of, even if it is more serious, provided that the grounds are facts included in the indictment or similar ruling.”

3.5 The author claims that his right under article 14, paragraph 3 (b), to communicate with counsel was violated, as he could not consult his lawyer during incommunicado detention, at a critical state of the proceedings, and because the trial judge did not adjourn the trial upon disbarring the author’s lawyer and appointing an ex officio defence counsel on 23 March 2000, thereby denying him adequate time to communicate with his new counsel. His right to defend himself through legal assistance of his own choosing (article 14, paragraph 3 (d)) was breached because his lawyer was unlawfully removed from the case, as confirmed by the Supreme Court’s judgment of 26 October 2000. He claims that, despite his willingness to pay for a counsel of his own choosing, a new counsel was appointed ex officio, who was neither qualified nor competent to provide adequate defence, limiting his interventions during the remainder of the trial to requesting the Court to “do justice” and to an expression of satisfaction with the proceedings.

3.6 For the author, the judge’s decision to hear only one defence witness, a human rights activist who was expelled from court after claiming that article 46 of the Press Law was unconstitutional, and to reject documentary evidence of the truth of the author’s statements, and the good faith basis on which they had been made, on the ground that article 46 of the Press Law precluded the presentation of evidence against the President, violated his rights under article 14, paragraph 3 (e), and denied him an opportunity to produce evidence on whether or not all the elements of the offence had been met, in particular whether he had acted with the intention of offending the President.

3.7 The author claims a violation of article 14, paragraph 5, because of the Supreme Court’s lack of impartiality when it publicly criticized the Bar Association while his appeal was still pending, as well as by the lack of clarity as to the exact legal basis of his conviction, which prevented him from lodging a “meaningful” appeal.

3.8 The author contends that his critical statements about President *dos Santos* were covered by his right to freedom of expression under article 19, which requires that citizens be allowed to criticize or openly and publicly evaluate their Governments, as well as the ability of the press to express political opinion, including criticism of those who wield political power. His unlawful arrest and detention on the basis of his statements, the restrictions on his rights to free speech and movement pending trial, his conviction and sentence, and the threat that any expression of opinion may be punished by similar sanctions in the future constituted restrictions on his freedom of speech. He argues that these restrictions were not “provided by law” within the meaning of article 19, paragraph 3, given (a) that his unlawful detention and subsequent travel restrictions had no basis in Angolan law; (b) that his conviction was based on provisions such as article 43 of the Press Law (“abuse of the press”) and article 410 of the Criminal Code (“injury”), which lacked the necessary clarity to qualify as “adequately accessible” and “sufficiently precise” norms, enabling an individual to foresee the consequences that his statements may entail; and (c) that the terms of his bail prohibiting him to “engage in certain activities that [...] create the risk that new violations may be perpetrated” were equally unclear and that he had unsuccessfully requested clarification of the meaning of these restrictions.

3.9 The author denies that the restrictions imposed on him pursued a legitimate aim under article 19, paragraph 3 (a) and (b). In particular, respect of the rights or reputation of others (lit. a) could not be interpreted so as to protect a President from political, as opposed to personal, criticism, given that the aim of the Covenant is to promote political debate. Nor were the measures against him necessary or proportionate to achieve a legitimate purpose, considering (a) that the limits of acceptable criticism are wider regarding politicians as opposed to private individuals, who do not enjoy comparable access to effective channels of communication to counteract false statements; (b) that he was convicted for his statements without having had an opportunity to defend the factual basis of these statements or to establish the good faith basis on which they were made; and (c) that the use of criminal rather than civil penalties against him, in any event, constitutes a disproportionate means of protecting the reputation of others.

3.10 Lastly, the author claims a violation of article 12, which includes a right to obtain the necessary travel documents for leaving one’s country. His prevention from leaving Angola on 12 December 2000 and the confiscation, without any justification, of his passport, which was withheld until February 2001, despite his repeated attempts to recover it and

to clarify his legal entitlement to travel, had no legal basis, as the bail restrictions no longer applied and since the Supreme Court’s judgment did not include any penalty inhibiting free movement. He contends that, in addition to article 12, these measures also violated his freedom of expression by precluding his participation in the conference organized by the Open Society Institute in South Africa.

3.11 The author claims that the same matter is not being examined under another procedure of international investigation or settlement and that he has exhausted domestic remedies, as he unsuccessfully tried to initiate *habeas corpus* proceedings to challenge the lawfulness of his arrest and detention and also appealed his conviction and sentence to the Supreme Court, the highest judicial authority in Angola.

3.12 The author seeks compensation for the alleged violations and requests the Committee to recommend that his conviction be quashed, that the State party clarify that there are no impediments to his freedom of movement, and that articles 45 and 46 of the Press Law be repealed.

State party’s failure to cooperate

4. On 15 November 2002, 15 December 2003, 26 January 2004 and 23 July 2004, the State party was requested to submit to the Committee information on the admissibility and merits of the communication. The Committee notes that this information has still not been received. The Committee regrets the State party’s failure to provide any information with regard to the admissibility or the substance of the author’s claims. It recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol that States parties examine in good faith all the allegations brought against them, and that they make available to the Committee all information at their disposal. 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 are substantiated.

Issues and proceedings before the Committee

Consideration of admissibility

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

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

5.3 With regard to the author's allegation that the press and the public were excluded from his trial, in violation of article 14, paragraph 1, the Committee notes that the author did not raise this issue before the Supreme Court. It follows that this part of the communication is inadmissible under articles 2 and 5, paragraph 2 (b), of the Optional Protocol.

5.4 Insofar as the author claims that he was not apprised of the formal charges against him until 40 days after his arrest, the Committee recalls that article 14, paragraph 3 (a), of the Covenant does not apply to the period of remand in custody pending the result of police investigations,¹³ but requires that an individual be informed promptly and in detail of the charge against him, as soon as the charge is first made by a competent authority. Although the author was formally charged on 25 November 1999, that is, one week after the indictment had been "approved" by the prosecution, he did not raise this delay on appeal. The Committee therefore concludes that this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

5.5 As to the claim that the conviction of more serious crimes than the ones charged by the prosecution violated the author's right under article 14, paragraph 3 (b), the Committee has noted the argument, in the Supreme Court's judgement of 26 October 2000, that a judge may convict a defendant of a more serious offence than the one that he was accused of, as long as the conviction is based on the facts described in the indictment. It recalls that it is generally for the national courts, and not for the Committee, to evaluate the facts and evidence in a particular case, or to review the interpretation of domestic legislation, unless it is apparent that the courts' decisions are manifestly arbitrary or amount to a denial of justice. The Committee considers that the author has not adequately substantiated that there was any absence of fair notice of the charges confronting him, nor has he otherwise substantiated any defects in relation to the Supreme Court's finding that a judge is not bound by the prosecution's legal evaluation of the facts as included in the indictment. Accordingly, this part of the communication is inadmissible under article 2 of the Optional Protocol.

5.6 As regards the author's claim that article 14, paragraph 3 (b), was also violated because the trial judge did not adjourn the trial after having replaced his lawyer by an ex officio counsel, thereby denying him adequate time to consult with his new counsel to prepare his defence, the Committee notes that the material before it does not reveal that the author, or his new counsel, requested an adjournment on

¹³ See Communication No. 253/1987, *Kelly v. Jamaica*, Views adopted on 8 April 1991, para. 5.8.

grounds of insufficient time to prepare the defence. If counsel felt that they were not properly prepared, it was incumbent on him to request the adjournment of the trial.¹⁴ In this respect, the Committee refers to its jurisprudence that a State party cannot be held responsible for the conduct of a defence lawyer, unless it was, or should have been, manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice.¹⁵ It considers that the author has not substantiated, for purposes of admissibility, that failure to adjourn the trial was manifestly incompatible with the interests of justice. Accordingly, this part of the communication is inadmissible under article 2 of the Optional Protocol.

5.7 As to the author's claim that his right to defend himself through legal assistance of his own choosing (article 14, paragraph 3 (d)) was breached, the Committee notes that the Supreme Court, while annulling the temporary suspension of the author's lawyer, did not pronounce itself on the legality of the lawyer's removal from the trial. On the contrary, it held that the abandonment of a client by a lawyer, outside situations specifically allowed by law, was subject to disciplinary sanctions under applicable regulations. In its public notice, the Supreme Court, instead of defending the judge's decision to debar the author's lawyer, expressed its concern about the effects of the Bar Associations criticism (causing "an unjustly suspicious climate [...] discrediting [the judiciary] both domestically and abroad"), while emphasizing that the trial judge's decision "may be cured by a higher court in the legal process." The Supreme Court subsequently declared the author's lawyer's six-month suspension null and void. Similarly, it does not transpire from the trial transcript that counsel was appointed against the author's will or that he limited his interventions during the remainder of the trial to redundant pleadings. According to the transcript, the author, when asked whether he intended to designate a new legal representative, declared that he would leave such decision to the Court. The Committee concludes that the author has not substantiated, for purposes of admissibility, that the removal of his lawyer from the trial was unlawful or arbitrary, that counsel was appointed against the author's will, or that he was unqualified to provide effective legal representation. Accordingly, this part of the communication is inadmissible under article 2 of the Optional Protocol.

¹⁴ See Communication No. 349/1989, *Wright v. Jamaica*, Views adopted on 27 July 1992, at para. 8.4.

¹⁵ See Communications No. 980/2001, *Hussain v. Mauritius*, decision on admissibility adopted on 18 March 2002, at para. 6.3, and No. 618/1995, *Campbell v. Jamaica*, Views adopted on 20 October 1998, at para. 7.3.

5.8 With respect to the alleged violation of article 14, paragraph 3 (e), by the trial judge's decision to admit only one defence witness, who was expelled from the court after criticizing Article 46 of the Press Law as unconstitutional, the Committee notes that it does not transpire from the Supreme Court's judgment of 26 October 2000, or from any other document at its disposal, that the author raised this claim on appeal. Consequently, this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol for failure to exhaust domestic remedies.

5.9 While noting that the author based his appeal, *inter alia*, on the fact that the trial judge had rejected the documentary evidence presented by him in defence of the truth of his statements, the Committee notes that it is in principle beyond its competence to determine whether national courts properly evaluate the admissibility of evidence, unless it is apparent that their decision is manifestly arbitrary or amounts to a denial of justice. In the instant case, the Committee notes that the Provincial Court and, in particular, the Supreme Court examined whether the Press Law lawfully precludes the defence of the truth in relation to statements concerning the Angolan President, and it finds no evidence that their findings suffered from the above defects. It therefore considers that the author has not substantiated this part of his claim under article 14, paragraph 3 (e), for purposes of admissibility, and concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

5.10 As regards the author's claim that his right under article 14, paragraph 5, was violated because of the lack of clarity about the legal basis for his conviction by the Provincial Court, and because the Supreme Court's impartiality was undermined by its public notice of 7 April 2000, the Committee observes that the crime of which the author was convicted (abuse of the press by defamation) is described with sufficient clarity in the Provincial Court's judgment. The Committee therefore concludes that the author has not sufficiently substantiated his claim, for purposes of admissibility, and that this part of the communication is inadmissible under article 2 of the Optional Protocol.

5.11 As to the remainder of the communication, the Committee considers that the author has sufficiently substantiated his claims for purposes of admissibility.

5.12 On the issue of exhaustion of domestic remedies, the Committee notes that the author raised the substance of his claims under article 9 in his application for *habeas corpus*, which, according to him, was never adjudicated by the Angolan courts. As regards the author's claim under article 19 of the

Covenant, the Committee notes that he invoked "the right of political and social criticism and of the freedom of the press" on appeal. It furthermore notes the author's claim (in relation to article 12 of the Covenant) that he "took repeated legal measures to recover his passport and [to] clarify, legally, his entitlement to travel but was hampered by complete lack of access to information regarding his travel documents," and observes that, in the circumstances, no domestic remedies were available to the author.

5.13 In the absence of any information from the State party to the contrary, the Committee concludes that the author has met the requirements of article 5, paragraph 2 (b), of the Optional Protocol, and that the communication is admissible, insofar as it appears to raise issues under articles 9, paragraphs 1 to 5, 12, 14, paragraph 3 (b) (inasmuch as author's inability to have access to counsel during his incommunicado detention is concerned), and 19 of the Covenant.

Consideration of the merits

6.1 The first issue before the Committee is whether the author's arrest on 16 October 1999 and his subsequent detention until 25 November 1999 were arbitrary or otherwise in violation of article 9 of the Covenant. In accordance with the Committee's constant jurisprudence,¹⁶ the notion of "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law. This means that remand in custody must not only be lawful but reasonable and necessary in all the circumstances, for example to prevent flight, interference with evidence or the recurrence of crime. No such element has been invoked in the instant case. Irrespective of the applicable rules of criminal procedure, the Committee observes that the author was arrested on, albeit undisclosed, charges of defamation which, although qualifying as a crime under Angolan law, does not justify his arrest at gunpoint by 20 armed policemen, nor the length of his detention of 40 days, including 10 days of incommunicado detention. The Committee concludes that in the circumstances, the author's arrest and detention were neither reasonable nor necessary but, at least in part, of a punitive character and thus arbitrary, in violation of article 9, paragraph 1.

¹⁶ See Communication No. 305/1988, *Van Alphen v. The Netherlands*, Views adopted on 23 July 1990, at para. 5.8; Communication No. 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994, at para. 9.8; Communication No. 560/1993, *A. v. Australia*, Views adopted on 3 April 1997, at para. 9.2.

6.2 The Committee notes the author's uncontested claim that he was not informed of the reasons for his arrest and that he was charged only on 25 November 1999, 40 days after his arrest on 16 October 1999. It considers that the chief investigator's statement, on 16 October 1999, that the author was held as a *UNITA* prisoner, did not meet the requirements of article 9, paragraph 2. In the circumstances, the Committee concludes that there has been a violation of article 9, paragraph 2.

6.3 As regards the author's claim that he was not brought before a judge during the 40 days of detention, the Committee recalls that the right to be brought "promptly" before a judicial authority implies that delays must not exceed a few days, and that incommunicado detention as such may violate article 9, paragraph 3.¹⁷ It takes note of the author's argument that his 10-day incommunicado detention, without access to a lawyer, adversely affected his right to be brought before a judge, and concludes that the facts before it disclose a violation of article 9, paragraph 3. In view of this finding, the Committee need not pronounce itself on the alleged violation of article 14, paragraph 3 (b).

6.4 As to the author's claim that, rather than being detained in custody for 40 days, he should have been released pending trial, in the absence of a risk of flight, the Committee notes that the author was not charged until 25 November 1999, when he was also released from custody. He was therefore not "awaiting" trial within the meaning of article 9, paragraph 3, before that date. Moreover, he was not brought before a judicial authority before that date, which could have determined whether there was a lawful reason to extend his detention. The Committee therefore considers that the illegality of the author's 40-day detention, without access to a judge, is subsumed by the violations of article 9, paragraphs 1 and 3, first sentence, and that no issue of prolonged pre-trial detention arises under article 9, paragraph 3, second sentence.

6.5 As regards the alleged violation of article 9, paragraph 4, the Committee recalls that the author had no access to counsel during his incommunicado detention, which prevented him from challenging the lawfulness of his detention during that period. Even though his lawyer subsequently, on 29 October 1999, applied for *habeas corpus* to the Supreme Court, this application was never adjudicated. In the absence of any information from the State party, the Committee finds that the author's right to judicial review of the lawfulness of his detention (article 9, paragraph 4) has been violated.

¹⁷ Communication No. 277/1988, *Terán Jijón v. Ecuador*, Views adopted on 26 March 1992, at para. 5.3.

6.6 With respect to the author's claim under article 9, paragraph 5, the Committee recalls that this provision governs the granting of compensation for arrest or detention that is "unlawful" either under domestic law or within the meaning of the Covenant.¹⁸ It recalls that the circumstances of the author's arrest and detention gave rise to violations of article 9, paragraphs 1 to 4, of the Covenant, and notes the author's uncontested argument that the State party's failure to bring him before a judge during his 40-day detention also violated article 38 of the Angolan Constitution. Against this background, the Committee deems it appropriate to deal with the issue of compensation in the remedial paragraph.

6.7 The next issue before the Committee is whether the author's arrest, detention and conviction, or his travel constraints, unlawfully restricted his right to freedom of expression, in violation of article 19 of the Covenant. The Committee reiterates that the right to freedom of expression in article 19, paragraph 2, includes the right of individuals to criticize or openly and publicly evaluate their Governments without fear of interference or punishment.¹⁹

6.8 The Committee refers to its jurisprudence that any restriction on the right to freedom of expression must cumulatively meet the following conditions set out in paragraph 3 of article 19: it must be provided for by law, it must serve one of the aims enumerated in article 19, paragraph 3 (a) and (b), and it must be necessary to achieve one of these purposes. The Committee notes that the author's final conviction was based on Article 43 of the Press Law, in conjunction with Section 410 of the Criminal Code. Even if it were assumed that his arrest and detention, or the restrictions on his travel, had a basis in Angolan law, and that these measures, as well as his conviction, pursued a legitimate aim, such as protecting the President's rights and reputation or public order, it cannot be said that the restrictions were necessary to achieve one of these aims. The Committee observes that the requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect. Given the paramount importance, in a democratic society, of the right to freedom of expression and of a free and uncensored press or other media,²⁰ the severity

¹⁸ See Communication No. 560/1993, *A. v. Australia*, Views adopted on 3 April 1997, at para. 9.5.

¹⁹ See Communications Nos. 422/1990, 423/1990 and 424/1990, *Aduayom et al. v. Togo*, Views adopted on 12 July 1996, at para. 7.4.

²⁰ See Human Rights Committee, General Comment 25 [57], 12 July 1996, at para. 25.

of the sanctions imposed on the author cannot be considered as a proportionate measure to protect public order or the honour and the reputation of the President, a public figure who, as such, is subject to criticism and opposition. In addition, the Committee considers it an aggravating factor that the author's proposed truth defence against the libel charge was ruled out by the courts. In the circumstances, the Committee concludes that there has been a violation of article 19.

6.9 The last issue before the Committee is whether the author's prevention from leaving Angola on 12 December 2000 and the subsequent confiscation of his passport were in violation of article 12 of the Covenant. It notes the author's contention that his passport was confiscated without justification or legal basis, as his bail restrictions no longer applied, and that he was denied access to information about his entitlement to travel. In the absence of any justification advanced by the State party, the Committee finds that the author's rights under article 12, paragraph 1, have been violated.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights,

is of the view that the facts before it reveal violations of article 9, paragraphs 1, 2, 3 and 4, and of articles 12 and 19 of the Covenant.

8. In accordance with article 2, paragraph 3, of the Covenant, the author is entitled to an effective remedy, including compensation for his arbitrary arrest and detention, as well as for the violations of his rights under articles 12 and 19 of the Covenant. The State party is under an obligation to take measures 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 or not and that, pursuant to article 2 of the Covenant, that State party has undertaken to ensure all individuals within its territory or 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 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

Communication No. 1134/2002

Submitted by: Fongum Gorji-Dinka (represented by Irene Schäfer)

Alleged victim: The author

State Party: Cameroon

Date of adoption of Views: 17 March 2005 (eighty-third session)

Subject matter: Claim of right to self-determination of former British Southern Cameroon by separatist leader

Procedural issues: Admissibility *ratione temporis* and *ratione materiae* - Substantiation of claims - Exhaustion of domestic remedies

Substantive issues: Right to self-determination - Liberty and security of person - Right of persons deprived of their liberty to be treated with humanity - Segregation of accused from convicted persons - Liberty of movement - Compensation for miscarriage of justice - Right to vote

Articles of the Covenant: 1 (1), 7, 9 (1), 10 (1) and (2), 12, 14 (6), 19 and 25 (b)

Articles of the Optional Protocol: 1, 2, 3 and 5 (2) (b)

Finding: Violation (articles 9, paragraph 1; 10, paragraphs 1 and 2 (a); 12, paragraph 1; and 25 (b))

1. The author of the communication is Mr. Fongum Gorji-Dinka, a national of Cameroon, born on 22 June 1930, currently residing in the United Kingdom. He claims to be victim of violations by Cameroon¹ of articles 1, paragraph 1; 7; 9 paragraphs 1 and 5; 10, paragraphs 1 and 2 (a); 12; 19; 24, paragraph 3; and 25 (b) of the Covenant. He is represented by counsel.²

Factual background

2.1 The author is a former President of the Bar Association of Cameroon (1976-1981), the *Fon*, or traditional ruler, of Widikum in Cameroon's North-

¹ The Covenant and the Optional Protocol entered into force for the State party on 27 September 1984.

² The communication was submitted by the author personally. However, by letter dated 4 August 2004, Ms. Irene Schäfer presented an instrument executed by the author making her counsel of record.

West province, and claims to be the head of the exile government of “Ambazonia”. His complaint is closely linked to events which occurred in British Southern Cameroon in the context of decolonization.

2.2 After World War I, the League of Nations placed all former German colonies under international administration. Under a League of Nations mandate, Cameroon was partitioned between Great Britain and France. After World War II, the British and French Cameroons became United Nations trust territories, the British part being divided into the United Nations trust territory of British Southern Cameroon (“Ambazonia”) and the United Nations trust territory of British Northern Cameroon. The “Ambas” were a federation of sovereign but interdependent ethnocracies, each under a traditional ruler called “Fon”. In 1954, they were unified in a modern parliamentary democracy, consisting of a House of Chiefs appointed from among the traditional leaders, a House of Assembly elected by universal suffrage, and a government led by a Prime Minister appointed and dismissed by the Queen of England.

2.3 French Cameroon achieved independence in 1960 as the Republic of Cameroon. While the largely Muslim British Northern Cameroon voted to join Nigeria, the largely Christian British Southern Cameroon, in a United Nations plebiscite held on 11 February 1961, voted in favour of joining a union with the Republic of Cameroon, within which Ambazonia would preserve its nationhood and a considerable degree of sovereignty. The United Kingdom allegedly refused to implement the plebiscite, fearing that the Ambazonian Prime Minister would come under communist influence and would nationalize the Cameroon Development Cooperation (CDC), in which Britain had invested £2 million. In exchange for a licence to continue exploiting CDC, the United Kingdom allegedly “sold” Ambazonia to the Republic of Cameroon which then became the Federal Republic of Cameroon.

2.4 On 8 October 1981, the author was asked to secure bail for five Nigerian missionaries accused of disseminating the teachings of a sect without a government permit. At the police station, he was arrested and detained together with the missionaries. A few months later, he was charged with the offence of fabricating a fake permit for the sect to operate in Cameroon. Although the trial judge found, on the facts, that the author had not been in Cameroon when the offence was committed, he sentenced him to 12 months’ imprisonment. The author’s appeal was delayed until after he had served his prison term. Just before the hearing of his appeal, Parliament enacted Amnesty Law 82/21, thereby expunging his conviction. The author subsequently abandoned his appeal and filed for compensation for unlawful

detention, but he never received a reply from the authorities.

2.5 As a result of the “subjugation” of Ambazonians, whose human rights were allegedly severely violated by members of the Franco-Cameroonian armed forces as well as militia groups, riots broke out in 1983, prompting Parliament to enact Restoration Law 84/01, which dissolved the union of the two countries. The author then became head of the “Ambazonian Restoration Council” and published several articles, which called on President Paul Biya of the Republic of Cameroon to comply with the Restoration Law and to withdraw from Ambazonia.

2.6 On 31 May 1985, the author was arrested and taken from Bamenda (Ambazonia) to Yaoundé, where he was detained in a wet and dirty cell without a bed, table or any sanitary facilities. He fell ill and was hospitalized. After having received information on plans to transfer him to a mental hospital, he escaped to the residence of the British Ambassador, who rejected his asylum request and handed him over to the police. On 9 June 1985, the author was re-detained at the headquarters of the *Brigade mixte mobile* (BMM), a paramilitary police force, where he initially shared a cell with 20 murder convicts.

2.7 Allegedly as a result of the physical and mental torture he was subjected to during detention, the author suffered a stroke which paralyzed his left side.

2.8 The author’s detention reportedly provoked the so-called “Dinka riots”, whereupon schools closed for several weeks. On 11 November 1985, Parliament adopted a resolution calling for a National Conference to address the Ambazonian question. In response, President Biya accused the President of Parliament of leading a “pro-Dinka” parliamentary revolt against him; he had the author charged with high treason before a Military Tribunal, allegedly asking for the death penalty. The prosecution’s case collapsed in the absence of any legal provision which would have criminalized the author’s call on President Biya to comply with the Restoration Law by withdrawing from Ambazonia. On 3 February 1986, the author was acquitted of all charges and released from detention.

2.9 President Biya’s intention to appeal the judgement, after having ordered the author’s re-arrest, was frustrated because the law establishing the Military Tribunal did not provide for the possibility of appeal in cases involving high treason. The author was then placed under house arrest between 7 February 1986 and 28 March 1988. In a letter dated 15 May 1987, the Department of Political Affairs of the Ministry of Territorial Administration advised the author that his behaviour during house arrest was incompatible with his

“probationary release” by the Military Tribunal, since he continued to hold meetings at his palace, to attend customary court sessions, to invoke his prerogatives as *Fon*, to contempt and disregard the law enforcement and other authorities, and to continue the practice of the illegal Olumba Olumba religion. On 25 March 1988, the Sub-Divisional Office of the Batibo Momo Division informed the author that because of his “judicial antecedent”, his name had been removed from the register of electors until such time he could produce a “certificate of rehabilitation”.

2.10 On 28 March 1988, the author went into exile in Nigeria. In 1995, he went to Great Britain, where he was recognized as a refugee and became a barrister.

The complaint

3.1 The author claims that the “illegal annexation” of Ambazonia by the Republic of Cameroon denies the will of Ambazonians to preserve their nationhood and sovereign powers, as expressed in the 1961 plebiscite and confirmed by a 1992 judgement of the High Court of Bamenda, thereby violating his people’s right to self-determination under article 1, paragraph 1, of the Covenant. By reference to article 24, paragraph 3, he also alleges a breach of the right to his own nationality.

3.2 The author claims that his detention from 8 October 1981 to 7 October 1982 and from 31 May 1985 to 3 February 1986, as well as his subsequent house arrest from 7 February 1986 to 28 March 1988, were arbitrary and in breach of article 9, paragraph 1, of the Covenant. The conditions of detention and the ill-treatment suffered during the second detention period amounted to violations of articles 7 and 10, paragraph 1, while the fact that he was initially kept with a group of murder convicts at the BMM headquarters, upon his re-arrest on 9 June 1985, violated article 10, paragraph 2 (a). He further claims that the restriction on his movement during house arrest and his current *de facto* prohibition from leaving and entering his country amount to a breach of article 12 of the Covenant.

3.3 The author alleges that his deprivation of the right to vote and to be elected at elections violated article 25 (b) of the Covenant.

3.4 Under article 19 of the Covenant, the author claims that his arrest on 31 May 1985 and his subsequent detention were punitive measures, designed to punish him for his regime-critical publications.

3.5 The author further alleges that his right, under article 9, paragraph 5, to compensation for unlawful detention from 8 October 1981 to 7 October 1982

was violated, because the authorities never replied to his compensation claim.

3.6 The author claims that all his attempts to seek domestic judicial redress were futile, as the authorities did not respond to his compensation claim and did not comply with national laws or with the judgements of the Cameroon Military Tribunal and the High Court of Bamenda. Following his escape from house arrest in 1988, domestic remedies were no longer available to him as a fugitive. He contends that the only way to make his rights prevail would be through a Committee decision, since Cameroon’s authorities never respect their own tribunals’ decisions in human rights-related matters.

3.7 The author submits that the same matter is not being examined under another procedure of international investigation or settlement.

Issues and proceedings before the Committee

Considerations of admissibility

4.1 On 12 November 2002, 26 May 2003 and 30 July 2003, the State party was requested to submit to the Committee information on the admissibility and merits of the communication. The Committee notes that this information has still not been received. The Committee regrets the State party’s failure to provide any information with regard to the admissibility or the substance of the author’s claims. It recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol that States parties examine in good faith all the allegations brought against them, and that they make available to the Committee all information at their disposal. 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 are substantiated.³

4.2 The Committee has noted that several years passed between the occurrence of the events at the basis of the author’s communication, his attempts to avail himself of domestic remedies, and the time of submission of his case to the Committee. While such substantial delays might, in different circumstances, be characterized as an abuse of the right of submission within the meaning of article 3 of the Optional Protocol, unless a convincing explanation on justification of this delay has been adduced,⁴ the Committee also is mindful of the State party’s failure to cooperate with it and to present to it its observations on the admissibility and merits of the

³ See Communication No. 912/2000, *Deollall v. Guyana*, Views adopted on 1 November 2004, para. 4.1.

⁴ See Communication No. 788/ 1997, *Gobin v. Mauritius*, decision of inadmissibility adopted on 16 July 2001, para. 6.3.

case. In the circumstances, the Committee does not consider it necessary further to address this issue.

4.3 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

4.4 Insofar as the author claims that his and his people's right to self-determination has been violated by the State party's failure to implement the 1961 plebiscite, Restoration Law 84/01, the 1992 judgement of the High Court of Bamenda, or by its "subjugation" of the Ambazonians, the Committee recalls that it does not have competence under the Optional Protocol to consider claims alleging a violation of the right to self-determination protected in article 1 of the Covenant.⁵ The Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated. These rights are set out in part III (articles 6 to 27) of the Covenant.⁶ It follows that this part of the communication is inadmissible under article 1 of the Optional Protocol.

4.5 Regarding the author's claim that his incarceration from 8 October 1981 to 7 October 1982 was arbitrary, in violation of article 9, paragraph 1, of the Covenant, given that his conviction was expunged by Amnesty Law 82/21, the Committee recalls that it cannot consider alleged violations of the Covenant which occurred before the entry into force of the Optional Protocol for the State party, unless these violations continue after that date or continue to have effects which in themselves constitute a violation of the Covenant.⁷ It notes that the author's incarceration in 1981-82 predates the entry into force of the Optional Protocol for the State party on 27 September 1984. The Committee observes that, while punishment suffered as a result of a criminal conviction that was subsequently reversed may continue to produce effects for as long as the victim of such punishment has not been compensated according to law, this is an issue which arises under article 14, paragraph 6, rather than under article 9, paragraph 1, of the Covenant. It does not therefore consider that the alleged arbitrary detention of the author continued to have effects

⁵ See Communication No. 932/2000, *Gillot v. France*, Views adopted on 15 July 2002, at para. 13.4.

⁶ See Communication No. 167/1984, *Bernard Ominayak et al. v. Canada*, Views adopted on 26 March 1990, at para. 32.1.

⁷ See Communication No. 520/1992, *A.K. v. Hungary*, decision on admissibility adopted on 7 April 1994, para. 6.4; Communication No. 24/1977, *Sandra Lovelace v. Canada*, Views adopted on 30 July 1981, para. 7.3.

beyond 27 September 1984, which would *in themselves* have constituted a violation of article 9, paragraph 1, of the Covenant. The Committee concludes that this part of the communication is inadmissible *ratione temporis* under article 1 of the Optional Protocol.

4.6 As to the author's allegation that he was not compensated for his unlawful detention in 1981-82, the Committee considers that the author has not provided sufficient information to substantiate his claim, for purposes of admissibility. In particular, he did not provide copies, nor indicate the date or addressee of any letters to the competent authorities, claiming compensation. It follows that this claim is inadmissible under article 2 of the Optional Protocol.

4.7 Insofar as the author claims a violation of articles 7 of the Covenant in that he was physically and mentally tortured in detention after his re-arrest on 9 June 1985 (and which allegedly resulted in a stroke which paralyzed his left side), the Committee notes that he has not provided any details about the ill-treatment allegedly suffered, nor copies of any medical reports which would corroborate his allegation. Therefore, the Committee concludes that the author has not substantiated this claim, for purposes of admissibility, and that this part of the communication is inadmissible under article 2 of the Optional Protocol.

4.8 With regard to the author's claim that his arrest on 31 May 1985 and his subsequent detention were measures designed to punish him for the publication of his regime-critical pamphlets, in violation of article 19 of the Covenant, the Committee finds that the author has not substantiated, for purposes of admissibility, that said detention was a direct consequence of such publications. It follows that this part of the communication is also inadmissible under article 2 of the Optional Protocol.

4.9 As regards the author's claim under article 25 (b) of the Covenant, the Committee is of the view that exercise of the right to vote and to stand for election is dependent on the name of the person concerned being included in the register of voters. If the author's name is not on the register of voters or is removed from the register, he cannot exercise his right to vote or stand for election. In the absence of any explanations from the State party, the Committee notes that the author's name was arbitrarily removed from the voters' list, without any motivation or court decision. The very fact of removal of the author's name from the register of voters may therefore constitute denial of his right to vote and to stand for election in accordance with article 25 (b) of the Covenant. The Committee is accordingly of the view that the author has

sufficiently substantiated this claim, for purposes of admissibility.

4.10 Insofar as the author claims that he is being denied his right to Ambazonian nationality, in violation of article 24, paragraph 3, of the Covenant, the Committee recalls that this provision protects the right of every *child* to acquire a nationality. Its purpose is to prevent a child from being afforded less protection by society and the State because he or she is stateless,⁸ rather than to afford an entitlement to a nationality of one's own choice. It follows that this part of the communication is inadmissible *ratione materiae* under article 3 of the Optional Protocol.

4.11 With regard to exhaustion of domestic remedies, the Committee takes note of the author's argument that, following his escape from house arrest in 1988, he was not in a position to seek redress at the domestic level, as a person who was wanted in Cameroon. In the light of its jurisprudence⁹ that article 5, paragraph 2 (b), of the Optional Protocol does not require resort to remedies which objectively have no prospect of success, and in the absence of any indication by the State party that the author could have availed himself of effective remedies, the Committee is satisfied that the author has sufficiently demonstrated the ineffectiveness and unavailability of domestic remedies in his particular case.

4.12 The Committee concludes that the communication is admissible, insofar as it raises issues under articles 7, 9, paragraph 1, 10, paragraphs 1 and 2 (a), 12 and 25 (b) of the Covenant, and to the extent that it relates to the lawfulness and the conditions of detention following his arrest on 31 May 1985, his incarceration initially with a group of murder convicts at the BMM headquarters, the lawfulness of, as well as the restrictions on his liberty of movement during his house arrest from 7 February 1986 to 28 March 1988, and the removal of his name from the voters' register.

Consideration of the merits

5.1 The first issue before the Committee is whether the author's detention from 31 May 1985 to 3 February 1986 was arbitrary. In accordance with the Committee's constant jurisprudence,¹⁰

⁸ See General Comment No. 17 [35] on article 24, para. 8.

⁹ See, e.g., Communications Nos. 210/1986 and 225/1987, *Earl Pratt and Ivan Morgan v. Jamaica*, Views adopted on 6 April 1989, para. 12.3.

¹⁰ See Communication No. 305/1988, *Van Alphen v. The Netherlands*, Views adopted on 23 July 1990,

"arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law. This means that remand in custody must not only be lawful but reasonable and necessary in all the circumstances, for example to prevent flight, interference with evidence or the recurrence of crime.¹¹ The State party has not invoked any such elements in the instant case. The Committee further recalls the author's uncontested claim that it was only after his arrest on 31 May 1985 and his re-arrest on 9 June 1985 that President Biya filed criminal charges against him, allegedly without any legal basis and with the intention to influence the outcome of the trial before the Military Tribunal. Against this background, the Committee finds that the author's detention between 31 May 1985 and 3 February 1986 was neither reasonable nor necessary in the circumstances of the case, and thus in violation of article 9, paragraph 1, of the Covenant.

5.2 With regard to the conditions of detention, the Committee takes note of the author's uncontested allegation that he was kept in a wet and dirty cell without a bed, table or any sanitary facilities. It reiterates that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and that they must be treated in accordance with, *inter alia*, the Standard Minimum Rules for the Treatment of Prisoners (1957).¹² In the absence of State party information on the conditions of the author's detention, the Committee concludes that the author's rights under article 10, paragraph 1, were violated during his detention between 31 May 1985 and the day of his hospitalization.

5.3 The Committee notes that the author's claim that he was initially kept in a cell with 20 murder convicts at the headquarters of the *Brigade mixte mobile* has not been challenged by the State party, which has not adduced any exceptional circumstances which would have justified its failure to segregate the author from such convicts in order to emphasize his status as an unconvicted person. The Committee therefore finds that the author's rights under article 10, paragraph 2 (a), of the Covenant were breached during his detention at the BMM headquarters.

5.4 As to the author's claim that his house arrest between 7 February 1986 and 28 March 1988 was arbitrary, in violation of article 9, paragraph 1, of the Covenant, the Committee takes note of the letter

para. 5.8; Communication No. 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994, para. 9.8.

¹¹ See *ibid.*

¹² General Comment No. 21 [44] on article 10, paras. 3 and 5.

dated 15 May 1987 from the Department of Political Affairs of the Ministry of Territorial Administration, which criticized the author's behaviour during his house arrest. This confirms that the author was indeed under house arrest. The Committee further notes that this house arrest was imposed on him after his acquittal and release by virtue of a final judgement of the Military Tribunal. The Committee recalls that article 9, paragraph 1, is applicable to all forms of deprivation of liberty¹³ and observes that the author's house arrest was unlawful and therefore arbitrary in the circumstances of the case, and thus in violation of article 9, paragraph 1.

5.5 In the absence of any exceptional circumstances adduced by the State party, which would have justified any restrictions on the author's right to liberty of movement, the Committee finds that the author's rights under article 12, paragraph 1, of the Covenant were violated during his house arrest, which was itself unlawful and arbitrary.

5.6 As regards the author's claim that the removal of his name from the voters' register violates his rights under article 25 (b) of the Covenant, the Committee observes that the exercise of the right to vote and to be elected may not be suspended or excluded except on grounds established by law which are objective and reasonable.¹⁴ Although the letter dated 25 March 1998, which informed the author of the removal of his name from the register of voters, refers to the "current electoral law", it justifies that measure with his "judicial antecedent". In this regard, the Committee reiterates that persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote,¹⁵ and recalls that the author was acquitted by the Military Tribunal in 1986 and that

¹³ General Comment No. 8 [16] on article 9, para. 1.

¹⁴ General Comment No. 25 [57] on article 25, para. 4.

¹⁵ *Ibid.*, at para. 14.

his conviction by another tribunal in 1981 was expunged by virtue of Amnesty Law 82/21. It also recalls that persons who are otherwise eligible to stand for election should not be excluded by reason of political affiliation.¹⁶ In the absence of any objective and reasonable grounds to justify the author's deprivation of his right to vote and to be elected, the Committee concludes, on the basis of the material before it, that the removal of the author's name from the voters' register amounts to a violation of his rights under article 25 (b) of the Covenant.

6. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal violations of articles 9, paragraph 1; 10, paragraphs 1 and 2 (a); 12, paragraph 1; and 25 (b) of the Covenant.

7. In accordance with article 2, paragraph 3, of the Covenant, the author is entitled to an effective remedy, including compensation and assurance of the enjoyment of his civil and political rights. The State party is also under an obligation to take measures to prevent similar violations in the future.

8. 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, that State party has undertaken to ensure all individuals within its territory or 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 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

¹⁶ *Ibid.*, at para. 15.

Communication No. 1136/2002

Submitted by: Vjatšeslav Borzov
Alleged victim: The author
State party: Estonia
Date of adoption of Views: 26 July 2004

Subject matter: State party's refusal to grant citizenship to a permanent resident on national security grounds

Procedural issue: Exhaustion of domestic remedies

Substantive issues: Need to have reasonable and objective justification, and a legitimate aim, for distinctions that relate to an individual's characteristics enumerated in article 26, including "other status"

Article of the Covenant: 26

Article of the Optional Protocol: 5, paragraph 2 (b)

Finding: No violation

1. The author of the communication is Vjatšeslav Borzov, who is allegedly stateless, born in Kurganinsk, Russia, on 9 August 1942 and currently residing in Estonia. The author claims to be a victim of violations by Estonia of article 26 of the Covenant. He is not represented by counsel.

The facts as presented by the author

2.1 From 1962 to 1967, the author attended the Sevastopol Higher Navy College in the specialty of military electrochemical engineer. After graduation, he served in Kamchatka until 1976 and thereafter in Tallinn as head of a military factory until 1986. On 10 November 1986, he was released from service with rank of captain due to illness. The author has worked, since 1988, as a head of department in a private company, and he is married to a naturalized Estonian woman. In 1991, Estonia achieved independence.

2.2 On 28 February 1994, the author applied for Estonian citizenship. In 1994, an agreement between Estonia and the Russian Federation entered into force which concerned the withdrawal of troops stationed on the former's territory (the 1994 treaty). In 1995, the author obtained an Estonian residence permit, pursuant to the Aliens Act's provisions concerning persons who had settled in Estonia prior to 1990. In 1996, an agreement between Estonia and the Russian Federation entered into force, concerning "regulation of issues of social guarantees of retired officers of the armed forces of the Russian Federation in the territory of the Republic of Estonia" (the 1996 treaty). Pursuant to the 1996 treaty, the author's pension has

been paid by the Russian Federation. Following delays occasioned by deficiencies of archive materials, on 29 September 1998, the Estonian Government, by Order No. 931-k, refused the application. The refusal was based on section 8 of the Citizenship Act of 1938, as well as section 32 of the Citizenship Act of 1995 which precluded citizenship for a career military officer in the armed forces of a foreign country who had been discharged or retired therefrom.

2.3 On 23 April 1999, the Tallinn District Court (Administrative Section) rejected the author's appeal against the refusal, holding that while the 1938 Act (which was applicable to the author's case) did not contain the specific exemption found in section 32 of the 1995 Act, the Government was within its powers to reject the application. On 7 June 1999, the Tallinn Court of Appeal allowed the author's appeal against the District Court's decision and declared the Government's refusal of the authors' application to be unlawful. The Court considered that in simply citing a general provision of law rather than justifying the individual basis on which the author's application was refused, the Government had insufficiently reasoned the decision and left it impossible to ascertain whether the author's equality rights had been violated.

2.4 On 22 September 1999, upon reconsideration, the Government, by Decree 1001-k, again rejected the application, for reasons of national security. The order explicitly took into account the author's age, his training from 1962 to 1967, his length of service in the armed forces of a "foreign country" from 1967 to 1986, the fact that in 1986 he was assigned to the reserve as a captain, and that he was a military pensioner under article 2, clause 3, of the 1996 treaty pursuant to which his pension was paid by the Russian Federation.

2.5 On 4 October 2000, the Tallinn Administrative Court rejected, at first instance, the author's appeal against the new refusal of citizenship. The Court found that the author had not been refused citizenship because he had actually acted against the Estonian state and its security in view of his personal circumstances. Rather, for the reasons cited, the author was in a position where he could act against Estonian national security. On 25 January 2001, the Tallinn Court of Appeal rejected the author's appeal. The Court, finding the

Citizenship Act as amended in 1999 to be the applicable law in the case, found that the Government had properly come to the conclusion that, for the reasons cited, the author could be refused citizenship on national security grounds. It observed that there was no need to make out a case of a specific individual threat posed by the author, as he had not been accused of engaging in actual activities against the Estonian state and its security.

2.6 The author filed a further appeal in cassation to the Supreme Court, arguing that the applicable law was in fact the 1938 Act, and that the Government's order refusing citizenship was insufficiently reasoned, as it simply referred to the law and listed factual circumstances. These circumstances did not, in his view, prove that he was a threat to national security. He also argued that the lower court had failed to assess whether the refusal was in fact discriminatorily based on his membership of a particular social group, in violation of article 12 of the Constitution. On 21 March 2001, the Appeals Selection Panel of the Supreme Court refused the author leave to appeal.

The complaint

3.1 The author argues that he has been the victim of discrimination on the basis of social origin, contrary to article 26 of the Covenant. He contends that section 21 (1) of the Citizenship Act¹ imposes an unreasonable and unjustifiable restriction of rights on the grounds of a person's social position or origin. He argues that the law presumes that all foreigners who have served in armed forces pose a

¹ Section 21 (1) provides, in material part:

§ 21. *Refusal to grant or refusal for resumption of Estonian citizenship*

(1) Estonian citizenship shall not be granted to or resumed by a person who:

(2) does not observe the constitutional order and Acts of Estonia;

(3) has acted against the Estonian state and its security;

(4) has committed a criminal offence for which a punishment of imprisonment of more than one year was imposed and whose criminal record has not expired or who has been repeatedly punished under criminal procedure for intentionally committed criminal offences;

(5) has been employed or is currently employed by foreign intelligence or security services;

(6) has served as a professional member of the armed forces of a foreign state or who has been assigned to the reserve forces thereof or has retired therefrom, and nor shall Estonian citizenship be granted to or resumed by his or her spouse who entered Estonia due to a member of the armed forces being sent into service, the reserve or into retirement.

threat to Estonian national security, regardless of the individual features of the particular service or training in question. He argues that there is proof neither of a threat posed generally by military retirees, nor of such a threat posed by the author specifically. Indeed, the author points out that rather than his residence permit being annulled on national security grounds, he has been granted a five-year extension. The author also contends that refusal of citizenship on such grounds is in conflict with an alleged principle of international law pursuant to which persons cannot be considered to have served in a foreign military force if, prior to acquisition of citizenship, they served in armed forces of a country of which they were nationals.

3.2 The author argues that the discriminatory character of the Law is confirmed by section 21 (2) of the Citizenship Act 1995, which provides that Estonian citizenship may be granted to "a person who has retired from the armed forces of a foreign state if the person has been married for at least five years to a person who acquired citizenship by birth" [rather than by naturalization] and if the marriage has not been dissolved. He argues that there is no rational reason why marriage to an Estonian by birth would reduce or eliminate a national security risk. Thus, he also sees himself as a victim of discrimination on the basis of the civil status of his spouse.

3.3 The author argues that, as a result of this legal position, there are some 200,000 persons comprising 15 per cent of the population that are residing permanently in the State party but who remain stateless. As a result of the violation of article 26, the author seeks compensation for pecuniary and non-pecuniary damage as well as costs and expenses of the complaint.

The State party's admissibility and merits submissions

4.1 By submissions of 30 June 2003, the State party contested both the admissibility and the merits of the communication. The State party argues, as to admissibility, that the author has failed to exhaust domestic remedies, and that the communication is incompatible with the provisions of the Covenant as well as manifestly ill-founded. As to the merits, the State party argues that the facts disclose no violation of the Covenant.

4.2 The State party argues that the author did not submit a request to the administrative seeking the initiation of constitutional review proceedings to challenge the constitutionality of the Citizenship Act. The State party refers in this respect to a decision of 5 March 2001 where the Constitutional Review Chamber, on reference from the administrative court, declared provisions of the

Aliens Act, pursuant to which the applicant had been refused a residence permit, to be unconstitutional. Additionally, with reference to a Supreme Court decision of 10 May 1996 concerning the Convention on the Rights of the Child, the State party observes that the Supreme Court exercises its capacity for striking down domestic legislation inconsistent with international human rights treaties.

4.3 The State party argues that, as equality before the law and protection against discrimination are rights protected by both the Constitution and the Covenant, a constitutional challenge would have afforded an available and effective remedy. In light of the Supreme Court's recent case law, the State party considers that such an application would have had a reasonable prospect of success and should have been pursued.

4.4 The State party argues, in addition, that the author did not pursue recourse to the Legal Chancellor to verify the non-conformity of an impugned law with the Constitution or Covenant. The Legal Chancellor has jurisdiction to propose a review of legislation regarded as unconstitutional, or, failing legislative action, to make a reference to this effect to the Supreme Court. The Supreme Court has "in most cases" granted such a reference. Accordingly, if the author regarded himself as incapable of lodging the relevant constitutional challenge, he could have applied to the Legal Chancellor to take such a step.

4.5 In any event, the State party argues that the author has not raised the particular claim of discrimination on the basis of his wife's status before the local courts, and this claim must accordingly be rejected for failure to exhaust domestic remedies.

4.6 The State party further contends that the communication is inadmissible for being incompatible with the provisions of the Covenant. It observes that the right to citizenship, much less a particular citizenship, is not contained in the Covenant, and that international law does not give rise to any obligation to grant unconditionally citizenship to a person permanently residing in the country. Rather, under international law all States have the right to determine who, and in which manner, can become a citizen. In so doing, the State also has the right and obligation to protect its population, including national security considerations. The State party refers to the Committee's decision in *V M R B v. Canada*,² where in finding no violation of article 18 or 19 in deporting an alien, the Committee observed that it was not for it to test a sovereign State's evaluation of an alien's security rating. Accordingly, the State

argues that the refusal to grant citizenship on the grounds of national security does not, and cannot, interfere with any of the author's Covenant rights. The claim is thus inadmissible *ratione materiae* with the Covenant.

4.7 For the reasons developed below with respect to the merits of the communication, the State party also argues that the communication is manifestly ill-founded, as no violation of the Covenant is disclosed.

4.8 On the merits of the claim under article 26, the State party refers to the Committee's established jurisprudence that not all differences in treatment are discriminatory; rather, differences that are justified on a reasonable and objective basis are consistent with article 26. The State party argues that the exclusion in its law from citizenship of persons who have served as professional members of the armed forces of a foreign country is based on historical reasons, and must also be viewed in the light of the treaty with the Russian Federation concerning the status and rights of former military officers.

4.9 The State party explains that by 31 August 1994, troops of the Russian Federation were withdrawn pursuant to the 1994 treaty. The social and economic status of military pensioners was regulated by the separate 1996 treaty, pursuant to which military pensioners and family members received an Estonian residence permit on the basis of personal application and lists submitted by the Russian Federation. Under this agreement, the author was issued a residence permit entitling him to remain after the withdrawal of Russian troops. However, under the agreement, Estonia was not required to grant citizenship to persons who had served as professional members of the armed forces of a foreign country. As the author's situation is thus regulated by separate treaty, the State party argues that the Covenant is not applicable to the author.

4.10 The State party argues that the citizenship restriction is necessary for reasons of national security and public order. It is further necessary in a democratic society for the protection of state sovereignty, and is proportional to the aim stipulated in the law. In the order refusing the author's application, the Government justified its decision in a reasoned fashion, which reasons, in the State party's view, were relevant and sufficient. In adopting the law in question, it was also taken into account that in certain conditions former members of the armed forces might endanger Estonian statehood from within. This particularly applies to persons who have been assigned to the reserve, as they are familiar with Estonian circumstances and can be called to service in a foreign country's forces.

4.11 The State party emphasizes that the author was not denied citizenship due to his social origin

² Case No. 236/1987, decision adopted on 18 July 1988.

but due to particularized security considerations. With respect to the provision in law allowing the granting of citizenship to a spouse of an Estonian by birth, the State party argues that this is irrelevant to the present case as the author's application was denied on national security grounds alone. Even if the author's spouse were Estonian by birth, the Government would still have had to make the same national security assessment before granting citizenship. The State party invites the Committee to defer, as a question of fact and evidence, to the assessment of the author's national security risk made by the Government and upheld by the courts.

4.12 The State party thus argues that the author was not treated unequally compared to other persons who have professionally served in foreign armed forces, as the law does not allow grant of citizenship to such persons. As no distinction was made on the basis of his wife's status (the decision being made on national security grounds), nor was the author subject to discrimination on the basis of social or family status. The State party argues that the refusal, taken according to law, was not arbitrary and has not had negative consequences for the author, who continues to live in Estonia with his family by virtue of residence permit. The further claim of a large-scale violation of rights in other cases should also be disregarded as an *actio popularis*.

Author's comments

5.1 By letter of 27 August 2003, the author responded to the State party's submissions. At the outset, he states that his complaint is not based upon the exemption provisions of the Citizenship Act concerning spouses who are Estonian by birth. Rather, he attacks article 21 (1) of the Citizenship Act, which he argues is contrary to the Covenant as devoid of reasonable and objective foundation and being neither proportional nor in pursuit of a legitimate aim. In all proceedings at the domestic level, he unsuccessfully raised the allegedly discriminatory nature of this provision. The author contends that the courts' rejection of his discrimination claims illustrates that he was denied the equal protection of the law and show that he has no effective remedy.

5.2 As to the possibility of approaching the Legal Chancellor, the author observes that the Chancellor advised him to pursue judicial proceedings. As the author wished to challenge a specific decision concerning him, the issue did not concern legislation of general application, which is the extent of the Chancellor's mandate. In any event, the Chancellor must reject applications if the subject matter is, or has been, the subject of judicial proceedings.

5.3 On the substantive issues, the author argues with reference to the Committee's established

jurisprudence that the protections of article 26 apply to all legislative action undertaken by the State party, including the Citizenship Act. He argues that he has been a victim of a violation of his right to equality before the law, as a number of (unspecified) persons in Estonia have received Estonian citizenship despite former service in the armed forces of a foreign state (including the then USSR). The denial in his case is accordingly arbitrary and not objective, in breach of the guarantee of equal application.

5.4 The author observes that as a result of the refusal of citizenship he remains stateless, while article 15 of the Universal Declaration of Human Rights provides for a right to nationality and freedom from arbitrary deprivation thereof. In this context, he argues that article 26 also imposes a positive duty on the State party to remedy the discrimination suffered by the author, along with numerous others, who arrived in Estonia after 1940 but who are only permanent residents.

5.5 The author rejects the characterisation that he had twice been refused citizenship on grounds of national security. On the first occasion, he and 35 others were rejected purely on the basis of membership of the former armed forces of the USSR. On the second occasion, the national security conclusion was based on the personal elements set out above. In the author's view, this is in contradiction to other legislation – his residence permit was extended for a further five years, at the same time that the Law on Aliens provides that if a person represents a threat to national security, a residence permit shall not be issued or extended and deportation shall follow. The author contends that he does not satisfy any of the circumstances which the Aliens Act describes as threats to state security.

5.6 By contrast, the author argues he has never represented, and does not currently represent, such a threat. He describes himself as a stateless and retired electrician, without a criminal record and who has never been tried. Additionally, being stateless, he cannot be called for service in the armed forces of a foreign state. There is no pressing social need in refusing him citizenship, and thus no relevant and sufficient reasons to justify the discriminatory treatment are at hand.

5.7 The author also observes that, under the 1996 treaty, discharged military service members (except those who represent a threat to national security) shall be guaranteed residence in Estonia (article 2 (1)), and Estonia undertook to guarantee to such service members rights and freedoms in accordance with international law (article 6). The author points out that, contrary to what the State party suggests, he did not receive his residence permit pursuant to the 1996 treaty, but rather first received such a permit in 1995 under article 20 (2) of the Aliens Law as an

alien who settled in Estonia before July 1990 and enjoyed permanent registration.

5.8 The author also argues that neither the 1994 nor 1996 treaties address issues of citizenship or statelessness of former military personnel. These treaties are therefore of no relevance to the current Covenant claim. The author also rejects that historical reasons can justify the discrimination allegedly suffered. He points out that after the dissolution of the USSR he was made against his will into a stateless person, and that the State party, where he has lived for an extended period, has repeatedly refused him citizenship. He queries therefore whether he will remain stateless for the remainder of his natural life.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

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

6.3 To the extent that the author maintains a claim of discrimination based upon the social status or origin of his wife, the Committee observes that the author did not raise this issue at any point before the domestic courts. This claim accordingly must be declared inadmissible under article 5, paragraph 2 (b), of the Optional Protocol for failure to exhaust domestic remedies.

6.4 As to the State party's contention that the claim concerning a breach of article 26 is likewise inadmissible, as constitutional motions could have been advanced, the Committee observes that the author consistently argued before the domestic courts, up to the level of the Supreme Court, that the rejection of his citizenship claim on national security grounds violated equality guarantees of the Estonian Constitution. In light of the courts' rejection of these arguments, the Committee considers that the State party has not shown how such a remedy would have any prospects of success. Furthermore, with respect to the avenue of the Legal Chancellor, the Committee observes that this remedy became closed to the author once he had instituted proceedings in the domestic courts. This claim, therefore, is not inadmissible for failure to exhaust domestic remedies.

6.5 The Committee takes note of the State party's argument that the Covenant does not apply *rationae materiae* because it concluded, after its ratification of the Covenant, the 1994 treaty with the Russian Federation regarding Estonian residence permits for former Russian military pensioners. It considers, however, that in accordance with general principles of the law of treaties, reflected in articles 30 and 41 of the Vienna Convention on the Law of Treaties, the subsequent entry into force of a bilateral treaty does not determine the applicability of the Covenant.

6.6 As to the State party's remaining arguments, the Committee observes that the author has not advanced a free-standing right to citizenship, but rather the claim that the rejection of his citizenship on the national security grounds advanced violates his rights to non-discrimination and equality before the law. These claims fall within the scope of article 26 and are, in the Committee's view, sufficiently substantiated, for purposes of admissibility.

Consideration of the merits

7.1 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.

7.2 Turning to the substance of the admissible claim under article 26, the Committee refers to its jurisprudence that an individual may be deprived of his right to equality before the law if a provision of law is applied to him or her in arbitrary fashion, such that an application of law to an individual's detriment is not based on reasonable and objective grounds.³ In the present case, the State party has invoked national security, a ground provided for by law, for its refusal to grant citizenship to the author in the light of particular personal circumstances.

7.3 While the Committee recognizes that the Covenant explicitly permits, in certain circumstances, considerations of national security to be invoked as a justification for certain actions on the part of a State party, the Committee emphasizes that invocation of national security on the part of a State party does not, ipso facto, remove an issue wholly from the Committee's scrutiny. Accordingly, the Committee's decision in the particular circumstances of *V M R B* should not be understood as the Committee divesting itself of the jurisdiction to inquire, as appropriate, into the weight to be accorded to an argument of national security. While the Committee cannot leave it to the unfettered discretion of a State party whether reasons related to

³ See *Kavanagh v. Ireland* (No.1), Case No. 819/1998, Views adopted on 4 April 2001.

national security existed in an individual case, it recognizes that its own role in reviewing the existence and relevance of such considerations will depend on the circumstances of the case and the relevant provision of the Covenant. Whereas articles 19, 21 and 22 of the Covenant establish a criterion of necessity in respect of restrictions based on national security, the criteria applicable under article 26 are more general in nature, requiring reasonable and objective justification and a legitimate aim for distinctions that relate to an individual's characteristics enumerated in article 26, including "other status". The Committee accepts that considerations related to national security may serve a legitimate aim in the exercise of a State party's sovereignty in the granting of its citizenship, at least where a newly independent state invokes national security concerns related to its earlier status.

7.4 In the present case, the State party concluded that a grant of citizenship to the author would raise national security issues generally on account of the duration and level of the author's military training, his rank and background in the armed forces of the then USSR. The Committee notes that the author has a residence permit issued by the State party and that he

continues to receive his pension while living in Estonia. Although the Committee is aware that the lack of Estonian citizenship will affect the author's enjoyment of certain Covenant rights, notably those under article 25, it notes that neither the Covenant nor international law in general spells out specific criteria for the granting of citizenship through naturalization, and that the author did enjoy a right to have the denial of his citizenship application reviewed by the courts of the State party. Noting, furthermore, that the role of the State party's courts in reviewing administrative decisions, including those decided with reference to national security, appears to entail genuine substantive review, the Committee concludes that the author has not made out his case that the decision taken by the State party with respect to the author was not based on reasonable and objective grounds. Consequently, the Committee is unable, in the particular circumstances of this case, to find a violation of article 26 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of article 26 of the Covenant.

Communication No. 1155/2003

Submitted by: Ms. and Mr. Unn and Ben Leirvåg, and their daughter Guro, Mr. Richard Jansen, and his daughter Maria, Ms. and Mr. Birgit and Jens Orning, and their daughter Pia Suzanne, and Ms. Irene Galåen and Mr. Edvin Paulsen, and their son Kevin Johnny Galåen (represented by the law firm Stavrum, Nystuen & Bøen, by lawyer Laurentz Stavrum)

Alleged victim: The authors

State party: Norway

Date of adoption of Views: 3 November 2004 (eighty-second session)

Subject matter: Compulsory instruction of religious subjects in schools

Procedural issues: Notion of victim - Same matter (different authors) - Exhaustion of domestic remedies

Substantive issues: Right to freedom of thought - Conscience and religion - Right of parents to secure the religious and moral education of their children in conformity with their own convictions - Right to privacy - Discrimination

Articles of the Covenant: 17, 18, and 26

Articles of the Optional Protocol: 1 and 5, paragraph 2 (a)

Finding: Violation (article 18, paragraph 4)

1. The authors of the communication are Ms. and Mr. Unn and Ben Leirvåg, and their daughter Guro, Mr. Richard Jansen, and his daughter Maria, Ms. and Mr. Birgit and Jens Orning, and their daughter Pia Suzanne, and Ms. Irene Galåen and Mr. Edvin Paulsen, and their son Kevin Johnny Galåen. All are Norwegian citizens who claim to be victims of violations of articles 17, 18, and 26, of the International Covenant on Civil and Political rights by Norway. They are represented by counsel.

General background submitted by the authors

2.1 Norway has a State religion and a State Church, of which approximately 86% of the population are members. Article 2 of the Norwegian Constitution states that the Evangelical Lutheran

Church is the official state religion, and further determines that “those of the inhabitants, who subscribe to this have an obligation to bring up their children in the same manner”. Christianity has been taught since the general mandatory education was introduced in 1739, but from the time of the Dissenter or Non-conformist Act of 1845, a right of exemption for children of other faiths has existed.

2.2 At the same time, pupils so exempted had the right to participate in a non-denominational alternative life stance subject “life stance knowledge”. However, it was not compulsory for the exempted pupils to participate or attend tutoring in this subject, and the subject did not have the same basic framework as other subjects, for example the number of school hours. A number of pupils thus participated in neither the Christianity nor life stance subjects.

2.3 In August 1997, the Norwegian government introduced a new mandatory religious subject in the Norwegian school system, entitled “Christian Knowledge and Religious and Ethical Education” (hereafter referred to as CKREE) replacing the previous Christianity subject and the life stance subject. This new subject only provides for exemption from certain limited segments of the teaching. The new Education Act’s §2 (4) stipulates that education provided in the CKREE subject shall be based on the schools’ Christian object clause¹ and provide

¹ Paragraph 2 (4) of the Education Act reads as follows: “Section 2-4. Teaching the subject CKREE. Exemption from regulations, etc: Teaching in CKREE shall

- Provide a thorough knowledge of the Bible and Christianity both as cultural heritage and Evangelical-Lutheran faith,
- Provide knowledge of other Christian denominations,
- Provide knowledge of other world religions and philosophies of life, ethical and philosophical topics,
- Promote understanding and respect for Christian and humanist values and
- Promote understanding, respect and the ability to carry out a dialogue between people with different views concerning beliefs and philosophies of life.

CKREE is an ordinary school subject that shall normally be attended by all pupils. Teaching in the subject shall not involve preaching.

Teachers of CKREE shall take as their point of departure the objects clause of the primary and lower secondary school laid down in section 1-2, and present Christianity, other religions and philosophies of life on the basis of their distinctive characteristics. Teaching of the different topics shall be founded on the same educational principles.

On the basis of written notification from parents, pupils shall be exempted from attending those parts of the

“thorough knowledge of the Bible and Christianity as a cultural heritage and Evangelical-Lutheran Faith”. During the preparation of the Act, the Parliament instructed the Ministry to obtain a professional evaluation of the Act’s relationship with human rights. This evaluation was carried out by the then Appeals Court judge Erik Møse, who stated that:

“As the situation stands, I find that the safest option is a general right of exemption. This will mean that the international inspectorate bodies will not involve themselves with the questions of the doubt raised by compulsory education. However, I cannot state that the partial exemption will be in contravention of the conventions. The premise is that one establishes an arrangement that in practice lies within their (the conventions’) frameworks. Much will depend on the further legislative process and the actual implementation of the subject.”

2.4 The Ministry’s circular on the subject states that: “When pupils request exemption, written notification of this shall be sent to the school. The notification must state the reason for what they experience as the practice of another religion or affiliation to a different life stance in the tutoring.” A later circular from the Ministry states that demands for exemption on grounds other than those governed by clearly religious activities must be assessed on the basis of strict criteria.

2.5 The Norwegian Humanist Association (the NHA), of which the authors are members, engaged an expert in Minority Psychology in the autumn of 2000 to investigate and report on how children react to conflicting life stance-related upbringing and education both in school and at home. He interviewed among others the authors. His conclusion was amongst others that both children and parents (and in all likelihood the school) experience conflicts of loyalty, pressure to conform and acquiesce to the norm, and for some of the children bullying and a feeling of helplessness. The report was put before the State party and presented as evidence in Supreme Court proceedings.

2.6 Due to criticism of the subject and the limited right to exemptions, the legislators decided that the subject would be evaluated in the course of a three-year period after its introduction. The Ministry gave this task to the Norwegian Research Council, which

teaching at the individual school that they, on the basis of their own religion or philosophy of life, perceive as being the practice of another religion or adherence to another philosophy of life. This may involve religious activities either in or outside the class room. In cases where exemption is notified, the school shall, as far as possible and especially in the lower primary school, seek solutions involving differentiated teaching within the curriculum.

Pupils who have reached the age of 15 may themselves give written notification pursuant to the fourth paragraph.”

engaged three research institutes carry out the evaluation. The results were published in two reports in October 2000. One of the reports concluded that, “the partial exemption arrangements did not function in a way that parents’ rights were sufficiently protected”. Subsequently, the Ministry issued a press release stating that “the partial exemption does not function as intended and should therefore be thoroughly reviewed”.

2.7 The issue was debated in Parliament and a proposal was adopted that from the start of the school year 2002, the subject’s name should be “Christianity and General Religious and Moral Education”. It was emphasized that all teaching would be based on the school’s Christian object clause and that Christianity covered 55% of the teaching hours, leaving 25% to other religious/life stances and 20% to ethical and philosophical themes. A standardised form for applications for exemption from religious activities was issued to simplify existing exemption arrangements. The idea was that it would not be necessary to submit the application form more than once per educational stage, in other words three times during the total period of schooling. It was emphasized that it was still only religious activities, not the knowledge thereof, that were subject to exemption. Subsequently, a Curriculum Group was gathered to assist the Norwegian Board of Education in implementing the changes. Although the majority of the Curriculum Group voted against it, the Ministry included in the revised curriculum that a clause that the teaching of knowledge of religions and life stances that are not represented in the local community can be postponed from the primary school until the intermediate stage. The authors contend that this confirms the prioritising of the majority’s identity at the cost of pluralism

2.8 Several organisations representing minorities with different beliefs voiced strong objections to the CKREE subjects. After school started in the autumn of 1997, a number of parents, including the authors, demanded full exemption from relevant instruction. Their applications were rejected by the schools concerned, and on administrative appeal to the Regional Director of Education, on the ground that such exemption was not authorized under the Act.

2.9 On 14 March 1998, the NHA and the parents of eight pupils, including the authors in the present case, instituted proceedings before the Oslo City Court. By judgement of 16 April 1999, the Oslo City Court rejected the authors’ claims. On 6 October 2000, upon appeal, the Borgarting Court of Appeal upheld this decision. The decision was confirmed upon further appeal, by the Supreme Court in its judgement of 22 August 2001, thus it is claimed that domestic remedies have been exhausted. Three of the other parents in the national court suit, and the NHA, decided to bring their complaint to the

European Court of Human Rights (hereinafter denominated ECHR).

The facts as submitted by Ms. and Mr. Unn and Ben Leirvåg, and their daughter Guro

3.1 Unn and Ben Leirvåg have a non-religious humanist life stance. They did not wish to see their daughter participate in CKREE classes, where textbooks are in conflict with their life stance. Their daughter, Guro (born on 17 February 1991), started at Bratsbergkleiva School in Porsgrunn in the autumn of 1997. Her application for full exemption from the CKREE subject was rejected. Subsequently, Guro attended CKREE classes.

3.2 As time passed with Guro’s attendance of CKREE classes, the parents became aware that most of the material used in the subject was religious narrative and mythology as the sole basis for understanding the world and reflection on moral and ethical issues. Unn Leirvåg, a teacher, applied professional skills on the evaluation of the curriculum, syllabus and textbooks, and found that the main theme of the subject matter in the 1st to 4th school year was taught through retelling Bible stories and relating them to the pupils. The CKREE subject thereby ensures that the children are immersed deeply into the stories contained in the Bible as a framework around their own perception of reality. The children start with stories from the Old Testament; the main lesson appearing is that the worst thing a person can do is to disobey God. Subsequently, the Gospel is introduced, where the faith in a leader and follow him is put forward as an ideal. This is again followed by similar narrative from other religions. On this basis, the pupils are expected to learn how to think about how they should behave. It is submitted that religious doctrines form an uncritical basis, availing their daughter of no opportunity or means to distance herself from, make any reservation against, or criticize the basis. Guro started to use certain expressions that indicate that the things she learns about Christianity are synonymous with “good”.

3.3 Against her parents’ will, Guro found herself in a situation where a conflict of loyalties arose between school and home. The situation is such that Guro feels obliged to adapt what she tells her parents about school to match what she feels is acceptable to her parents.

The facts as submitted by Mr. Richard Jansen and his daughter Maria

4.1 Richard Jansen, a humanist, does not wish his daughter to be taught a subject that provides for the opportunity of preaching of religion. When his daughter Maria (born on 3 March 1991) started to attend Lesterud School in Bærum in the autumn of

1997, an application for full exemption from the CKREE subject was filed on her behalf, which was rejected. A partial exemption was granted in accordance with the new law. The authors concluded that a partial exemption did not work in practice and appealed the decision to the Director of Education in Oslo and Akershus, who upheld the school's rejection in rulings of 25 May 1998 and January 2000.

4.2 Subsequently, Maria attended segments of the tutoring under the partial exemption arrangement. The authors state that Maria on several cases came home from school and said that she had been teased because her family did not believe in God. In connection with the end of year term celebrations for Christmas, Maria was picked out to learn by heart and perform a Christian text. The school was unable to provide her parents with a local timetable including an overview of the themes to be treated by Maria's class. Instead, they were referred to the main curriculum and the weekly timetable. Maria's parents did exempt her from some lessons during her first year at school. On these occasions she was placed in the kitchen where she was told to draw, sometimes alone, and sometimes under supervision. When her parents became aware that banishment to the kitchen was used as a punishment for pupils who behaved badly in class, they stopped exempting her from lessons.

The facts as submitted by Ms. and Mr. Birgit and Jens Orning, and their daughter Pia Suzanne

5.1 Birgit and Jens Orning are humanists and members of the NHA. They do not wish their children to participate in religious instruction that contains preaching. The CKREE subject influences the children in a Christian/religious direction. The authors believe that the child's life stance should develop freely and naturally, an objective difficult to achieve in the framework of the CKREE subject.

5.2 Their daughter, Pia Suzanne (born on 23 May 1990), started school in the autumn of 1997. The parents applied for full exemption from the CKREE subject. Their application was rejected. Subsequently, Pia Suzanne was enrolled under the partial exemption from the CKREE subject, an arrangement that did not work according to her parents' wishes. For example, even though Pia Suzanne was not to participate in religious tutoring that practised preaching, she was enrolled in such tutoring.

5.3 The authors submit that their daughter was on at least two occasions instructed to learn and recite psalms and Bible texts in connection with the end of term Christmas celebrations. The children were also required to learn a number of psalms and Bible texts by heart, a fact that is confirmed by their workbooks. As a result of the religious instruction, Pia often

experienced conflicts of loyalty between her home and her school. Her parents decided to move to another part of the country where they could enrol Pia in a private school.

The facts as submitted by Ms. Irene Galåen and Mr. Edvin Paulsen, and their son Kevin Johnny

6.1 Kevin Galåen's (born on 18 February 1987) parents are humanists and want the tuition of their son to have a non-dogmatic, agnostic basis. They consider the CKREE subject to be so designed that it would gradually absorb their son into the Christian faith. Therefore, they applied for full exemption for Kevin from CKREE subject in the autumn 1997; the application was rejected. Subsequently, Kevin attended CKREE classes. The parents did not apply for partial exemption as they did not consider it to be of any use in their case.

6.2 Kevin did not start school with a fully developed life stance. It is important to Kevin's parents that he can experience his parent's life stance as a natural standpoint on his journey to adulthood and in his meeting with other life stances and philosophies. Kevin's parents consider that the CKREE subject does not comply with this requirement since they use Christianity as a basis for the treatment of existential questions and religious pedagogic methods. The life stance they believe in is only represented by small fragments and totally without a whole and consistence. They state that the CKREE subject is over-concentrating on a single religion.

The complaint

7.1 The authors claim that the State party violated their rights to freedom of religion – i.e. their right to decide on the type of life stance upbringing and education their children shall have - and their right to privacy. It is also claimed that the partial exemption procedure violates the prohibition of discrimination.

7.2 It is argued that the right to freedom of thought, conscience and religion, as enshrined in article 18 of the Covenant, also applies to non-religious life stances, and that parents have, pursuant to paragraph 4 of that article, a right to ensure that their children receive education in accordance with their own philosophical convictions, in particular in relation to mandatory, state-provided education. The authors refer to the Committee's Views in the case of *Hartikainen et al. v. Finland* (Communication No. 40/1978) and to General Comment No. 22 on article 18, in particular its paragraphs 3 and 6. Reference is also made to the Committee's Concluding Observations on the fourth periodic report by Norway, where the Committee reiterated its concerns over section 2 of the Constitution which

provides that individuals professing the Evangelical-Lutheran religion are bound to bring up their children in the same faith and held that this provision of the Constitution is “incompatible with the Covenant” (CCPR/C/79/Add.112, paragraph 13).

7.3 The Committee on the Rights of the Child in its Concluding observations on the report by Norway, adopted on 2 June 2000, also expressed concerns about the CKREE, in particular on the process of providing for exemption which it considered to be potentially discriminatory (CRC/C/15/Add.126, paragraphs 26-27).

7.4 While the State party has argued that it is necessary for children to understand and learn about various life stances in order to develop their own life stance identity and a greater level of respect for other religions and life stances, the authors consider that a mandatory religious subject is not a suitable vehicle for obtaining the desired result. They find that the introduction of the CKREE has lowered the respect for their own life stances.

7.5 Furthermore, it is submitted that the obligatory attendance of CKREE teaching is not necessary in a democratic society. This is demonstrated through the absence of such compulsory teaching in Norway prior to the introduction of the CKREE, as well as in other European states.

7.6 The authors claim that a more suitable vehicle to achieve the desired result would be to strengthen the pre-CKREE life stance subject, and make it mandatory for pupils that are exempted from religious studies. The CKREE subject is based on Christian premises and fulfils only the part of the intention that applies to the strengthening of the identity of children from Christian homes. Therefore, the compulsory CKREE subject represents a violation of the authors’ rights to display an independent life stance.

7.7 In relation to the children, it is submitted their right to choose and hold a religion or life stance of their own is violated, in that the compulsory CKREE subject forces them to participate in a learning process that includes indoctrination into the direction of a religious/Christian life stance. The authors have no wish to be incorporated in such a religious/Christian conception of reality.

7.8 The partial exemption arrangement implies that there shall be communication between the parents and the school about what they consider problematic. This implies that the parents’ life stance forms the basis for the evaluation of the exemption, in particular during the early school years. Instead of a free and independent development of the child’s life stance, the child is forced to take a junior role in relation to its parents. This conflicts with the

humanist view of the child’s development shared by the authors’ families. The authorities’ evaluation of whether there are grounds for an application for exemption imposes on the children a conflict of loyalties between the school and the parents.

7.9 The partial exemption arrangement also requires that the authors describe to the school officers, the segments of the CKREE education that conflict with their own convictions, thus violating their right to privacy under article 17 of the Covenant. In relation to the children, it is submitted that they are subjected to a violation of their right to privacy to the extent that they are drawn into the exemption process.

7.10 The authors contend that the facts as submitted also constitute a violation of their rights under article 27 of the Covenant.

7.11 The authors submit that the exemption arrangement in place put heavier requirements on non-Christian parents than on Christian parents, making imposition of this procedure discriminatory, in violation of article 26 of the Covenant. The exemption arrangement requires that the authors have a clear insight into other life stances and educational methodology and practice, an ability to formulate their opinions, and the time and opportunity follow up the exemption arrangement in practice, whereas no such requirements apply to Christian parents. The exemption arrangement stigmatises in that it obliges the authors to state which segments of the CKREE subject are problematic in relation to their own life stance, which in turn will appear as a “deviation” from the commonly held life stance. The imposition on the authors to reveal their own life stance to school officers is claimed to be in violation of article 26 in conjunction with article 18, paragraphs 1-4.

7.12 In relation to the children, it is submitted that the partial exemption means that they shall not participate in the activity stipulated in the syllabus, but would gradually obtain the same knowledge of the theme in question as other pupils. The approach of those exempted to the material will therefore be qualitatively inferior to the other pupils. This entails a sense of being different which can be experienced as problematic and creates a sense of insecurity and conflicts of loyalty.

State party’s submission on admissibility

8.1 On 3 July 2003, the State party commented on the admissibility of the complaint. It challenges the admissibility on the basis that the same matter is already being examined under another procedure of international investigation or settlement, for non-exhaustion of domestic remedies and for non-substantiation of their claims.

8.2 The State party notes that before the Norwegian courts, the authors' claims of exemption from the school subject named "*Christian Knowledge and Religious and Ethical Education*" were adjudicated in a single case, along with identical claims from three other sets of parents. The different parties were all represented by the same lawyer (the identical to counsel in this case), and their identical claims were adjudicated as one. No attempts were made to individualize the cases of the different parties. The domestic courts passed a single judgement concerning all the parties, and none of the courts differentiated between the parties. Despite having pleaded their case jointly before the domestic courts, the parties opted to send complaints both to the European Court of Human Rights (ECHR) and to the Human Rights Committee. Four sets of parents lodged their communications with the Human Rights Committee, and three others with the ECHR on 20 February 2002. The communications to the Human Rights Committee and to the ECHR are to a large extent identical. Thus it appears that the authors stand together, but that they are seeking a review by both international bodies of what is essentially one case.

8.3 While the State party acknowledges the Committee's findings on communication 777/1997,² it submits that the present case should be held inadmissible because the same matter is being examined by the ECHR. It contends that the present case differs from the case of Sánchez López in that the authors in that case argued that "although the complaint submitted to the European Commission of Human Rights relates to the same matter, in that the complaint, the offence, the victim and, of course, the Spanish judicial decisions, including the relevant application for amparo, were not the same". In the present case the same judgement by the Norwegian Supreme Court is being challenged before both bodies. The Norwegian Supreme Court judgement concerned an issue of principle, whether or not the CKREE subject violated international human rights standards.

8.4 If the communication is deemed admissible, the international bodies will need to take a general approach, i.e. they have to ask whether or not the subject as such, in the absence of the right to a full exemption, is in violation of the right to freedom of religion. As the primary objective of article 5, paragraph 2 (a), of the Optional Protocol is to prevent a duplication of examination by international bodies of the same case, such duplication is exactly what the different parties to the case adjudicated by Norwegian courts are operating.

8.5 On the issue of exhaustion of domestic remedies, the State party submits that the claims under articles 17 and 18 were not raised in the domestic proceedings, and thus domestic remedies have not been exhausted. It refers to Section 2-4, paragraph 4 of the Education Act which allows for partial exemption from teaching in the CKREE subject, namely from those parts of the teaching that they, on the basis of their own religion or philosophy of life, perceive as being the practice of another religion or adherence to another philosophy of life. Schools must allow for exemption from the parts of the tuition that reasonably may be perceived as being the practice of another religion or adherence to another life philosophy. A decision by a school not to allow for exemption is subject to administrative appeal to the County Governor, whose decision again may in turn be brought before the courts for a judicial review.

8.6 The authors did not avail themselves of the possibility of applying for partial exemption; their cases concern applications for full exemption from the CKREE subject. Any basis for finding a violation of articles 17 and 18 would have to be found in the tuition offered to the authors' children. Such violation, however, could have been avoided by applications for partial exemption. To comply with the requirement of exhaustion of domestic remedies, the authors would first have to exercise their right under Section 2-4, paragraph 4. If the school and the County Governor did not grant partial exemptions, the authors would have to apply for judicial review.

8.7 The State party argues that the authors' claims under articles 26 and 27 are insufficiently substantiated. As to article 26, the State party points out that the exemption clause of the Education Act applies to all parents, regardless of religion or life stance. Also, the syllabus for the CKREE subject provides for tuition in tenets of Christianity and other religions and life stances, shall not involve preaching, and shall be founded on the same educational principles.³ Any differentiation between Christians and other groups is based on objective and reasonable criteria. The school subject at issue has important cultural and educational objectives. Limiting the possibilities for exemption to those parts of the tuition that reasonably may be perceived as being the practice of another religion or adherence to another philosophy of life, cannot be considered discrimination contrary to article 26.

8.8 On article 27, the State party notes that the authors have simply invoked this provision without making any attempt at explaining how a group defines itself as non-Christians, can constitute a religious minority within the meaning of article 27.

² *Sánchez López v. Spain* (777/1997), decision adopted on 18 October 1999.

³ Education Act Section 2-4, paragraphs 1-3.

8.9 On 9 July 2003, the Committee's Special Rapporteur on New Communications and interim measures declined to separate the admissibility and the merits of the complaint.

State party's submission on the merits

9.1 On 21 November 2003, the State party commented on the merits of the complaint. The principal issue of the case before the domestic courts was whether or not the CKREE subject in general, in the absence of a full exemption clause, was in violation of the human rights treaties ratified by Norway, including the ICCPR. Accordingly, all claims made in the present communication have already been assessed by the domestic courts, including the Supreme Court of Norway. The Supreme Court concluded that the CKREE subject with its partial exemption clause is in full compliance with international human rights.

9.2 When Norwegian authorities proposed a new national curriculum for mandatory education to the Parliament in 1995, the Parliament's Standing Committee on Education, Research and Church Affairs ("the Education Committee") proposed that the curriculum should include a common subject encompassing Christianity and other religious and ethical beliefs. As some elements of the subject gave rise to concerns in relation to the rights of parents to secure their children's education in conformity with their own convictions, the Standing Committee requested the Government to prepare guidelines for exemption.

9.3 Proposals for amendments and guidelines for partial exemption to the CKREE subject were then drafted. The Government charged Erik Møse, then a Judge of the Court of Appeal, with the task of examining to what extent Norway's obligations might impose limitations with regard to compulsory instruction on issues of religion or philosophies of life, and to what extent exemption from instruction in the CKREE subject would have to be allowed for. Mr. Møse's report concluded, *inter alia*, that a limited exemption would in principle be compatible with Norway's international legal obligations, provided that a system for practising the exemption could be devised within the limits imposed by the conventions. Final conclusions would depend on the further process of establishing the legal framework for the CKREE subject, and the way the subject was taught in schools.

9.4 In response, the Ministry of Education proposed further amendments to the 1996 Education Act. The Act came into force on 1 July 1997. The right to exemption was limited to those parts of the instruction that are perceived by parents as being the practice of another religion or adherence to another philosophy of life.

9.5 The State party considers the rights of parents under article 18, paragraph 4, to be the core issue of the case. Their claim is based on their allegation that the CKREE subject amounts to "*both preaching and indoctrinating*" and that it is "*neither objective, pluralistic or neutral*", combined with the fact that the 1998 Education Act does not allow for full exemption. The State party submits that the CKREE subject is in conformity with the Covenant. However, the applicable law, regulations or instructions may be incorrectly applied in individual cases. Some teachers may include themes or choose words for their instruction that may be found indoctrinating or that particular schools or municipalities may practise the exemption clause in a manner that is inconsistent with the Act and the secondary legislation.

9.6 Parents who perceive the teaching as indoctrinating and do not obtain an exemption have several avenues of redress. Firstly, a decision not to allow for exemption may be subjected to administrative and/or judicial review. Secondly, claims of alleged human rights violations may be brought before the courts. The authors in the present case did not specify when or how their children were exposed to indoctrinating instruction for which they in vain have sought exemption as provided by the Act. As far as the State party is aware, none of the authors have had requests for partial exemption rejected, and certainly, no rejections have been brought before the domestic courts for judicial review.

9.7 The procedural choices of the authors must have consequences for the admissibility and merits of their case. The claim under article 18 should be held inadmissible because the authors have not exhausted the available and effective remedy of requesting partial exemption. Secondly, until such exemption has been sought, it cannot be established whether or not their children were compelled to participate in tuition, in violation of Covenant rights, and the authors thus cannot be considered victims of a violation of article 18. Thirdly, in the event that the communication is deemed admissible, the failure of the parents to challenge the tuition accorded to their children, must influence consideration of the merits. The Committee should limit its examination to the general issue of whether or not, in the absence of a clause providing for full exemption, the CKREE subject as such violates the rights of parents. There is no basis for examining the individual teaching experiences of the authors' children.

9.8 As to the authors' references to the textbooks, the State party points out that the textbooks are not defined as part of the subject's legal framework. The Act and secondary regulations confer discretion on the schools with regard to which and to what extent textbooks are to be used as part of the instruction.

Nevertheless, should the Committee examine the particular instruction offered to the authors' children, the authors have made scant attempts to substantiate their claim that instruction is indoctrinating, which cannot be sufficient to sustain a finding of a violation. It should also be noted that the State party reported on the new CKREE subject in its fourth periodic report to the Committee, and that the Committee, in its, concluding observations, did not express concern regarding the subject's compatibility with the Covenant.

9.9 The State party submits that from General Comment No. 22 on article 18, and the Committee's decision in *Hartikainen et al. v. Finland*,⁴ can be inferred that article 18, paragraph 4, does not prohibit compulsory school instruction on issues of religion and philosophies of life, provided that the instruction is given in a neutral and objective way.

9.10 The State party contends that religious instruction imparted in a neutral and objective way complies with other human rights standards, such as the CESCR, and the CRC. Accordingly, article 18, paragraph 1 cannot bar compulsory education which is intended to "*enable all persons to participate effectively in a free society, [and] promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups*" (CESCR article 13, paragraph 1) or to develop respect for "*his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own*" (CRC art 29, paragraph 1(c)). The CKREE is designed to promote understanding, tolerance and respect among pupils of different backgrounds, and to develop respect and understanding for one's own identity, the national history and values of Norway, as well as for other religions and philosophies of life.

9.11 The State party invokes the practice under article 2 of the Protocol No.1 to the European Convention on Human Rights, which includes the State party's obligation to respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions. Reference is made to relevant jurisprudence of the ECHR.

9.12 The State party argues that the Committee's approach in the present case should be two-fold. Firstly, the Committee should examine whether or not the CKREE subject in general involves the imparting of information and knowledge in a manner that is not objective and neutral. Secondly, with regard to elements of the subject that do not meet

those standards, it should examine whether or not sufficient provision has been made for non-discriminatory exemptions or alternatives that would accommodate the wishes of the parents.

9.13 With regard to the first issue, it is submitted that the CKREE subject involves only a few activities that may be perceived as being of a religious nature. Until 1997, knowledge of Christianity was taught as an independent subject in Norwegian schools. In 1997, the government introduced the CKREE subject in order to combat prejudices and discrimination, and to cater for mutual respect and tolerance between different groups' religions and life stances as well as a better understanding of one's background and identity. Another explicit aim was to contribute to the enhancement of a collective cultural identity. The achievement of these goals requires that members of different groups jointly participate in the instruction. Consequently, the CKREE subject could not function in accordance with its purpose if full exemption from the subject was readily available to everyone.

9.14 Children are not required to attend public schools. It is possible for, i.e. the NHA or the authors, to establish private schools. This is a realistic and viable alternative also as regards economic risk, as the government carries more than 85 per cent of all expenditures related to the operation and functioning of private schools.

9.15 With regard to the authors' allegation that instruction in Christianity involves more time than instruction of other religions and philosophies of life, it is submitted that instruction in Christianity in itself cannot cause concerns under the Covenant, as long as the instruction is carried out in an objective and neutral manner. Reference is also made to a pertinent decision of the European Commission of Human Rights.

9.16 In response to the authors' challenge of the so-called "*Christian object clause*"⁵ in section 1-2, paragraph 1, of the Education Act, the State party submits that, according to the Christian object clause itself, it shall only apply "*in agreement and cooperation with the home*". Also, under section 3 of the Norwegian Human Rights Act, section 1-2 of the Education Act must be interpreted and applied in accordance with international human rights treaties that have been incorporated into domestic law (ICCPR, CESCR and ECHR). Consequently, the Christian object clause does not authorize preaching or indoctrination in Norwegian schools. This was the conclusion of the Supreme Court in the authors' case.

⁴ Communication No. 40/1978, Views adopted on 9 April 1981.

⁵ See footnote 1 above.

9.17 On the second issue, it is submitted that sufficient measures were taken to provide exemptions and/or alternatives to accommodate all parents with regard to activities that may be perceived as being of a religious nature. This solution was designed to meet the competing interests of recognizing the parents' right to secure their children's education in conformity with their own religious and philosophical convictions, while also acknowledging that society had a legitimate interest in enhancing mutual respect, understanding and tolerance between pupils of different backgrounds.

9.18 The most important mechanism is the provision⁶ which allows from exemption from parts of the courses that were perceived as being the practice of another religion or philosophy of life, on the basis of written notification from concerned parents. The travaux préparatoires lay down further guidelines for allowing such exemption. Activities that allow for exemption are grouped in two different categories. Firstly, exemption shall be granted when requested for activities that clearly may be perceived to be of a religious nature. For such activities, parents are under no obligation to give reasons for their requests. In 2001, the Ministry simplified the exemption procedure by developing a notification form that may be used to claim exemption from eight different, specific activities, e.g. learning by heart of prayers, declarations of faith and religious texts, singing of religious hymns, attendance of religious service, excursions to churches, production of religious illustrations, active or passive roles in religious dramatizations, and receiving holy scripts as gifts and taking part in events in this context. Parents may claim exemptions from these activities by simply ticking off boxes for the relevant religion(s). Secondly, exemption may be granted from other activities, provided that they may reasonably be perceived as being the practice of another religion or adherence to another philosophy of life. For these cases, parents must present brief reasons for their request to enable the schools to consider whether the activity may reasonably be perceived as the practice of another religion or adherence to another life philosophy.

9.19 The second mechanism intended to remedy problems encountered on the basis of parents' religious or philosophical convictions involves flexibility in teaching, to the extent possible, and in accordance with the pupils' background.

9.20 On the alleged violation of article 26, the State party submits that to impose general obligations or rules, while at the same time allowing for exemptions provided that specific criteria are

fulfilled, is an effective and admissible way of governing, and does not contravene article 26. Such methods of governing will, invariably, require that the citizens themselves consider whether they fulfil the requirements for exemption, and that they must duly apply for exemption, in the manner and within the time limits posed, and the State party does not consider such legal regimes to be discriminatory. The exemption clause does not distinguish between Christians and non-Christians.

9.21 In any event, the obligations imposed by the exemption clause cannot be considered disproportionate or unreasonable. Requests for exemption need not be justified by the parents in cases where the activities clearly may be perceived to be of a religious nature. General Comment No. 22, paragraph 6, of the Committee appears to accept systems in which the general rule is that children must participate in school courses, with the possibility for exemption from instruction in a particular religion. Other subjects, such as history, music, physical education and social studies, may also give rise to religious or ethical issues, and the exemption clause therefore applies to all subjects. The State party considers that the only viable system both for those subjects and for the CKREE subject is to allow for partial exemptions. If that was deemed discrimination, article 26 would make most compulsory education impossible to carry out.

9.22 As to the alleged violation of article 17 on the ground that parents applying for partial exemption "must reveal elements of their life stance and beliefs to school officers and staff", the State party submits that parents only have to give reasons for activities that do not obviously appear to be the practice of a specific religion or adherence to a different philosophy of life. Where reasons have to be given, parents are not required to provide information on their own religion or philosophical convictions. School employees are under a strict duty of secrecy with regard to the knowledge they obtain about personal affairs of individuals.⁷ If the Committee were to find that the requirement for reasons in certain cases constitutes an interference with the privacy of the authors, the State party argues that the interference neither is unlawful or arbitrary.

9.23 On the "lawfulness" of the interference, the State party notes that the obligation for parents to give reasons in certain cases is spelled out in section 2-4 of the Education Act. As to the notion of arbitrariness, the State party refers to the Committee's General Comment No.16, paragraph 4, and to the positive interests that the CKREE subject pursues, and submits that the partial exemption clause must be considered both reasonable and

⁶ Education Act, Section 2-4, paragraph 4.

⁷ Public Administration Act (1967), Section 13.

proportionate. Reference is made to the parallel of conscientious objection to compulsory military service, where conscientious objectors must give far more elaborate and more personal reasons for their requests than parents requesting exemptions from the CKREE subject, yet these systems have been accepted by international human rights bodies.

Authors' comments on admissibility and merits

10.1 On 6 and 27 April 2004, the authors commented on the State party submissions and withdrew their claim under article 27. They submit that the issue of whether or not the CKREE subject constitutes a violation of Covenant rights, must be seen in the broader context of a society with Christian predominance, as Norway has a state religion, a state church, constitutional prerogatives for the Christian faith, a Christian intention clause for public schools and pre-schools, state church priests in the armed forces, prisons, universities and hospitals, etc. Still, the right to freedom of religion for non-Christians has been taken care of in different ways, i.a., by an exemption arrangement from the Christian knowledge subject in public schools. The right to general exemption, practised for more than 150 years, was eliminated when the CKREE subject was introduced in 1997.

10.2 On admissibility, the authors submit that the children were not formal plaintiffs before domestic courts because Norwegian civil procedure is based on the recognition of parents as legal representatives of their minor children. Had the children been formal plaintiffs, they would still have been represented by their parents and the factual context would have been the same as in this case. The children thus have no further domestic remedy.

10.3 While other sets of parents have lodged similar complaints with the ECHR, this cannot be considered as "*the same matter*" as the present case being examined "*under another procedure of international ...settlement*", within the meaning of article 5, paragraph 2 (a), of the Optional Protocol. Reference is made to relevant jurisprudence of the Committee,⁸ which holds that if different individuals send their complaints to different international bodies, the complaints are not considered as the "same matter". The Norwegian civil procedure allows different parties to join in a common law suit. Before domestic courts, each author's case was presented separately. The claims concerned separate administrative decisions on the respective party's application for full exemption from the CKREE tuition. The fact that the NHA was recognized as a

⁸ *Fanali v. Italy* (No. 75/1980), Views adopted on 31 March 1983, and *Blom v. Sweden* (No. 191/1985), Views adopted on 4 April 1988.

formal party before the lower courts, but denied such status before the Supreme Court, indicates that the Supreme Court considered the parents' separate claims.

10.4 The parents who were parties to the domestic court proceedings are all individuals, and have a right to decide which international body to complain to. That they share the same life stance and membership in a life stance organisation does not change this situation. The communications before the Human Rights Committee and the ECHR are therefore not the "same matter".

10.5 On the State party's claim that they did not exhaust domestic remedies because they did not apply for partial exemption, the authors submit that two of them actually applied for partial exemption but that they reverted to an application for full exemption when they realized that the partial exemption arrangement did not protect their children from religious influence, and was perceived by them and the children to be stigmatising. The partial exemption arrangement provides for exemptions from certain activities but not from certain knowledge. Consequently, the pupils may be exempted from praying but not from knowing the prayer. Accordingly, the authors claim that their right to full exemption is protected by the Covenant, and the State party's argument that they should have applied for partial exemption is dismissed as irrelevant.

10.6 On the State party's contention that their claim under article 26 is unsubstantiated, the authors reaffirm that non-Christians are discriminated against in that they have to give reasons for why they seek exemption from CKREE, whereas Christians are subjected to no such requirements since the CKREE subject is first and foremost designed for them. The Committee already characterized the Norwegian school system on education in religion as discriminatory (before the introduction of the CKREE subject in 1997). The new exemption arrangements are more discriminatory than the former system, since the former system only required that those applying for exemption stated whether or not they were members of the state church. After proceedings in the Supreme court, the State party introduced a standard form of notification of partial exemption from CKREE. This fact, however, is not relevant to the present case, and does not change the authors' view on the partial exemption procedure.

10.7 In response to the State party's argument that all claims in the present case have been carefully examined, the authors note that the Supreme Court chose not to examine the parents' substantial claims and approached the legal questions in a very general way.

10.8 The authors challenge the State party's legalistic approach to the question of a Covenant violation, since the practice of the law, that is the actual tuition and practice of the exemption, is the key to the question of whether or not there has been a Covenant violation. The Government appointed two research institutions to examine how the CKREE subject and in particular the partial exemption procedure worked in practice. One of them (Diaforsk) concluded that *the exemption arrangement did not function in a way that sufficiently protected the rights of parents in practice*. The press release from the Ministry of Church, Education and Research stated that *both investigations concluded that the partial exemption arrangement did not operate as planned and should therefore be reviewed*. Both research institutions recommended the introduction of a general right to exemption.

10.9 The authors consider that the CKREE subject itself constitutes a breach of their right to decide on their children's life stance education, and that a possible partial exemption in their cases would have encompassed such a great part of the subject that it would have exceeded the 50% limit indicated in the *travaux préparatoires*. Partial exemption arrangements do not secure these parental rights, as those parts of tuition that may be exempted from, still are imparted to the student.

10.10 As admitted by the government, the textbooks contain segments that may be conceived as professing Christianity. Although the textbooks are not defined as part of the subject's legal framework, they have been controlled and authorized by an official state agency, they have official status, and are used by 62% of Norwegian schools

10.11 The State party admits that at least parts of the CKREE tuition can be perceived as being of religious nature, but it does not comment on whether this fact implies that these parts of the education are inconsistent with the "*neutral and objective*" standard. The authors consider that a distinction between the parts that are of religious nature and those that are not cannot be made and that it has not even been attempted. Reference is made to the research results of the Diaforsk Institute, where it is stated that: "*We asked the teachers how they practised this distinction in the tuition situation. Very few teachers understood what we meant by the question.*" One of the CKREE goals, i.e. that of having all pupils to join in the tuition situation, is clearly contrary to the State party's argument that one has the freedom to choose private schooling for children from humanist homes. If humanists were to establish their own school, their children would not be gathered in the same tuition situation as other children.

10.12 The CKREE subject's emphasis on Christianity can be further illustrated by the *travaux préparatoires*, where the Education Committee stated: "*The majority underline[s] that the tuition is not neutral in value. That the instruction shall not be of a preaching character, must never be interpreted in the way that it should be practised in a religious/moral vacuum. All instruction and upbringing in our primary school shall have the starting point in the intention clause for the school, in this subject Christianity and the different religions and life stances should be present according to their particular character. The main emphasis of the subject is the instruction on Christianity.*"

10.13 It is argued that the CKREE's discrimination of non-Christians is disproportionate and unreasonable since it was not necessary for the State party to abolish the previous arrangement, and that the purpose of bringing pupils together "*in order to combat prejudices and discrimination*", and other laudable intentions, could have been achieved by other arrangements than forcing everyone to take part in a subject predominantly designed for Christian upbringing.

Additional observations by the State party

11.1 On 4 October 2004, the State party submitted additional observations on the admissibility and merits of the communication.⁹ As to the admissibility of the communication, the State party reiterates its observations submitted earlier (27 April 2004). On the merits, the State party reiterates that the Supreme Court had carefully assessed the case and concluded that the CKREE subject and its partial exemption clause was in full compliance with international human rights; Article 18 of the Covenant does not prohibit mandatory school instruction on issues of religion and philosophies of life, provided it is carried out in a pluralistic, neutral and objective way; Both the ICESCR (International Covenant on Economic, Social and Cultural Rights) and the Convention on the Rights of the Child impose positive obligations on the States parties to provide education with certain social and ethical dimensions; and the parents failed to challenge the specific tuition accorded to their children.

11.2 More specifically, the State party refers to the authors' main objection that by virtue of teaching of the CKREE subject, their children may receive information that amounts to indoctrination. In order to avoid a violation of article 18, paragraph 4, they requested a full exemption of the CKREE. The State

⁹ The State party provides the English translation of Circular F-03-98 (12 January 1998) and excerpts of Recommendation no. 15 for 1995-96 from the Education Committee from the Storting (the Norwegian Parliament).

party considers unnecessary a full exemption as the subject is multidisciplinary, with components of social science, world religions, philosophy and ethics, in addition to Christian knowledge.

11.3 In respect to the authors' submissions, the State party contends that the CKREE was thoroughly evaluated and two independent reports were commissioned and considered in the 2000-2001 Report of the Ministry of Education to the Storing. The Supreme Court examined the reports and their administrative follow-up what constitutes, of the State party's opinion, the proof that the Court was fully aware of all aspects of the case when concluding that the CKREE subject was in conformity with international human rights covenants. The concluding remarks of the evaluation reports indicated that in the majority of the cases, partial exemptions operated satisfactorily, most parents found that the CKREE worked well for their children and that few teachers perceived partial exemption as source of practical problems.

11.4 With regard to the authors' allegation that the State party ignored warnings from different religious groups, human rights law body and the judge Mose's recommendation, it is stated that there was no unified position against the introduction of the CKREE subject in school, that religious minority groups participated in drawing up the new teaching plan approved by Parliament, and that at present there was a little, if any, disagreement on the exemption clause of the CKREE.

11.5 The State party further refers to the authors' commentary on the limited relevance of the ECHR case of *Kjeldsen, Busk Madsen and Pedersen v. Denmark*¹⁰ to the present case, because it related to mandatory sex education and not religious education.

11.6 The State party points out, with respect to the authors' allegations that in its observations the Committee of the Rights of the Child expressed concern of "the process of providing for exemptions", without giving the reasons for its concern. Since the adoption of the above observations (2 June 2000), the CKREE subject and its exemption process have been thoroughly evaluated and the authorities acted on concerns raised by granting exemptions upon standardized notification and by facilitating the communications between schools and homes. Finally, the State party notes that the Committee did not object to a partial exemption scheme, nor supported the authors' claims for a full exemption.

¹⁰ European Court for Human Rights, applications Nos 5095/71, 5920/72 and 5926/72.

11.7 The State party affirms that many subjects taught at school may include information or actions perceived to have philosophical or religious aspects. It notes that in the present case, the authors of the communication were not concerned by subjects such as science, music, physical education and home economics, but that there were religious minorities that refused to take partially part to these subjects, i.e. to the practical aspects of physical education and music. The State party affirms that a partial exemption clause is, in general and in respect to CKREE in particular, the only viable way of carrying out mandatory education.

11.8 As to the issue of discrimination, the State party notes that the authors' appear to have misapprehended its observations, by taking out the words "do not" from the following sentence: "In particular, States parties must be at liberty to demand that parents provide grounds when applying for exemption from activities that *do not* immediately appear to be practice of a specific religion or adherence to a different philosophy of life". The State party reiterates that following the 2000-2001 evaluation of the CKREE subject, a general notification form replaced the former application procedure.

11.9 Finally, with reference to the latest international developments, the State party affirms that intercultural and inter-religious dialogue should be encouraged as an integrated part to the children education. According to it, in this context, the CKREE subject appears to be a vital tool in promoting "a common playing field for an increasingly multicultural and diverse generation".

Additional submission by authors

12.1 By letter of 15 October 2004, the authors filed additional observations on State party's latest submission. They re-emphasize that they oppose CKREE because it is not a subject that involves neutral information on different life stances and religions. CKREE involves direct and undisputed religious activities (such as prayers). According to the authors', the CKREE syllabus, combined with the Christian intention clause belies the ratio legis invoked by the State party. The authors do not oppose education with certain "social and ethical" dimensions, but the CKREE methodology was to strengthen the students' religious identity and to teach religious activity within the framework of the Christian intention clause.

12.2 The authors affirm that even if partial exemption arrangements were satisfactory in the majority of cases and only few teachers faced practical problems, this is irrelevant to the present case. The crucial point in the present case is that

minority students and their parents experienced the system quite differently.

12.3 The authors contest the State party's objection on the absence of broader opposition to the introduction of the CKREE and argue that practically all religious and life stance minority groups in Norway opposed the subject. They add that the Islamic Council and Muslim parents of Norway filed a law suit against the Government, more or less corresponding to their own case, and that they lost their case on grounds similar to the authors' case. It is stated that the Council had decided to await the outcome of the authors' communication before taking any further legal action.

12.4 It is pointed out that large groups of Norwegian society continue to have problems with the partial exemption arrangement. The authors submit a copy of a report prepared in June 2004 by the Norwegian Forum for the Convention of the Rights of the Child, where it invited the CRC to recommend the State party to review its "religious and ethical education both in the state school system and with regard to the requirements for and inspection of private schools, in relation to the CRC's stipulations on freedom of thought, conscience and religion".

12.5 Finally, the authors support the continued promotion of the intercultural dialogue, but affirm that the CKREE does not fulfil this aim.

Issues and proceedings before the Committee

Considerations of admissibility

13.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol.

13.2 The Committee has noted the State party's challenge to the admissibility of the communication on the grounds that the authors would not be "victims" of an alleged human rights violation in the meaning of article 1 of the Optional Protocol. In the Committee's opinion, the authors have shown that they are affected, individually and as families, of the State party's law and practice. Consequently, the Committee finds no reason to declare the communication inadmissible on this ground.

13.3 The State party has contested the admissibility also on the ground that the "same matter" is already being examined by the ECHR as three other sets of parents have lodged a similar complaint with the ECHR and that before the Norwegian courts, the authors' claims for full exemption from the CKREE subject were adjudicated in a single case, along with

identical claims from these three other sets of parents. The Committee reiterates its jurisprudence that the words "*the same matter*" within the meaning of article 5, paragraph 2 (a), of the Optional Protocol, must be understood as referring to one and the same claim concerning the same individual, as submitted by that individual, or by some other person empowered to act on his behalf, to the other international body.¹¹ That the authors' claims were joined with the claims of another set of individuals before the domestic courts does not obviate or change the interpretation of the Optional Protocol. The authors have demonstrated that they are individuals distinct from those of the three sets of parents that filed a complaint with the ECHR. The authors in the present communication chose not to submit their cases to the ECHR. The Committee, therefore, considers that it is not precluded under article 5, paragraph 2 a), of the Optional Protocol from considering the communication.

13.4 The Committee has taken note of the State party's argument that the claims under articles 17 and 18 were not raised in domestic proceedings, since the authors did not avail themselves of the possibility of applying for partial exemption, and that domestic remedies were not exhausted in that respect. However, both before the Committee and the domestic courts, the authors' claimed that the compulsory nature of the CKREE subject violates their Covenant rights, since cannot apply for full exemption from it. Furthermore, the State party has explicitly confirmed that the claims made in the communication were already assessed by domestic courts. The Committee considers that the authors have exhausted domestic remedies in relation to the claim in question.

13.5 The State party challenged the admissibility of the authors' claim under article 26 because of non-substantiation, since the exemption clause under the Norwegian Education Act applies to all parents, regardless of their religion or life stance. The Committee does not share this view. Consideration of whether there has been a differentiation between Christians and other groups, and whether such differentiation is based on objective and reasonable criteria, would be part of the merits consideration. The Committee considers that the authors have sufficiently demonstrated, for purposes of admissibility, that the exemption arrangements applicable to the CKREE subject may differentiate between non-Christian parents and Christian parents and that such differentiation may amount to discrimination within the meaning of article 26.

¹¹ *Sánchez López v. Spain* (Communication No. 777/1997), decision adopted on 18 October 1999.

13.6 Noting that the authors have withdrawn their claim presented under article 27, the Committee decides that the communication is admissible insofar as it raises issues under articles 17, 18, and 26, of the Covenant.

Consideration of the merits

14.1 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.

14.2 The main issue before the Committee is whether the compulsory instruction of the CKREE subject in Norwegian schools, with only limited possibility of exemption, violates the authors' right to freedom of thought, conscience and religion under article 18 and more specifically the right of parents to secure the religious and moral education of their children in conformity with their own convictions, pursuant to article 18, paragraph 4. The scope of article 18 covers not only protection of traditional religions, but also philosophies of life,¹² such as those held by the authors. Instruction in religion and ethics may in the Committee's view be in compliance with article 18, if carried out under the terms expressed in the Committee's General Comment No. 22 on article 18: "[A]rticle 18.4 permits public school instruction in subjects such as the general history of religions and ethics if it is given in a neutral and objective way", and "public education that includes instruction in a particular religion or belief is inconsistent with article 18, paragraph 4 unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents or guardians." The Committee also recalls its Views in *Hartikainen et al. v. Finland*, where it concluded that instruction in a religious context should respect the convictions of parents and guardians who do not believe in any religion. It is within this legal context that the Committee will examine the claim.

14.3 Firstly, the Committee will examine the question of whether or not the instruction of the CKREE subject is imparted in a neutral and objective way. On this issue, the Education Act, section 2-4, stipulates that: "Teaching on the subject shall not involve preaching. Teachers of Christian Knowledge and Religious and Ethical Education shall take as their point of departure the object clause of the primary and lower secondary school laid down in section 1-2, and present Christianity, other religions and philosophies of life on the basis of their

distinctive characteristics. Teaching of the different topics shall be founded on the same educational principles". In the object clause in question it is prescribed that the object of primary and lower secondary education shall be "in agreement and cooperation with the home, to help to give pupils a Christian and moral upbringing". Some of the *travaux préparatoires* of the Act referred to above make it clear that the subject gives priority to tenets of Christianity over other religions and philosophies of life. In that context, the Standing Committee on Education concluded, in its majority, that: *the tuition was not neutral in value, and that the main emphasis of the subject was instruction on Christianity*. The State party acknowledges that the subject has elements that may be perceived as being of a religious nature, these being the activities exemption from which is granted without the parents having to give reasons. Indeed, at least some of the activities in question involve, on their face, not just education in religious knowledge, but the actual practice of a particular religion (see para 9.18). It also transpires from the research results invoked by the authors, and from their personal experience that the subject has elements that are not perceived by them as being imparted in a neutral and objective way. The Committee concludes that the teaching of CKREE cannot be said to meet the requirement of being delivered in a neutral and objective way, unless the system of exemption in fact leads to a situation where the teaching provided to those children and families opting for such exemption will be neutral and objective.

14.4 The second question to be examined thus is whether the partial exemption arrangements and other avenues provide "*for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents or guardians.*" The Committee notes the authors' contention that the partial exemption arrangements do not satisfy their needs, since teaching of the CKREE subject leans too heavily towards religious instruction, and that partial exemption is impossible to implement in practice. Furthermore, the Committee notes that the Norwegian Education Act provides that "on the basis of written notification from parents, pupils shall be exempted from attending those parts of the teaching at the individual school that they, on the basis of their own religion or philosophy of life, perceive as being the practice of another religion or adherence to another philosophy of life".

14.5 The Committee notes that the existing normative framework related to the teaching of the CKREE subject contains internal tensions or even contradictions. On the one hand, the Constitution and the object clause in the Education Act contain a clear preference for Christianity as compared to the role of other religions and world views in the

¹² General Comment No. 22 on article 18, adopted on 30 July 1993.

educational system. On the other hand, the specific clause on exemptions in Section 2-4 of the Education Act is formulated in a way that in theory appears to give a full right of exemption from any part of the CKREE subject that individual pupils or parents perceive as being the practice of another religion or adherence to another philosophy of life. If this clause could be implemented in a way that addresses the preference reflected in the Constitution and the object clause of the Education Act, this could arguably be considered as complying with article 18 of the Covenant.

14.6 The Committee considers, however, that even in the abstract, the present system of partial exemption imposes a considerable burden on persons in the position of the authors, insofar as it requires them to acquaint themselves with those aspects of the subject which are clearly of a religious nature, as well as with other aspects, with a view to determining which of the other aspects they may feel a need to seek – and justify – exemption from. Nor would it be implausible to expect that such persons would be deterred from exercising that right, insofar as a regime of partial exemption could create problems for children which are different from those that may be present in a total exemption scheme. Indeed as the experience of the authors demonstrates, the system of exemptions does not currently protect the liberty of parents to ensure that the religious and moral education of their children is in conformity with their own convictions. In this respect, the Committee notes that the CKREE subject combines education on religious knowledge with practising a particular religious belief, e.g. learning by heart of prayers, singing religious hymns or attendance at religious services (para 9.18). While it is true that in these cases parents may claim exemption from these activities by ticking a box on a form, the CKREE scheme does not ensure that education of religious knowledge and religious practice are separated in a way that makes the exemption scheme practicable.

14.7 In the Committee's view, the difficulties encountered by the authors, in particular the fact that Maria Jansen and Pia Suzanne Orning had to recite religious texts in the context of a Christmas celebration although they were enrolled in the

exemption scheme, as well as the loyalty conflicts experienced by the children, amply illustrate these difficulties. Furthermore, the requirement to give reasons for exempting children from lessons focusing on imparting religious knowledge and the absence of clear indications as to what kind of reasons would be accepted creates a further obstacle for parents who seek to ensure that their children are not exposed to certain religious ideas. In the Committee's view, the present framework of CKREE, including the current regime of exemptions, as it has been implemented in respect of the authors, constitutes a violation of article 18, paragraph 4, of the Covenant in their respect.

14.8 In view of the above finding, the Committee is of the opinion that no additional issue arises for its consideration under other parts of article 18, or articles 17 and 26 of the Covenant.

15. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 18, paragraph 4, of the Covenant.

16. 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 and appropriate remedy that will respect the right of the authors as parents to ensure and as pupils to receive an education that is in conformity with their own convictions. The State party is under an obligation to avoid similar violations in the future.

17. Bearing in mind that, by becoming a State 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. The State party is also requested to publish the Committee's Views.

Communication No. 1189/2003

Submitted by: Anthony Michael Emmanuel Fernando (represented by Kishali Pinto-Jayawardena and Suranjith Hewamanne)

Alleged victim: The author

State party: Sri Lanka

Date of adoption of Views: 31 March 2005

Subject matter: Alleged breach of author's right to have his case examined by impartial tribunal - Impossibility to appeal decision on imprisoning for "contempt to court" - Alleged ill-treatment in detention

Procedural issues: Level of substantiation of claim - Non-exhaustion of domestic remedies

Substantive issues: Due process in criminal contempt case - Extent of State party's responsibility for investigating death threats and protecting the targets of such threats

Articles of the Covenant: 7; 9; 10, paragraph 1; 14, paragraph 1, 2, 3, (a), (b), (c), (d), (e), and 5; 19; and 2, paragraph 3

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

Finding: Violation (article 9, paragraph 1)

1.1 The author of the communication is Anthony Michael Emmanuel Fernando, a Sri Lankan national currently seeking asylum in Hong Kong SAR. He claims to be a victim of violations by Sri Lanka of his rights under articles 7, 9, 10, paragraph 1, 14, paragraphs 1, 2, 3, (a), (b), (c), (d), (e), 5, and articles 19, and 2, paragraph 3, of the Covenant on Civil and Political Rights. He is represented by counsel.

1.2 A request for interim measures to release the author from prison in Sri Lanka, submitted at the same time as the communication, was denied by the Special Rapporteur on New Communications.

Factual background

2.1 The author filed a workers compensation claim with the Deputy Commissioner of Worker's Compensation, for redress in respect of injuries he had suffered. According to the Court proceedings, the author was an employee of the Young Men's Christian Association (Y.M.C.A). While engaged in that employment he suffered injuries as a result of a fall. The Deputy Commissioner of Workmen's Compensation held an inquiry into the incident. The author and the Y.M.C.A were represented by lawyers. A settlement was arrived at but when the matter was called before the Deputy Commissioner

on 9 January 1998, the author refused to accept the settlement. The author's claim was thereafter dismissed and following the rejection of his claim, the author filed four successive motions in the Supreme Court. The first two motions concerned alleged violations of his constitutional rights by the Deputy Commissioner of Worker's Compensation. On 27 November 2002, the Supreme Court considered these two motions jointly and dismissed them. Thereafter, on 30 January 2003, the author filed a third motion, claiming that the first two motions should not have been heard jointly, and that their consolidation violated his constitutional right to a "fair trial". On 14 January 2003, this motion was similarly dismissed.

2.2 On 5 February 2003, the author filed a fourth motion, claiming that the Chief Justice of Sri Lanka and the two other judges who had considered his third motion should not have done so, as they were the same judges who had consolidated and considered the first two motions. During the hearing of this motion on 6 February 2003, the author was summarily convicted of contempt of court and sentenced to one year's "rigorous imprisonment" (meaning that he would be compelled to perform hard labour). He was imprisoned on the same day. According to the author, approximately two weeks later, a "second" contempt order was issued by the Chief Justice, clarifying that, despite earlier warnings, the author had persisted in disturbing court proceedings. The operative part of the Order stated as follows: "The petitioner was informed that he cannot abuse the process of Court and keep filing applications without any basis. At this stage he raised his voice and insisted on his right to pursue the application. He was then warned that he would be dealt with for contempt of Court if he persists in disturbing the proceedings of Court. In spite of the warning, he persists in disturbing the proceedings of Court. In the circumstances, we find him guilty of the offence of contempt of Court and sentence him to one year rigorous imprisonment. The Registrar is directed to remove the Petitioner from Court and commit him to prison on the sentence that is imposed". The Order was based on article 105 (3) of the Sri Lankan Constitution, which confers on the Supreme Court "the power to punish for contempt of itself, whether committed in the court itself or elsewhere, with imprisonment or fine or both as the

court may deem fit....”¹ According to the author, neither the Constitution nor any other statutory provisions regulate the procedure for informing the person in contempt of the charges against him, so as to enable him to consult a lawyer or appeal against the order of the Supreme Court, nor does it specify the sentence that may be imposed in cases of contempt.

2.3 Following his imprisonment, the author developed a serious asthmatic condition which required his hospitalization in an intensive care unit. On 8 February 2003, he was transferred to a prison ward of the General Hospital, where he was made to sleep on the floor with his leg chained, and only permitted to move to go to the toilet. He developed a chill from lying on the floor, which worsened his asthmatic condition. Neither the author's wife nor his father was informed that he had been transferred to hospital; they had to make their own enquiries.

2.4 On 10 February 2003, the author experienced severe pain all over his body but was not given medical attention. On the same day, he was returned to prison and was assaulted several times by prison guards during his transfer. In the police van, he was repeatedly kicked on the back, causing damage to his spinal cord. On arrival at the prison, he was stripped naked and left lying near the toilet for more than 24 hours. When blood was noticed in his urine, he was returned to the hospital, where he was subsequently visited by the United Nations Special Rapporteur on Independence of the Judges and Lawyers, who expressed concern about the case. After 11 February 2003, the author was allegedly unable to rise from his bed. On 17 October 2003, he was released from prison, after completing ten months of his sentence. The Sri Lankan authorities brought criminal charges against the prison guards accusing them of having been involved in the assault of the author. They have since been released on bail, pending trial.

2.5 On 14 March 2003, the author filed a fundamental rights petition under article 126 of the

Constitution with respect to his alleged torture, which is currently pending in the Supreme Court. He also submitted an appeal against his conviction for contempt, on the grounds that no charge was read out to him before conviction and that the sentence was disproportionate. He also submitted that the matter should not be heard by the same judges, since they were biased. The appeal was heard by the same three judges who had convicted him and was dismissed on 17 July 2003.

The complaint

3.1 The author claims violations of his rights under article 14, paragraphs 1, 2, and 3 (a), (b), (c) and (e), and 5, in that: he was denied a hearing on the question of contempt, having been convicted summarily; conviction and sentence were handed down by the same judges who had considered his previous three motions;² he had not been informed of the charges against him, nor given adequate time for the preparation of his defence;³ the appeal was heard by the same Supreme Court judges who had previously considered the matter; there was no proof that he had committed contempt of court or that “a deliberate intention” to commit contempt, required under domestic law, had been established; the term of one years imprisonment was grossly disproportionate to the offence which he was found to have committed.

3.2 The author claims that the fact that the same judges heard all his motions was contrary to domestic law. According to the author, Section 49 (1) of the Judicature Act No. 2 of 1978 (as amended) stipulates that no judge shall be competent, and in no case shall any judge be compelled to exercise jurisdiction in any action, prosecution, proceedings or matter in which he is a party or is personally interested. Sub-section (2) of the section provides that no judge shall hear an appeal from, or review, any judgment, sentence or order passed by himself. Sub-section (3) provides that where any judge who is a party or personally interested, is a judge of the Supreme Court or the Court of Appeal, the action, prosecution or matter to or in which he is a party or is interested, or in which an appeal from his judgment shall be preferred, shall

¹ “Article 105 (3), provides that “The Supreme Court of the Republic of Sri Lanka and the Court of Appeal of the Republic of Sri Lanka shall each be a superior court of record and shall have all the powers of such court including the power to punish for contempt of itself, whether committed in the court itself or elsewhere, with imprisonment or fine or both as the court may deem fit. The power of the Court of Appeal shall include the power to punish for contempt of any other court, tribunal or institution referred to in paragraph (1) (c) of this article, whether committed in the presence of such court or elsewhere:

Provided that the preceding provisions of this Article shall not prejudice or affect the rights now or hereafter vested by any law in such other court, tribunal or institution or punishment for contempt of itself.”

² The author refers to *Karttunen v. Finland*, Case No. 387/1989 and *Gonzalez del Rio v. Peru*, Case No. 263/1987. He also distinguishes the current case from that of *Rogerson v. Australia*, Case No. 802/1998 and *Collins v. Jamaica*, Case No. 240/1987.

³ He refers to a press release of 17 February 2003, in which it is stated that the UN Special Rapporteur on the Independence of the Judges and Lawyers and the Sri Lankan Legal Profession, are of the view that contempt of court cases are not an exception to the right of an accused to present a defence.

be heard or determined by another judge or judges of the court. In support of the author's view that the trial was unfair he refers to international and national concern regarding the conduct of the Chief Justice.⁴

3.3 The author argues that his imprisonment without a fair trial amounts to arbitrary detention, in violation of article 9 of the Covenant. He refers to the criteria under which the Working Group on Arbitrary Detention determines whether a deprivation of liberty is arbitrary.

3.4 The author claims that his freedom of expression under article 19 was infringed by the imposition of a disproportionate prison sentence, given that the exercise of contempt powers was neither "prescribed by law", (given the insufficient precision of the relevant provisions), nor "necessary to protect the administration of justice" or "public order" (article 19 (3) (b)), in the absence of an abusive behaviour on his part that could be considered as "scandalizing the court". He argues that his treatment and the consequent restrictions of his freedom of expression did not meet the three pre-conditions for a limitation:⁵ it must be provided by law; it must address one of the aims set out in paragraphs 3 (a) and (b) of article 19; and it must be necessary to achieve a legitimate purpose.

3.5 On the first condition, the author argues that the restriction is not provided by law, as the measures in question are not clearly delineated and so wide in their ambit that they do not meet the test of certainty required for any law. He invokes the case law of the European Court on Human Rights for the proposition that the legal norm in question must be accessible to individuals, in that they must be able to identify it and must have a reasonable prospect of anticipating the consequences of a particular action.⁶ The State party's laws on contempt are opaque, inaccessible and the discretion for the Supreme Court to exercise its own powers of contempt is so wide and unfettered that it fails the test of accessibility and predictability.

⁴ Report of the United Nations Special Rapporteur on Independence of Judges and Lawyers to the United Nations Commission in April 2003, in which it states that "the Special Rapporteur continues to be concerned over the allegations of misconduct on the part of the Chief Justice Sarath Silva, the latest being the proceedings filed against him and the Judicial Service Commission in the Supreme Court by two district judges...." He also refers to the Report of the International Bar Association, 2001, Sri Lanka on failing to protect the rule of law and the independence of the judiciary.

⁵ *Faurisson v. France*, Case No. 550/93.

⁶ *Grigoriades v. Greece* (Application No. 24348/94) and *Sunday Times v. the United Kingdom* (6538/74) 1979.

3.6 On the second condition, it is argued that the latitude afforded to the judiciary regarding its powers of contempt under Sri Lankan law, and the extent to which they operate as a restriction on the right to freedom of expression, are not sufficiently closely related to the aims specified in article 19, namely the protection of "public order" and "the rights and reputation of others". On the third condition, while the right to freedom of expression may be restricted, "to protect the rights and reputations of others", and in this instance, to safeguard the administration of justice, the powers of the Supreme Court provided for under Sri Lankan law for contempt of court, including the power to impose prison sentences, are wholly disproportionate and cannot be justified as being "necessary" for this end. Even if the Committee were to find that there is a pressing social need in this case (to secure the administration of justice) and that the author was in fact in contempt, one year of imprisonment – with hard labour – is in no way a proportionate or necessary response.⁷

3.7 The author claims that article 105 (3) of the Sri Lankan Constitution is in itself incompatible with articles 14 and 19 of the Covenant. He claims violations of articles 7 and 10, paragraph 1, in relation to his assault and his conditions of his detention (paras. 2.3 and 2.4 above). He also claims that in having submitted his appeal against his conviction for contempt, he has exhausted all available domestic remedies.

State party's admissibility submission

4.1 On 27 August 2003, the State party provided its comments on the admissibility of the communication. It submits that the appeal judgment, of 17 July 2003, of the Supreme Court on the author's conviction for contempt, deals with the entirety of the case; it is significant that the author failed to express regret for this "contemptuous behaviour", though given an opportunity to do so by Court, and thereby exhibiting his contempt of justice and the judiciary.

4.2 With regard to the alleged torture by the prison authorities, the State party confirms that it had taken measures to charge the persons held responsible, that the case is still pending and that the accused are currently on bail, pending trial. There are two cases pending before the courts. If the accused are convicted they will be sentenced. Further, it is confirmed that the author has filed a fundamental rights petition in the Supreme Court against the alleged torture, which remains pending. In the event that the Supreme Court decides the

⁷ The author refers to the European Court of Human Rights case of *De Haes & Gijssels v. Belgium*.

fundamental rights application in the author's favour he will be entitled to compensation. As such, the allegation of torture is inadmissible for failure to exhaust domestic remedies. Further, since the State took all possible steps to prosecute the alleged offenders there can be no cause for further complaint against the State in this regard.

4.3 The State party adds that the Sri Lankan Constitution provides for an independent judiciary. The judiciary is not under the State's control and as such the State cannot influence nor give any undertaking or assurances on behalf of the judiciary on the conduct of any judicial officer. If the State attempts to influence or interfere with the judicial proceedings, this would be tantamount to an interference with the judiciary and would lead to any officer responsible facing charges of contempt himself.

4.4 Although the State party requested the Committee to consider the admissibility separately from the merits of the communication, the Committee advised, through its Special Rapporteur on New Communications, that it would consider the admissibility and merits of the communication together, on the basis that the State party's future submissions on the merits would provide greater clarity on the issues of admissibility and that the information provided was too scarce for any final determination on these issues at that point.

Interim measures request

5.1 On 15 December 2003, following the receipt of death threats, the author requested interim measures of protection, requesting the State party to adopt all necessary measures to ensure his protection and that of his family, and to ensure that an investigation into the threats and other measures of intimidation be initiated without delay. He submits that on 24 November 2003, at about 9.35 a.m., an unknown person called his mother and asked her whether he was at home. When she answered in the negative, this person made death threats against the author and demanded that he withdraw his three complaints: The communication to the Human Rights Committee; the fundamental rights case in the Supreme Court regarding alleged torture; and the complaint filed in the Colombo Magistrate's Court against the two Welikade prison guards. The caller did not reveal his identity.

5.2 On 28 November 2003, the author's complaint against the two prison guards was taken up in the Colombo Chief Magistrate's court, and the author was present. The magistrate directed the police to charge the accused on 6 February 2004, as they had failed on three occasions to present themselves before the Maligakanda Mediation Board, as directed by the court. Later that day on 28

November 2003, his mother told him that an unidentified person had come to the house at about 11.30 a.m. and, while standing outside the locked gate, had called out for the author. When the author's mother told him that he was not in, he went away threatening to kill him. Once again, on 30 November 2003, at about 3.30 p.m., the same person returned, behaved in the same threatening manner and demanded that the author's mother and father send their son out of the house. The author's parents did not respond and called the police. Before the police arrived, the person uttered threats against the author's parents and after once again threatening to kill the author left the premises. The author's mother filed a complaint at the police station on the same day.

5.3 On 24 November 2003, at 10.27 a.m., an unidentified person called at the office of a Sri Lankan newspaper, Ravaya, which had supported the author throughout his ordeal. The caller spoke to a reporter and levelled death threats against him and the editor of Ravaya, demanding that they cease publishing further news concerning the author. This newspaper had published interviews of the author on 16 and 23 February and 2 November 2003 regarding the alleged miscarriage of justice suffered by him. The threats were reported in the weekend edition of the Ravaya newspaper.

5.4 The author adds that, on 4 December 2003, he received information to the effect that the two prison guards who had been cited in the fundamental rights petition filed by the author as well as in the case filed in the Colombo Magistrate's court, had been reinstated: one of them was transferred to the New Magazine prison and the other remains at the Welikade prison. As a result, the author lives in daily fear for his life as well as for the life and safety of his wife, his son and his parents. In spite of his complaint to the authorities, he has not, to date, received any protection from the police and is unaware of what action has been taken to investigate the threats against himself and his family. He recalls that he had received death threats in prison as well; he invokes the Committee's Concluding Observations, of November 2003, which stated that, "The authorities should diligently enquire into all cases of suspected intimidation of witnesses and establish a witness protection program in order to put an end to the climate of fear that plagues the investigation and prosecution of such cases." He also refers to the Committee's Views in *Delgado Páez v. Colombia* on the State party's obligation to investigate and protect subjects of death threats.⁸

⁸ *Delgado Páez v. Colombia*, Case No. 195/1985, paragraph 5.5.

5.5 On 9 January 2004, pursuant to rule Rule 86 of the rules of procedure and, on the behalf of the Committee, the Special Rapporteur on New Communications requested the State party to adopt all necessary measures to protect the life, safety and personal integrity of the author and his family, so as to avoid irreparable damage to them, and to inform the Committee on the measures taken by the State party in compliance with this decision within 30 days from the date of the Note Verbale, i.e. not later than by 9 February 2004.

5.6 On 3 February 2004, the author submitted that on the morning of 2 February 2004, he had been subjected to an attack by an unknown assailant who sprayed chloroform in his face. A van pulled up close by during the attack, and the author believes that it was going to be used to kidnap him. He managed to escape and was taken to hospital. Had he not escaped, he would have been the victim of an assassination or disappearance. On 13 February 2004, the Committee, through its Special Rapporteur on New Communications, reiterated his previous request to the State party under Rule 86 of the Committee's rules of procedure in his note of 9 January 2004.

5.7 On 19 March 2004, the State party commented on the attack against the author of 2 February 2004. It submits that the Attorney General's Department directed the police to investigate the alleged attack and to take measures necessary to ensure his safety. The police recorded his statement in which he was unable to either name the suspects or to provide the police with the number of the vehicle that the alleged assailants had travelled in. The investigations remain in progress and steps will be taken to inform the author of the outcome. If the investigations reveal credible evidence that the threats were caused by any person with a view to subverting the course of justice, the State party will take appropriate action.

5.8 With regard to the author's security, a police patrol book has been placed at his residence and police patrols have been directed to visit his residence day and night and to record their visits in the police patrol book. In addition to this, his residence is kept under surveillance by plain-cloth policemen. There is no evidence to conclude that the author received threats to his life because of his communication to the Human Rights Committee.

State party's merits submission

6.1 On 16 March 2004, the State party provided its submissions on the merits. On the alleged violations of articles 9, 14 and 19 of the Covenant, it concedes that the author has exhausted domestic remedies. It refers to the judgment of the Supreme Court of 17 July 2003, on appeal against the contempt order, and

submits that it cannot comment on the merits of any judgment given by a competent Sri Lankan Court. The State party relies on the arguments set out in the judgment for its proposition that the author's rights were not violated. It submits that the manner in which the author behaved from the time he walked out on a settlement reached between himself and the Y.M.C.A, where both parties were legally represented, before the Deputy Commissioner General of Workman's Compensation, to the point of his refusal to express any regret for his behaviour, when his case for contempt was reviewed by the Supreme Court, demonstrates the author's lack of respect for upholding the dignity and decorum of a judicial tribunal. It refers to the judges' consideration of the powers vested in such Courts to deal with cases of contempt, noting that in such cases committed in the face of the Court punishment may be imposed summarily. While the author was given an opportunity to mitigate the sentence by way of apology, he failed to do so.

6.2 Freedom of speech and expression, including publication, are guaranteed under article 14, paragraph 1 (a), of the Sri Lankan Constitution. Under article 15, paragraph 2, it is permissible to place restrictions on rights under article 14; these may be prescribed by law in relation to contempt of court. The State party denies that the power of the Supreme Court under article 105, paragraph 3 of the Constitution is inconsistent with either the fundamental right guaranteed by Article 14, paragraph 1 (a) of the Sri Lankan Constitution or with articles 19 or 14 of the Covenant.

6.3 The State party reiterates that the author did not exhaust domestic remedies with respect to the claim relating to torture and ill-treatment as the case is still pending. Since the State cannot make submissions on behalf of the accused, it would be tantamount to a breach of rules of natural justice for the Committee to express its views on the alleged violation, as there is no opportunity for the persons accused of the assault to give their version of the incident. A determination of the case by the Committee at this stage would be prejudicial to the accused and/or the prosecution. It observes that the author has not submitted that such remedies are ineffective or that such remedies would be unreasonably prolonged.

6.4 The State party notes that the fundamental rights case filed by the author in the Supreme Court remains pending, and that a violation of the same rights as those protected under articles 7 and 10, paragraph 1, of the Covenant will be considered in these proceedings. It further submits that it has declined to appear for the individuals against whom allegations of torture are made. The Attorney General who represents the State refrains, as a matter of policy, from appearing for public officers against

whom allegations of torture are pending, since the Attorney General could consider filing criminal charges against the perpetrators even after such a case is concluded. In the present case such action (criminal prosecution) is pending.

Author's comments

7.1 On 6 August 2004, the author commented on the State party's submission and reiterated his earlier claims. Following the attack on him of 2 February 2004, he lived in hiding. Despite having made complaints to the police, no investigations were made, and no one was prosecuted or arrested. Although the author concedes that police patrols did pass by his house he argues that this is insufficient protection from an attempted kidnapping and possibly attempted murder. He was diagnosed with post-traumatic stress disorder and his mental health deteriorated. Because of these events, he left Sri Lanka on 16 July 2004 and applied for asylum in Hong Kong, where he continues to receive treatment for his mental difficulties. His application has not yet been considered. He contests the State party's view that it has no role to play with regard to a judgment pronounced by a local court of law.

7.2 Contrary to his initial submission, the author now contends that no charges have been filed against the suspects of the alleged assault to date. According to him, preliminary reports called "B reports" have been before the Magistrate's Court in Colombo, but these are merely reports relating to the progress of the inquiries. The last time this report was heard by the Court was on 23 July 2004. Thus, even after one and a half years after the incident, the inquiry is supposed to be continuing. In the author's view, this failure by the State party promptly to investigate complaints of torture violates article 2, and the lack of witness protection makes it impossible to participate in any trial that may eventually take place.

7.3 The author also claims that the State party has failed to contribute to his rehabilitation. He states that four doctors have diagnosed him with psychological trauma caused by the above events, but that his fundamental rights and request for compensation application filed on 13 March 2003 has been postponed constantly. According to article 126 (5) of the Constitution, "[t]he Supreme Court shall hear and finally dispose of any petition or reference under this article within two months of the filing of such petition or the making of such reference". The author's petition remains pending. The State party's failure to consider these applications are also said to demonstrate that exhaustion of domestic remedies with respect to the alleged violations of articles 7 and 10, paragraph 1 has been unduly prolonged, and that the remedies are ineffective.

7.4 The author adds a new claim relating to his conviction for contempt, that he was not given an opportunity to be tried and defend himself in person, or through legal assistance of his own choosing and he was not informed of the right to have legal assistance, nor was legal assistance assigned to him. In this regard he claims a violation of article 14, paragraph 3 (d).

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

8.2 As to the alleged violation of articles 7 and 10, paragraph 1, with respect to the author's alleged torture and his conditions of detention, the Committee notes that these issues are currently pending before both the Magistrate Court and the Supreme Court. Although it is unclear whether the individuals allegedly responsible for the assault have been formally charged, it is uncontested that this matter is under review by the Magistrates Court. The Committee is of the view that a delay of 18 months from the date of the incident in question does not amount to an unreasonably prolonged delay within the meaning of article 5, paragraph 2 (b), of the Optional Protocol. The Committee therefore finds these claims inadmissible for non-exhaustion of domestic remedies in accordance with article 5, paragraph 2 (b) of the Optional Protocol.

8.3 As to the claim that the author's detention was arbitrary under article 9, since it was ordered after an allegedly unfair trial, the Committee finds that this claim is more appropriately dealt together with article 14 of the Covenant as it relates to post-conviction detention.

8.4 As to the alleged violation of article 14, paragraph 3 (c), the Committee finds that this claim has not been substantiated for the purpose of admissibility and is therefore inadmissible under article 2 of the Optional Protocol.

8.5 As to the remaining claims of violations of articles 9, paragraph 1, and 14, paragraphs 1, 2, 3 (a), (b), (d), (e), and 5, and article 19, the Committee considers these claims are sufficiently substantiated and finds no other bar to their admissibility.

Consideration of the merits

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

9.2 The Committee notes that courts notably in Common Law jurisdictions have traditionally enjoyed authority to maintain order and dignity in court debates by the exercise of a summary power to impose penalties for “contempt of court.” But here, the only disruption indicated by the State party is the repetitious filing of motions by the author, for which an imposition of financial penalties would have evidently been sufficient, and one instance of “rais[ing] his voice” in the presence of the court and refusing thereafter to apologize. The penalty imposed was a one year term of “Rigorous Imprisonment”. No reasoned explanation has been provided by the court or the State party as to why such a severe and summary penalty was warranted, in the exercise of a court’s power to maintain orderly proceedings. Article 9, paragraph 1, of the Covenant forbids any “arbitrary” deprivation of liberty. The imposition of a draconian penalty without adequate explanation and without independent procedural safeguards falls within that prohibition. The fact that an act constituting a violation of article 9, paragraph 1 is committed by the judicial branch of government cannot prevent the engagement of the responsibility of the State party as a whole. The Committee concludes that the author’s detention was arbitrary, in violation of article 9, paragraph 1. In the light of this finding in the present case, the Committee does not need to consider the question whether provisions of article 14 may have any application to the

exercise of the power of criminal contempt. Similarly, the Committee does not need to consider whether or not there was a violation of article 19.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party has violated articles 9, paragraph 1, of the International Covenant on Civil and Political Rights.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an adequate remedy, including compensation, and to make such legislative changes as are necessary to avoid similar violations in the future. The State party is under an obligation to avoid similar violations in the future.

12. Bearing in mind that, by becoming a State 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, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee’s Views.

Communication No. 1222/2003

Submitted by: Jonny Rubin Byahuranga (represented by Tyge Trier)

Alleged victim: The author

State Party: Denmark

Date of adoption of Views: 1 November 2004 (eighty-second session)

Subject matter: Deportation of refugee after conviction of drug-related crimes

Procedural issue: Request for interim measures of protection

Substantive issues: Real and foreseeable risk of being subjected to ill-treatment upon return - Arbitrary interference with right to family life - Protection of the family

Articles of the Covenant: 7, 17 and 23, paragraph 1

Article of the Optional Protocol and Rules of Procedure: rule 86

Finding: Violation (article 7)

awaiting expulsion to Uganda. He claims to be victim of a violation by Denmark¹ of articles 7, 17 and 23, paragraph 1, of the Covenant. He is represented by counsel.

1.2 On 27 November 2003, the communication was transmitted to the State party. On 7 July 2004, the author requested the Committee to issue a request for interim measures under Rule 86 of its rules of procedure, asking the State party not to deport him while his communication was under consideration by the Committee. On 9 July 2004, the Committee, through its Special Rapporteur on New Communications, requested the State party not to deport the author before the Committee has had an opportunity to address the continued need for interim

1.1 The author of the communication is Jonny Rubin Byahuranga, a Ugandan national born on 28 October 1956, currently residing in Denmark and

¹ The Covenant and the Optional Protocol entered into force for the State party on 23 March 1976.

measures. The State party acceded to this request. On 30 July 2004, the Committee informed the State party of its decision to extend its temporary request not to deport the author until the closing date of the Committee's 82nd session, i.e. 5 November 2004.

The facts as submitted by the author

2.1 The author served as an officer in the Ugandan army during the rule of Idi Amin. He fled Uganda in 1981, after he had been unlawfully detained and allegedly tortured several times by military forces. In December 1984, he entered Denmark, where he was granted asylum on 4 September 1986, under Section 7 (1) (ii)² of the Aliens Act. On 24 July 1990, he was issued a permanent residence permit.

2.2 In 1997, the author married a Tanzanian national. Together with the author's daughter from a former marriage (born in 1980), his wife united with him in Denmark in 1998. She has meanwhile become a Danish citizen and has two children with the author, who were born in Denmark in 1999 and 2000, respectively.

2.3 By judgement of 23 April 2002, the Copenhagen City Court convicted the author of drug-related offences (Section 191 of the Danish Criminal Code), and sentenced him to two years and six months' imprisonment. It also ordered the author's expulsion from Denmark,³ finding that such expulsion would not amount to a violation of the right to family life under article 8 of the European Convention, and permanently barred him from re-entering Denmark. It based its decision on an opinion dated 19 April 2002 of the Danish Immigration Service, which considered that there were no circumstances which would constitute a decisive argument against the author's expulsion within the meaning of Section 26⁴ of the Aliens Act.

² Section 7 (1) of the Aliens Act then in force read: "Section 7. (1). Upon application, a residence permit shall be issued to an alien in Denmark or at the border, (i) if the alien falls within the provisions of the Convention on the Status of Refugees of 28 July 1951; or (ii) if for reasons similar to those listed in the Convention or for other weighty reasons, the alien cannot be required to return to his country of origin."

³ Section 22 of the Aliens Act then in force read, in pertinent parts: "Section 22. An alien who has lawfully stayed in Denmark for more than the past seven years or an alien issued with a residence permit under sections 7 or 8 may be expelled if: [...] (iv) the alien is sentenced, pursuant to the Drugs and Narcotics Act or pursuant to sections 191 or 191a of the Criminal Code, to imprisonment [...]."

⁴ Section 26 of the Aliens Act then in force read: "Section 26. (1) In deciding on expulsion, regard must be had to the question whether the expulsion must be

It based itself on (a) the fact that, at the age of 45 years, the author had resided in Denmark for 17 years and four months; (b) the author's good health, i.e. the absence of any diseases which could not be treated in Uganda; (c) the fact that his expulsion would not affect the right of his spouse and children to continue residing in Denmark, given that his wife and his older daughter had meanwhile been granted permanent residence permits; (d) the absence of any risk that, in cases other than those mentioned in Section 7 (1) and (2) of the Aliens Act, he would be ill-treated in Uganda. The Immigration Service did not object to the prosecutor's claim to expel the author, despite the latter's loose ties with his Ugandan family and the fact that he had not returned to Uganda since 1981.

2.4 On 3 September 2002, the High Court of Eastern Denmark dismissed the author's appeal against the decision of the Copenhagen City Court. On 12 November 2002, the Danish Board of Appeal rejected the author's application for leave to appeal against the High Court's judgement.

The complaint

3.1 The author claims (a) that his expulsion would amount to a violation of his rights under article 7 of the Covenant, as it would expose him to a real and immediate danger of being subjected to ill-treatment upon return to Uganda; and (b) that it would constitute an arbitrary interference with his right to family life under article 17 of the Covenant and a violation of the State party's duty to respect and protect the family as the natural and fundamental group unit of society, as prescribed by article 23, paragraph 1.

presumed to be particularly burdensome, in particular because of:

- (i) the alien's ties with the Danish community [...];
- (ii) the duration of the alien's stay in Denmark;
- (iii) the alien's age, health and other personal circumstances;
- (iv) the alien's ties with persons living in Denmark;
- (v) the consequences of the expulsion for the alien's close relatives living in Denmark;
- (vi) the alien's weak or non-existing ties with his country of origin or any other country in which he may be expected to take up residence; and
- (vii) the risk that, in cases other than those mentioned in section 7 (1) and (2), the alien will be ill-treated in his country of origin or any other country in which he may be expected to take up residence.

(2) An alien may be expelled under section 22 (iv) to (vi) unless the circumstances mentioned in subsection (1) constitute a decisive argument against such expulsion."

3.2 The author emphasizes that he has lived in Denmark for 18 years without ever having returned to Uganda, that he has no contact with relatives in Uganda, that his wife and children are living with him; the two youngest children were born in Denmark and have never been to Uganda.

State party's submissions on admissibility and merits

4.1 On 11 February 2004, the State party submitted its observations on the admissibility and merits of the communication, challenging the admissibility because of the author's failure to exhaust domestic remedies, and denying violations of articles 7, 17 and 23, paragraph 1.

4.2 Regarding exhaustion of domestic remedies, the State party submits that, on 31 July 2003, the author requested the Copenhagen police to place the matter of revocation of the expulsion order before a tribunal, for review under Section 50 (1)⁵ of the Aliens Act. On 29 August 2003, the police requested the Danish Immigration Service to provide another opinion on the desirability of the author's expulsion. On 18 September 2003, the Immigration Service reiterated that it was not in possession of any information as to whether the author would be exposed to particularly burdensome criminal sanctions upon return to Uganda, or whether he would be at risk of double jeopardy for the same offence for which he had been convicted in Denmark. However, it had requested the Danish Foreign Ministry to investigate the risk of double jeopardy in Uganda. Apart from such risk, possible grounds for asylum set out in Section 7 (1) and (2) of the Aliens Act could not be taken into account, in accordance with Section 26 (1) (vii) of the Act. The Immigration Service concluded that, in the light of the nature of the offences committed by, and the severity of the prison sentence imposed on, the author, his personal circumstances did not outweigh the arguments for his expulsion.

4.3 On 11 November 2003, the Copenhagen City Court affirmed the expulsion order against the author, finding that its revocation was not required under article 3 of the European Convention on Human Rights, since the author still could invoke

⁵ Section 50 (1) of the Aliens Act reads: "(1) If expulsion under section 49 (1) has not been enforced, an alien claiming that a material change in his circumstances has occurred, cf. section 26, can request that the public prosecutor put the question of resumption [revocation] of the expulsion order before court. A request to that effect must be submitted not earlier than 6 months and not later than 2 months before the date when enforcement of the expulsion can be expected. If the request is submitted at a later date, the court may decide to examine the case if it deems it to be excusable that the time-limit has been exceeded."

Section 31⁶ of the Aliens Act, allowing for a further risk assessment⁷ by the Danish Immigration Service prior to his return to Uganda. On 1 December 2003, the High Court of Eastern Denmark dismissed the author's appeal against the City Court's decision. On 19 January 2004, the Danish Immigration Service, based on information from the Foreign Ministry about an amnesty for supporters of former President Amin and the risk of double jeopardy in Uganda, determined that Section 31 of the Aliens Act would not preclude the author's expulsion. The author's appeal to the Danish Refugee Board and his application to the Board of Appeal for leave to appeal the High Court's decision of 1 December 2003, were still pending when the State party made its submission. It is thus submitted that the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

4.4 On the merits, the State party submits that the procedure before the Danish courts and immigration authorities ensures that a person will not be expelled to a country where he or she would face a real risk of being subjected to torture or to cruel, inhuman or degrading treatment or punishment. The Danish Immigration Service, both in its opinions dated 19 April 2002 and 18 September 2003, and in its risk assessment under Section 31 of the Aliens Act, carefully examined the author's risk of being subjected to ill-treatment. It concluded that his expulsion would not contravene Sections 26 or 31 of the Aliens Act. The latter reflects Denmark's obligations under article 3 of the European Convention on Human Rights and hence article 7 of the Covenant. The State party concludes that the author's expulsion would be compatible with article 7 of the Covenant.

⁶ Section 31 of the Aliens Act reads: "(1) An alien may not be returned to a country where he will be at risk of the death penalty or of being subjected to torture or inhuman or degrading treatment or punishment, or where the alien will not be protected against being sent on to such country. (2) An alien falling under section 7 (1) may not be returned to a country where he will risk persecution on the grounds set out in article 1 A of the Convention on the Status of Refugees (28 July 1951), or where the alien will not be protected against being sent on to such country. This does not apply if the alien must reasonably be deemed a danger to national security or if, after final judgement in respect of a particularly dangerous crime, the alien must be deemed a danger to society, but cf. subsection (1)."

⁷ See section 49a of the Aliens Act: "Section 49a. Prior to the return of an alien who has been issued a residence permit under sections 7 or 8 and who has been expelled by judgement [...], the Danish Immigration Service decides whether the alien can be returned, cf. section 31, unless the alien consents to his return. [...]"

4.5 While conceding that the author's expulsion constitutes an interference with his right to family life under article 17, the State party argues that this interference is provided for by law, is in accordance with the provisions, aims and objectives of the Covenant, and reasonable in the circumstances of the case, given that it was based on the author's conviction for a particularly serious offence. The State party invokes its right to control the entry and residence of aliens, which included a right to expel persons convicted of criminal offences, insofar as such expulsion was not arbitrary but proportionate to the legitimate aim pursued. For the State party, the author's expulsion would not constitute an unreasonable hardship for his wife and oldest daughter, who both only had minor ties with Denmark and could therefore reasonably be expected to accompany the author. Conversely, if they prefer to stay in Denmark, their right of residence would not be affected by the author's expulsion, as they were both issued permanent residence permits.

4.6 The State party argues that, while constituting an interference with article 23, paragraph 1, of the Covenant, the author's expulsion would not violate that provision, since nothing prevented his wife, a Tanzanian national, their children, or his oldest daughter from continuing their family life with the author in Tanzania or elsewhere outside Denmark.

5. On 17 March 2004, the State party informed the Committee that, by decision of 17 February 2004, the Board of Appeal dismissed the author's application for leave to appeal against the High Court's decision of 1 December 2003.

Author's request for interim measures

6.1 On 7 and 9 July 2004, the author requested the Committee to seek the State party's assurance that he will not be expelled to Uganda while his communication is under consideration by the Committee, where he would risk suffering irreparable harm, due to his former position as lieutenant during the rule of Idi Amin.

6.2 The author submits that, by decision of 28 June 2004, the Danish Refugee Board dismissed his appeal against the decision of the Danish Immigration Service dated 19 January 2004, on the ground that he would risk no harm upon return to Uganda. On 6 July 2004, the police formally notified him of this decision, and informing him that he would be deported without delay.

6.3 The author argues that he was an outspoken critic of the present Ugandan government during his time in Denmark and that he participated in conferences, where he protested against Uganda's treatment of political opponents. He identifies several current Ugandan military and government officials whom he fears particularly.

6.4 In support of his claim, the author refers to reports from non-governmental and governmental sources, which confirm the continued occurrence of extrajudicial killings, torture and arbitrary detention of political opponents or suspected rebel supporters in Uganda. By reference to the Committee's jurisprudence, he argues that his immediate expulsion from Denmark would render examination of his communication by the Committee moot.

State party's additional submission and author's comments

7. On 15 July 2004, the State party conceded that the author has exhausted domestic remedies, after his appeal against the decision of 19 January 2004 of the Danish Immigration Service was dismissed by the Immigration Board on 28 June 2004. A subsequent request to the Minister for Refugees, Immigration and Integration to grant him a residence permit on humanitarian grounds, pursuant to Section 9b (1) of the Aliens Act, was rejected on 9 July 2004, as such a permit could, at the earliest, be granted two years after an applicant's departure from Danish territory.

8. On 21 July 2004, the author observed that the State party had not addressed the risk of irreparable harm that he would face upon return to Uganda. In support of his claims, he submits a letter dated 14 July 2004 from the former chairman of the Schiller Institute in Denmark, who confirms that the author participated in conferences of the Institute in his capacity as chairman of the Ugandan Union in Denmark. His participation in a September 1997 conference, during which Ugandan President Museveni's alleged links with the Rwandan Patriotic Front were criticized, was documented in an article published in the Executive Intelligence Review on 10 October 1997, as well as in a German-language newspaper. The letter expresses concern that the Ugandan Embassy in Copenhagen may have registered Ugandan citizens who participated in the Schiller Institute's conferences.

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

9.1 On 26 August 2004, the author commented on the State party's admissibility and merits submissions of 11 February and 15 July 2004, reiterating that he has exhausted domestic remedies. He submits that the letter from the Schiller Institute clearly shows that the Ugandan authorities are aware of his political activities, on the basis of the lists of participants of the conferences he attended, which are also available online. While claiming that the danger he faces upon return to Uganda is real and a necessary and foreseeable consequence of deportation, the author criticizes that the State party failed to address the evidence he had submitted.

9.2 By merely relying on the risk assessments conducted by the Danish Immigration Service on 19 April 2002 and 18 September 2003, under Sections 50 and 26 of the Aliens Act, the State party ignored the fact that a substantial part of the author's article 7 complaint was based on information obtained *after* the risk assessments. In the absence of a response from the State party to his specific submissions, considerable weight should be given to these uncontested submissions, given that the State party had the opportunity to investigate his allegations thoroughly. It had not shown that the circumstances in Uganda had changed fundamentally, so as to render the reasons for granting him asylum, in 1986, obsolete.

9.3 In support of his claims under articles 17 and 23, the author reiterates that he and his wife have two children who were both born and raised in Denmark, speak Danish and consider Denmark as their home. The State party's failure to address this aspect could not change the importance which the Committee should accord to their upbringing in a stable and reliable environment, especially if articles 17 and 23 of the Covenant are interpreted in the light of articles 9 and 16 of the Convention on the Rights of the Child. His important role in the lives of the two children is reflected in several reports on family visits during prison leave; the reports record the happiness of the children to see their father.

9.4 On 6 August 2004, the Copenhagen City Court decided to release the author, thereby implicitly acknowledging his close family ties, as well as the hardship that the 11 months in custody on remand pending deportation after the end of his prison sentence constituted for him and his family. He argues that enabling him to resume his family life for a few months, during which he may look after his children while his wife works, only to eventually deport him to Uganda, would amount to a severe infringement of his rights under articles 17 and 23.

9.5 Regarding the State party's argument that nothing prevents his family from continuing to live together outside Denmark, the author submits that his wife would not be able to follow him to a country without any job opportunities or any prospects for schooling and day-care institutions for her children.

9.6 The author adds that the possibility of his resettling in Tanzania, as proposed by the State party, is not a realistic option, since that country is under no obligation to receive him, and most likely reluctant to accept a non-national who had been convicted of a criminal offence. Despite occasional visits to Tanzania, he has no ties to that country.

9.7 The author reiterates that he has no contact with any family members in Uganda. His tribe members, the Toros, were likely to treat him as an

outcast or to kill him, because of his service in the army of Idi Amin, who had oppressed the Toros.

9.8 The author recalls that the May 2002 judgement of the Copenhagen City Court was not unanimous with regard to his expulsion, as one of the three judges considered his expulsion incompatible with article 8 of the European Convention on Human Rights. In a case similar to this, involving the deportation of a foreign national who had lived in Denmark for a number of years together with his wife, and who also had been ordered deported on the basis of a conviction for drug-related offences, the European Court of Human Rights had found a violation of article 8 of the Convention.⁸

9.9 The author argues that, in the light of the length of his stay in Denmark and his family's interest to continue living together, the State party's decision to deport him must be considered disproportionate to the aim pursued, despite the relatively serious nature of his conviction. By reference to the Committee's jurisprudence,⁹ he concludes that the expulsion order against him constitutes arbitrary interference with his rights under article 17 and 23.

Issues and proceedings before the Committee

Considerations of admissibility

10.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

10.2 The Committee has ascertained, in accordance with article 5, paragraphs (a) and (b), of the Optional Protocol, that the same matter is not being examined under another international procedure of investigation or settlement, and that the author has exhausted domestic remedies, as conceded by the State party.

10.3 The Committee considers that the author has sufficiently substantiated his claims under articles 7, 17 and 23, paragraph 1, for purposes of admissibility. It concludes that the communication is admissible and proceeds to an examination on the merits.

⁸ European Court of Human Rights, application No. 56811/00 (*Amrollahi v. Denmark*), Judgement of 11 July 2002.

⁹ See Communication No. 1069/2002, *Bakhtiyari v. Australia*, Views adopted on 29 October 2003, at para. 9.6.

Consideration of the merits

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

11.2 The first issue before the Committee is whether the author's expulsion to Uganda would expose him to a real and foreseeable risk of being subjected to treatment contrary to article 7. The Committee recalls that, under article 7 of the Covenant, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.¹⁰ It takes note of the author's detailed account as to why he fears to be subjected to ill-treatment at the hands of the Ugandan authorities, and concludes that he has made out a *prima facie* case of such a risk.

11.3 The Committee observes that the State party, while challenging the author's claim under article 7, does not submit any substantive grounds for its position. Instead, it merely refers to the risk assessments of the Danish Immigration Service under articles 26 (opinions dated 19 April 2002 and 18 September 2003) and 31 (decision of 19 January 2004, as affirmed by the Danish Refugee Board on 28 June 2004) of the Aliens Act. After an examination of the documents, the Committee notes, firstly, that the Immigration Service's scrutiny under article 26 (1) (vii) of the Aliens Act was limited to an assessment of the author's personal circumstances in Denmark, as well as his risk of being subjected to punishment for the same offence for which he had been convicted in Denmark, without addressing the broader issues under article 7 of the Covenant, such as ill-treatment which may give rise to an asylum claim under article 7 (1) and (2) of the Aliens Act. Secondly, in its decision of 19 January 2004, the Immigration Service merely relies on an assessment made by the Ministry for Foreign Affairs concerning the risk of double jeopardy in Uganda and an amnesty for supporters of former President Amin to conclude that the author would not face a risk of being tortured or ill-treated upon return to Uganda. Similarly, the Refugee Board, after giving a detailed account of the author's statements as to his fear of being subjected to ill-treatment upon return to Uganda, dismissed his appeal on the basis of the same opinion by the Ministry, without providing any substantive reasons of its own, in its decision of 28 June 2004. In particular, the Board merely dismissed, because of late submission, the author's claim that his political activities in Denmark were

known to the Ugandan authorities, thereby placing him at a particular risk of being subjected to ill-treatment upon return to Uganda. The State party has not furnished the Committee with the opinion of its Ministry for Foreign Affairs or with other documents that would make out the factual basis for the Ministry's assessment. In sum, before the Committee the State party seeks to refute the alleged risk of treatment contrary to article 7 merely by referring to the outcome of the assessment made by its own authorities, instead of commenting the author's fairly detailed account on why such a risk in his opinion exists.

11.4 In the light of the State party's failure to provide substantive arguments upon which the State party relies to rebut the author's allegations, the Committee finds that due weight must be given to his detailed account of the existence of a risk of treatment contrary to article 7. Consequently, the Committee is of the view that the expulsion order against the author would, if implemented by returning him to Uganda, constitute a violation of article 7 of the Covenant.

11.5 As to the alleged violation of the author's right to family life under articles 17 and 23, paragraph 1, the Committee reiterates its jurisprudence that there may be cases in which a State party's refusal to allow one member of a family to remain in its territory would involve interference in that person's family life. However, the mere fact that one member of the family is entitled to remain in the territory of a State party does not necessarily mean that requiring other members of the family to leave involves such interference.¹¹

11.6 In the present case, and as the State party has conceded that the author's removal would constitute an interference with his family life, the Committee considers that a decision by the State party to deport the father of a family with two minor children and to compel the family to choose whether they should accompany him or stay in the State party is to be considered "interference" with the family. Although the author's life with his family was interrupted for a considerable period of time because of his incarceration and subsequent custody on remand pending deportation, he received regular visits from his wife during that period and was able to visit his children several times during prison leave. Moreover, he resumed his family life after the Copenhagen City Court's decision to release him on 6 August 2004.

¹⁰ General Comment 20 [44], at para. 9.

¹¹ Communication No. 930/2000, *Winata v. Australia*, Views adopted on 26 July 2001, at para. 7.1; Communication No. 1011/2001, *Madafferi v. Australia*, Views adopted on 26 July 2004, at para. 9.7.

11.7 The issue therefore arises whether or not such interference would be arbitrary or unlawful and thus contrary to article 17, read in conjunction with article 23, paragraph 1, of the Covenant. The Committee observes that the author's expulsion was based on Section 22 of the Aliens Act. However, it recalls that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be reasonable in the particular circumstances.¹² In this regard, the Committee reiterates that in cases where one part of a family must leave the territory of the State party while the other part would be entitled to remain, the relevant criteria for assessing whether or not the specific interference with family life can be objectively justified must be considered, on the one hand, in light of the significance of the State party's reasons for the removal of the person concerned and, on the other, the degree of hardship the family and its members would encounter as a consequence of such removal.¹³

11.8 The Committee notes that the State party justifies the author's removal (a) by the fact that he was convicted of drug-related offences, and (b) on the assumption that the serious nature of these offences is reflected by the length of the prison sentence imposed on him. It also takes note of the author's argument that his wife and children live in Denmark under stable and reliable conditions and would, therefore, not be able to follow him, if he were to be expelled to Uganda. While it may well be that the author's expulsion would constitute a considerable hardship for his wife and children, whether they remain in Denmark, or whether they decide to avoid separation of the family by following the author to a country they do not know and whose language the children do not speak, the Committee notes that the author has submitted the communication solely in his own right and not on behalf of his wife or children. It follows that the Committee can only consider whether the author's rights under articles 17 and 23 would be violated as a result of his removal.

11.9 In the present case, the Committee notes that the State party has sought to justify its interference with the author's family life by reference to the nature and severity of the author's offences. The Committee considers that these reasons advanced by the State party are reasonable and sufficient to justify the interference with the author's family life. The Committee therefore concludes that the author's expulsion, if implemented by returning him to Uganda, would not amount to a violation of his rights under articles 17 and 23, paragraph 1.

¹² General Comment 16 [32], at para. 4.

¹³ See Communication No. 1011/2001, *Madafferi v. Australia*, Views adopted on 26 July 2004, para. 9.8.

12. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the author's expulsion to Uganda would, if implemented, violate his rights under article 7 of the Covenant.

13. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including revocation and full re-examination of the expulsion order against him. The State party is also under an obligation to prevent similar violations in the future.

14. Bearing in mind that, by becoming a State 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, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

APPENDIX

Individual opinion (dissenting) by Committee members Ruth Wedgwood and Maxwell Yalden

The majority of the Committee concludes that Denmark has failed adequately to support its decision to deport the author, a Ugandan citizen, following his conviction for drug-related criminal offences and a prison sentence of 2 years, six months. The majority finds that the author, who was a former member of Idi Amin's armed forces, has shown a "prima facie" case that he would risk torture or other mistreatment in Uganda upon his return, and that the State party has not rebutted it.

States parties have a duty to observe the international legal requirements of non-refoulement. The general circumstances in Uganda are not reassuring. In the Human Rights Committee's recent review of Uganda's country report under the Covenant, for example, the Committee noted a "widespread practice of torture and ill-treatment" of persons in detention. (Concluding Observations on Uganda, May 5, 2004, at para. 17.) The State party would therefore wish to give careful consideration to the dangers claimed by the author.

Nevertheless, the Committee cannot sit in review of the facts and evidence *de novo* in each deportation case, especially where a case turns upon an evaluation of a complainant's credibility. The Committee has therefore been obliged to examine the documents available to it. The State party's response in this case describes the lengthy review of the author's status by the national authorities. This has included information obtained from the Foreign Ministry, and three reviews by the Danish

Immigration Service, as well as decisions of the Copenhagen City Court, the High Court of Eastern Denmark, and the Danish Board of Appeal. The 28 June 2004 decision of the Danish Refugee Board was also submitted to the Committee by the author's counsel, though counsel chose not to provide a translation, leaving it available only to those few members of the Committee who might be able to read Danish.

The State party has assured the Committee that it is "at the disposal of the Secretary-General of the United Nations should this pleading or the case in general give rise to any questions." (State party's observations of 11 February 2004 on admissibility and merits, at p. 1.) The Committee is able to pose written requests to States parties, as well as to complainants. If the Committee had wished to have the author's full immigration file or any other documents within it, it could easily have asked the State party. Denmark has been wholly cooperative with the Committee while this complaint was pending, holding in abeyance the author's deportation at the Committee's request, and releasing him on parole to his family. The Committee has not ordinarily asked to see a foreign ministry's telex traffic, when presented with reasoned opinions, and it is doubtful that many States

would agree to provide confidential material of this nature. But the Committee is certainly able to ask for the documents that it finds necessary for an evaluation, instead of deciding a case irrevocably on an incomplete record.

At a minimum, the Committee should have given the State party an opportunity to provide any additional documents it wished to inspect. And we believe that this requirement has not been met. It is true that, in the absence of any cooperation and provision of information by a State party, the Committee may, as appropriate, decide to give "due weight" to an author's allegations, and may proceed to find a violation on that basis. However, this conclusion is not warranted in the present case, where the State party, as noted above, made an effort to cooperate with the Committee, and could readily have been asked to provide further relevant information.

The Committee has a clear duty to respect a standard of fairness that entails not only being fair to both parties but being seen to be fair, and we believe that standard has not been respected. We therefore cannot agree that the conclusion of a violation of the Covenant can be sustained in the present case.

ANNEX

SUMMARY OF STATES PARTIES' REPLIES PURSUANT TO THE ADOPTION OF VIEWS BY THE HUMAN RIGHTS COMMITTEE

NOTE: The replies are not reproduced in full. However, they are on file with the Committee's secretariat and references to follow-up on Views are regularly made in the Committee's annual reports. Pertinent references are indicated wherever possible.

Communication No. 563/1993

Submitted by: Nydia Bautista [represented by counsel]

Alleged victim: The author

State party: Colombia

Declared admissible: 11 October 1994 (fifty-second session)

Date of the adoption of Views: 27 October 1995 (fifty-fifth session)

Follow-up information received from the State party*

By note verbale of 25 October 2002, the State party informed the Committee that it was taking measures to ensure that no similar events will occur in the future. Before the House of Representatives, the Government submitted two draft bills, which became Law 589 and 599 of 2000. Genocide, torture and enforced disappearances are now considered criminal offences. The State party also describes measures enacted into laws and decrees, which were implemented after the Committee's views, such as Law 288 of 1996. The State party also informs the Committee that it had ratified the Statute of the International Criminal Court. It had also made a payment of damages of 36.935.300 Colombian pesos to the victim, in compliance with the Committee's views.

Committee's Decision

At its eightieth session, the Committee considered that this matter should not be considered any further under the follow-up procedure, as the State party had complied with the Views.

Communication No. 836/1998

Submitted by: Kestutis Gelazauskas [represented by counsel]

Alleged victim: The author

State party: Lithuania

Declared admissible: 17 March 2003 (seventy-seventh session)

Date of the adoption of Views: 17 March 2003 (seventy-seventh session)

Follow-up information received from the State party **

By note verbale of 25 July 2003, the State party informed the Committee that the author was released (three years, two months and 10 days) prior to the completion of his sentence pursuant to the decision of the District Court of Kaisiadorys District. Also, since the reform of the court system and the adoption of the new Code of Criminal Procedure which came into force on 1 May 2003, the State party guarantees to every person under its jurisdiction the requirement provided in article 14, paragraph 5, of the Covenant, that everyone convicted of a crime shall have the right "to his conviction and sentence being reviewed by a higher tribunal according to law".

Committee's Decision

At its eightieth session, the Committee considered that this matter should not be considered any further under the follow-up procedure, as the State party had complied with the Views.

* For the Committee's Views, see *Selected Decisions*, vol. 6, p. 103. For information on follow-up, see the Committee's Annual Report (A/58/40, Vol. I, para. 229 and A/59/40, Vol. I).

** For the Committee's Views, see *Selected Decisions*, vol. 8, p. 101. For information on follow-up, see the Committee's Annual Report (A/59/40, Vol. I).

Communication No. 1096/2002

Submitted by: Safarmo Kurbanova [not represented by counsel]
Alleged victim: The author's son
State party: Tajikistan
Declared admissible: 6 November 2003 (seventy-ninth session)
Date of the adoption of Views: 6 November 2003 (seventy-ninth session)

Follow-up information received from the State party *

On 29 September 2004, the State party confirmed that following the Committee's Views, the author's death sentence was commuted to a "long term" of imprisonment. Subsequently, the State party informed the Committee that this was 25 years. The State party provides a copy of the joint reply of the Office of the General Prosecutor and the Supreme Court addressed to the Deputy Prime Minister. The General Prosecutor and the Supreme Court re-examined the author's case. He was arrested on 12 May 2001 suspected of fraud and was kept in detention since 15 May 2001. According to the authorities, the case file did not contain any information that the author had been subjected to torture or ill-treatment, and he presented no complaint on this issue during the investigation or in court. The authorities concluded that his conviction of different crimes (including murders) was proved, that the judgement was grounded, and found no reason to challenge it.

Communication No. 829/1998

Submitted by: Roger Judge [represented by counsel]
Alleged victim: The author
State party: Canada
Declared admissible: 26 July 2002 (seventy-fifth session)
Date of the adoption of Views: 5 August 2003 (seventy-eight session)

Follow-up information received from the State party **

On 17 November 2003, the State party informed the Committee that on 7 October 2003, the federal government officials, representatives of Amnesty International and the author's counsel met to hear Amnesty's views on how Canada should give effect to the Views. On 24 October 2003, the Canadian Consul General in Buffalo contacted the Governor of Pennsylvania and raised the Judge case with him. On 7 November 2003, the Government of Canada delivered a diplomatic note to the Government of the United States, which included a copy of the Views and requested the United States not to carry out the death penalty against Mr. Judge. It also requested that this request not to carry out the death penalty be transmitted to relevant state authorities expeditiously. The State party informed the Committee that since the Supreme Court of Canada's decision in *U.S. v. Burns and Rafeay* in 2001, it has been in substantial compliance with the Committee's interpretation of article 6, paragraph 1 as stated in its Views. It stated that the Views have been posted on the Department of Canadian Heritage website. The State party also informed the Committee that its interpretation of article 6, paragraph 1, goes beyond the language in resolution 2003/67 of the 59th session of the Commission on Human Rights. It expressed concern over the Committee's statement that the rights in the Covenant should be interpreted by reference to the time of the Committee's examination, and not by reference to the time the alleged violation took place. It asserted that compliance with the Covenant should not be assessed against an interpretation of Covenant rights that had no currency at the time of the alleged violation and thus could not have been reasonably anticipated at the time of their actions.

On 8 August 2004, the State party informed the Committee that a stay of execution was issued by the United States District Court for Eastern Pennsylvania in October 2002, and no date has been set for his execution.

* For the Committee's Views, see *Selected Decisions*, vol. 8, p. 355. For information on follow-up, see the Committee's Annual Report (A/59/40, Vol. I, and A/60/40, Vol. II, annex VII).

** For the Committee's Views, see *Selected Decisions*, vol. 8, p. 85. For information on follow-up, see the Committee's Annual Report (A/59/40, chap. VI and A/60/40, Vol. II, annex VII).

Communication No. 1090/2002

Submitted by: Tai Wairiki Rameka et al. [represented by counsel]

Alleged victim: The author

State party: New Zealand

Declared admissible: 6 November 2003 (seventy-ninth session)

Date of the adoption of Views: 6 November 2003 (seventy-ninth session)

Follow-up information received from the State party *

On 3 February 2004, the State party informed the Committee that section 5 (3) of the Parole Act 2000 provides that the Minister of Justice may designate a class of offenders who have not yet reached their parole eligibility dates for early consideration by the Parole Board, who would review the justification for a person's continued detention for preventive purposes. The Minister for Justice proposes to designate as a class of offenders for early consideration by the Parole Board, any offender who has been sentenced to preventive detention under the Criminal Justice Act if: (i) a court has indicated that, had preventive detention not been imposed, the finite sentence that would have instead been imposed on the offender would have been less than 10 years' imprisonment; and (ii) the offender has served a period of imprisonment of not less than the full term of the notional finite sentence; and (iii) the offender has applied for early parole consideration. This designation should ensure that Mr. Harris has the ability to challenge his continued detention at the time the notional finite sentence period mentioned in the Court of Appeal judgement has expired. In addition, the State party advises that the law on preventive detention has been amended. The Sentencing Act 2002 requires the court to make an order at the time a sentence of preventive detention is imposed as to the minimum period of detention, which must be for a period of not less than five years. The offender becomes eligible for regular review once the minimum period of detention has expired. On 29 March 2004, the State party provided arguments in response to the author's submission of 12 March to the effect that the issues raised were new matters that were not raised in the initial communication.

Other information

On 12 March 2004, the authors responded to the State party's submission, stating that the remedy was ineffective, that the remedy itself was a new violation of article 15 and that the State party failed to publicize the Views.

Committee's Decision

At its eightieth session, while noting the author's dissatisfaction with the remedy offered by the State party, the Committee considered that this case should not be considered any further under the follow-up procedure.

* For the Committee's Views, see *Selected Decisions*, vol. 8, p. 336. For information on follow-up, see the Committee's Annual Report (A/59/40, chap. VI).

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