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INTERNATIONAL COVENANT
ON CIVIL AND POLITICAL RIGHTS

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

Volume 7

**Sixty-sixth to seventy-fourth sessions
(July 1999 – March 2002)**



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NOTE

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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 March 2002, 102 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.7), 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 seventy-fourth session in March 2002, 1069 communications relating to alleged violations by 69 States parties were placed before it for consideration. By the end of March 2002, the status of these communications was as follows:

(a) Concluded by adoption of Views under article 5 (4) of the Optional Protocol	394
(b) Declared inadmissible	306
(c) Discontinued or withdrawn	143
(d) Declared admissible but not yet concluded	26
(e) Pending at pre-admissibility stage	200

8. In its first twenty-five years, the Committee received many more than the 1069 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 1993 report incorporating the forty-sixth session, all the Committee's Views and a selection of its decisions declaring communications inadmissible, decisions in reversal of admissibility and decisions to discontinue consideration were published in full.¹

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

¹ See *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 40 (A/34/40); Thirty-fifth Session, Supplement No. 40 (A/35/40); Thirty-sixth Session, Supplement No. 40 (A/36/40); Thirty-seventh Session, Supplement No. 40 (A/37/40); Thirty-eighth Session, Supplement No. 40 (A/38/40); Thirty-ninth Session, Supplement No. 40 (A/39/40); Fortieth Session, Supplement No. 40 (A/40/40); Forty-first Session, Supplement No. 40 (A/41/40); Forty-second Session, Supplement No. 40 (A/42/40); Forty-third Session, Supplement No. 40 (A/43/40); Forty-fourth Session, Supplement No. 40 (A/44/40); Forty-fifth Session, Supplement No. 40 (A/45/40); Forty-sixth Session, Supplement No. 40 (A/46/40); Forty-seventh Session, Supplement No. 40 (A/47/40); Forty-eighth Session, Supplement No. 40 (A/48/40).*

nature. Volume 1 of this series, covering decisions taken from the second to the sixteenth session inclusive, was published in 1985 in English.² 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.³ 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, and Volume 6 covers sessions fifty-six to sixty-five.

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. 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 in principle no longer considers follow-up information on a confidential basis but in public session.

² *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. French and Spanish versions were published in June 1988 (CCPR/C/OP/1).

For an introduction to the Committee's jurisprudence from the second to the twenty-eighth sessions, see A. de Zayas, J. Möller, T. Opsahl, "Application of the International Covenant on Civil and Political Rights under the Optional Protocol by the Human Rights Committee" in *German Yearbook of International Law*, vol. 28, 1985, pp. 9-64. Reproduced by the United Nations Centre for Human Rights as Reprint No.1, 1989.

For a more recent discussion, see Manfred Nowak: *ICCPR Commentary*, 2nd edition (Engel Verlag, 2005)

³ *International Covenant on Civil and Political Rights. Selected Decisions under the Optional Protocol (Seventeenth to thirty-second sessions)*, New York, 1990. French and Spanish versions were published in 1991.

13. The format of decisions on admissibility and final Views adopted at the Committee's thirty-seventh session in 1989, which was designed to achieve greater precision and brevity, continued to be followed during the period covered by the present volume.

14. An important development in terms of jurisprudence was the 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 particularly 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.

FINAL DECISIONS

A. Decision declaring a decision admissible

Communication No. 845/1999

Submitted by: Rawle Kennedy [represented by counsel]

Alleged victim: The author

State party: Trinidad and Tobago.

Declared admissible: 2 November 1999 (sixty-seventh session)

Subject matter: Mandatory death sentence following unfair trial

Procedural issues: Re-accession to the Optional Protocol after denunciation - Re-accession with reservation - Committee's competence to determine the validity of a reservation - Compatibility of reservation with the object and purpose of the Optional Protocol

Substantive issues: Right to be promptly informed of charges - Right to be brought promptly before a judge and to be tried without undue delay - Right to life - Right not to be subjected to cruel or inhuman treatment

Articles of the Covenant: articles 2, paragraph 3; 6, paragraphs 1, 2 and 4; 7; 9, paragraphs 2 and 3; 10, paragraph 1; 14, paragraphs 1, 3 (c) and 5; and 26

Articles of the Optional Protocol and Rules of Procedure: article 1, and (old) Rule 86.

Finding: Admissible

1. The author of the communication is Rawle Kennedy, a citizen of Trinidad and Tobago, awaiting execution in the State prison in Port of Spain. He claims to be a victim of violations by Trinidad and Tobago of articles 2, paragraph 3; 6, paragraphs 1, 2 and 4; 7; 9, paragraphs 2 and 3; 10, paragraph 1; 14, paragraphs 1, 3 (c) and 5; and 26 of the International Covenant on Civil and Political Rights. He is represented by the London law firm Simons Muirhead & Burton.

The facts as submitted by the author

2.1 On 3 February 1987, one Norris Yorke was wounded in the course of a robbery of his garage. He died the following day. The author was arrested on 4 February 1987, charged with murder along with one Wayne Matthews on 9 February 1987, and first brought before a magistrate on 10 February 1987.

The author was tried between 14 and 16 November 1988 and was found guilty. The author appealed against his conviction and on 21 January 1992, the Court of Appeal allowed the appeal and ordered a retrial which took place between 15 and 29 October 1993. The author was again found guilty and sentenced to death. A new appeal was subsequently lodged, but the Court of Appeal refused leave to appeal on 26 January 1996, giving its reasons for doing so on 24 March 1998. The author's subsequent petition to the Judicial Committee of the Privy Council was dismissed on 26 November 1998.

2.2 The case for the prosecution was that the victim, Norris Yorke, was at work in his gas station along with the supervisor, one Ms. Shanghie, on the evening of 3 February 1987. After close of business, when Mr. Yorke was checking the cash from the day's sale, the author and Mr. Matthews entered the station. The prosecution alleged that the author asked Ms. Shanghie for a quart of oil, and that when she returned after getting it, she found Mr. Yorke headlocked by the author, with a gun pointing to his forehead. At this point, Mr. Matthews allegedly told the author that Mr. Yorke had a gun which he was reaching for, and then rushed into the room and struck Mr. Yorke on the head several times with a length of wood before he went back out of the room. Mr. Yorke subsequently told the intruders to take the money. Then Ms. Shanghie, on Mr. Yorke's proposal, threw a glass at Mr. Matthews upon which the author pointed the gun at her and told her to be quiet. Mr. Matthews then ran and hit Mr. Yorke on the head a second time causing him to slump down. The two intruders then stole the money and escaped from the scene in a vehicle belonging to Mr. Yorke. Mr. Yorke died the next day from the wounds sustained during the robbery.

2.3 Counsel argues that all available domestic remedies have been exhausted for the purposes of article 5, paragraph 2 (b), of the Optional Protocol. While a constitutional motion might be open to the author in theory, it is not available in practice due to

the State party's unwillingness or inability to provide legal aid for such motions and to the extreme difficulty of finding a Trinidadian lawyer who would represent an applicant pro bono on a constitutional motion.

The Complaint

3.1 The author alleges to be a victim of a violation of article 9, paragraphs 2 and 3, as he was not informed of the charges against him until five days after his arrest and was not brought before a magistrate until six days after his arrest. Counsel cites the Covenant which requires that such actions be undertaken "promptly", and submits that the periods which lapsed in this case do not meet that test.¹

3.2 The author claims to be a victim of a violation of article 14, paragraphs 3 (c) and 5, on the ground of undue delays in the proceedings against him. In this regard, counsel calls that it took 1) 21 months from the date on which the author was charged until the beginning of his first trial, 2) 38 months from the conviction until the hearing of his appeal, 3) 21 months from the decision of the Court of Appeal to allow his appeal until the beginning of the re-trial, 4) 27 months from the second conviction to the hearing of the second appeal, and 5) 26 months from the hearing of the second appeal until the reasoned judgement of the Court of Appeal was delivered. Counsel argues that there is no reasonable excuse as to why the re-trial took place some six years after the offence and why the Court of Appeal took a further four years and four months to determine the matter, and submits that the State party must bear the responsibility for this delay.²

3.3 The author claims to be a victim of violations of articles 6, 7, and 14, paragraph 1, on the ground of the mandatory nature of the death penalty for murder in Trinidad and Tobago. Counsel states that the distinction between capital and non-capital murder

which has been enacted in many other Common Law countries. Reference is made to the United Kingdom's Homicide Act 1957 which restricted the death penalty to the offence of capital murder (murder by shooting or explosion, murder done in the furtherance of theft, murder done for the purpose of resisting arrest or escaping from custody, and murders of police and prison officers on duty) pursuant to section 5 and murder committed on more than one occasion pursuant to section 6, has never been applied in Trinidad and Tobago. The law in Trinidad and Tobago does however contain provisions reducing the offence of murder to one of manslaughter in cases of murder committed with diminished responsibility or under provocation. It is argued that the stringency of the mandatory death penalty for murder is exacerbated by the Murder/Felony Rule which exists in Trinidad and Tobago and under which a person who commits a felony involving personal violence does so at his own risk, and is guilty of murder if the violence results even inadvertently in the death of the victim. The application of the Murder/Felony Rule, it is submitted, is an additional and harsh feature for secondary parties who may not have participated with the foresight that grievous bodily harm or death were possible incidents of that robbery.

3.4 It is submitted that given the wide variety of circumstances in which the crime of murder may be committed, a sentence which is indifferently imposed on every category of murder fails to retain a proportionate relationship between the circumstances of the actual crime and the punishment and therefore becomes cruel and unusual punishment in violation of article 7 of the Covenant. It is similarly submitted that article 6 was violated as imposing the death sentence irrespective of the circumstances was cruel, inhuman and degrading, and an arbitrary and disproportionate punishment which cannot justify depriving someone of the right to life. In addition, it is submitted that article 14, paragraph 1, was violated because the Constitution of Trinidad and Tobago does not permit the author to allege that his execution is unconstitutional as inhuman or degrading or cruel treatment, and because it does not afford the right to a judicial hearing or a trial on the question whether the death penalty should be imposed or carried out for the particular murder committed.

3.5 Counsel submits that the imposition of the death penalty without consideration and opportunity for presentation of mitigating circumstances was particularly harsh in the author's case as the circumstances of his offence were that he was a secondary party to the killing and thus would have been considered less culpable. In this regard, counsel makes reference to a Bill to Amend the Offences Against the Persons Act which has been considered

¹ Reference is made to the Committee's General Comment on article 9 (HRI/GEN/1/Rev. 3, 15 August 1997, pp 9 following), and to the jurisprudence of the Committee Communication No. 11/1977, *Motta v. Uruguay*; Communication No. 257/1987, *Kelly v. Jamaica*; Communication No. 373/1989, *Stevens v. Jamaica*; Communication No. 597/1994, *Grant v. Jamaica*.

² Reference is made to the Committee's jurisprudence Communication No. 336/1988, *Fillastre v. Bolivia*; Communication No. 27/1978, *Pinkney v. Canada*; Communication No. 283/1988, *Little v. Jamaica*; Communication Nos. 210/1986 and 225/1987, *Pratt and Morgan v. Jamaica*; Communication No. 253/1987, *Kelly v. Jamaica*; Communication No. 523/1992, *Neptune v. Trinidad and Tobago*.

but never enacted by the Trinidadian Parliament. According to counsel, the author's offence would have fallen clearly within the non-capital category had this bill been passed.

3.6 The author claims to be a victim of a violation of article 6, paragraphs 2 and 4, on the ground that the State party has not provided him with the opportunity of a fair hearing in relation to the prerogative of mercy. Counsel states that in Trinidad and Tobago, the President has the power to commute any sentence of death under section 87 of the Constitution, but that he must act in accordance with the advice of a Minister designated by him, who in turn must act in accordance with the advice of the Prime Minister. Under section 88 of the Constitution, there shall also be an Advisory Committee on the Power of Pardon, chaired by the designated Minister. Under section 89 of the Constitution, the Advisory Committee must take into account certain materials, such as the trial judge's report, before tendering its advice. Counsel submits that in practice, the Advisory Committee is the body in Trinidad and Tobago which has the power to commute sentences of death, and that it is free to regulate its own procedure but that in doing so, it does not have to afford the prisoner a fair hearing or have regard to any other procedural protection for an applicant, such as a right to make written or oral submissions or to have the right to be supplied with the material upon which the Advisory Committee will make its decision.³

3.7 Counsel submits that the right to apply for mercy contained in article 6, paragraph 4, of the Covenant must be interpreted so as to be an effective right, i.e. it must in compliance with general principles be construed in such a way that it is practical and effective rather than theoretical or illusory, and it must therefore afford the following procedural rights to a person applying for mercy:

- The right to notification of the date upon which the Advisory Committee is to consider the case

- The right to be supplied with the material which will be before the Advisory Committee at the hearing

- The right to submit representations in advance of the hearing both generally and with regard to the material before the Advisory Committee

- The right to an oral hearing before the Advisory Committee

³ Counsel states that these principles were set forth by the Judicial Committee of the Privy Council in *Reckley v. Minister of Public Safety* (No. 2) (1996) 2WLR 281 and *De Freitas v. Benny* (1976) A.C.

- The right to place before the Advisory Committee, and have it considered, the findings and recommendations of any international body, such as the United Nations Human Rights Committee.

3.8 With regard to the particular circumstances of the author's case, counsel submits that the Advisory Committee may have met a number of times to consider the author's application without his knowing, and may yet decide to reconvene, without notifying him, without giving him an opportunity to make representations on his behalf and without supplying him with the material to be considered. Counsel argues that this constitutes a violation of article 6, paragraph 4, as well as article 6, paragraph 2, as the Advisory Committee can only make a reliable determination of which crimes constitute "the most serious crimes" if the prisoner is allowed to fully participate in the decision making process.

3.9 The author claims to be a victim of a violation of articles 7 and 10, paragraph 1, as after having been arrested on 4 February 1987 he was tortured and beaten by police officers whilst awaiting to be charged and brought before a magistrate. It is submitted that he suffered a number of beatings and was tortured to admit to the offence. In particular, the author states that he was hit on the head with a traffic sign, jabbed in the ribs with the butt of a rifle, continually stamped on by named police officers, struck in the eyes by a named police officer, threatened with a scorpion and drowning, and denied food. The author states he complained of the beatings and showed his bruises to the court before which he was brought on 10 February 1987, and that the judge ordered that he be taken to hospital after the hearing, but that he nonetheless was denied treatment.

3.10 The author claims to be a victim of a violation of articles 7 and 10, paragraph 1, on the ground that he has been detained, both on remand and on death row, in appalling conditions. It is submitted that for the duration of the periods on remand (21 months before the first trial and 21 months before the second trial), the author was kept in a cell measuring 6 by 9 feet which he shared with between five to ten other inmates. With regard to the period of altogether almost eight years on death row, it is submitted that the author has been subjected to solitary confinement in a cell measuring 6 by 9 feet, containing only a steel bed, table and bench, with no natural light or integral sanitation and only a plastic pail for use as a toilet. The author further states that he is allowed out of his cell only once a week for exercise, that the food is inadequate and almost inedible and that no provisions are made for his particular dietary requirements. Care by doctors or dentists are, despite requests, infrequently made available. Reference is made to NGO reports on the conditions of detention in Trinidad and Tobago, quotations printed in a national newspaper from the General Secretary of the Prison

Officers' Association, and the UN Standard Minimum Rules for the Treatment of Prisoners.

3.11 Further to the alleged violation of articles 7 and 10, paragraph 1, on the grounds of the appalling conditions of detention, the author claims that carrying out his death sentence in such circumstances would constitute a violation of his rights under articles 6 and 7. Reference is made to the Judicial Committee of the Privy Council's judgment in *Pratt and Morgan v. The Attorney General of Jamaica*,⁴ in which it held that prolonged detention under sentence of death would violate, in that case, Jamaica's constitutional prohibition on inhuman and degrading treatment. Counsel argues that the same line of reasoning must be applied in this case with the result that an execution after detention in such circumstances must be unlawful.

3.12 Finally, the author claims to be a victim of a violation of articles 2, paragraph 3, and 14 on the ground that due to lack of legal aid he is de facto being denied the right under section 14(1) of the Trinidadian Constitution to apply to the High Court for redress for violations of his fundamental rights. It is submitted that the costs of instituting proceedings in the High Court are extremely high and beyond the author's financial means and indeed beyond the means of the vast majority of those charged with capital offences.⁵

3.13 With regard to the State party's reservation set forward upon its reaccession to the Optional Protocol on 26 May 1998, the author claims that the Committee has competence to deal with the present communication notwithstanding the fact that it concerns a "prisoner who is under sentence of death in respect of [... matters] relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him".

3.14 Even though the reservation purports to exclude all communications relating to the sentence of death forwarded after 26 August 1998, the author submits that the reservation significantly impairs the competence of the Committee under the Optional Protocol to hear communications as it purports to exclude from consideration a broad range of cases, including many which would contain allegations of violations of non-derogable rights. It is submitted that the reservation therefore is incompatible with the object and purpose of the Protocol and that it is invalid and without effect and thus presents no bar to the Committee's consideration of this communication.

⁴ (1994) 2 AC1

⁵ Reference is made to the jurisprudence of the European Court of Human Rights in *Golder v. UK* (1975) A18; *Airey v. Ireland* (1979) A32; and for the jurisprudence of the Committee, see Communication No. 377/1989, *Currie v. Jamaica*.

3.15 To support this view, counsel advances several arguments. Firstly, counsel argues that the Preamble to the Optional Protocol as well as its articles 1 and 2 all state that the Protocol gives competence to the Committee to receive and consider communications from individuals subject to the jurisdiction of a State party who claim to be victims of a violation by the State party of *any of the rights* set forth in the Covenant. A State party to the Protocol thus, it is averred, accepts a single obligation in relation to all of the rights enumerated in the Covenant and cannot by reservation exclude consideration of a violation of any particular right. It is argued that this view is supported by the following points:

– The rights enumerated in the Covenant include non-derogable human rights having jus cogens status. A State party cannot limit the competence of the Committee to review cases which engage rights with such status, and thus a State party cannot, for example, limit communications from prisoners under sentence of death alleging torture.

– The Committee will be faced with real difficulties if it is to deal with communications only in relation to certain rights, as many complaints necessarily involve allegations of violations of several of the Covenant's articles.

– In its approach the Trinidad and Tobago reservation is without precedent and, in any event, there is little or no support for the practice of making reservations *rationae personae* or *ratione materiae* in relation to the Optional Protocol.

3.16 Secondly, counsel argues that in determining whether the reservation is compatible with the object and purpose of the Optional Protocol it is appropriate to recall that a State may not withdraw from the Protocol for the purpose of shielding itself from international scrutiny in respect of its substantive obligations under the Covenant. Trinidad and Tobago's reservation would in effect serve that purpose and accordingly allow such an abuse to occur.

3.17 Thirdly, counsel argues that the breadth of the reservation is suspect because it precludes consideration of any communications concerned not just with the imposition of the death penalty as such, but with every possible claim directly or even indirectly connected with the case merely because the death penalty has been imposed.

The State party's submission and counsel's comments thereon

4.1 In its submission of 8 April 1999, the State party makes reference to its instrument of accession to the Optional Protocol of 26 May 1998, which included the following reservation:

"...Trinidad and Tobago re-accedes to the Optional Protocol to the International Covenant on Civil and Political Rights with a Reservation to article 1 thereof to the effect that the Human Rights Committee shall not be competent to receive and consider communications relating to any prisoner who is under sentence of death in respect of any matter relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him and any matter connected therewith."

4.2 The State party submits that because of this reservation and the fact that the author is a prisoner under sentence of death, the Committee is not competent to consider the present communication. It is stated that in registering the communication and purporting to impose interim measures under rule 86 of the Committee's rules of procedure, the Committee has exceeded its jurisdiction, and the State party therefore considers the actions of the Committee in respect of this communication to be void and of no binding effect.

5. In his comments of 23 April 1999, counsel submits that the State party's assertion that the Human Rights Committee has exceeded its jurisdiction in registering the present communication is wrong as a matter of settled international law. It is argued that, in conformity with the general principle that the body to whose jurisdiction a purported reservation is addressed decides on the validity and effect of that reservation, it must be for the Committee, and not the State party, to determine the validity of the purported reservation. Reference is made to the Committee's General Comment No. 24 para. 181/GEN HR/1/Rev. 3, 15 August 1997, p. 48. and to the Order of the International Court of Justice of 4 December 1998 in *Fisheries Jurisdiction (Spain v. Canada)*.

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 On 26 May 1998, the Government of Trinidad and Tobago denounced the first Optional Protocol to the International Covenant on Civil and Political Rights. On the same day, it reaccessed, including in its instrument of reaccession the reservation set out in paragraph 4.1 above.

6.3 To explain why such measures were taken, the State party makes reference to the decision of the Judicial Committee of the Privy Council in *Pratt and Morgan v. the Attorney General for Jamaica*,⁶ in

which it was held that "in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute "inhuman or degrading punishment or other treatment"" in violation of section 17 of the Jamaican Constitution. The effect of the decision for Trinidad and Tobago is that inordinate delays in carrying out the death penalty would contravene section 5, paragraph 2 (b), of the Constitution of Trinidad and Tobago, which contains a provision similar to that in section 17 of the Jamaican Constitution. The State party explains that as the decision of the Judicial Committee of the Privy Council represents the constitutional standard for Trinidad and Tobago, the Government is mandated to ensure that the appellate process is expedited by the elimination of delays within the system in order that capital sentences imposed pursuant to the laws of Trinidad and Tobago can be enforced. Thus, the State party chose to denounce the Optional Protocol:

"In the circumstances, and wishing to uphold its domestic law to subject no one to inhuman and degrading punishment or treatment and thereby observe its obligations under article 7 of the International Covenant on Civil and Political Rights, the Government of Trinidad and Tobago felt compelled to denounce the Optional Protocol. Before doing so, however, it held consultations on 31 March 1998, with the Chairperson and the Bureau of the Human Rights Committee with a view to seeking assurances that the death penalty cases would be dealt with expeditiously and completed within 8 months of registration. For reasons which the Government of Trinidad and Tobago respects, no assurance could be given that these cases would be completed within the timeframe sought."

6.4 As stated in the Committee's General Comment No. 24, it is for the Committee, as the treaty body to the International Covenant on Civil and Political Rights and its Optional Protocols, to interpret and determine the validity of reservations made to these treaties. The Committee rejects the submission of the State party that it has exceeded its jurisdiction in registering the communication and in proceeding to request interim measures under rule 86 of the rules of procedure. In this regard, the Committee observes that it is axiomatic that the Committee necessarily has jurisdiction to register a communication so as to determine whether it is or is not admissible because of a reservation. As to the effect of the reservation, if valid, it appears on the face of it, and the author has not argued to the contrary, that this reservation will leave the Committee without jurisdiction to consider the present communication on the merits. The Committee must, however, determine whether or not such a reservation can validly be made.

⁶ 2 A.C. 1, 1994

6.5 At the outset, it should be noted that the Optional Protocol itself does not govern the permissibility of reservations to its provisions. In accordance with article 19 of the Vienna Convention on the Law of Treaties and principles of customary international law, reservations can therefore be made, as long as they are compatible with the object and purpose of the treaty in question. The issue at hand is therefore whether or not the reservation by the State party can be considered to be compatible with the object and purpose of the Optional Protocol.

6.6 In its General Comment No. 24, the Committee expressed the view that a reservation aimed at excluding the competence of the Committee under the Optional Protocol with regard to certain provisions of the Covenant could not be considered to meet this test:

"The function of the first Optional Protocol is to allow claims in respect of [the Covenant's] rights to be tested before the Committee. Accordingly, a reservation to an obligation of a State to respect and ensure a right contained in the Covenant, made under the first Optional Protocol when it has not previously been made in respect of the same rights under the Covenant, does not affect the State's duty to comply with its substantive obligation. A reservation cannot be made to the Covenant through the vehicle of the Optional Protocol but such a reservation would operate to ensure that the State's compliance with that obligation may not be tested by the Committee under the first Optional Protocol. And because the object and purpose of the first Optional Protocol is to allow the rights obligatory for a State under the Covenant to be tested before the Committee, a reservation that seeks to preclude this *would be contrary to object and purpose of the first Optional Protocol*, even if not of the Covenant."⁷ (emphasis added).

6.7 The present reservation, which was entered after the publication of General Comment No. 24, does not purport to exclude the competence of the Committee under the Optional Protocol with regard to any specific provision of the Covenant, but rather to the entire Covenant for one particular group of complainants, namely prisoners under sentence of death. This does not, however, make it compatible with the object and purpose of the Optional Protocol. On the contrary, the Committee cannot accept a reservation which singles out a certain group of individuals for lesser procedural protection than that which is enjoyed by the rest of the population. In the view of the Committee, this constitutes a discrimination which runs counter to some of the basic principles embodied in the Covenant and its Protocols, and for this reason the reservation cannot be deemed compatible with the object and purpose

of the Optional Protocol. The consequence is that the Committee is not precluded from considering the present communication under the Optional Protocol.

6.8 The Committee, noting that the State party has not challenged the admissibility of any of the author's claims on any other ground than its reservation, considers that the author's claims are sufficiently substantiated to be considered on the merits.

7. The Human Rights Committee therefore decides:

(a) that the communication is admissible;

(b) that, in accordance with article 4, paragraph 2, of the Optional Protocol, the State party shall be requested to submit to the Committee, within six months of the date of transmittal to it of this decision, written explanations or statements clarifying the matter and the measures, if any, that may have been taken;

(c) that any explanations or statements received from the State party shall be communicated by the Secretary-General under rule 93, paragraph 3, of the rules of procedure to the author, with the request that any comments which he may wish to make should reach the Human Rights Committee, in care of the High Commissioner for Human Rights, United Nations Office at Geneva, within six weeks of the date of transmittal;

(d) that this decision shall be communicated to the State party, to the author and his representatives.

APPENDIX

*Individual opinion (dissenting) of Committee members
Nisuke Ando, Prafullachandra N. Bhagwati,
Eckart Klein and David Kretzmer*

1. We agree that it was within the Committee's competence to register the present communication and to issue a request for interim measures under rule 86 of the Committee's Rules of Procedure so as to allow the Committee to consider whether the State party's reservation to the Optional Protocol makes the communication inadmissible. However, we cannot accept the Committee's view that the communication is admissible.

2. Recognition by a State party to the Covenant of the Committee's competence to receive and consider communications from individuals subject to the State party's jurisdiction rests solely on the ratification of, or the accession to, the Optional Protocol. Article 1 of the Optional Protocol states expressly that no communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a party to the Optional Protocol.

3. The Optional Protocol is a distinct international treaty, which is deliberately separated from the Covenant,

⁷ HRI/GEN/1/Rev.3, 15 August 1997, p 46.

in order to enable States to accept the provisions of the Covenant without being obliged to accept the Committee's competence to consider individual communications. In contrast to the Covenant, which includes no provision allowing denunciation, article 12 of the Optional Protocol expressly permits the denunciation of the Protocol. It goes without saying that denunciation of the Optional Protocol can have no legal impact whatsoever on the State party's obligations under the Covenant itself.

4. In the present case the State party exercised its prerogative to denounce the Optional Protocol. By its reaccession to the Optional Protocol, it reaffirmed its commitment to recognize the competence of the Committee to receive and consider communications from individuals. However, this act of reaccession was not unrestricted. It was accompanied by the reservation which concerns us here.

5. The Optional Protocol itself does not govern the permissibility of reservations to its provisions. In accordance with rules of customary international law that are reflected in article 19 of the Vienna Convention on the Law of Treaties, reservations can therefore be made, provided they are compatible with the object and purpose of the Optional Protocol. Thus, a number of States parties have made reservations to the effect that the Committee shall not have competence to consider communications which have already been considered under another procedure of international investigation or settlement. These reservations have been respected by the Committee.

6. The object and purpose of the Optional Protocol is to further the purposes of the Covenant and the implementation of its provisions by allowing international consideration of claims that an individual's rights under the Covenant have been violated by a State party. The purposes and implementation of the Covenant would indeed best be served if the Committee had the competence to consider every claim by an individual that his or her rights under the Covenant had been violated by a State party to the Covenant. However, assumption by a state of the obligation to ensure and protect all the rights set out in the Covenant does not grant competence to the Committee to consider individual claims. Such competence is acquired only if the State party to the Covenant also accedes to the Optional Protocol. If a State party is free either to accept or not accept an international monitoring mechanism, it is difficult to see why it should not be free to accept this mechanism only with regard to some rights or situations, provided the treaty itself does not exclude this possibility. All or nothing is not a reasonable maxim in human rights law.

7. The Committee takes the view that the reservation of the State party in the present case is unacceptable because it singles out one group of persons, those under sentence of death, for lesser procedural protection than that enjoyed by the rest of the population. According to the Committee's line of thinking this constitutes discrimination which runs counter to some of the basic principles embodied in the Covenant and its Protocols. We find this argument unconvincing.

8. It goes without saying that a State party could not submit a reservation that offends peremptory rules of international law. Thus, for example, a reservation to the Optional Protocol that discriminated between persons on

grounds of race, religion or sex, would be invalid. However, this certainly does not mean that every distinction between categories of potential victims of violations by the State party is unacceptable. All depends on the distinction itself and the objective reasons for that distinction.

9. When dealing with discrimination that is prohibited under article 26 of the Covenant, the Committee has consistently held that not every differentiation between persons amounts to discrimination. There is no good reason why this approach should not be applied here. As we are talking about a reservation to the Optional Protocol, and not to the Covenant itself, this requires us to examine not whether there should be any difference in the substantive rights of persons under sentence of death and those of other persons, but whether there is any difference between *communications* submitted by people under sentence of death and communications submitted by all other persons. The Committee has chosen to ignore this aspect of the matter, which forms the very basis for the reservation submitted by the State party.

10. The grounds for the denunciation of the Optional Protocol by the State party are set out in paragraph 6.3 of the Committee's decision and there is no need to rehearse them here. What is clear is that the difference between communications submitted by persons under sentence of death and others is that they have different results. Because of the constitutional constraints of the State party the mere submission of a communication by a person under sentence of death may prevent the State party from carrying out the sentence imposed, *even if it transpires that the State party has complied with its obligations under the Covenant*. In other words, the result of the communication is not dependent on the Committee's views on whether there has been a violation and if so what the recommended remedy is but on mere submission of the communication. This is not the case with any other category of persons who might submit communications.

11. It must be stressed that if the constitutional constraints faced by the State party had placed it in a situation in which it was violating substantive Covenant rights, denunciation of the Optional Protocol, and subsequent reaccession, would not have been a legitimate step, as its object would have been to allow the State party to continue violating the Covenant with impunity. Fortunately, that is not the situation here. While the Committee has taken a different view from that taken by the Privy Council (in the case mentioned in para. 6.3 of the Committee's decision) on the question of whether the mere time on death row makes delay in implementation of a death sentence cruel and inhuman punishment, a State party which adheres to the Privy Council view does not violate its obligations under the Covenant.

12. In the light of the above, we see no reason to consider the State party's reservation incompatible with the object and purpose of the Optional Protocol. As the reservation clearly covers the present communication (a fact that is not contested by the author), we would hold the communication inadmissible.

13. Given our conclusion that this communication is inadmissible for the reasons set out above, we need not have dealt with a further issue that arises from the Committee's views: the effect of an invalid reservation.

However, given the importance of this question and the fact that the Committee itself has expressed its views on this issue we cannot ignore it.

14. In para. 6.7 of its decision the Committee states that it considers that the reservation cannot be deemed compatible with the object and purpose of the Optional Protocol. Having reached this conclusion the Committee adds that "[t]he consequence is that the Committee is not precluded from considering the present communication under the Optional Protocol." It gives no reason for this "consequence", which is far from self-evident. In the absence of an explanation in the Committee's decision itself, we must assume that the explanation lies in the approach adopted by the Committee in its General Comment No. 24, which deals with reservations to the Covenant.

15. In General Comment No. 24 the Committee discussed the factors that make a reservation incompatible with the object and purpose of the Covenant. In para. 18 the Committee considers the consequences of an incompatible reservation and states:

"The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation."

It is no secret that this approach of the Committee has met with serious criticism. Many experts in international law consider the approach to be inconsistent with the basic premises of any treaty regime, which are that the treaty obligations of a state are a function of its consent to assume those obligations. If a reservation is incompatible with the object and purpose of a treaty, the critics argue, the reserving state does not become a party to the treaty unless it withdraws that reservation. According to the critics' view there is no good reason to depart from general principles of treaty law when dealing with reservations to the Covenant.

16. It is not our intention within the framework of the present case to reopen the whole issue dealt with in General Comment No. 24. Suffice it to say that even in dealing with reservations to the Covenant itself the Committee did not take the view that in every case an unacceptable reservation will fall aside, leaving the reserving state to become a party to the Covenant without benefit of the reservation. As can be seen from the section of General Comment No. 24 quoted above, the Committee

merely stated that this would *normally* be the case. The normal assumption will be that the ratification or accession is not dependent on the acceptability of the reservation and that the unacceptability of the reservation will not vitiate the reserving state's agreement to be a party to the Covenant. However, this assumption cannot apply when it is abundantly clear that the reserving state's agreement to becoming a party to the Covenant is *dependent* on the acceptability of the reservation. The same applies with reservations to the Optional Protocol.

17. As explained in para. 6.2 of the Committee's decision, on 26 May, 1998 the State party denounced the Optional Protocol and immediately reaccessed with the reservation. It also explained why it could not accept the Committee's competence to deal with communications from persons under sentence of death. In these particular circumstances it is quite clear that Trinidad and Tobago was not prepared to be a party to the Optional Protocol without the particular reservation, and that its reaccession was dependent on acceptability of that reservation. It follows that if we had accepted the Committee's view that the reservation is invalid we would have had to hold that Trinidad and Tobago is not a party to the Optional Protocol. This would, of course, also have made the communication inadmissible.

18. In concluding our opinion we wish to stress that we share the Committee's view that the reservation submitted by the State party is unfortunate. We also consider that the reservation is wider than required in order to cater to the constitutional constraints of the State party, as it disallows communications by persons under sentence of death even if the time limit set by the Privy Council has already been exceeded (as would seem to be the case in the present communication). We understand that since the State party's denunciation and reaccession there have been developments in the jurisprudence of the Privy Council that may make the reservation unnecessary. These factors do not affect the question of the compatibility of the reservation with the object and purpose of the Optional Protocol. However, we do see fit to express the hope that the State party will reconsider the need for the reservation and withdraw it. We also stress the obvious: the acceptability of the reservation in no way affects the duty of the State party to meet all its substantive obligations under the Covenant. The rights under the Covenant of persons under sentence of death must be ensured and protected in all circumstances.

*Individual opinion (concurring) by Committee member
Louis Henkin*

I concur on the result.

B. Decisions declaring a decision inadmissible

Communication No. 717/1996

Submitted by: Carlos Acuña Inostroza et al [represented by counsel]

Alleged victim: The authors

State party: Chile

Declared inadmissible: 23 July 1999 (sixty-sixth session)

Subject matter: Extrajudicial executions of political opponents which occurred prior to the entry into force of the Optional Protocol

Procedural issues: Admissibility *ratione temporis* - Violation with continuous effect

Substantive issues: Arbitrary deprivation of life - Duty to investigate extrajudicial executions - Amnesty law applied by tribunals to discontinue investigations

Articles of the Covenant: articles 2; 5; 14, para. 1; 15, para. 1 and 2; 16 and 26.

Article of the Optional Protocol: article 1

Finding: inadmissible

1. The communication is submitted on behalf of Carlos Maximiliano Acuña Inostroza and 17 other individuals, all Chilean citizens who were executed in 1973. It is alleged that Mr. Acuña Inostroza et al are victims of violations by Chile of articles 2; 5; 14, paragraph 1; 15, paragraphs 1 and 2; 16 and 26 of the International Covenant on Civil and Political Rights. They are represented by Nelson G.C. Pereira of the Fundación de Ayuda Social de las Iglesias Cristianas.

2.1 On 9 October 1973, a military convoy composed of several vehicles and approximately ninety soldiers drove towards an industrial complex in Panguipulli (*Sector Sur del Complejo Maderero Panguipulli*). The victims were rounded up by the police (*Carabineros*) of the towns of Chabranco, Curriñe, Llifén and Futrono, and handed over to the soldiers. Later the same night, the authors were taken to the property of a civilian situated in the mountains. At an unknown hour, the prisoners were taken from the trucks and made to enter the house. They were then led some 500 meters away from the house, and were executed.

2.2 On 10 October 1973, a witness identified several of the victims and testified that the bodies had been mutilated. The bodies remained at the place of execution, and were covered only with leaves and

branches. Only 15 days later were they buried, by soldiers, in shallow graves.

2.3 Towards the end of 1978 or early in 1979, unidentified civilians arrived at the mountain property and asked the owner to indicate the location of the graves. They dug up the graves and removed the bodies; it is unknown where they were taken to. It is known that the victims had never been judged by a military tribunal, during time of war; they were simply summarily and arbitrarily executed.

2.4 On 25 June 1990, proceedings were initiated in the Criminal Court of Los Lagos (*Juzgado Criminal de Los Lagos*), with a view to ascertaining the whereabouts of the victims' remains. A special investigating magistrate was nominated (*Ministro en Visita extraordinaria*), but proceedings were aborted by a petition of 17 August 1990 emanating from a military jurisdiction. The special investigator was ordered to cease his investigations. This was officially confirmed by a decision of 3 September 1990. On 17 January 1991, the conflict of jurisdiction was resolved by the Supreme Court in favour of the military jurisdiction.

2.5 On 24 May 1993, the 4th Military Court of Valdivia (*IV Juzgado Militar de Valdivia*) formally decided to discontinue the case (*sobreseimiento definitivo*); on 13 October 1994, the Military Court (*Corte Marcial*) Counsel explains that this Court is made up of five judges, three are officers, one each from the army, the air force and the Carabineros, the other two are civil judges from the Santiago Court of Appeal. endorsed this decision. One of the civilian judges dissented, holding that proceedings should be re-initiated as the facts appeared to support evidence to the effect that an act of genocide had been perpetrated.

2.6 A complaint (*Recurso de Queja*) was then filed with the Supreme Court (*Corte Suprema*), on grounds of abuse of power on the part of the Military Tribunal and the Military Court, by dismissing a case under the provisions of the Amnesty Decree of 1978. On 24 October 1995, the Supreme Court dismissed the complaint.

The complaint

3.1 Before the Supreme Court, the case was based on violations by the Chilean authorities both of national law and international conventions. Reference was made in this context to the 1949 Geneva Conventions, in force for Chile since April 1951, under which certain illicit acts committed during an armed conflict without international dimensions, are not subject to an amnesty. In this respect, it was alleged that the events under investigation had taken place during a state of siege ("*Estado de sitio en grado de 'Defensa Interna'*") in Chile. Counsel alleges that by their acts, the present Chilean authorities are condoning, and have become accessories to, the acts perpetrated by the former military regime.

3.2 It is alleged that, regardless of how the events in question may be defined, i.e. whether under the Geneva Conventions or under article 15, paragraph 2, of the Covenant, they constitute acts or omissions which, when committed, were criminal acts according to general principles of law recognized by the community of nations, and which may not be statute-barred nor unilaterally pardoned by any State. Counsel states that with the application of the amnesty law, Decree No. 2191 of 1978, Chile has accepted the impunity of those responsible for these acts. It is alleged that the State is renouncing its obligation to investigate international crimes, and to bring those responsible for them to justice and thus determine what happened to the victims. This means that fundamental rights of the authors and their families have been violated. Counsel claims a violation of article 15, paragraph 2, of the Covenant, in that criminal acts have been unilaterally and unlawfully pardoned by the State.

3.3 Counsel alleges that the application of the amnesty law No.2.191 of 1978 deprived the victims and their families of the right to justice, including the right to a fair trial and to adequate compensation for the violations of the Covenant. In this respect, reference is made to the Inter-American Commission's decision in the *Velasquez Rodriguez* case. Counsel further alleges a violation of article 14 of the Covenant, in that the victims and their families were not afforded access on equal terms to the courts, nor afforded the right to a fair and impartial hearing. Since the cases were remitted to the military courts, the principle of equality of arms was violated.

3.4 To counsel, the decision of the military tribunals not to investigate the victims' deaths amounts to a violation of article 16 of the Covenant, i.e. failure to recognize the victims as persons before the law.

3.5 As to the reservation entered by Chile upon ratification of the Optional Protocol in 1992, it is

alleged that although the events complained of occurred prior to 11 March 1990, the decisions challenged by the present communication are the judgments of the Supreme Court of October 1995.

State party's observations and counsel's comments

4.1 In submissions dated 6 December 1996, 12 February 1997 and 9 February 1998, the State party provides a detailed account of the history of the cases and of the amnesty law of 1978. It specifically concedes that the facts did occur as described by the authors. It was indeed in reaction to the serious human rights violations committed by the former military regime that former President Aylwin instituted the National Truth and Reconciliation Commission by Decree of 25 April 1990. For its report, the Commission had to set out a complete record of the human rights violations that had been brought to its attention; among these was the so-called "Baños de Chihuío" incident, during which Mr. Acuña Inostroza and the others were killed. The State party gives a detailed account of investigations into this incident.

4.2 The State party submits that the facts at the basis of the communication cannot be attributed to the constitutionally elected government(s) which succeeded the military regime. It provides a detailed account of the historical context in which large numbers of Chilean citizens disappeared and were summarily and extrajudicially executed during the period of the military regime.

4.3 The State party notes that it is not possible to abrogate the Amnesty Decree of 1978, and adduces reasons: first, legislative initiatives such as those relating to amnesties can only be initiated in the Senate (article 62 of the Constitution), where the Government is in a minority. Second, abrogation of the law would not necessarily have repercussions under criminal law for possible culprits, on account of the prohibition of retroactive application of criminal laws. This principle is enshrined in article 19 lit.3 of the Chilean Constitution and article 15, paragraph 1, of the Covenant. Three, the composition of the Constitutional Court. Four, the designation of the Commanders in Chief of the Armed Forces; the President of the Republic may not remove the present officers, including General Pinochet. Lastly the composition and attributions of the National Security Council (*Consejo de Seguridad Nacional*) restrict the attributions of the democratic authorities in all matters pertaining to internal or external national security.

4.4 The State party further observes that the existence of the amnesty law does not inhibit the continuation of criminal investigations already under way in Chilean tribunals. In this sense, the amnesty decree of 1978 may extinguish the criminal

responsibility of those accused of crimes under the military regime, but it cannot in any way suspend the continuation of investigations that seek to establish what happened to individuals who were detained and later disappeared. This has been the interpretation of the decree both by the Military Court and by the Supreme Court.

4.5 The Government emphasizes that the Chilean Constitution (article 73) protects the independence of the judiciary. As such, the Executive cannot interfere with the application and the interpretation of domestic laws by the courts, even if the courts' decisions go against the interests of the Government.

4.6 With respect to the terms of the amnesty law, the State party points to the necessity to reconcile the desire for national reconciliation and pacification of society with the need to ascertain the truth of past human rights violations and to seek justice. These criteria inspired ex-President Aylwin when he set up the Truth and Reconciliation Commission. To the State party, the composition of the Commission was a model in representativity, as it included members associated with the former military regime, former judges and members of civil society, including the founder and president of the Chilean Human Rights Commission.

4.7 The State party distinguishes between an amnesty granted de facto by an authoritarian regime, by virtue of its failure to denounce or investigate massive human rights abuses or by adopting measures designed to ensure the impunity of its members, and an amnesty adopted by a constitutionally elected democratic regime. It is submitted that the constitutionally elected governments of Chile have not adopted any amnesty measures or decrees which could be considered incompatible with the provisions of the Covenant; nor have they committed any acts which would be incompatible with Chile's obligations under the Covenant.

4.8 The State party recalls that after the end of the mandate of the Truth and Reconciliation Commission, another body – the so-called “*Corporación Nacional de la Verdad y Reconciliación*” – continued the work of the former, thereby underlining the Government's desire to investigate the massive violations of the former military regime. The “*Corporación Nacional*” presented a detailed report to the Government in August of 1996, in which it added the cases of 899 further victims of the previous regime. This body also oversees the implementation of a policy of compensation for victims which had been recommended by the Truth and Reconciliation Commission.

4.9 The legal basis for the compensation to victims of the former military regime is Law No. 19.123 of 8 February 1992, which:

- sets up the *Corporación Nacional* and mandates it to promote the compensation to the victims of human rights violations, as identified in the final report of the Truth and Reconciliation Commission;

- mandates the *Corporación Nacional* to continue investigations into situations and cases in respect of which the Truth and Reconciliation Commission could not determine whether they were the result of political violence;

- fixes maximum levels for the award of compensation pensions in every case, depending on the number of beneficiaries;

- establishes that the compensation pensions are readjustable, much like the general system of pensions;

- grants a “compensation bonus” equivalent to 12 monthly compensation pension payments;

- increases the pensions by the amount of monthly health insurance costs, so that all health-related expenditures will be borne by the State;

- decrees that the education of children of victims of the former regime will be borne by the State, including university education;

- lays down that the children of victims of the former regime may request to be exempted from military service. In accordance with the above guidelines, the relatives of Mr. Acuña Inostroza and the other victims have received and are currently receiving monthly pension payments.

4.10 In the light of the above, the State party requests the Committee to find that it cannot be held responsible for the acts which are at the basis of the present communication. It solicits, moreover, a finding that the creation of the National Truth and Reconciliation Commission and the corrective measures provided for in Law No. 19.123 constitute appropriate remedies within the meaning of article 2 of the Covenant.

4.11 By a further submission dated 29 July 1997, the State party reaffirms that the real obstacle to the conclusion of investigations into disappearances and summary executions such as in the authors' cases remains the Amnesty Decree of 1978 adopted by the former military government. The current Government cannot be held responsible internationally for the serious human rights violations which are at the basis of the present complaints. Everything possible to ensure that the truth be established, that justice be done and that compensation be awarded to the victims or their relatives has been undertaken by the present Government, as noted in the previous submission(s). The desire of the Government to promote respect for human rights is reflected in the ratification of several

international human rights instruments since 1990, as well as the withdrawal of reservations to some international and regional human rights instruments which had been made by the military regime.

4.12 The State party further recalls that with the transition to democracy, the victims of the former regime have been able to count on the full cooperation of the authorities, with a view to recovering, within the limits of the law and the circumstances, their dignity and their rights. Reference is made to the ongoing work of the *Corporación Nacional de Reparación y Reconciliación*.

5.1 In his comments, counsel takes issue with several of the State party's observations. He contends that the State party's defence ignores or at the very least misconstrues Chile's obligations under international law, which are said to mandate the Government to take measures to mitigate or eliminate the effects of the amnesty decree of 1978. Article 2 of the American Convention on Human Rights and article 2, paragraph 2, of the Covenant impose a duty on the State party to take the necessary measures (by legislation, administrative or judicial action) to give effect to the rights enshrined in these instruments. To counsel, it is wrong to argue that there is no other way than to abrogate or declare null and void the 1978 amnesty decree: nothing prevents the State party from amnestying those who committed wrongs, except where the wrongs committed constitute international crimes or crimes against humanity. For counsel, the facts at the basis of the present communication fall into the latter category.

5.2 To counsel, it is equally wrong to argue that the principle of non-retroactivity of criminal laws operates against the possibility of prosecuting those deemed responsible for grave violations of human rights under the former military regime. This principle does not apply to crimes against humanity, which cannot be statute-barred. Moreover, if the application of the principle of non-retroactivity of criminal legislation operates in favour of the perpetrator but collides with other fundamental rights of the victims, such as the right to a remedy, the conflict must be solved in favour of the latter, as it derives from violations of fundamental rights, such as the right to life, to liberty or physical integrity. In other words, the perpetrator of serious crimes cannot be deemed to benefit from more rights than the victims of these crimes.

5.3 Counsel further claims that from a strictly legal point of view, the State party has, with the modification of Chile's Constitution in 1989 and with the incorporation into the domestic legal order of international and regional human rights instruments such as the American Convention on

Human Rights and the Covenant, implicitly abrogated all domestic norms incompatible with these instruments; this would include Amnesty Decree D.L.2.191 of 1978.

5.4 In respect of the State party's argument relating to the independence of the judiciary, counsel concedes that the application of the amnesty decree and consequently the denial of appropriate remedies to the victims of the former military regime derives from acts of Chilean tribunals, in particular the military jurisdictions and the Supreme Court. However, while these organs are independent, they remain agents of the State, and their acts must therefore engage State responsibility if they are incompatible with the State party's obligations under international law. Counsel therefore considers unacceptable the State party's argument that it cannot interfere with the acts of the judiciary: no political system can justify the violation of fundamental rights by one of the branches of Government, and it would be absurd to conclude that while the executive branch of government seeks to promote adherence to international human rights standards, the judiciary may act in ways contrary to, or simply ignore, these standards.

5.5 Counsel finally argues that the State party has misleadingly adduced the conclusions of several reports and resolutions of the Inter-American Commission on Human Rights in support of its arguments. To counsel, it is clear that the Commission would hold any form of amnesty which obstructs the determination of the truth and prevents justice from being done, in areas such as enforced and involuntary disappearances and summary executions, as incompatible with and in violation of the American Convention on Human Rights.

5.6 In additional comments, counsel reiterates his allegations as summarized in paragraphs 3.2 and 3.3 above. What is at issue in the present case is not the granting of some form of compensation to victims of the former regime, but the denial of justice to them: the State party resigns itself to arguing that it *cannot* investigate and prosecute the crimes committed by the military regime, thereby foreclosing the possibility of any judicial remedy for the victims. To counsel, there is no better remedy than the determination of the truth, by way of judicial proceedings, and the prosecution of those held responsible for the crimes. In the instant case, this would imply ascertaining the burial sites of the victims, why they were murdered, who killed them or ordered them to be killed, and thereafter indicting and prosecuting those responsible.

5.7 Counsel adds that his interpretation of the invalidity of Amnesty Decree 2.191 of 1978, in the light of international law and the Covenant, has been endorsed by the Inter-American Commission on

Human Rights in a Resolution adopted in March 1997. In this resolution, the Commission held the amnesty law to be contrary to the American Convention on Human Rights, and admonished the State party to amend its legislation accordingly. The Chilean Government was requested to continue investigations into disappearances that occurred under the former regime, and to indict, prosecute and try those held responsible. To counsel, the Commission's resolution perfectly sets out Chile's responsibility for facts and acts such as those at the basis of the present communications.

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 it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the State party does not explicitly challenge the admissibility of the communication, although it does point out that the events complained of by the authors, including the Amnesty Decree of 1978, occurred prior to the entry into force of the Optional Protocol for Chile, which ratified that instrument on 28 August 1992 with the following declaration:

"In ratifying the competence of the Human Rights Committee to receive and consider communications from individuals, it is the understanding of the Government of Chile that this competence applies in respect of acts occurring after the entry into force for that State of the Optional Protocol or, in any event, to acts which began after 11 March 1990."

6.3 The Committee notes that the authors also challenge the judgments of the Supreme Court of Chile of 24 October 1995 denying their request for the revision of earlier adverse decisions rendered on their applications by military courts.

6.4 The Committee notes that the acts giving rise to the claims related to the deaths of the authors occurred prior to the international entry into force of the Covenant, on 23 March 1976. Hence, these claims are inadmissible *ratione temporis*. The Supreme Court judgement of 1995 cannot be regarded as a new event that could affect the rights of a person who was killed in 1973. Consequently, the communication is inadmissible under article 1 of the Optional Protocol, and the Committee does not need to examine whether the declaration made by Chile upon accessing to the Optional Protocol has to be regarded as a reservation or a mere declaration.

6.5 The question of whether the next of kin of the executed victims might have a valid claim under the

Covenant, notwithstanding the inadmissibility of the instant communication, is not before the Committee and need not be addressed in these proceedings.

7. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible;

(b) that this decision shall be communicated to the State party, and to the authors' counsel.

APPENDIX

Individual opinion by Committee member Hipólito Solari Yrigoyen (dissenting)

I hold a dissenting opinion on paragraph 6.4, which should have read as follows: "With regard to the author's claim under article 16 of the Covenant, the Committee notes that the communication concerns the violation of the author's right to recognition everywhere as a person before the law, as a consequence of the lack of investigation of his whereabouts or location of the body. The Committee considers this a fundamental right to which anyone is entitled, even after his death, and one that should be protected whenever its recognition is sought. It therefore does not need to consider whether the declaration made by Chile upon accession to the Optional Protocol should be regarded as a reservation or a mere declaration, and can conclude that it is not precluded *ratione temporis* from examining the author's communication on the matter.

Regarding the claim under article 14, paragraph 1, of the Covenant, it is submitted that in the author's case the trial was not impartial in determining whether a violation of article 16 of the Covenant had occurred. The Committee considers it has been sufficiently substantiated for admissibility purposes that the author's case was not heard by an independent tribunal."

Individual opinion by Committee member Christine Chanet (dissenting)

I challenge the decision taken by the Committee, which, in dealing with the two communications, dismissed the applicants on the grounds of the *ratione temporis* reservation lodged by Chile at the time of its accession to the Optional Protocol.

In my view the question could not be addressed in this manner, in view of the fact that judicial decisions taken by the State party were adopted after the date it had specified in its reservation and that the problem raised in connection with article 16 of the Covenant relates to a situation which, as long as it is not permanently ended, has long-term consequences.

In the case in question, even if the actual circumstances referred to in the two communications diverge, the attitude of the State regarding the consequences to be drawn from the disappearances necessarily raised a question as regards article 16 of the Covenant.

Under article 16, everyone has the right to recognition as a person before the law.

While this right is extinguished on the death of the individual, it has effects which last beyond his or her death; this applies in particular to wills, or the thorny issue of organ donation;

This right survives *a fortiori* when the absence of the person is surrounded by uncertainty; he or she may reappear, and even if not present, does not cease to exist under the law; it is not possible to substitute civil death for confirmed natural death;

These observations do not imply that this right is of unlimited duration: either the identification of the body is incontestable and a declaration of death can be made, or uncertainty remains concerning the absence or the identification of the person and the State must lay down rules applicable to all these cases; it may, for example, specify a period after which the disappeared person is regarded as dead.

This is what the Committee should have sought to find out in this particular case by examining the matters in depth.

Communication No. 880/1999

Submitted by: Terry Irving [represented by counsel]

Alleged victim: The author

State party: Australia

Declared inadmissible: 1 April 2002

Subject matter: Right to compensation following reversal of conviction

Procedural issues: None

Substantive issues: Reversal of conviction after “final decision”

Article of Covenant: 14, paragraph 6

Article of the Optional Protocol and Rules of procedure: 3

1.1 The author of the communication, dated 5 October 1999, is Terry Irving, an Australian national, born in 1955. The author claims to be the victim of a violation by Australia of article 14, paragraph 6, of the International Covenant on Civil and Political Rights. He is represented by counsel. The author’s initial claim under article 9, paragraph 5, of the Covenant was abandoned by submission of counsel dated 29 May 2001.

1.2 Upon ratification of the Covenant, Australia entered a reservation to article 14, paragraph 6, of the Covenant to the effect that “the provision of compensation for miscarriage of justice in the circumstances contemplated in paragraph 6 of article 14 may be by administrative procedures rather than pursuant to specific legal provision”.

The facts as presented by the author

2.1 On 8 December 1993, a jury in the District Court of Cairns convicted the author of an armed robbery of a branch office of the ANZ bank in Cairns, committed on 19 March 1993; he was sentenced to eight years of imprisonment. He applied

for legal aid to appeal the decision, but Legal Aid Queensland turned down his request. He appeared without legal representation before the Queensland Court of Appeal, which dismissed the appeal on 20 April 1994.

2.2 On 3 May 1994, the author applied for legal aid to fund an application for special leave to appeal to the High Court of Australia. On 28 May 1994, the Queensland Legal Aid Office refused the application. In July 1994, the author further applied to the Legal Aid Review Committee for review of that decision. In August 1994, the District Committee once more refused legal aid. The author then unsuccessfully pursued appeals to other bodies, including the Queensland Criminal Justice Commission, the Queensland Law Society and the Queensland Ombudsman.

2.3 The author applied again to the Legal Aid Review Committee, seeking legal aid for an application for special leave to appeal. In January 1995, the Committee granted legal aid to refer the matter to counsel for advice on the prospects of an appeal. In April 1995, the author was refused further legal aid. On 17 July 1995, the Queensland Prisoners Legal Service refused the author’s request for assistance. On 28 August 1995, the ACT Legal Aid Office refused the author’s application for legal aid.

2.4 In August 1995, the author was served with documents naming him as the respondent in compensation proceedings instituted by the three bank tellers of the ANZ bank he denies robbing. On 22 September 1995, appearing in these proceedings, the author stated that he was wrongly convicted of the offence. On 24 November 1995, he was refused permission to adduce further identification evidence

in the same proceedings, and an order of compensation was made.

2.5 After exhausting all possible avenues of representation and assistance known to him, the author considered that he had no alternative but to represent himself in the High Court of Australia, notwithstanding his previous failure as a self-represented applicant in the Queensland Court of Appeal. On 2 May 1996, the High Court accepted the documentation compiled by the author in custody as an application for special leave to appeal. On 8 December 1997, four years to the day from his original conviction, the High Court at once granted the author's application for special leave to appeal, allowed the appeal, quashed the conviction and ordered a retrial. The Court accepted the Crown's concession at the hearing that the author's original trial had been unfair. The Court observed that it had "the gravest misgivings about the circumstances of this case", that "it is a very disturbing situation" and that "in all of this, the accused has been denied legal aid for his appeal". On 11 December 1997, the author was released from prison on bail. On 2 October 1998, the Director of Public Prosecutions of Queensland indicated that the author would not be re-tried, and entered a *nolle prosequi*.

2.6 On 6 July 1998, the author applied to the Queensland Attorney General, seeking ex gratia compensation for a miscarriage of justice occasioned by his wrongful imprisonment that lasted for over four and half years. He also requested the establishment of an independent Commission of Inquiry into the circumstances of his wrongful conviction and imprisonment. On 10 August 1998, 18 September 1998 and 21 December 1998, the author again applied to the Queensland Attorney-General.

2.7 On 11 January 1999, the Queensland Department of Justice referred allegations of official misconduct in the case to the Queensland Criminal Justice Commission. On 19 March 1999, the author initiated an action in the Queensland Supreme Court against the investigating officer and the State of Queensland, seeking damages for malicious prosecution and exemplary damages.

2.8 On 25 July 1999, the author again sought compensation from the Queensland Attorney-General. In August 1999, the Criminal Justice Commission replied that the author's matter was not one giving rise to a reasonable suspicion of official misconduct. The author thereupon again sought compensation from the Attorney-General. In September 1999, the Attorney-General's senior policy adviser informed the author that "[I]n view of the advice from the Criminal Justice Commission and of your decision to initiate legal action, the Attorney-General will not further consider your

application for an ex-gratia payment of compensation, but will await the outcome of your legal action". On 15 August 2000, the author complained to the Queensland Parliamentary Criminal Justice Committee. By early Feb. 2002, no response to his complaint had been forthcoming from the Parliamentary Committee, and the matter was said to be still under investigation.

The complaint

3.1 The author contends that he has exhausted all available and effective domestic remedies, and that he has unsuccessfully made all reasonable efforts to obtain the payment of compensation for wrongful imprisonment from the Queensland Attorney General, as required under article 5, paragraph 2 (b), of the Optional Protocol.

3.2 The author contends that he fulfils all the conditions to obtain compensation under the terms of article 14, paragraph 6. Firstly, he was convicted of a criminal offence on 8 December 1993. Secondly, his conviction was subsequently reversed by the High Court of Australia on 8 December 1997. Thirdly, the decision of the High Court was a final one. Fourthly, the author submits that the conviction has been reversed on the ground that a new or newly discovered fact showed conclusively that there had been a miscarriage of justice, in particular the facts that he had not had a fair trial and that the Court had the gravest misgivings about the circumstances of the case. Finally, the author states that it has not been proved that the non-disclosure of the unknown fact in issue is wholly or partly attributable to him. As all the elements necessary for compensation under article 14, paragraph 6, have been met, the State of Queensland should have paid him compensation. Article 14, paragraph 6, was violated since this was not done.

State party's submissions on admissibility and merits

4.1 On the admissibility of the communication, the State party, by submission of 22 October 2000, observes that:

– The author failed to exhaust available and effective domestic remedies. At the time of submission of the communication, he was pursuing two different actions, one for malicious prosecution and exemplary damages against the investigating detective and the State of Queensland, the other one seeking compensation for wrongful imprisonment from the Attorney-General of Queensland. The two procedures, according to the State party, are under active consideration, and thus said to be effective. There are no special circumstances which would absolve the author from exhausting these remedies. The State party submits that final determination of

the complaints would, assuming diligent pursuit, take 12 to 18 months – it denies that Mr. Irving’s pursuit of relief is being unreasonably delayed by the Queensland courts.

– The author failed to show a violation of article 14, paragraph 6, as the final decision in his case, i.e. that of the High Court of Australia, did not constitute, nor affirm, the initial conviction. Since, for the purposes of article 14, paragraph 6, of the Covenant, the final decision must confirm the conviction, and in the instant case the judgment of the High Court had exactly the opposite effect, article 14, paragraph 6, is inapplicable in the circumstances of the case, and this claim should be declared inadmissible *ratione materiae*.

4.2 As far as the merits of the author’s claims are concerned, the State party submits that:

– Article 14, paragraph 6, of the Covenant, was not violated because the author was not convicted by a "final decision" within the meaning of this provision. The State party recalls that a "final decision" is one that is no longer subject to appeal. The author’s conviction was always subject to appeal under the mechanisms of the Australian judicial review system. In Australia generally, and in Queensland specifically, a decision of a trial court convicting a person is not, at least initially, a final decision, since the convicted person always has a right of appeal against the conviction. The State party notes that the fact that the author successfully appealed to the High Court counters any argument that the decision of the Supreme Court of Queensland was a final one.

Author’s comments on the State party’s submissions

5.1 As far as the admissibility of his communication is concerned, the author contends that:

– The tort remedies which he has initiated cannot be considered to constitute available remedies within the meaning of article 5, paragraph 2 (b), of the Optional Protocol, as they are not effective. Moreover, the mere *possibility* of ex-gratia payments for wrongful imprisonment in the event of the dismissal of his claims also cannot be said to constitute a remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol, because it depends on the exercise of the discretion of the State party’s authorities. Finally, Mr. Irving submits that the application of remedies has been "unreasonably prolonged" by the judicial authorities of Queensland.

5.2 As an alternative to his initial argument relating to article 14 (6), Mr. Irving now argues that the High Court’s decision did not constitute a "final decision" in the sense of this provision, but the reversal of his conviction. He notes that the grant of

special leave to appeal to the High Court is entirely discretionary and is obtained only if the High Court considers that an application relates to a question of law or is of public importance. As there is no mandatory right of appeal to the High Court, the author contends that he was convicted by the "final decision" of the Queensland Court of Appeal. He further contends that his appeal to the High Court could not be considered a normal appeal, because his conviction was quashed by the High Court following an application for special leave to appeal that was lodged two years after the expiry of the time within which such an application should normally be lodged. He was unable to lodge this appeal within normal deadlines because of the State party’s refusal to grant legal aid. Thus, in the special circumstances of the case, it was the decision of the Court of Appeal of Queensland, which affirmed his conviction, was "final" within the meaning of article 14, paragraph 6.

Further State party submissions on admissibility and merits

6.1 As far as admissibility is concerned, the State party contends that the delays complained of by the author, in relation to progress of the two actions for malicious prosecution and for compensation for wrongful imprisonment, are primarily attributable to him, not to the State party. Furthermore, any delay of the Queensland Parliamentary Criminal Justice Committee in replying to the author cannot be attributed to the State party, as this parliamentary committee is not subject to the direction of the Queensland executive.

6.2 On the merits, the State party reiterates that there was no conviction by a "final decision", as required by article 14, paragraph 6, in the author’s case. It contends that the fact that the High Court has discretion to refuse special leave to appeal from judgments of the Queensland Court of Appeal does not negate the normalcy of the appeal procedure, as a right to appeal is often subject to conditions relating to timing or standing: "the special leave requirement for appeals to the High Court is an ordinary part of the method adopted to give effect to the right of appeal guaranteed in the Australian Constitution".

6.3 Nor does the existence of statutory deadlines for the filing of special leave to appeal applications lead to a different conclusion: a failure to file an application within the normal 28 day period is not determinative of whether the High Court will hear the application. There are frequent delays with special leave applications, especially where legal aid is involved, and the High Court often grants extensions of time in which to file such applications. The State party therefore challenges the author’s alternative argument that the judgment of the Court

of Appeal of April 1994 constituted the “final decision” for the purposes of article 14, paragraph 6, of the Covenant.

Counsel’s final submission

7.1 By supplementary submission of 5 February 2002, counsel emphasizes that the two actions against the arresting officer and the State of Queensland (March 1999) and against the Attorney-General of Queensland (December 1999) were initiated only after Queensland’s refusal to honor its obligations under article 14, paragraph 6; furthermore, Queensland insists that it will not negotiate any settlement of the matter and that the author’s actions be litigated, including conclusion of all possible appeals. Finally, the pursuit of domestic remedies must be considered to be “unreasonably prolonged”, not only by virtue of the fact that more than seven years have already elapsed since the author’s wrongful imprisonment, but also in light of Queensland’s firm refusal to consider *ex gratia* compensation until the conclusion of all appeals.

7.2 Counsel takes issue with the State party’s characterization of special leave to appeal to the High Court as a constitutionally guaranteed right. He points out that the High Court itself has stated¹ that a special leave application to the High Court is not in the ordinary course of litigation; that any application must exhibit features which attract the Court’s discretion in granting leave or special leave; and that there is no right of special leave. Thus, criminal proceedings in Queensland are final once the Court of Appeal of Queensland has decided.

7.3 On the issue of the State party’s reservation to article 14 (6), counsel notes that the terms of the reservation only entitle the State party and Queensland to be exempt from *legislating* to give effect to the obligations under article 14 (6), but not to be exempt from its obligation under article 2 to take necessary steps to adopt other measures to give effect to the rights enshrined in the Covenant. In that context, he notes that Queensland has issued no administrative guidelines to give effect to the obligations under article 14 (6), and that the State party’s (and Queensland’s) additional requirements that any persons must demonstrate the existence of “exceptional circumstances”, exemplified by the State party as ‘serious wrongdoing’ by the investigating authority, establishes prerequisites for compensation not envisaged by article 14 (6).

¹ In the case of *Collins v. The Queen* (1975) B, CLR 120.

Issues and proceedings before the Committee

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 The facts laid out in the communication, which have not been contested by the State party, show that Mr. Irving was subject to manifest injustice. It would appear that they raise a serious issue regarding compliance by the State party with article 14, paragraph 3 (d), of the Covenant, as Mr. Irving was repeatedly denied legal aid in a case in which the High Court of Australia itself considered that the interests of justice required such aid to be provided. It would therefore appear that Mr. Irving should be entitled to compensation. The only claim made by the author of the communication was a claim based on article 14, paragraph 6, of the Covenant and the question before the Committee is therefore whether this claim is admissible.

8.3 The Committee recalls the conditions of application of article 14, paragraph 6:

“When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.”

8.4 The Committee observes that the author’s conviction in the District Court of Cairns of 8 December 1993 was affirmed by the Court of Appeal of Queensland on 20 April 1994. Mr. Irving applied for leave to appeal this decision before the High Court of Australia. Leave to appeal was granted and on 8 December 1997 the High Court of Australia quashed the conviction on the ground that the author’s trial had been unfair. As the decision of the Court of Appeal of Queensland was subject to appeal (albeit with leave) on the basis of the normal grounds for appeal, it would appear that until the decision of the High Court of Australia, the author’s conviction may not have constituted a “final decision” within the meaning of article 14, paragraph 6. However, even if the decision of the Court of Appeal of Queensland were deemed to constitute the “final decision” for the purposes of article 14, paragraph 6, the author’s appeal to the High Court of Australia was accepted on the grounds that the original trial had been unfair and not that a new, or newly discovered fact, showed

conclusively that there had been a miscarriage of justice. In these circumstances, the Committee considers that article 14, paragraph 6, does not apply in the present case, and this claim is inadmissible *ratione materiae* under article 3 of the Optional Protocol.

9. The Human Rights Committee therefore decides:

- (a) that the communication is inadmissible;
- (b) that this decision shall be communicated to the author, his counsel and to the State party.

Communication No. 925/2000

Submitted by: Wan Kuok Koi [represented by counsel]

Alleged victim: The author

State party: Portugal

Declared inadmissible: 22 October 2001

Subject matter: Fairness of trial against alleged member of secret association

Procedural issues: None

Substantive issues: Fair trial - Presumption of innocence - Legal representation

Article of Covenant: 14

Articles of the Optional Protocol and Rules of procedure: 1, 2 and 5, paragraph 2 (b)

1.1 The author of the communication, dated 15 December 1999, is Mr. Wan Kuok Koi, a citizen of Portugal and resident of Macao, at present serving a sentence of imprisonment at Coloane Prison in Macao. At the time of submission of the communication, Macao was a territory under Chinese sovereignty and Portuguese administration (Art. 292 of the Portuguese Constitution). The author claims to be a victim of a violation of article 14 of the International Covenant on Civil and Political Rights. He is represented by counsel.

1.2 Portugal is a party to the International Covenant on Civil and Political Rights since 15 September 1978 and a party to the Optional Protocol since 3 August 1983. On 27 April 1993, Portugal made a notification concerning the application of the Covenant to Macao. There is no record of a notification of territorial application of the Optional Protocol to Macao. However, there is no reservation or declaration by Portugal excluding the application of the Optional Protocol to Macao.

1.3 At the time of submission of the communication, Macao was still under Portuguese administration. It reverted to Chinese administration on 20 December 1999, four days after submission of the communication against Portugal.

1.4 Until 19 December 1999, the status of Macao was governed by the Basic Statute of Macao of

15 February 1976 (Lei No. 1/76). Article 2 of the Statute stipulated that the territory of Macao constituted a legal personality under internal public law, with administrative, economic, financial and legislative autonomy within the framework of the Portuguese Constitution. The judiciary remained part of the Portuguese administration of justice. Macao's status under public international law was also defined in the Sino-Portuguese Joint Declaration of Beijing of 13 April 1987 (in force 15 January 1988), pursuant to which Macao's status was determined to be Chinese territory under Portuguese administration, as already provided for by secret arrangements of 1976. Indeed, in the Portuguese Constitution of 2 April 1976, Macao is not included among the territories under Portuguese sovereignty, but is referred to as a territory under Portuguese administration.

The facts as submitted

2.1 The author was arrested on 1 May 1998 at the Coloane Prison in Macao, under suspicion of being the moral author of an alleged attempt against the Director of the Macao Judiciary Police. He was brought before the Judge of Criminal Prosecutions forty-eight hours later, who considered that there was no evidence linking the author to the alleged attempt, but that he was suspected of the crime of secret association. He was accordingly placed in preventive detention.

2.2 In May 1998 the author unsuccessfully challenged his detention before the High Court of Macao (Tribunal Superior de Justiça de Macao, the Supreme Court of the Territory), judgment being rendered on 21 July 1998 on the grounds that the defendant is a member of 14-K (carats) secret association.”

2.3 The trial at the Court of Generic Competence of Macao (Tribunal de Competência Genérica) against the author and nine other defendants on the

charge of involvement in the crime of secret association was opened on 27 April 1999 but immediately adjourned to 17 June 1999. The Chief Judge, however, tendered his resignation and left the Territory of Macao. It is alleged that pursuant to the applicable procedure, the lawsuit should immediately have been referred to the legal substitute of the Chief Judge. Instead of following this procedure, a new judge was recruited from Portugal, who came to Macao expressly to preside over this trial, and who returned to Portugal immediately after its conclusion. It is alleged that such procedure was illegal and in breach of Art. 31.2 of Decree-Law No. 55/92/M of 18 August 1992.

2.4 The trial was successively postponed to 29 September and 11 October 1999. It is alleged that the rights of defence were violated, in particular the right to be presumed innocent, which the Chief Judge is said to have breached by expressing on different occasions, as early as the initial hearing, a pre-judgment about the author's guilt. Moreover, it is stated that the defence attorneys were initially prohibited from having any contact with their clients until the end of the production of testimonial evidence in court (a measure lifted after protests in the press). The Macao Bar Association is said to have addressed an urgent communication to the Judiciary Council of the territory complaining about the judge's orders dictated into the minutes referring to the defendants as "naturally dangerous" and suggesting that the attorneys would intimidate the witnesses.

2.5 Eight of the ten defendants, amongst them the author, filed a petition requesting the rejection of the new Chief Judge in view of doubts as to his impartiality on the basis of certain remarks of the judge allegedly by showing bias, but the High Court (Tribunal Superior de Justicia de Macao), by judgement of 15 October 1999 dismissed the petition and refused to decree a suspension of the judge in question, allowing the trial to proceed. A second challenge against the judge's impartiality was filed on 25 October 1999 and rejected on 29 October 1999. On this date author's counsel withdrew, arguing in a statement presented to the Secretariat of the Court that he could not continue to assure in a valid and efficient manner his clients's defence. Following the withdrawal of author's counsel, the Chief Judge appointed as official defender a young lawyer who was among the public to attend the hearing, but rejected the new lawyer's request for a suspension of the hearing to allow for consultation of the files. Said newly appointed lawyer also withdrew, whereupon the Chief Judge appointed first one clerk of the court and then another, neither one of whom had the minimum conditions to assure the defence. The author was thus tried without the

assistance of an attorney of record and without being offered the opportunity of appointing a new attorney.

2.6 On 29 October 1999 a third petition for the rejection of the Chief Judge was lodged, which was dismissed on 8 November 1999.

2.7 Judgment was rendered on 23 November 1999, and the author was convicted and sentenced to fifteen years of imprisonment. An appeal was filed with the Court of Second Instance (Tribunal de Segunda Instância, Case No. 46/2000), which was heard in March 2000, judgement being rendered on 28 July 2000. The Tribunal of Last Instance (Tribunal de Ultima Instância), by judgment of 16 March 2001, affirmed the second instance court's findings.

2.8 Counsel states that the same matter has not been submitted to any other international procedure of investigation and settlement.

The complaint

3. Counsel claims multiple violations of article 14 concerning the alleged denial of a fair hearing before a competent and impartial tribunal, the alleged violation of the presumption of innocence, and the alleged violation of fundamental guarantees of the defence, including access of counsel to the accused and proper representation of the accused during the trial.¹

The State party's observations and author's comments thereon

4.1 In its submission of 29 June 2000, the State party refers to article 2 of Macao's Statute, pursuant to which Macao enjoyed autonomy and did not fall under the sovereignty of Portugal. It argues that whereas the application of the Covenant was extended to Macao by the Portuguese Parliament by virtue of Resolution 41/92 of 17 December 1992, no such resolution was adopted with respect to the Optional Protocol.

4.2 The State party also indicates that the Optional Protocol is not among the treaties listed in the note addressed by the Portuguese Government in November 1999 to the United Nations Secretary General concerning those treaties for which the People's Republic of China had agreed to assume the responsibilities of succession.

¹ These issues, including the question of the alleged breach of article 31.2 of the Decree-Law No. 55/92/M (see above para. 2.3), were addressed in the Judgment of the Tribunal de Segunda Instância of 28 July 2000 as well as in the judgment of the Tribunal of Last Instance of 16 March 2001.

4.3 The State party quotes the text of article 1 of the Optional Protocol, indicating that Macao was not a State party to the Protocol. Accordingly, it requests the Committee to declare the communication inadmissible.

4.4 In the alternative, the State party requests that the case be declared inadmissible because, since Portugal is no longer responsible for Macao, there is no legitimate international procedure.

4.5 Moreover, the State party contends that domestic remedies have not been exhausted, since the decision on the author's appeal is still pending. It is not relevant that the decisions concerning the petitions against the Chief Judge are final, since the exhaustion of domestic remedies should be understood as applying to the entire procedure. Moreover, the decision on appeal will no longer be the responsibility of Portugal, since it will be taken by a Court of the Macao Special Administrative Region, which is under the jurisdiction of the People's Republic of China.

5.1 In his comments, dated 29 September 2000, the author argues that the Optional Protocol is complementary to the Covenant and therefore its application in Macao should be deemed to have been effected by Resolution 41/92 of 17 December 1992.

5.2 Notwithstanding the transfer of administration to the People's Republic of China on 19/20 December 1999, it is clear that the events complained of occurred in the period when Portugal was responsible for Macao and bound by the Optional Protocol.

5.3 With regard to the alleged non-exhaustion of domestic remedies, the author contends that it is legitimate to sever the decisions concerning the impartiality of the judge from the decision on the author's guilt or innocence. It is stressed that the violations alleged were perpetrated by a court under Portuguese jurisdiction and not by the courts under the jurisdiction of the People's Republic of China. Moreover, the pending appeal before the Second Instance Court was finally decided on 28 July 2000.

5.4 The Second Instance Court examined the author's allegations, *inter alia*, that the tribunal was neither competent nor impartial, that the Chief Judge was biased against the defendants, that the adversary principle and the principle of equality of arms were systematically violated (judgement, section. 1.5.A.) The judgement reaffirmed the competence of the tribunal of first instance and found no merit in the author's other allegations of procedural irregularities. The author's conviction on charges of membership in a secret association and usury was affirmed. The sentence, however, was reduced to thirteen years and ten months. The Tribunal of the Last Instance, by judgment of 16 March 2001, fully affirmed the judgment of the Tribunal of Second Instance.

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 With regard to the application of the Optional Protocol to Macao during the period under Portuguese administration, until 19 December 1999, the Committee notes that the State party adhered to the Optional Protocol with effect from 3 August 1983. It further notes that the application of the Protocol cannot be based on article 10 of the Optional Protocol, since Macao was not a constituent part of Portugal after adoption of the new Constitution in 1976. It is also not possible to draw a positive conclusion from the Portuguese Parliament's resolution 41/92 which formally extended the application of the Covenant to Macao, since the Covenant and the Optional Protocol are distinct treaties.

6.3 The Committee, on the other hand, does not share the view that the fact that an analogous declaration has not been made with regard to the Optional Protocol precludes the application of the Protocol to this case. The Committee recalls the language of article 1 of the Optional Protocol which stipulates in its first clause:

"A State party to the Covenant that becomes a party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State party of any of the rights set forth in the Covenant".

All these elements are present in the case at hand. Portugal is a party to the Covenant, as well as to the Optional Protocol, and as such it has recognized the Committee's competence to receive and consider communications from individuals "subject to its jurisdiction". Individuals in Macao were subject to Portugal's jurisdiction until 19 December 1999. In the present case, the State party exercised its jurisdiction by the courts over the author.

As the intention of the Optional Protocol is to further the implementation of Covenant rights, its non-applicability in any area within the jurisdiction of a State party cannot be assumed without any express indication (reservation/declaration) to that effect. No act of this nature exists. Therefore, the Committee comes to the conclusion that it has the competence to receive and consider the author's communication insofar it concerns alleged violations by Portugal of any of the rights set forth in the Covenant.²

² Cf. also the general rule embodied in article 29 of the Vienna Convention on the Law of Treaties.

6.4 With regard to exhaustion of domestic remedies, Article 2 of the Optional Protocol states:

“Subject to the provisions of article 1, individuals who claim that any of their rights enumerated in the Covenant have been violated *and who have exhausted all available domestic remedies* may submit a written communication to the Committee for consideration.” (emphasis added)

The implications of this provision are clear: until such time as remedies available under the domestic legal system have been exhausted an individual who claims that his or her rights under the Covenant have been violated is not entitled to submit a communication to the Committee. It is therefore incumbent on the Committee to reject as inadmissible a communication submitted before this condition has been met. And indeed it has been the practice of the Committee not to receive communications when it is abundantly clear that available domestic remedies have not been exhausted. Thus, for example, in communications involving allegations of violations of fair trial in criminal cases, the Committee does not receive and register communications when it is clear that an appeal is still pending. The problem is that in many cases it is not self-evident from the communication itself whether domestic remedies were available and if so, whether they were exhausted by the author. In such cases the Committee has no choice but to register the communication and to decide on admissibility after considering the submissions of both the author and the State party on the issue of domestic remedies. When deciding whether to reject such communications as inadmissible under article 5, paragraph 2 (b), of the Optional Protocol, the Committee generally follows the practice of other international decision-making bodies and examines whether domestic remedies have been exhausted at the time of considering the matter (rather than at the time the communication was submitted). The rationale of this practice is that rejecting a communication as inadmissible when domestic remedies have been exhausted at the time of consideration would be pointless, as the author could merely submit a new communication relating to the same alleged violation. It should be noted, however, that the assumption underlying this practice is that the legal standing of the State party has not changed between the date of submission and the date of consideration of the communication, and that there would therefore be no legal impediments to submission of a new communication by the author relating to the alleged violation. When this assumption is invalid, the practice becomes incompatible with the requirements of the Optional Protocol.

6.5 In the present case, both the author’s claims concerning the lack of competence of the special Portuguese judge, as well as the other claims

regarding alleged violations of article 14 of the Covenant in the course of the author’s trial, were raised in the appeal to the Tribunal de Segunda Instancia in Macao. This appeal had not yet been heard at the time of the submission of the communication. The judgments in this appeal and in a further appeal lodged with the Tribunal of Last Instance, were rendered on 28 July 2000 and 16 March 2001 respectively, when Macao was no longer administered by Portugal. It follows that domestic remedies had not been exhausted when the communication was submitted and that the author was therefore not entitled, under article 2 of the Optional Protocol, to submit a communication. By the time the remedies had been exhausted the author was no longer subject to the jurisdiction of Portugal and his communication was inadmissible under article 1 of the Optional Protocol.

6.6 It should further be noted that the fact that the author’s appeals were heard after Portugal no longer had jurisdiction over Macao in no way implies that these remedies ceased to be domestic remedies which had to be exhausted before a communication could be submitted against Portugal. While Macao became a special administrative region in the People’s Republic of China after submission of the communication, its legal system remained intact, and the system of criminal appeals remained unchanged. Thus there remained remedies that had to be pursued under the domestic legal system, irrespective of the State which exercised control over the territory.

6.7 In conclusion, while the Committee is of the opinion that in the period during which Portugal exercised jurisdiction over Macao after it had acceded to the Optional Protocol, individuals subject to its jurisdiction who claimed their rights under the Covenant had been violated were entitled to submit communications against Portugal, it finds that the present communication is inadmissible, under articles 2 and 5, para.2 (b) of the Optional Protocol.

7. The Human Rights Committee decides:

- (a) that the communication is inadmissible,
- (b) that this decision shall be communicated to the State party and to the author of the communication.

APPENDIX

Individual Opinion by Committee members, Messrs. Abdelfattah Amor and Prafullachandra Natwarlal Bhagwati (partly dissenting)

With regard to the application of the Optional Protocol to Macao during the period under Portuguese administration, until 19 December 1999, the Committee notes that the State party ratified the Optional Protocol and it came into force with effect from 3 August 1983.

The State party ratified the Covenant and became a party to it from 3 August 1983. The State party ratified the Covenant and became a party to it from 15 September 1978, but so far as the Optional Protocol is concerned, it was not ratified until about 5 years later. Obviously, the Covenant and the Optional Protocol are two distinct treaties and the ratification of the former does not carry with it the ratification of the latter and that is why the Optional Protocol had to be separately ratified as a distinct treaty by the State Party.

The first question that requires to be considered for determining the applicability of the Optional Protocol to Macao up to 19 December 1999 is whether there is anything in the language of the Optional Protocol to suggest that when the State party ratified the Optional Protocol, it became applicable to Macao as a territory under the administration of the State Party. Article 10 of the Optional Protocol obviously cannot be invoked since Macao was not a constituent part of Portugal. Some reliance may be placed on article 29 of the Vienna Convention on the Law of Treaties which stipulates that "Unless different intention appears from the Treaty, or is otherwise established, a treaty is binding upon each party in respect of its entire territory".

There are divergent views on whether the application of a treaty automatically extends to dependent territories or whether the extension needs a specific legal act. We do not think it would be a fruitful exercise to enter upon a discussion of these divergent views; lawyers are divided sharply on this issue. In any event, it is, in our view, clear that since Macao was at no material time a constituent part of Portugal, it could not be said to be a part of the territory of Portugal and hence the Optional Protocol could not be said to be binding on Macao by virtue of article 29 of the Vienna Convention on the Law of Treaties. The ratification of the Optional Protocol by Portugal did not therefore have the effect of making it automatically applicable to Macao.

It may also be pointed out that if, contrary to what we have held, article 29 of the Vienna Convention on the Law of Treaties were applicable, it would equally be applicable in relation to the Covenant and in that event the Covenant would have to be regarded as applicable right from the time it was ratified by Portugal. But it is indisputable that the Covenant did not become applicable to Macao from the moment of its ratification by Portugal. The Covenant was in fact extended to Macao for the first time by a Resolution passed by the Portuguese Parliament on 17 December 1992. Till that time the Covenant was not applicable to Macao. It was by virtue of the Parliamentary Resolution dated 17 December 1992 that it became applicable to Macao. The Parliamentary extension of the Covenant to Macao on 17 December 1992 also demonstrates that in any event, it was not the intention of Portugal, when it ratified the Covenant, to make it applicable to Macao. The conclusion is therefore inevitable that the Covenant became applicable to Macao for the first time on 17 December 1992.

Turning once again to the question of applicability of the Optional Protocol to Macao, we have already pointed out that the Optional Protocol did not become applicable to Macao by virtue of its ratification by Portugal. There is also an additional reason why the

Optional Protocol could not be said to have become applicable on its ratification by Portugal. If the Covenant did not become applicable to Macao until 17 December 1992, how could the Optional Protocol which merely provides the machinery for redressing violations of the Covenant rights, become applicable to Macao at any earlier point of time? Since the Optional Protocol did not become applicable to Macao as a consequence of its ratification by Portugal, it becomes necessary to consider whether at any subsequent point of time, it was extended to Macao.

It is obvious that there was no explicit legal act by which the applicability of the Optional Protocol was extended to Macao. The only argument which the State party could advance in support of the applicability of the Optional Protocol to Macao was that the extension of the Covenant to Macao on 17 December 1992 carried with it also the extension of the Optional Protocol to Macao. But this argument is clearly unsustainable. In the first place, the Covenant and the Optional Protocol are two distinct treaties. The former can be ratified without ratification of the latter. The ratification of the Covenant does not therefore involve ratification of the Optional Protocol. If the contrary argument of Portugal were valid, there would be no necessity for a State party to the Covenant, separately to ratify the Optional Protocol, because the ratification of the Covenant would carry with it ratification of the Optional Protocol. But it is incontrovertible that the Optional Protocol does not become binding until it is ratified by the State Party. Here, in the present case, it is significant to note that though the Covenant was extended to Macao on 17 December 1992 by a specific resolution passed by the Portuguese Parliament, the extension did not include the Optional Protocol. Portugal specifically made one treaty applicable to Macao but not the other. This clearly shows the intention of Portugal that, while the Covenant should be applicable to Macao, the Optional Protocol should not be. This also becomes abundantly clear from the fact that it was only the Covenant and not the Optional Protocol which was mentioned in the note sent by Portugal to the Secretary-General setting out the treaties for which China was going to be responsible. I have therefore no doubt that the Optional Protocol was not applicable to Macao at any time and hence the communication must be held to be inadmissible under article 2 of the Optional Protocol.

There was some argument debated in the Committee that in any event, the case would fall within article 1 of the Optional Protocol and since the author was within the jurisdiction of Portugal at the time of submission of the communication, the Committee would have jurisdiction to deal with the communication. But this argument suffers from a two-fold fallacy. In the first place, it postulates the applicability of the Optional Protocol to Macao so as to enable the author to invoke its article 1 for supporting the sustainability of the communication. But, as I have pointed out above, the Optional Protocol was not applicable to Macao at any time and hence this argument based on article 1 must fail. Secondly, in order to attract the applicability of article 1, what is necessary is that the author who complains of violation of his Covenant rights must be subject to the jurisdiction of the State party not only when the Committee receives the communication but also when the

Committee considers the Communication. The language of article 1 speaks of “the competence of the Committee to receive and consider the communication”. Here, in the present case, when the Committee is considering a communication the author is no longer subject to the jurisdiction of Portugal, because China took over the administration of Macao on 20 December 1999. Article 1 has therefore, in any event, no application in the present case.

So far as the question of exhaustion of domestic remedies is concerned, article 5 (2) (b) requires that the author of a communication must have exhausted all domestic remedies by the time the Committee considers the communication. The Committee is precluded from considering any communication unless the author has exhausted all domestic remedies. Therefore, the point of time at which the question of exhaustion of domestic remedies is required to be considered is when the Committee is considering the communication. It is common ground that at the present time when the Committee is considering the author’s communication, the author has exhausted all domestic remedies. The communication cannot therefore be held to be inadmissible on the ground of non-exhaustion of domestic remedies under article 5 (2) (b) of the Optional Protocol.

In the result, we hold that the communication is inadmissible.

Individual Opinion by Committee Member Mr. Nisuke Ando (partly dissenting)

In the present case I agree with the Committee’s conclusion that the communication is inadmissible because the author was no longer subject to the jurisdiction of Portugal both when his appeals were heard by the Court of Second Instance in May 2000 and when the Tribunal of Last Instance rendered its judgement in March 2001. (See paras. 6.4, 6.5 and 2.7). However, I am unable to share the Committee’s view that non-applicability of the Optional Protocol in any area within its jurisdiction of a State party cannot be assumed without an express indication to that effect (para. 6.3). In my view this assumption of the Committee is not fully convincing for the following reasons:

First of all, the State party clearly indicated that, whereas the application of the Covenant was extended to Macao by a resolution of the Portuguese Parliament, no such resolution was adopted with respect to the Optional Protocol (para. 4.2). Secondly, the Committee accepts the State party’s statement that the Optional Protocol is not, whereas the Covenant is, among the treaties listed in its note to the United Nations Secretary General with respect to which the Chinese Government has agreed to assume responsibilities of succession (para. 4.1). Thus, thirdly, while the Committee accepts that the continued application of the Covenant requires “express” indication of a State concerned (China in the present case), it seems to assume that no such indication is required with respect to the extension of application of the Optional Protocol. (Portugal in the present case).

In regard to the third point, it must be admitted that, while the continued application of the Covenant is an

issue between two different States (China and Portugal), the extension of application of the Optional Protocol to Macao is an issue within one and the same State (Portugal alone). Nevertheless, the fact remains that, while the Covenant has become applicable to the Macao Special Administrative Region by the “express” indication of China, the Optional Protocol has not become applicable to the same region in the absence of “express” indication of the same State. In this connection, it must be remembered that, according to the Committee’s General Comment No. 26 entitled “Continuity of Obligations”, “The Human Rights Committee has consistently taken the view ... that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant”.³

Personally, I agree with the Committee’s view as a matter of policy statement, but I cannot agree with it as a statement of a rule of customary international law. As far as State practice with respect to the Covenant is concerned, only in the cases of the dismemberment of the former Yugoslavia and that of Czechoslovakia, each of the newly born States in Central and Eastern Europe except Kazakhstan (Kazakhstan has made no indication) indicated that it “succeeds to” the Covenant. All the other seceding or separating States indicated that they “accede to” the Covenant, which implies that they are not succeeding to the former States’ Covenant obligations but are newly acceding to the Covenant obligations on their own. The corresponding State practice with respect to the Optional Protocol makes it clear that only the Czech Republic and Slovakia “expressly” succeeded to the Optional Protocol obligations. Certainly the State practice shows that there is no “automatic” devolution of the Covenant obligations, to say nothing of the Optional Protocol obligations, to any State. A State needs to make an “express” indication as to whether or not it accepts obligations under the Covenant and/or the Optional Protocol. Absent such an indication, it should not be assumed that the State has accepted the obligations.

It may be recalled that during the consideration of the 4th periodic report of Portugal on Macao, the Committee specifically posed the question; “What arrangements exist for the application of the Optional Protocol in the Macao Special Administration Region?” The delegation replied that the question of the Optional Protocol had not been addressed in its negotiation with China (CCPR/C/SR. 1794, para. 9). From this reply it is difficult to determine whether or not the Optional Protocol, as distinguished from the Covenant, was considered as applicable in Macao. However, in response to the author’s claims in the present case, Portugal expressly indicates that no resolution was adopted by its Parliament to extend the application of the Optional Protocol to Macao during its administration of the territory, suggesting that it has never intended to apply the Optional Protocol there.

³ UN document No. A/53/40, Annex VII, para. 40.

Individual Opinion by Committee Members, Messrs. Eckart Klein, Rafael Rivas Posada and Maxwell Yalden (partly dissenting)

In our view the Committee should have decided that the communication was admissible.

We agree with the Committee's finding that in the present case the Optional Protocol establishing the competence of the Committee to receive and consider communications is applicable to Macao.

However, we disagree with the finding that the author had not exhausted domestic remedies. We base our dissent on two interrelated grounds.

First, we do not think that further domestic remedies were, in fact, available to the author after the jurisdiction of Portugal over Macao had come to an end. It is true that by agreement between the State party and the People's Republic of China the system of criminal appeals was to remain unchanged. But it is likewise true that after 19 December 1999, the courts to which the author could have applied (and has done in fact) no longer came within the jurisdiction of the State party against which this communication had been directed. The author submitted his communication on 15 December 1999, only four days before Macao reverted to Chinese administration. To take the view that the author should have exhausted further domestic (i.e. Portuguese) remedies within this short period of time would be clearly unreasonable. Therefore, even if the essential moment for deciding the question when domestic remedies are exhausted were to be the time of submission of the communication and not that of its consideration by the Committee (an issue on which we need not comment here), this requirement would have been met due to the special circumstances of the present case.

Second, we believe that the Committee's decision suffers from a further defect. Requesting the author C at the time of submission of his communication to exhaust domestic remedies, since otherwise the communication would be inadmissible, on the one hand, and taking the line when he has done so that his communication is inadmissible because he is no longer subject to the jurisdiction of Portugal, on the other, creates an unacceptable situation in which the author is deprived of *any* effective protection which the Covenant and the Optional Protocol purport to ensure.

For these reasons we are of the view that the Committee should have declared the communication admissible.

Individual Opinion by Committee member Mr. David Kretzmer (partly concurring and possibly reserving his position)

Domestic remedies in this case had not been exhausted when the communication was submitted. For

the reasons set out in the Committee's decision the communication is therefore inadmissible even on the assumption that the Optional Protocol to alleged violations of the Covenant carried out by the authorities in Macao before the transfer of jurisdiction to the People's Republic of China. I believe that in these circumstances it was unnecessary for the Committee to decide whether the Optional Protocol did indeed apply to such alleged violations. I reserve my opinion on this question.

Individual Opinion by Committee member Mr. Martin Scheinin (dissenting)

It needs to be pointed out at the outset that although the majority of the Committee came to the conclusion that the communication is inadmissible, there was no majority for any specific reason for inadmissibility. The reasons given in the decision itself were formulated by a minority of Committee members, representing the majority position among those who came to inadmissibility as conclusion.

In my opinion the decision is to be seen as an anomaly in the Committee's jurisprudence. It is the established position of the Committee that article 5, paragraph 2 (b), is the clause in the Optional Protocol that prescribes the requirement of exhaustion of domestic remedies as a condition for admissibility. The reference to exhaustion of domestic remedies in article 2 as a condition for the submission of an individual communication is to be understood as a general reflection of this rule, not as a separate admissibility requirement. The requirement of exhaustion of domestic remedies is subject to the discretion of the Committee (article 5, paragraph 2, *in fine*). Also, it is a recoverable ground for inadmissibility (Rule 92.2 of the Committee's Rules of Procedure). Consequently, it would be absurd to read into article 2 an additional requirement that domestic remedies must be exhausted prior to the submission of a communication and to declare a communication inadmissible in a case where domestic remedies were not yet exhausted at the time of submission but have been exhausted by the time when the Committee has the opportunity to make its decision on admissibility.

The specific circumstances of transfer of sovereignty over Macao do not change the situation. If that change has any effect on the requirement of exhausting domestic remedies, it is because the available remedies after the transfer might not be regarded as effective ones in respect of Portugal. Consequently, domestic remedies would be exhausted in respect of Portugal on the date of transfer of sovereignty, irrespective of the stage where the proceedings were on that date.

**B. Views of the Human Rights Committee under article 5 (4)
of the Optional Protocol to the International Covenant
on Civil and Political Rights**

Communication No. 580/1994

Submitted by: Interights [represented by Interights]

Alleged victim: Glen Ashby

State party: Trinidad and Tobago

Declared admissible: 25 July 1995 (fifty-fourth session)

Date of the adoption of Views: 21 March 2002 (seventy-fourth session)

Subject matter: Arbitrary deprivation of life after requesting interim measures for a stay of the execution of a death sentence.

Procedural issues: Failure to comply with Committee's request for interim measures – Execution of death penalty following a trial in which procedural guarantees were not respected

Substantive issues: Right to life – Ill-treatment of detainees – Right to have legal assistance in capital punishment cases – Undue delays in appellate proceedings- Prolonged detention on death row – Prison conditions of death row inmates

Articles of the Covenant: 6; 7; 10, paragraph 1; and 14, paragraph 1, 3 (b), (c), (d), (g) and 5

Article of the Optional Protocol and Rules of Procedure: 3 and rule 86

Finding: Violation.

1. The communication was submitted on 6 July 1994 by Interights on behalf of Glen Ashby, a Trinidadian citizen, at the time of submission awaiting execution at the State prison of Port-of-Spain, Trinidad and Tobago. On 14 July 1994, after the complaint had been transmitted to the authorities of Trinidad and Tobago, Mr. Ashby was executed in the State prison. Counsel claims that Mr. Ashby was the victim of violations of articles 6, 7, 10, paragraph 1, and 14, paragraphs 1, 3 (b), (c), (d) and (g) and 5 of the International Covenant on Civil and Political Rights.¹

¹ Finally, the Optional Protocol entered into force for Trinidad and Tobago on 14 February 1981. On 26 May 1998,

The facts as submitted by counsel

2.1 Mr. Ashby was arrested on 17 June 1988. He was convicted of murder and sentenced to death in the Port-of Spain Assizes Court on 20 July 1989. The Court of Appeal of Trinidad and Tobago dismissed his appeal on 20 January 1994. On 6 July 1994, the Judicial Committee of the Privy Council dismissed Mr. Ashby's subsequent application for special leave to appeal. With this, it was argued, all available domestic remedies within the meaning of the Optional Protocol had been exhausted. While Mr. Ashby might have retained the right to file a constitutional motion in the Supreme (Constitutional) Court of Trinidad and Tobago, it is submitted that the State party's inability or unwillingness to provide legal aid for constitutional motions would have rendered this remedy illusory.

2.2 The prosecution's case rested mainly on the testimony of one S. Williams, who had driven Mr. Ashby and one R. Blackman to the house where the crime was committed. This witness testified that before entering the victim's house with Blackman, Mr. Ashby had held a penknife in his hand. Furthermore, he testified that Mr. Ashby, after having left the house with Blackman and having

the Government of Trinidad and Tobago denounced the Optional Protocol to the International Covenant on Civil and Political Rights. On the same day, it re-accessed, including in its instrument of re-accession a reservation "to the effect that the Committee shall not be competent to receive and consider communications relating to any prisoner who is under sentence of death in respect of any matter relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him and any matter connected therewith". On 27 March 2000, the Government of Trinidad and Tobago denounced the Optional Protocol again.

entered the car, had said he had “cut the man with the knife”. This testimony was corroborated by evidence of the pathologist, who concluded that the cause of death had been a stab wound to the neck. In addition to that, Mr. Ashby himself allegedly made oral statements as well as written statements admitting that he had killed the victim.

2.3 The defense challenged the credibility of the testimony of S. Williams and maintained that Mr. Ashby was innocent. It submitted that there was clear evidence that Mr. Williams was himself an accomplice to the crime; that Mr. Ashby had not carried a penknife; that it was Blackman who had sought to involve Mr. Ashby in the crime and that he had been beaten by a police officer after his arrest and had made a subsequent statement only after being promised that he could return home if he gave the statement.

Chronology of events surrounding Mr. Ashby's execution

3.1 Mr. Ashby's communication under the Optional Protocol was received by the secretariat of the Human Rights Committee on 7 July 1994. On 13 July 1994, counsel submitted additional clarifications. On the same day, the Committee's Special Rapporteur on New Communications issued a decision under rules 86 and 91 of the Committee's rules of procedure to the Trinidad and Tobago authorities, requesting a stay of execution, pending the determination of the case by the Committee, and seeking information and observations on the question of the admissibility of the complaint.

3.2 The combined rule 86/rule 91 request was handed to the Permanent Mission of Trinidad and Tobago at Geneva at 4.05 p.m. Geneva time (10.05 a.m. Trinidad and Tobago time) on 13 July 1994. According to the Permanent Mission of Trinidad and Tobago, this request was transmitted by facsimile to the authorities in Port-of-Spain between 4.30 and 4.45 p.m. on the same day (10.30-10.45 a.m. Trinidad and Tobago time).

3.3 Efforts continued throughout the night of 13 to 14 July 1994 to obtain a stay of execution for Mr. Ashby, both before the Court of Appeal of Trinidad and Tobago and before the Judicial Committee of the Privy Council in London. When the Judicial Committee issued a stay order shortly after 11.30 a.m. London time (6.30 a.m. Trinidad and Tobago time) on 14 July, it transpired that Mr. Ashby had already been executed. At the time of his execution, the Court of Appeal of Trinidad and Tobago was also in session, deliberating on the issue of a stay order.

3.4 On 26 July 1994, the Committee adopted a public decision expressing its indignation over the

State party's failure to comply with the Committee's request under rule 86; it decided to continue consideration of the Mr. Ashby's case under the Optional Protocol and strongly urged the State party to ensure, by all means at its disposal, that situations similar to that surrounding the execution of Mr. Ashby do not recur. The Committee's public decision was transmitted to the State party on 27 July 1994.

The complaint

4.1 Counsel claims a violation of articles 7, 10 and 14, paragraph 3 (g), alleging that Mr. Ashby was beaten and ill-treated at the police station after his arrest and that he signed the confession statement under duress, after having been told that he would be released if he signed the statement.

4.2 It is submitted that the State party violated article 14, paragraph 3 (d), since Mr. Ashby received inadequate legal representation prior to and during his trial. Counsel points out that Mr. Ashby's legal aid attorney spent hardly any time with his client to prepare the defence. The same lawyer reportedly argued the appeal without conviction.

4.3 Counsel submits that the Court of Appeal failed to correct the trial judge's omission to direct the jury on the danger of acting on uncorroborated evidence given by an accomplice as well as the Privy Council's failure to correct the misdirection and material irregularities of the trial, amounted to a denial of Mr. Ashby's right to a fair trial.

4.4 In her initial submission, counsel submitted that Mr. Ashby was the victim of a violation of article 7 and 10, paragraph 1, on the grounds of his prolonged detention on death row, namely, for a period of 4 years, 11 months and 16 days. According to counsel, the length of the detention, during which Mr. Ashby lived in cramped conditions with no or very poor sanitary and recreational facilities, amounted to cruel, inhuman and degrading treatment within the meaning of article 7. As support for her argument, counsel adduces recent judgements of the Judicial Committee of the Privy Council and the Supreme Court of Zimbabwe.²

4.5 It is submitted that Mr. Ashby's execution violated his rights under the Covenant, because he was executed (1) after an assurance had been given to the Privy Council that he would not be executed before all his avenues of relief had been exhausted; (2) while his application for a stay of execution was

² Judicial Committee of the Privy Council, *Pratt and Morgan v. Attorney-General of Jamaica*, Privy Council Appeal No. 10/1993, judgement of 2 November 1993; Supreme Court of Zimbabwe, judgement No. SC 73/93 of 24 June 1993 (unreported).

still under consideration by the Court of Appeal in Trinidad and Tobago; and (3) just moments after the Privy Council heard and granted a stay. Moreover, Mr. Ashby was executed in violation of the Committee's rule 86 request.

4.6 Counsel further submits that Mr. Ashby's execution deprived him of his rights under:

– Article 14, paragraph 1, because he was denied a fair hearing in that he was executed before his pending litigation was completed;

– Article 14, paragraph 5, because he was executed before the Court of Appeal in Trinidad and Tobago, the Privy Council and the Human Rights Committee reviewed his conviction and the lawfulness of his sentence. In this latter context, counsel recalls the Committee's jurisprudence that article 14, paragraph 5, applies to whatever levels of appeal are provided by law.³

4.7 Counsel concedes that there may be an issue of whether Mr. Ashby had a right, under article 14, paragraph 5, to have his case reviewed by a higher tribunal, where that constitutional review was available to him, and where he was already in the process of pursuing it and relying upon it. She submits that where an individual has been permitted to initiate a constitutional challenge, and where that individual is actually in court in the midst of seeking "review", that individual has a right under article 14, paragraph 5, to effective access to that review. Moreover, it is submitted that this interference with the appellate process was so grave that it not only violated the right to an appeal under article 14, paragraph 5, but also the right to a fair trial and equality before the courts under article 14, paragraph 1. It is clear that the constitutional process is governed by the guarantees of article 14, paragraph 1. Counsel relies on the Committee's Views in case No. 377/1989 (*Currie v. Jamaica*) in this respect.

4.8 It is submitted that article 6 has been violated both because it is a violation of article 6, paragraph 1, to execute the penalty of death in a case where the Covenant's other guarantees have not been adhered to, and because the specific guarantees of article 6, paragraphs 2 and 4, have not been adhered to. Finally, counsel argues that a "final judgement" within the meaning of article 6, paragraph 2, must be understood in this case to include the decision on the constitutional motion, because a final judgment on the constitutional motion, challenging the constitutionality of Mr. Ashby's execution, would in reality represent the "final" judgement of this case. Furthermore,

³ Communication No. 230/1987, *Henry v. Jamaica*, para. 8.4, Views adopted on 1 November 1991.

article 6, paragraph 4, was violated because Mr. Ashby was in the process of pursuing his right to seek commutation when he was executed.

State party's observations and counsel's comments thereon

5.1 In a submission dated 18 January 1995, the State party submits that its authorities "were not aware of the Special Rapporteur's request under rule 86 at the time of Mr. Ashby's execution. The representation of Trinidad and Tobago at Geneva transmitted a covering memorandum by fax at 16.34 (Geneva time) (10.34 Trinidad time) on 13 July 1994. This memorandum made reference to a note from the Centre for Human Rights. However, the note referred to was not attached to the memorandum. The entire application filed on behalf of Mr. Ashby, together with the Special Rapporteur's request under rule 86, was received by the Ministry of Foreign Affairs on 18 July 1994, that is, four days after Mr. Ashby's execution."

5.2 The State party notes that "unless the urgency of the request and Mr. Ashby's imminent execution were drawn by the Committee to the attention of the Permanent Representative, he would not in any way have been aware of the extreme urgency with which the request was to be transmitted to the relevant authorities in Trinidad and Tobago. It is not known whether the Committee in fact drew the urgency of the request to the attention of the Permanent Representative." Mr. Ashby was executed at 6.40 (Trinidad and Tobago time) on 14 July 1994.

5.3 The State party gives the following chronology of the events preceding Mr. Ashby's execution: "On 13 July 1994, a constitutional motion was filed on behalf of Mr. Ashby, challenging the constitutionality of the execution of the sentence of death upon him. Mr. Ashby's attorneys sought an order staying the execution until the determination of the motion. The High Court refused a stay of execution and held that Mr. Ashby had shown no arguable case to warrant the grant of a conservatory order. An appeal was filed on behalf of Mr. Ashby and another application was made to stay the execution pending the determination of the appeal. Attorneys for Mr. Ashby also sought to render ineffective the established procedure of the courts in Trinidad and Tobago by bypassing both the High Court and the Court of Appeal and approaching the Privy Council directly for a stay of execution, prior to the decisions of the local courts. There was confusion as to whether the State party's lawyer had given an undertaking to the Privy Council and as to whether the Privy Council had jurisdiction to grant a stay or a conservatory order prior to the decision of the local Court of Appeal."

5.4 The State party goes on to note that, so as “to preserve the status quo, the Privy Council granted a conservatory order in the event that the Court of Appeal refused a stay at 11.45 a.m (United Kingdom time) (6.45 a.m. Trinidad and Tobago time) on 14 July 1994, that is five minutes after Mr. Ashby’s execution. The trial attorney for Mr. Ashby indicated to the Court of Appeal at 6.52 (Trinidad and Tobago time) that he had received a document by fax from the Registrar of the Privy Council indicating that a conservatory order was granted in the event that the Court of Appeal refused a stay of execution. This order appeared to be conditional upon the Court of Appeal refusing to grant the stay of execution.”

5.5 According to the State party, “Mr. Ashby was executed pursuant to a warrant of execution signed by the President, at a time when there was no judicial or presidential order staying the execution. The Advisory Committee on the Power of Pardon considered Mr. Ashby’s case and did not recommend that he be pardoned.”

5.6 The State party “questions the competence of the Committee to examine the communication, since the communication was submitted at a time when Mr. Ashby had not exhausted his domestic remedies, and the communication would therefore have been inadmissible under rule 90”. It further disputes the Committee’s finding, in its public decision of 26 July 1994, that it had failed to comply with its obligations both under the Optional Protocol and under the Covenant: “Apart from the fact that the relevant authorities were unaware of the request, the State party is of the view that rule 86 does not permit the Committee to make the request which was made nor does it impose an obligation on the State party to comply with the request.”

6.1 In a submission dated 13 January 1995, counsel elaborates on the circumstances of the death of her client and submits new allegations relating to article 6 of the Covenant, as well as supplementary information on the claims initially filed under articles 7 and 14. She submits these observations at the express request of Desmond Ashby, the father of Glen Ashby, who has requested that the case of his son be further examined by the Committee.

6.2 Counsel provides the following chronology of events: “On 7 July 1994, through his attorneys in Trinidad and Tobago, Glen Ashby wrote to the Mercy Committee. Mr. Ashby requested the right to be heard before that body, stating that the Human Rights Committee was considering his communication and asking that the Mercy Committee await the outcome of the Human Rights Committee’s recommendations. On 12 July 1994, the Mercy Committee rejected Glen Ashby’s petition for mercy.” On the same day, a warrant for execution at 6 a.m. on 14 July 1994 was read to Mr. Ashby.

6.3 On 13 July 1994, Mr. Ashby’s lawyers in Trinidad filed a constitutional motion in the Trinidad and Tobago High Court, seeking a conservatory order staying the execution because of: (1) delay in carrying out execution (pursuant to the Privy Council’s judgment in *Pratt and Morgan*); (2) refusal of the Mercy Committee to consider the recommendations of the Human Rights Committee; (3) the unprecedented short interval between the reading of the warrant and the date of Mr. Ashby’s execution. The respondents to the motion were the Attorney-General, the Commissioner of Prisons and the Prison Marshal. On 13 July, at approximately 3.30 p.m. London time, at a special sitting of the Privy Council, London counsel for Mr. Ashby sought a stay of execution on his behalf. The representative of the Attorney-General of Trinidad and Tobago then informed the Privy Council that Mr. Ashby would not be executed until all possibilities of obtaining a stay of execution, including applications to the Court of Appeal in Trinidad and Tobago and the Privy Council, had been exhausted. This was recorded in writing and signed by counsel for Mr. Ashby and counsel for the Attorney-General.

6.4 Also on 13 July, following a hearing in the High Court of Justice, Trinidad and Tobago, a stay of execution was refused. An appeal against the refusal was lodged immediately and its hearing started before the Court of Appeal in Trinidad and Tobago at 12.30 a.m. Trinidad and Tobago time, on the morning of 14 July. In the Court of Appeal, counsel for the respondents said that, notwithstanding any assurances given in the Privy Council, Glen Ashby would be hanged at 7 a.m. Trinidad and Tobago time (noon London time) unless the Court of Appeal granted a conservatory order. The Court of Appeal then proposed to adjourn until 11 a.m. Trinidad and Tobago time in order to seek clarification of what had taken place before the Privy Council. Lawyers for Mr. Ashby asked for a conservatory order until 11 a.m., noting that the execution had been scheduled for 7 a.m. and that counsel for the respondents had made it clear that Mr. Ashby could not rely on the assurance given to the Privy Council. The Court expressed the view that, in the interim, Mr. Ashby could rely on the assurance given to the Privy Council, and declined to make a conservatory order. The Court instead decided to adjourn until 6 a.m. Lawyers for Mr. Ashby applied for an interim conservatory order until 6 a.m. but the Court denied this request. At no time did the lawyers for the State party indicate that the execution was scheduled to take place earlier than 7 a.m.

6.5 On 14 July, at 10.30 a.m. London time, at a special sitting of the Judicial Committee of the Privy Council, a document was signed by counsel for the

Attorney-General of Trinidad and Tobago in London and countersigned by counsel for Mr. Ashby, recording what had happened, and what had been said in the Privy Council on 13 July. That document, consisting of three handwritten pages, was immediately sent by the Registrar of the Privy Council by facsimile to the Court of Appeal and to counsel for both sides in Trinidad and Tobago. Mr. Ashby's lawyers in Trinidad and Tobago received the document before 6 a.m. The Privy Council then asked for further clarification of the Attorney-General's position. As no clarifications were forthcoming, the Privy Council ordered a stay of execution at approximately 11.30 a.m. London time, directing that the sentence of death should not be carried out. At approximately the same time, 6.20 a.m. in Trinidad and Tobago, the Court of Appeal reconvened. At this time, lawyers for Mr. Ashby informed the Court that, at that moment, the Privy Council was in session in London. Counsel for Mr. Ashby also gave the Court the three-page document received by fax.

6.6 At around 6.40 a.m., the lawyers for Mr. Ashby again applied to the Court of Appeal in Trinidad and Tobago for a conservatory order. The order was denied; the Court again emphasizing that Mr. Ashby could rely on the assurance given to the Privy Council. At this point, one of Mr. Ashby's lawyers appeared in Court with a handwritten transcript of an order of the Privy Council staying the execution. The order had been read to him over the telephone, having been granted at approximately 6.30 a.m. Trinidad and Tobago time (11.30 a.m. London time). Shortly thereafter, it was announced that Mr. Ashby had been hanged at 6.40 a.m.

Decision on admissibility

7.1 At its fifty-fourth session in July 1995, the Committee considered the admissibility of the communication.

7.2 As to the claims under article 14, paragraph 1, relating to the trial judge's alleged failure to direct the jury properly on the danger inherent in relying on the testimony of a potential accomplice to the crime, the Committee recalled that it is primarily for the courts of States parties to the Covenant, and not for the Committee, to review facts and evidence in a particular case. It is for the appellate courts of States parties to the Covenant to review the conduct of the trial and the judge's instructions to the jury, unless it can be ascertained that the evaluation of evidence was clearly arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality. The trial transcript in Mr. Ashby's case did not reveal that his trial before the Assizes Court of Port-of-Spain suffered from

such defects. Accordingly, this part of the communication was inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

7.3 As to the claims related to Mr. Ashby's ill-treatment after his arrest, the inadequate preparation of his defence, the inadequacy of his legal representation, the alleged involuntary nature of his confession, the undue delay in the adjudication of his appeal, and the conditions of his detention, the Committee considered them to have been sufficiently substantiated, for purposes of admissibility. These claims, which may raise issues under articles 7, 10, paragraph 1, and 14, paragraphs 3 (b), (c), (d) and (g) and 5, should accordingly be considered on their merits.

7.4 As to the claims under article 6, the Committee has noted the State party's contention that since the communication was submitted at a time when Mr. Ashby had not exhausted available domestic remedies, his complaint should be declared inadmissible under article 5, paragraph 2 (b), of the Optional Protocol. Counsel has argued that, as Mr. Ashby was executed unlawfully while he was pursuing judicial remedies, the State party is estopped from claiming that further remedies remained to be exhausted.

7.5 The Committee observed that it was to prevent "irreparable harm" to Mr. Ashby that the Committee's Special Rapporteur issued, on 13 July 1994, a request for a stay of execution pursuant to rule 86 of the rules of procedure; this request was intended to allow Mr. Ashby to complete pending judicial remedies and to enable the Committee to determine the question of the admissibility of Mr. Ashby's communication. In the circumstances of the case, the Committee concluded that it was not precluded, by article 5, para. 2 (b) of the Optional Protocol, from considering Mr. Ashby's complaint under article 6, and that it was not necessary for counsel first to exhaust available local remedies in respect of her claim that Mr. Ashby was arbitrarily deprived of his life before she could submit this claim to the Committee.

8. On 14 July 1995, the Human Rights Committee therefore decided that the communication was admissible inasmuch as it appeared to raise issues under articles 6, 7, 10, paragraph 1, and 14, paragraphs 3 (b), (c), (d) and (g) and 5, of the Covenant.

State party's observations on the merits and counsel's comments thereon

9.1 By submission of 3 June 1996, the State party submits explanations and statements with regard to the merits of the case.

9.2 With regard to the alleged ill-treatment of Mr. Ashby after his arrest, the State party refers to the trial transcript. It submits that these allegations were raised in relation to Mr. Ashby's confession and that Mr. Ashby had the opportunity to give evidence and was cross-examined on this issue. The court therefore dealt with the complaint impartially and these findings of the court should prevail.

9.3 With regard to the inadequate preparation of Mr. Ashby's defence, the State party submits that the legal aid attorney, who appeared for him, is a well-known and competent counsel, who practises at the Criminal Bar in Trinidad and Tobago. The State party attaches comments by the former trial attorney refuting Mr. Ashby's allegations to the submission.

9.4 The State party further reiterates that a fair hearing took place with regard to the involuntary confession. Both the court of appeal and the State Court of Trinidad and Tobago were aware of the complaint in respect to the confession and reviewed the facts and evidence in an impartial manner.

9.5 On the question of undue delay in adjudication of Mr. Ashby's appeal, the State party points to the circumstances prevailing in Trinidad and Tobago at that time. The State party argues that delays are caused by the practice in all murder trials of handwritten notes of evidence that would then need to be typed and verified by the respective trial judge on top of their busy court schedule. Furthermore, it has proven difficult to recruit lawyers suitable for filling vacancies in the judiciary, so that even the Constitution had to be changed to allow the appointment of retired judges. Still, there are not enough judges at the High Court to deal with the increasing number of appeals in criminal cases. The State party explains that from January 1994 to April 1995, after the decision of the Judicial Committee of the Privy Council in the case of *Pratt and Morgan*, the High Court almost exclusively heard appeals in murder cases, largely ignoring civil appeals.

9.6 The State party submits that the conditions of Mr. Ashby's detention are similar to those of all prisoners on death row. The State party points to an affidavit of the Commissioner of Prisons attached to the submission and describing the general conditions of prisoners on death row. The State party contends that the facts in *Pratt and Morgan* and the Zimbabwe judgement are so different from the facts in Mr. Ashby's case that statements in these provide little, if any, assistance.

9.7 With regard to the alleged violation of article 6 of the Covenant, the State party submits that the Committee should not proceed with this claim as proceedings were filed at the High Court of Trinidad and Tobago in relation to the execution of Mr. Ashby. Without prejudice to this submission, the

State party argues that Mr. Ashby had no right to be heard by the Mercy Committee pointing to precedence decision of the Judicial Committee of the Privy Council.⁴

9.8 The State party contests details of the facts as provided by counsel. In particular, the State party states that it was not correct that the Court of Appeals expressed the view that counsel should rely on the assurances given to the Privy Council that Mr. Ashby would not be executed. Instead, the Court expressed that it was not prepared to do anything until the Judicial Committee of the Privy Council resolved the dispute.

9.9 On 26 July 1996, counsel requested the Committee to suspend examination of the merits of the communication, as an effective domestic remedy could be regarded as having become available. Counsel submits that the father of Mr. Ashby brought a constitutional and civil action against the State party in relation to the circumstances of the execution. On 16 July 2001, counsel requested the Committee to resume consideration of the case and submitted that the lawyers in Trinidad and Tobago had been unable to resolve difficulties in meeting certain procedural requirements with regard to the constitutional and civil action.

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 the State party's statement that Mr. Ashby's lawyers in Trinidad and Tobago were pursuing, on behalf of his estate and his father, certain court actions in relation to the circumstances surrounding Mr. Ashby's execution. The Committee notes that the civil and constitutional procedures in question are not relevant for the consideration of the claims in the present case. However, the Committee respected counsel's request to suspend examination of the merits (see para. 9.9).

10.3 With regard to the alleged beatings and the circumstances leading to the signing of the confession, the Committee notes that Mr. Ashby did not give precise details of the incidents, identifying those he holds responsible. However, details of his allegations appear from the trial transcript submitted by the State party. The Committee observes that the allegations of Mr. Ashby were dealt with by the domestic court and that he had the opportunity to

⁴ *De Freitas v. Benny* (1975), 3 WLR 388; *Reckley v. Minister of Public Safety (No. 2)* (1996), 2 WLR 281 at 291G to 292G.

give evidence and was cross-examined. His allegations were also mentioned in the decision of the Court of Appeals. The Committee recalls 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 information before the Committee and the arguments advanced by the author do not show that the Courts' evaluation of the facts were manifestly arbitrary or amounted to a denial of justice.⁵ The Committee finds that there is not sufficient evidence to sustain a finding that the State party violated its obligations under article 7 of the Covenant.

10.4 With regard to the claim of inadequacy of legal representation during and in preparation of the trial and the appeals proceedings, the Committee refers to its jurisprudence that a State party cannot be held responsible for the conduct of a defense lawyer, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice.⁶ In the instant case, there is no reason for the Committee to believe that the trial attorney was not using other than his best judgment. It is apparent from the trial transcript that the lawyer cross-examined all witnesses. It is further apparent from the appeals decision that the grounds of appeal submitted by the lawyer were argued and fully taken into account by the High Court in its reasoning. The material before the Committee does not reveal that either counsel or the author ever complained to the trial judge that the time for preparation of the defence was inadequate. In the circumstances, the Committee finds that the facts before it do not reveal a violation of the Covenant in this respect.

10.5 Counsel also claims undue delay in the adjudication of Mr. Ashby's appeal. The Committee notes that the Port-of-Spain Assizes Court found Mr. Ashby guilty of murder and sentenced him to death on 20 July 1989 and that the Court of Appeals affirmed the sentence on 20 January 1994. Mr. Ashby remained in detention during this time. The Committee notes the State party's explanation concerning the delay in the appeals proceedings against Mr. Ashby. The Committee finds that the State party did not submit that the delay in proceedings was dependent on any action by the accused nor was the non-fulfillment of this responsibility excused by the complexity of the case. Inadequate staffing or general administrative

⁵ Terrence *Sahadeo v. Guyana*, Case No. 728/1996, Views adopted on 1 November 2001, para. 9.3.

⁶ See *inter alia*, the Committee's decision in communication No. 536/1993, *Perera v. Australia*, declared inadmissible on 28 March 1995.

backlog is not sufficient justification in this regard.⁷ In the absence of any satisfactory explanation from the State party, the Committee considers that the delay of some four and a half years was not compatible with the requirements of article 14, paragraphs 3 (c) and 5, of the Covenant.

10.6 As to the conditions of Mr. Ashby's detention (see para. 4.4), the Committee reaffirms its constant jurisprudence that detention on death row for a specific period does not violate, as such, article 7 of the Covenant in the absence of further compelling circumstances. The Committee concludes that article 7 has not been violated in the instant case.

10.7 As to the claim regarding Mr. Ashby's conditions of detention being in violation of article 10 of the Covenant, the Committee notes the absence of any further submission after the Committee's admissibility decision in substantiation of Mr. Ashby's claim. Therefore, the Committee is unable to find a violation of article 10 of the Covenant.

10.8 Counsel finally submits that Mr. Ashby was arbitrarily deprived of his life when the State party executed him in full knowledge of the fact that Mr. Ashby was still seeking remedies before the Courts of Appeal of the State party, the Judicial Committee of the Privy Council and the Human Rights Committee. The Committee finds that, in these circumstances (detailed above at 6.3 to 6.6), the State party committed a breach of its obligations under the Covenant. Moreover, having regard to the fact that the representative of the Attorney-General informed the Privy Council that Mr. Ashby would not be executed until all possibilities of obtaining a stay of execution had been exhausted, the carrying out of Mr. Ashby's sentence notwithstanding that assurance constituted a breach of the principle of good faith which governs all States in their discharge of obligations under international treaties, including the Covenant. The carrying out of the execution of Mr. Ashby when the execution of the sentence was still under challenge constituted a violation of article 6, paragraphs 1 and 2, of the Covenant.

10.9 With regard to Mr. Ashby's execution, the Committee recalls its jurisprudence that apart from any violation of the rights under the Covenant, the State party commits a serious breach of its obligations under the Optional Protocol if it engages in any acts which have the effect of preventing or frustrating consideration by the Committee of a communication alleging any violation of the Covenant, or to render examination by the Committee moot and the expression of its Views

⁷ Communication No. 390/1990, *Lubuto v. Zambia*, para. 7.3.

nugatory and futile.⁸ The behaviour of the State party represents a shocking failure to demonstrate even the most elementary good faith required of a State party to the Covenant and of the Optional Protocol.

10.10 The Committee finds that the State party breached its obligations under the Protocol, by proceeding to execute Mr. Ashby before the Committee could conclude its examination of the communication, and the formulation of its Views. It was particularly inexcusable for the State to do so after the Committee had acted under its Rule 86 requesting the State party to refrain from doing so. Flouting of the Rule, especially by irreversible measures such as the execution of the alleged victim, undermines the protection of Covenant rights through the Optional Protocol.

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 disclose violations of articles 6, paragraphs 1 and 2, and 14, paragraphs 3 (c) and 5, of the Covenant.

12. Under article 2, paragraph 3, of the Covenant, Mr. Ashby would have been entitled to an effective

⁸ See Communication No. 707/1996, *Patrick Taylor v. Jamaica*, para. 8.5.

remedy including, first and foremost, the preservation of his life. Adequate compensation must be granted to his surviving family.

13. On becoming a State Party to the Optional Protocol, Trinidad and Tobago recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Trinidad and Tobago's denunciation of the Optional Protocol became effective on 27 June 2000;⁹ in accordance with article 12 (2) of the Optional Protocol it continues to be subject to the application of the Optional Protocol. 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.

⁹ 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*, para. 5.1 et seq.; Communication No. 869/1999, *Piandiong et al. v. The Philippines*, para. 5.1 et seq.

Communication No. 688/1996

Submitted by: Carolina Teillier Arredondo

Alleged victim: María Sybila Arredondo

State party: Peru

Declared admissible: 23 October 1998 (sixty-fourth session)

Date of the adoption of Views: 27 July 2000 (sixty-ninth session)

Subject matter: Detention and unfair trial of terrorist suspect

Procedural issues: Same matter pending before another international instance – Non-exhaustion of domestic remedies – Domestic remedies unduly prolonged – Due authorisation of victim's representative

Substantive issues: Arbitrary detention – Impartiality of judiciary – Faceless judges – Right to be treated with humanity – Right to be tried without undue delays

Articles of the Covenant: 9, paragraphs 3 and 4; 10, paragraphs 1 and 3; and 14 paragraphs 1, 2, 3 (b), (c), (d), (e), 6 and 7

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

Finding: Violation.

1. The author of the communication is Ms. Carolina Teillier Arredondo, daughter of María Sybila Arredondo, a Chilean national and Peruvian citizen by marriage, a widow, and currently imprisoned at the High-Security Prison for Women in Chorrillos, Lima (Peru), where she is serving several sentences for terrorist activities. The author is submitting the communication on behalf of her mother, who for technical reasons is unable to do so herself. She claims that her mother is the victim of violations by Peru of the International Covenant on

Civil and Political Rights, more specifically of articles 7; 9, paragraphs 3 and 4; 10, paragraphs 1 and 3; and 14, paragraphs 1, 2, 3 (b), (c), (d) and (e), 6 and 7, of the Covenant.

The facts as submitted by the author

2.1 Ms. Arredondo had been arrested for the first time on 29 March 1985 (Case No. 1), in Lima. At that time she had been accused of terrorist activities, including possession and transport of explosives. She had been acquitted of the charges and released after two trials, for which judgments were passed in August 1986 and November 1987.

2.2 At the time of her re-arrest on 1 June 1990 (Case No. 2), Ms. Sybila Arredondo was working as a human rights advocate in Lima, specializing in aid to indigenous groups.¹ She was arrested in the building where she worked, together with several people connected with the terrorist organization Shining Path (*Sendero Luminoso*).

2.3 Ms. Arredondo on arrest was accused of being a member of *Socorro Popular*, an organization which is allegedly a support unit of *Sendero Luminoso*, and sentenced to 12 years' imprisonment by a "faceless court" (*tribunal sin rostro*) (File No. 05-93). In a legal opinion prepared by counsel for Ms. Arredondo's defence, it is stated that she was convicted on the basis of her mere physical presence in the building at the same time as several members of *Sendero Luminoso* were arrested by the police. None of the other co-defendants accused her, nor were there any witnesses against her, nor any expert evidence which incriminated her. Counsel accepts that at the time of her arrest Sybila Arredondo was carrying a false electoral card (*libreta electoral*). In her submission the author provides a legal opinion by a Lima counsel where he states: "with regard to the allegations against Mrs. Sybila, it is regrettable that nothing whatsoever has been done to clear her nor to refute the allegations against her. No evidence in her favour was put forward and what is more she did not respond to any questioning by the police or before the Judge, and this was the way other people involved had acted, which gave the impression that they all acted in a concerted manner since they allegedly belonged to the same organization".

2.4 In May 1992, while she was in detention, proceedings (Case No. 3) were initiated against Ms. Arredondo for her participation in events which had occurred in the first week of May 1992, when

¹ By letter of 21 March 1999, the author informed the Committee that, although her mother had indeed been working as a human rights advocate at the time of her arrests, she was working on the compilation of the second part of the complete works of José María Arguedas.

the police had intervened at Miguel Castro Castro prison. The prosecution asked for a life sentence, in accordance with the new Peruvian anti-terrorist legislation. She was acquitted in October 1995, also by a "faceless court" (File No. 237-93).

2.5 Case No. 1, for which she had been tried in 1985, was reopened in November 1995 before a "faceless court" and she was sentenced to 15 years' imprisonment on 21 July 1997 (File No. 98-93).

2.6 Appeals were lodged in all three proceedings, twice by Ms. Arredondo on being convicted and once by the prosecution. The author acknowledges that domestic remedies have not been exhausted with respect to the criminal proceedings against her mother. She considers, however, that the proceedings have been unduly prolonged.

The complaint

3.1 The author claims that prison conditions are appalling, and that the inmates are allowed out of their 3 x 3 meter cells only for half an hour each day. They are allowed no writing materials, unless expressly authorized. Ms. Arredondo has been given permission to write three letters in the last three years. Any books brought to the prisoners are strictly censored and there is no guarantee that the prisoners will receive them. They have no access whatsoever to magazines, newspapers, radio or television. Only inmates on the first floor of B wing are allowed to work in workshops; as Ms. Arredondo is on the second floor, she is only permitted to do very rudimentary jobs. The quality of the food is poor. Any food supplies or toiletries have to be handed to the authorities in transparent bags, and no tinned or bottled products are allowed into the prison. Any medication, including vitamins and food supplements, has to be prescribed by the prison doctor. Many inmates suffer from psychiatric problems or contagious diseases. All inmates are housed together and there are no facilities for the sick. When inmates are taken to hospital, they are handcuffed and fettered. Inmates are allowed only one visit a month from their closest relatives. Visits are limited to 20 to 30 minutes. It is claimed that, according to Peruvian legislation, inmates are entitled to one visit a week. There is also a provision for direct contact between the prisoners and their children or grandchildren once every three months. Children have to enter the prison on their own, and the persons accompanying them must leave them at the prison entrance. Ms. Arredondo is visited once a month by her daughter and once every three months by her 5-year-old grandson; however, due to police controls applied to adult visitors, the two elder grandchildren (17 and 18 years old) do not visit her since by so doing they would acquire a police record.

3.2 The author claims that the judicial proceedings (in courts of "faceless judges") brought against her mother are not in conformity with article 14 of the Covenant. She also complains of the dilatory nature of the proceedings.

3.3 It is stated that the same matter is not being examined under another procedure of international investigation or settlement.

State party's observations and comments on admissibility

4. In its submission of 12 August 1997, the State party challenges the admissibility of the case on the grounds that domestic remedies have not been exhausted and that the victim's daughter is not legally entitled to submit the case on behalf of her mother. On the basis of the copies of two newspaper articles published in Chile, following the visit by several Chilean parliamentarians to Ms. Arredondo, the State party further claims that the latter does not desire favourable treatment and that she is prepared to wait for her case to be resolved.

5.1 In her comments on the State party's submissions, the author of the communication informs the Committee that she is in fact acting on behalf of and with the knowledge of her mother, because the latter is prevented from doing so herself. She again refers to the restrictions imposed on her mother in prison regarding visits, contact with the outside world, writing materials, etc.

5.2 With respect to the State party's claim that domestic remedies have not been exhausted, the author reiterates that her mother was arrested in 1985, accused of terrorism, tried and twice acquitted. After being re-arrested in 1990, the 1985 trial was reopened in 1995. In 1997, she was sentenced to 15 years. An appeal before the Supreme Court is still pending. The author therefore requests the Committee to consider the communication admissible on the ground of undue delay in domestic remedies caused by the State party. Ms. Arredondo was also sentenced to 12 years' imprisonment for belonging to *Socorro Popular*, a sentence which she is currently serving. She was acquitted of the accusation of taking part in the events at Miguel Castro Castro prison in May 1992, but an appeal was lodged against her acquittal by the Public Prosecutor and the matter is still pending.

5.3 The author reiterates that the treatment received by her mother in prison constitutes violations of articles 7 and 10 of the Covenant. By a letter of 28 September 1998, which was transmitted to the State party on 1 October 1998, Ms. Teillier also reiterates and gives more information about the circumstances surrounding the arrest of her mother, who was detained without a judicial warrant in

violation of article 9 of the Covenant, and states that the trials which she has undergone have not complied with the requirements and guarantees laid down in article 14 of the Covenant.

The Committee's decision on admissibility

6.1 At its sixty-fourth session in October 1998, the Committee examined 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 On the question of the requirement concerning the exhaustion of domestic remedies, the Committee noted the State party's challenge of the admissibility of the communication on the ground of failure to exhaust domestic remedies. The Committee referred to its case law, in which it had repeatedly found that, for the purposes of article 5, paragraph 2 (b), of the Optional Protocol, domestic remedies must be effective and available, and must not be unduly prolonged. The Committee considered that, in the circumstances of the case, the remedies had been unduly prolonged. Ms. Arredondo was arrested in 1990 and tried for several offences, one of which dated back to 1985, and for which she had already twice been acquitted. By 28 September 1998, the case had still not been resolved. The Committee accordingly found that article 5, paragraph 2 (b), did not preclude consideration of the complaint.

6.3 With regard to the author's claims that the conditions in which her mother is detained constitute inhuman and degrading treatment in violation of articles 7 and 10 of the Covenant, the Committee found that these claims had been sufficiently substantiated for the purposes of admissibility and should be considered on their merits.

6.4 The author stated that her mother's arrests had not been effected in accordance with domestic legislation and were therefore in violation of article 9 of the Covenant. The Committee considered that this claim should be examined on its merits as it might raise issues under article 9 of the Covenant.

6.5 With regard to the claims that the author's mother had undergone trials which did not comply with the guarantees laid down in article 14 of the Covenant, the Committee noted that she had been tried by a special military court. It further noted the State party's position to the effect that the criminal proceedings against her had been conducted, and were continuing to be conducted, in accordance with the procedures established by the anti-terrorist legislation in force in Peru. However, the question is whether these proceedings were in conformity with

article 14 of the Covenant. This point should be considered on its merits.

State party's observations and the author's comments

7.1 In its submission dated 4 August 1999, the State party requested a review of admissibility since it considers that the victim's daughter lacks competence to submit the case on her mother's behalf; it takes the view that the victim could herself have communicated with the Committee without difficulties of any kind. Alternatively she could, in its opinion, have given her daughter express authorization or have sent such authorization through her lawyer or her son, who is resident in Chile and has visited his mother in prison. In its submission, the State party says that Ms. Arredondo's son has never indicated that his mother wished to submit a case to any international body.

7.2 The State party maintains that the author's submissions are the same as those presented to the Working Group on Arbitrary Detention on 29 February 1996 and the fact that the Working Group has not issued an opinion means that it did not find the detention to have been arbitrary. The State party accordingly concludes that there has been no arbitrary action. It requests the Committee, in conformity with the *non bis in idem* principle, to declare the communication inadmissible.

7.3 The State party further submits that, if the Committee, despite the submissions presented with the aim of declaring the case inadmissible, considers that it should continue with the case, it could only do so in respect of the proceedings still under way against Ms. Arredondo. In these proceedings a decision has still to be reached on an appeal for annulment and a delay in the administration of justice would have to be admitted; the question arising would be whether or not the delay has been justified. In the State party's view, the causes relate to the redress sought by communication No. 688/1996 and to the principal objective of obtaining a decision by the Committee recommending the Peruvian State to release Ms. Arredondo on the ground that in the proceedings against her in the internal courts the guarantees of due process have not been observed. In this respect, the State party recalls that three judicial proceedings were initiated against Ms. Arredondo: in one she was acquitted at final instance, in the second a decision on an appeal for annulment (of the 15-year prison sentence) is pending, and in the third she was sentenced to 12 years' imprisonment. She is currently serving this sentence in the special high-security prison for women in Chorrillos. In the State party's view, the aim of the present communication is to obtain a decision annulling the pending proceedings against her on the ground of "unjustified" delay in the administration of justice and to secure her subsequent

release; the Peruvian State would thus have to annul the pending proceedings and initiate other proceedings, or declare her case closed. The State party points out that, if this course were followed, there would be no change in Ms. Arredondo's situation since, as has been stated, she is serving a 12 year sentence. If the third judgment were confirmed, this would be combined with the current sentence and Ms. Arredondo would remain in prison until she completed the 15-year sentence requested in the second of the proceedings against her.

7.4 The State party submits that the trial in which Ms. Arredondo was sentenced conformed to the guarantees of due process and, at the national level, there have been no complaints, denunciations or appeals on the ground of alleged irregularities in the conduct of the trial. In addition, it has not been proved in this international body that there have been violations of guarantees in the administration of justice.

7.5 As regards the claims concerning Ms. Arredondo's conditions of detention, the State party maintains that, according to the information provided by the National Prison Institute (INPE), the conditions complained of are those which were established when the problem of terrorism was at its height in Peru. Now that the situation has changed, it has been considered advisable to ease the prison regime for persons convicted of terrorist offences, and so Supreme Decree No. 005-97-JUS, of which Ms. Arredondo is a beneficiary, has entered into force. Since entering the Chorrillos high-security prison for women and in accordance with the assessments of the prison board, Ms. Arredondo has been held in maximum-security conditions. She is at present sharing a cell for two persons in B wing.

7.6 As to the number of family visits Ms. Arredondo has received, the State party points out that, during 1998 and up to the present time, she has been visited by her daughter and her grandson. She has also been visited by her mother and by her son by special arrangement, and has received a Christmas visit from her grandchildren living in Chile.

7.7 The special maximum-security regime (first stage) in force in B wing comprises the benefits provided for in the above-mentioned law and consists of "two hours' exercise, a one-hour visit in a visiting room on Saturdays for women and on Sundays for men, manual or craft work in their cells". The State party also asserts that, under this regime, those prisoners who show signs of progress in their rehabilitation treatment have access to the workshops supervised by INPE personnel.

7.8 The State party maintains that Ms. Arredondo is currently writing a book about her husband, and this invalidates the claim that she is being deprived

of access to writing materials. Every day the personnel responsible for the security of women prisoners hand her pen and paper. In addition, the State party maintains that women prisoners are not prevented from watching television; they are even permitted to see videotaped films once a fortnight, and are allowed to read books and periodicals, which are checked for reasons of national security to ensure that they do not contain material relating to subversive topics. As to leisure activities, they attend sports events and dances and listen to music.

7.9 As to the claims relating to the quality of the food given to women prisoners, the food contains the necessary calories and proteins and is prepared by the prisoners themselves, who take it in turns to do this in groups. Their work is assessed and a prize is awarded as an incentive to the best group.

7.10 Concerning the claim that prisoners are not allowed to receive medicines without the authorization of the prison doctor, the State party maintains that this requirement is prompted by security considerations and is aimed at preventing poisoning by out-of-date or inappropriate medicines, medicines taken without medical prescription or consumed in excessive quantities, or medicines which might in any other way endanger prisoners' health.

7.11 As to the claims relating to the treatment received by persons suffering from psychiatric problems, the State party says that it has a specialist who permanently evaluates the condition of women prisoners in this category and that they live in separate sectors in the various prison wings. They also receive work-therapy care in the open air in the countryside. Concerning the claims relating to contagious diseases, the State party says that there are few such cases and when they do occur, the necessary precautions are taken. On the question of the way in which prisoners are taken to and from hospital, transfers are effected in accordance with the directives of the Peruvian National Police (PNP). These directives are suited to the type of offence committed and are aimed at preventing escapes from treatment areas that might endanger other patients, since medical care is provided in public-sector hospitals.

7.12 Lastly, on the question of visits by children, according to the State party children are able to have direct contact with their relatives every Friday. On entering the prison, the children are taken by female PNP personnel to the place where they are to meet their relatives, who will be waiting for them, so as to prevent them from being frightened or mistakenly directed to other sectors. Adult relatives have an identification card in order to enter the prison; this establishes their relationship with the prisoner.

8.1 In her communication of 4 November 1999, Ms. Arredondo's daughter sent the Committee a certified photocopy of a general power of attorney

and a handwritten letter signed by Ms. Arredondo supporting the proceedings initiated and pursued by her daughter on her behalf.

8.2 The author states that, although her mother does receive family visits, these take place in a visiting room with a double metal mesh between the prisoner and her relatives. There is no personal contact of any kind or any possibility of handing over any object. The relatives can only receive from the prisoners - after a mandatory examination by the guards - returned food receptacles and craft products. In addition, the relatives have to undergo a search before they are allowed to leave the prison. Visits by lawyers take place in the same conditions as visits by relatives.

8.3 As to the possibility of sending correspondence outside the prison, Ms. Teillier explains the procedure followed for this purpose. Once a week the women prisoners have to deposit any letter leaving the prison in a mail box in their wing. The letters are removed and checked by prison personnel. All the letters are read and not all of them survive this level of censorship. By way of example she states that, some weeks before, her mother had told her that she had deposited an envelope addressed to Ms. Teillier with the copy of the request concerning a health problem which her mother had sent to the prison governor. This letter never reached Ms. Teillier. Once the letters have been checked, on visiting days they are deposited in a box near the prison exit. The visitors collect the letters addressed to them and indeed any others, since nothing is done to ensure that they reach the correct addressee.

8.4 The author states that the complaint submitted on her mother's behalf relates specifically to the harsh prison conditions. She raises the question whether the representatives of the State party really believe that Ms. Arredondo can write and confidently send off her communications on this subject. She also says, as the State party itself has done, that all persons found guilty of terrorist offences, including Ms. Arredondo, are subject to continuing assessment by the prison board set up by the prison authorities. This board can easily consider complaints to be tantamount to "bad behaviour".

8.5 As to the second question regarding consideration of the case by more than one international body, Ms. Teillier states that, although the Working Group on Arbitrary Detention established by the United Nations Commission on Human Rights may indeed have transmitted to the Peruvian State a number of complaints including one concerning Ms. Arredondo (widow), she is unaware of such a communication. Concerning the logical assumption mentioned in section 12 of the State party's communication to the effect that the Working Group "did not consider the detention of

Ms. Arredondo to be arbitrary", she believes this interpretation to be far-fetched. The author suggests that it could be more accurately assumed that note was taken of the "dual consideration" and consequently any further action was suspended.

8.6 As to the "ultimate aim", the author states that this is not necessarily to "reach a decision annulling the pending proceedings", i.e. the proceedings which began 14 years ago in 1985, but rather to ensure that the Supreme Court takes a decision. She reiterates that if the Supreme Court confirmed the 15-year sentence handed down in July 1997 (two years and three months before), her mother would be eligible for the prison benefits corresponding to the legislation of that time. These benefits would allow her to leave prison since the 12-year sentence would be subsumed under the longer sentence. And if this decision was not reached in the short term, it might happen that, having completed the 12-year sentence, she would be forbidden to leave prison or be arrested immediately and again subjected to the interminable trial proceedings.

8.7 On the question of the trial that led to a 12-year prison sentence, the author maintains that it is not true that no complaints, denunciations or appeals have been lodged at the national level, as the State party claims. The annulment appeal was lodged with the competent organs but was rejected. The fact of the matter is that there are no more organs to be appealed to. In this connection, the author recalls that this trial also took place in accordance with the 1992 legislation, under the faceless judges system.

8.8 As to conditions of detention, it is true that in Chorrillos they are not so harsh as they had been at the Callao Naval Base, Yanamayo and Challapalca, but they still constitute a punishment regime. In this connection she repeats that although she is able to visit her mother for one hour once a week on Saturdays, the visit takes place in a room where no direct contact is possible and they are unable to speak freely. When she visits her mother, she takes along some food to make up for the deficiencies in the prisoners' daily diet, due to the low budget allocation by the State. Since the appointment of the new prison governor, who is a National Police colonel, the introduction of food has again been restricted and a list of permitted products has been published.

8.9 On the question of the State party's statement that there are few cases of contagious diseases, the author says that in B wing alone there have been 15 cases of tuberculosis among approximately 100 prisoners. Three of these cases occurred during the second half of 1999. As an example of the difficulties existing with regard to health matters, the author explains that for several months her mother has been awaiting authorization from the prison governor to go to the hospital for x-rays on her knee.

These x-rays have been requested by the prison orthopaedic physician and by the INPE specialist (18 July 1999). Subsequently two medical committees have held meetings to authorize her mother's hospital visit, but by 4 November 1999 the visit had still not taken place.

8.10 The author states that, although the matter does not directly affect her mother, she cannot but dispute the information provided by the State party concerning the conditions in which women prisoners with psychiatric problems are held, since they are not separated from the rest of the prison population. Moreover, they receive no work-therapy care in the countryside. She regrets that the Committee has been misinformed on this point.

8.11 As to the claim that prisoners are not prevented from watching television and that they are allowed to watch films every two weeks, this is simply not true. They are allowed to watch films only when these are scheduled by the prison authorities. They are not allowed to watch the news or any other programme broadcast by local channels. Furthermore, they are still not allowed to listen to the radio or to read current periodicals or magazines. The introduction of books into the prison also continues to be restricted. As for the statement that there is a continuing policy, based on security considerations, of preventing prisoners from reading material that might contain subversive topics, the author wonders what is subversive about the official gazette *El Peruano*, which her mother recently was not allowed to receive.

8.12 Lastly, concerning visits by children to B wing, these take place on Sunday mornings but only occasionally are the children escorted by women warders. In any event, they enter the prison alone and are searched alone. In the author's opinion, this certainly has incalculable consequences for the children.

Consideration of the merits

9. 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.

10.1 As regards the State party's claim concerning the lack of competence of Ms. Arredondo's daughter to take action before the Human Rights Committee, the Committee notes that it is in possession of adequate written authorization provided by Ms. Arredondo to her daughter (see para. 8.1 above) and considers that this is sufficient to enable her to act on her mother's behalf. It also considers that Ms. Teillier is acting after full discussion with her mother.

10.2 The Committee takes note of the claim of inadmissibility made by the State party on the grounds that the present communication is before another international procedure of investigation or settlement body, since the Working Group on Arbitrary Detention of the United Nations Commission on Human Rights has, at Ms. Arredondo's request, taken up the question. The Committee decides to reach no decision on whether this matter falls within the scope of article 2, paragraph 5 (a), of the Optional Protocol, since it has received information from the Working Group that it realized the existence of the present communication and has referred the case to the Committee without any expression of its views.²

10.3 On the question of whether Ms. Arredondo's arrest was carried out in conformity with the requirements of article 9, paragraphs 1 and 3, of the Covenant, in other words, whether she was arrested on the basis of an arrest warrant, and whether or not, after being taken to police premises, she was promptly brought before a judge, the Committee regrets that the State party has not replied specifically to the allegation made, but has, in a general fashion, said that the detention and trial of Ms. Arredondo were conducted in conformity with Peruvian laws. The Committee considers that, since the State party has not replied to these allegations, due weight must be given to them and it must be assumed that the events occurred as described by the author. Consequently, the Committee finds a violation of article 9, paragraphs 1 and 3, of the Covenant.

10.4 As to the author's submissions concerning her mother's conditions of detention, contained in paragraph 3.1 and reiterated in paragraphs 8.3, 8.4 and 8.8-8.12 above, the Committee takes note of the State party's acceptance that the description of these conditions is accurate, and that they are justified by the seriousness of the offences committed by the prisoners and by the serious problem of terrorism which the State party experienced. The Committee furthermore notes Supreme Decree No. 005-97-JUS, as referred to above. It considers that the conditions of Ms. Arredondo's detention, especially in the earlier years and to a lesser extent since the Supreme Decree's entry into force, are excessively restrictive. Even though it recognizes the need for security restrictions, these always have to be justified. In the present case, the State party has failed to provide any justification for the conditions described in Ms. Teillier's submission. The Committee subsequently finds that the conditions of detention violate article 10, paragraph 1, of the Covenant.

² See Opinion No. 4/2000, adopted on 16 May 2000.

10.5 As to the author's complaint that her mother did not have a trial affording the guarantees of article 14 of the Covenant because she was tried by a court consisting of faceless judges, it has taken note of the book "*Terrorismo: Tratamiento juridico, Instituto de Defensa legal, Lima, 1995, pp. 288-290*" on which the author has relied to describe the process of trial before faceless judge courts.³ It takes note of the State party's statement that Ms. Arredondo's three trials were conducted in accordance with the national legislation in force at that time. It reiterates its jurisprudence to the effect that the trials conducted by the faceless courts in Peru were contrary to article 14.1 of the Covenant since the accused did not enjoy the guarantees provided by that article.⁴

10.6 As for the delays in the legal process, in violation of article 14, paragraph 3 (c), the Committee notes that the State party acknowledges a delay and that, despite instructions said to have been given to decide the case, the appeal on the reopened case remains unresolved. Given that the reopening, by the prosecution in 1995 of Ms. Arredondo's second acquittal of 1987, involves such unacceptable delays, the Committee finds that this constitutes a violation of article 14, paragraph 3 (c), 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 constitute violations of article 10, paragraph 1, of the Covenant as regards Ms. Arredondo's conditions of detention; of article 9 as regards the manner of her arrest; of article 14, paragraph 1, as regards her trial by a court made up of "faceless judges"; of article 14, paragraph 3 (c), with respect to the delay in the completion of the proceedings initiated in 1985.

12. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Ms. Arredondo with an effective remedy. The Committee considers that Ms. Arredondo should be released and adequately compensated. The State party is under an obligation to ensure that similar violations do not occur in the future.

³ "The anonymity of the magistrates, as pointed out by the Goldman Commission, deprives an accused of the basic legal guarantees: an accused does not know who is judging him or whether the person is competent to do so (for example, if they have the necessary legal training and experience); an accused is deprived of the right to be tried by an impartial tribunal since he cannot recuse the judge [Report of the International Commission of Jurist on the administration of Justice in Peru, Instituto de Defensa Legal, Lima, 1994, p.67]".

⁴ See Views No. 577/1994, *Victor Polay Campos v. Peru*, adopted on 6 November 1997, para. 8 (8).

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 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.

Communication No. 701/1996

Submitted by: Cesario Gómez Vázquez [represented by counsel]

Alleged victim: The author

State party: Spain

Declared admissible: 23 October 1997 (sixty-first session)

Date of the adoption of Views: 20 July 2000 (sixty-ninth session)

Subject matter: Adequacy and scope of State party's criminal appeal proceedings

Procedural issues: Exhaustion of domestic remedies – Status as “victim” – Abuse of the right of submission

Substantive issues: Right to have one's sentence and conviction reviewed by a higher tribunal according to law

Articles of the Covenant: 14, paragraph 5, and 26

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

Finding: Violation.

1. The author of the communication is Cesario Gómez Vázquez, a Spanish citizen born in 1966 in Murcia, formerly employed as a physical education teacher. He is currently living in hiding somewhere in Spain. He claims to be the victim of violations by Spain of articles 14, paragraph 5, and 26 of the International Covenant on Civil and Political Rights. The author is represented by counsel, Mr. José Luis Mazón Costa.

The facts as submitted by the author

2.1 On 22 February 1992, the author was sentenced to 12 years and one day by the Provincial Court (*Audiencia Provincial*) of Toledo for the attempted murder (*asesinato en grado de frustración*) of one Antonio Rodríguez Cottin. The Supreme Court (*Tribunal Supremo*) rejected his appeal on 9 November 1993.

2.2 At around 4 a.m. on 10 January 1988, Antonio Rodríguez Cottin was stabbed five times in a car lot outside a discotheque in Mocejón, Toledo. The wounds required 336 days' hospitalization and a total of 635 days for complete recovery.

2.3 The case for the prosecution was that the author, who had been working as doorman at the discotheque, saw the victim drive into the car lot and went out to talk to him, asking him to get out of the car. While they argued, an unidentified car came up to them, a person got out asking for a light and, when Mr. Rodríguez turned around, the author allegedly stabbed him in the back and neck.

2.4 The author has consistently denied this description of the events and maintains that, on 10 January 1988, he left the discotheque between 2 and 2.30 a.m., going home to Mostoles, Madrid, as he was feeling ill. He was taken home by Benjamin Sanz Carranza, Manuela Vidal Ramírez and another woman. When he arrived at his home at 3.15 a.m., he asked his flatmate for an aspirin and remained in bed all the following day. The author knew the victim, who was a frequent visitor to the discotheque, and considered him to be a violent person. The author states that, on 5 December 1987, Mr. Rodríguez had had an argument with Julio Pérez, the owner of the discotheque, and drawn a knife on him. During the trial, the author claimed that the assault on Mr. Rodríguez on 10 January 1988 was a settling of accounts between the victim and someone in the underworld of which he is a part.

2.5 During the trial, both the author and the prosecutor called witnesses to corroborate their respective versions.¹

2.6 Counsel states that the author did not file an appeal (*recurso de amparo*) because, as the right to an appeal is not covered by articles 14-38 and, in particular, article 24, paragraph 2, of the Spanish Constitution, the appeal would simply have been

¹ The author's witnesses at the trial were his girlfriend and his flatmate, who clearly had close ties with him, whereas the prosecution witnesses knew him only by sight.

rejected. He later submitted an additional allegation to the effect that the Constitutional Court's repeated rejection of *amparo* applications made them an ineffective remedy. Consequently, he considers the requirement of exhaustion of domestic remedies to have been duly met.

The complaint

3.1 The author's complaint concerns primarily the right to an effective appeal against conviction and sentence. He argues that the Spanish Criminal Procedure Act (*Ley de Enjuiciamiento Criminal*) violates articles 14, paragraph 5, and 26 of the Covenant because those charged with the most serious crimes have their cases heard by a single judge (*Juzgado de Instrucción*), who conducts all the pertinent investigations and, once he considers the case ready for the hearing, refers it to the Provincial Court (*Audiencia Provincial*), where a panel of three judges is in charge of proceedings and hands down the sentence. Their decision is subject to judicial review proceedings only on very limited legal grounds. There is no possibility of a re-evaluation of the evidence by the Court of Cassation, as all factual determinations by the lower court are final. By contrast, those convicted of less serious crimes for which sentences of less than six years' imprisonment have been imposed have their cases investigated by a single judge (*Juzgado de Instrucción*) who, when the case is ready for the hearing, refers it to a single judge ad quo (*Juzgado de lo Penal*), whose decision may be appealed before the Provincial Court (*Audiencia Provincial*), thus ensuring an effective review not only of the application of the law, but also of the facts.

3.2 Counsel claims that, as the Supreme Court does not re-evaluate evidence, the above constitutes a violation of the right to have one's conviction and sentence reviewed by a higher court according to law. In this context, the author's lawyer cites the decision of 9 November 1993 rejecting the application for judicial review filed on behalf of Mr. Cesario Gómez Vázquez, the first ground of which states:

"since it must also be pointed out that such evidence has to be evaluated exclusively by the court *ad quo* in accordance with the provisions of article 741 of the Criminal Procedure Act."

"The appellant therefore recognizes that there is a great deal of evidence for the prosecution and his arguments consist only in interpreting this evidence according to his own way of thinking - and this approach is inadmissible when the principle of the presumption of innocence is invoked because, if it were allowed, it would change the nature of the judicial review and turn it into an appeal".

The second ground states:

"[in this case] of the principle *in 'dubio pro reo'*, the result is also rejection because the complainant forgets that this principle cannot be the subject of a review for the obvious reason that that would mean re-evaluating the evidence and such an evaluation is, as we have stated and repeated, not admissible."

3.3 Counsel further claims that the existence of different recourse procedures, depending on the gravity of the offence, implies a discriminatory treatment of persons convicted of serious offences, constituting a violation of article 26 of the Covenant.

3.4 The author states that the communication has not been submitted to another procedure of international investigation or settlement.

State party's observations and comments on admissibility and author's comments

4.1 In its submission under rule 91 of the Committee's rules of procedure, the State party requested the Committee to declare the communication inadmissible for failure to meet the requirement of exhaustion of domestic remedies, as the author had not lodged an appeal with the Constitutional Court, and referred in this connection to the position of the European Commission of Human Rights, which has systematically denied admissibility in cases involving Spain when an *amparo* application has not been filed. The State party claimed that the author's defence was inconsistent, as counsel had stated in a first submission that he had not filed an application for *amparo* because the right to an appeal is not protected by the Spanish Constitution and had subsequently corrected that allegation in a second submission in which he had stated that his failure to file an application for *amparo* had been due to the Constitutional Court's repeated rejection of such appeals. The State party also maintained that the communication was inadmissible for failure to exhaust domestic remedies, since this question had never been brought before the Spanish courts.

4.2 The State party further claimed that the case was inadmissible because the author had abused his right to submit a communication, as his whereabouts were unknown and he had placed himself beyond the reach of the law. Lastly, the State party expressed doubts regarding counsel's right to represent the author, as counsel did not have sufficient authority and had not sought the permission of the previous defence counsel.

5.1 In his reply, counsel admitted that he had claimed in his initial submission that no effective remedy was available before the Constitutional Court. When he realized his error, he had made an additional submission, however, claiming that the

said remedy was ineffective because the Constitutional Court had repeatedly rejected it (Constitutional Court judgement attached), and he referred to the Committee's case law on this point.²

5.2. Counsel admitted that the author's whereabouts were unknown, but claimed that this had not been an obstacle in other cases which the Committee had accepted. With regard to the doubts about his right to represent the author, counsel regretted that the State party did not clearly explain the real reasons, if any, for such doubts.

Committee's admissibility decision

6.1 At its sixty-first session, of October 1997, the Committee considered the admissibility of the communication. It ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter had not been examined under another procedure of international investigation or settlement.

6.2 The Committee noted that the State party had challenged the communication on the ground of failure to exhaust domestic remedies. The Committee referred to its case law, in which it had repeatedly found that, for the purposes of article 5, paragraph 2 (b), of the Optional Protocol, domestic remedies must be both effective and available. With regard to the State party's argument that the author should have filed an appeal for *amparo* before the Constitutional Court, the Committee noted that the Constitutional Court had repeatedly rejected similar applications for *amparo*. The Committee considered that, in the circumstances of the case, a remedy which had no chance of being successful could not count as such and did not need to be exhausted for the purposes of the Optional Protocol. The Committee accordingly finds that article 5, paragraph 2 (a), of the Optional Protocol is not an obstacle to consideration of the complaint, which might raise issues under article 14, paragraph 5, and article 26 of the Covenant.

Comments of the State party on the merits and author's response

7.1 In its submission dated 31 May 1999, the State party reiterates its view with regard to the inadmissibility of the complaint because the issues which are now being brought before the Committee were not raised at the domestic level. It also believes that the domestic appeals. From information submitted by the State party, this refers only to the application for *amparo*, even though the plural form

² Communication No. 445/1991, *Champagnie, Palmer and Chisholm v. Jamaica*, Views adopted on 18 July 1994.

"appeals" is used³ in respect of the allegations of violation of article 14, paragraph 5, and article 26, of the Covenant were not lodged on time and in the correct form, resulting in their dismissal.

7.2 Counsel for the State maintains that the allegations made to the Committee are abstract and aim to amend the law in general; they do not relate specifically to Mr. Gómez Vásquez, and therefore he does not have the status of a victim. Consequently, since there is no victim in the sense of article 1 of the Optional Protocol, the State party considers that the case should be declared inadmissible.

7.3 Counsel for the State also maintains that, since Mr. Gómez Vásquez has placed himself beyond the reach of the law and is a fugitive from justice, the case should be dismissed, since the "clean hands" principle has been violated. Counsel for the State considers that, since the complaint was not brought before the national judicial bodies, the author does not have the capacity to be the victim of a violation of a human right, particularly since not only was no violation invoked at the domestic level, but also the facts established by the judiciary were explicitly accepted.

7.4 Counsel for the State affirms that it was only after the appointment of a new lawyer that the author requested a review of all the judicial proceedings. He also contends that the appointment of the lawyer to appear at the international level was defective in terms of form. According to counsel for the State, when appointing a lawyer at the domestic level, the author made the appointment through a public document, while at the international level he did so by means of a mere paper.

7.5 As to the allegation of violation of article 26, the State party maintains its view already expressed at the stage of admissibility that two separate types of crimes are being compared, on the one hand the most serious crimes and, on the other hand, less serious crimes. In this respect the State party believes that a differentiation in the treatment of the two different types of crimes cannot possibly constitute discrimination.

7.6 As to the question of violation of article 14, paragraph 5, in the author's case, the State party explains that not only did the author's lawyer not raise the question of the lack of a full appeal or of a complete review of the proceedings when applying for a review, but he also explicitly recognized in his submission to the Supreme Court that: "In claiming a constitutional presumption of innocence, we do not aim to subvert or distort the purposes of an appeal,

³ From information submitted by the State party, this refers only to the application for *amparo*, even though the plural form "appeals" is used.

and convert it into a second judicial instance". Moreover, not only did the author not file an appeal for *amparo* with the Constitutional Court after the rejection of the appeal on 9 December 1993, but also, and instead, on 30 December he applied to the Ministry of Justice for a pardon, and as a first plea affirmed: "The conduct of the undersigned has always been irreproachable, with the exception of the crime committed, which was an isolated incident in his life and for which he has given ample demonstrations of remorse". Also, in a submission to the court of Toledo, of 14 January 1994, the author affirms: "The crime for which he is being sentenced is an isolated incident in his life, and at all times he has shown a fervent and sincere desire to be reintegrated into society". The State party therefore considers that it cannot be argued that there was a violation of the Covenant, since the author has accepted the facts as established by the Spanish courts.

8.1 Counsel, in his response to the State party's allegations dated 8 November 1998, rejects the State party's contentions that the communication is abstract and the author does not have the status of a victim, since the author was sentenced on the basis of contradictory evidence and did not have an opportunity to request a review, or a re-evaluation of the evidence in a higher court, which took up only the legal aspects of the sentence.

8.2 Counsel rejects the State party's claim that he is not authorized to represent the author since he sought the permission of the previous representative of Mr. Gómez Vázquez before beginning to act in his defence at the international level; he also contends that neither the Covenant, nor its Optional Protocol, nor the Committee's case law requires that representation by counsel should be effected by means of a document granted by a public authenticating officer, so that he believes that the State party's allegation is completely groundless.

8.3 As to the allegation by counsel for the State that article 26 has not been at issue because there are two different categories of crimes and therefore they do not have to be treated in the same way under the law, counsel reiterates that the claim is not based on differential treatment of two different types of crimes, but on the fact that in the Spanish legal system, persons convicted of the most serious crimes do not have the possibility of a complete review of their convictions and sentences, in violation of article 14, paragraph 5, of the Covenant.

8.4 With regard to the alleged renunciation of his rights under article 14, paragraph 5, by drafting the appeal document subject to the limitations laid down under the Criminal Procedure Act, counsel explains that in the Spanish system of judicial appeals, acceptance of the legal limits of appeals made before a court is a condition *sine qua non* for the appeal to

be accepted for processing and subsequently considered. This cannot possibly be interpreted as a renunciation of the right to a sentence being reviewed in its entirety. The author's counsel maintains that the author's lawyer in the domestic court applied only for the partial review allowed under Spanish law, and it is precisely for this reason that there is a violation of article 14, paragraph 5; in this respect, he cites the Committee's case law.⁴

8.5 Counsel explains that the Committee is not being asked to evaluate the facts and evidence established in the case, a matter which in any case is beyond its jurisdiction, as the State affirms, but merely to ascertain whether the review of the sentence which convicted the author met the requirements of article 14, paragraph 5 of the Covenant. Counsel maintains that the case law submitted by the State party, 29 verdicts of the Supreme Court, have no connection with the denial of the author's right of appeal. Moreover, a careful examination of the texts of the verdicts shows that they lead to conclusions which are the opposite of those claimed by the State, since most of them recognize that criminal appeals are subject to severe limitations as to the possibility of reviewing the evidence brought before the court of the first instance. The criminal section of the Supreme Court did not review the evaluation of the evidence carried out by the court of the first instance in any of these cases unless there was some violation of the law or there was a gap in the evidence which would support a violation of the right to presumption of innocence or if the factual observations made in the sentence were in contradiction with documents which demonstrated the error.

8.6 The State party alleges that article 14, paragraph 5, of the Covenant does not require that a remedy of review should be specifically termed a remedy of appeal and that the Spanish criminal appeal fully satisfies the requirements in the second instance although it does not allow review of the evidence except in extreme cases which are specified in the law. In view of the foregoing, counsel believes that the criminal proceedings against his client and specifically the sentence convicting him were vitiated by the lack of a full review of the legal and factual aspects, so that the author was denied the right guaranteed under article 26 of the Covenant.⁵

⁴ 4. Communications 623-626/1995, *Domukovsky and others v. Georgia*, Views adopted on 6 April 1998.

⁵ In this respect counsel cites information from the press referring to part of the judicial memorandum of 1998 of the Basque Supreme Court of Justice indicating that the Supreme Court of Justice of the Basque country considers the need for referral to the second instance in criminal cases to be indisputable, since, in its view, there is no doubt that this shortcoming is not remedied by an appeal.

Consideration of the merits

9. 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.

Review of admissibility

10.1 With respect to the State party's claim of inadmissibility on the ground of failure to exhaust domestic remedies, the Committee has consistently taken the view that a remedy does not have to be exhausted if it has no chance of being successful. In the case under consideration, the case law of the Spanish Constitutional Court shows repeated and recent rejections of applications for *amparo* against conviction and sentence. The Committee therefore considers, as it did upon determining the admissibility of this case on 23 October 1998, that there is no obstacle to its consideration of the merits.

10.2 With respect to the State party's claim that the author is not a victim because his counsel's objective is to amend Spanish legislation, and that the case is therefore inadmissible, the Committee points out that the author was convicted by a Spanish court and that the issue before the Committee is not the amendment, in the abstract, of Spanish legislation, but whether or not the appeals procedure followed in the author's case provided the guarantees required under the Covenant. The Committee therefore considers that the author can be considered a victim within the meaning of article 1 of the Optional Protocol.

10.3 With respect to the State party's allegation that the communication should be declared inadmissible because the author abused his right to lodge a complaint, since he did not serve his sentence and is currently a fugitive from justice, in violation of Spanish law, the Committee reiterates⁶ its position that an author does not lose his or her right to lodge a complaint under the Optional Protocol simply because he or she has not complied fully with an order imposed by a judicial authority of the State party against which the complaint was lodged.

10.4 Lastly, with respect to the final ground of inadmissibility claimed by the State party, to the effect that the author's counsel does not have the right to represent him before the Human Rights Committee, the Committee takes note of the State party's claim, but reiterates that there are no specific requirements for representation before it and that the

⁶ Communication 526/1993, *Hill v. Spain*, Views adopted on 2 April 1997.

State party does not question whether or not Mr. Gómez Vázquez's counsel represents him, but only whether certain formalities that are not required by the Covenant have been fulfilled. The Committee therefore considers that the author's counsel is acting in accordance with the instructions of the principal and, therefore, legitimately represents him.

Substantive issues

11.1 As to whether the author has been the victim of a violation of article 14, paragraph 5, of the Covenant because his conviction and sentence were reviewed only by the Supreme Court on the basis of a procedure which his counsel, following the criteria laid down in article 876 et seq, of the Criminal Procedure Act, characterizes as an incomplete judicial review, the Committee takes note of the State party's claim that the Covenant does not require a judicial review to be called an appeal. The Committee nevertheless points out that, regardless of the name of the remedy in question, it must meet the requirements for which the Covenant provides. The information and documents submitted by the State party do not refute the author's complaint that his conviction and sentence were not fully reviewed. The Committee concludes that the lack of any possibility of fully reviewing the author's conviction and sentence, as shown by the decision referred to in paragraph 3.2, the review having been limited to the formal or legal aspects of the conviction, means that the guarantees provided for in article 14, paragraph 5, of the Covenant have not been met. The author was therefore denied the right to a review of his conviction and sentence, contrary to article 14, paragraph 5, of the Covenant.

11.2 With regard to the allegation that article 26 of the Covenant was violated because the Spanish system provides for various types of remedy depending on the seriousness of the offence, the Committee considers that different treatment for different offences does not necessarily constitute discrimination. The Committee is of the opinion that the author has not substantiated the allegation of a violation of article 26 of the Covenant.

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 facts before it disclose a violation of article 14, paragraph 5, in respect of Mr. Cesario Gómez Vázquez.

13. Under article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy. The author's conviction must be set aside unless it is subjected to review in accordance with article 14, paragraph 5, of the Covenant. The State party is under an obligation to take the necessary measures to ensure that similar violations do not occur in future.

14. Considering 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.

Communication No. 727/1996

Submitted by: Dobroslav Paraga [not represented by counsel]

Alleged victim: The author

State party: Croatia

Declared admissible: 28 July 1998 (sixty-third session)

Date of the adoption of Views: 4 April 2001 (seventy-first session)

Subject matter: Harassment, detention, and prosecution of political opponent

Procedural issues: Committee's competence *ratione temporis* - Continuous effect of violation - Exhaustion of domestic remedies - Reconsideration of decision on admissibility - Sufficient substantiation of claim

Substantive issues: Arbitrary detention - Right to be tried without undue delay - Freedom of expression - Political rights - Discrimination based on political opinion

Articles of the Covenant: 9, paragraph 5; 14, paragraph 3 (c); 19; 26

Articles of the Optional Protocol: 1, 2 and 5, paragraph 2 (b).

Finding: Violation.

1. The author of the communication, dated 16 April 1996, is Dobroslav Paraga, a Croatian citizen residing in Zagreb. He claims to be a victim of violations by Croatia of articles 2, paragraph 3, 9, paragraphs 1 and 5, 7, 12, paragraph 2, 14, paragraphs 2 and 7, 19, paragraphs 1 and 2, 25 and 26 of the International Covenant on Civil and Political Rights. The Covenant entered into force for Croatia on 8 October 1991; the Optional Protocol entered into force for Croatia on 12 January 1996. He is not represented by counsel.

The facts and claims as submitted by the author

2.1 The author claims that he has been a human rights activist throughout his life, and that he was imprisoned, tortured and was the subject of political trials in the former Yugoslavia. In 1990, he re-organized the Croatian Party of Rights ("HSP"), which had been banned since 1929. He then became the president of the HSP.

2.2 According to the author, following the disintegration of the former Yugoslavia, the new Croatian State has similarly subjected him to persecution and to numerous repressive measures, such as unlawful arrests, false declarations, political trials, unjustified arrest warrants, etc.

2.3 On 21 September 1991, the vice-president of the HSP, Ante Paradzik, was murdered after attending a political rally. The author contends that the attack had also targeted him, and that it was by pure chance that he had not been in the car with his colleague. In 1993, four officials of the Ministry of Internal Affairs were convicted of the murder; they were reportedly released in 1995.

2.4 On 22 November 1991, Mr. Paraga was arrested after a police ambush, on charges of planning to overthrow the Government. He was kept in detention until 18 December 1991, when his release was ordered after the High Court found that there was insufficient evidence in support of the charge. The author alleges a violation of article 9, paragraph 1 and 5, in this connection. He also claims that the president of the High Court was dismissed from his functions after having ruled in his favour.

2.5 On 1 March 1992, an explosion occurred in the offices of the HSP in Vinkovici, where the author had expected to be. Several people died in the blast, but according to the author, no formal investigation has ever taken place. On 21 April 1992, the author was summoned for having called the President of the Republic a dictator. Mr. Paraga claims that these events constitute a violation of article 19 of the Covenant, since the measures against him were aimed at restricting his freedom of expression.

2.6 On 2 June 1992, Mr. Paraga states that he was charged with "illegal mobilization of persons into an army". He claims that this charge was designed to prevent him from participating in an election campaign for Parliament and to run for election for

the Presidency of the Republic. To the author, this was in violation of article 25 of the Covenant, since he was effectively prevented from being a candidate in the elections. Moreover, he argues that the elections were rigged.

2.7 On 30 September 1992, the public prosecutor filed an action in the Constitutional Court, with a view to obtaining a declaration banning the HSP. On 8 November 1992, a military court in Zagreb initiated an investigation against the HSP for conspiracy to overthrow the Government. For the author, this action constituted a violation of article 14, paragraph 7, since he had already been acquitted on this charge in 1991. His parliamentary immunity was withdrawn for 13 months. On 4 November 1993, the military court dismissed the charges against the author.

2.8 After a trip to the United States during which the author had called the President of the Republic an oppressor, he was charged with slander on 3 June 1993. Parliament stripped the author of his function as vice-chairman of the parliamentary committee on human and ethnic rights. The author claims that a member of the secret police admitted in a statement printed by a weekly newspaper in July 1993 that he had received an order to assassinate the author.

2.9 On 28 September 1993, the ministry of registrations cancelled the author's right to represent the HSP and, according to the author, granted it to an agent who represented the Government, thereby making the HSP a simple extension of the ruling party. The author's complaints to the Court of Registrars and to the Constitutional Court were rejected.

2.10 In the parliamentary elections of October 1995, the author participated with a new party, the "Croatian Party of Rights - 1861", but failed to secure re-election. He argues that because of the sanctions against him, he could not compete fairly in the election, in violation of article 25 of the Covenant. According to the author, the Polling Committee violated the Election Law which allowed the HSP (then led by a Government agent) to enter Parliament although it had not obtained the required 5 per cent of the total vote. The author and leaders of 10 other political parties filed an objection, which the Constitutional Court dismissed on 20 November 1995.

2.11 The author notes that attacks on his person continue. He refers to a court order dated 31 January 1995, which was confirmed on 25 March 1996, that he must vacate the office premises he occupies. To him, this was done to obstruct him in his political activities. He further notes that his political party was elected as part of the coalition Government in the County Government of Zagreb, but that the

President of the Republic did not accept the results of the election and blocked the appointment of a mayor.

State party's admissibility observations and author's comments

3.1 In comments dated 31 October 1997, the State party recalls that when acceding to the Optional Protocol, it made the following declaration which limits the competence *ratione temporis* of the Committee to examine communications: "The Republic of Croatia interprets article 1 of this Protocol as giving the Committee the competence to receive and consider communications from individuals subject to the jurisdiction of the Republic of Croatia who claim to be victims of a violation by the Republic of any rights set forth in the Covenant which results either from acts, omissions or events occurring after the date on which the Protocol entered into force for the Republic of Croatia". For the State party, the author's allegations relate almost exclusively to events and acts which occurred well before the Protocol entered into force for Croatia on 12 January 1996.

3.2 For the State party, the alleged violations cannot be taken as a continuing process which, together, constitute a separate and continuing violation of the author's Covenant rights. Moreover, some of the judicial procedures referred to by the applicant were resolved in his favour, such as the proceedings related to the ban of the HSP, which the public prosecutor decided to discontinue. That the author was involved in a number of judicial procedures over the years does not prove that these procedures were mutually inter-related, nor does it generate the continuing effect the procedures may have had on the enjoyment of the author's rights.

3.3 It is conceded that an exception to the above observations is the court order issued against Mr. Paraga to vacate the premises he and his party occupy, which was confirmed on 25 March 1996, i.e. after the entry into force of the Optional Protocol for Croatia. However, the State party argues that as Mr. Paraga does not claim a violation of article 26 in this regard but a violation of his right to property, which is not protected by the Covenant, this part of the communication is inadmissible *ratione materiae*. Besides, the State party notes, the Constitutional Court of Croatia can address both the prohibition of discrimination on the basis of political opinion and the protection of property, in the context of the protection of fundamental rights and freedoms guaranteed by the Constitution. As this avenue was not used by the author in respect of this allegation, available domestic remedies have not been exhausted.

3.4 Thus, the State party considers the communication to be inadmissible partly on account

of its declaration *ratione temporis* and, partly, because of non-exhaustion of domestic remedies.

4.1 In his comments, the author contends that all the consequences, legal or otherwise, of actions taken against him by the Croatian authorities have had continuing effects. He reiterates that:

(a) the murder of his former deputy and vice-president of the HSP, Ante Paradzik, was never completely solved. After the second trial of four members of the Interior Ministry, the perpetrators of the crime were pardoned, and the judge who had sentenced them for conspiracy lost his job;

(b) the legal action initiated against the author which led to his arrest on 22 November 1991 and which resulted in his release for lack of evidence was never formally finalized, so that the author cannot initiate an action for compensation for unlawful arrest and unlawful detention;

(c) the procedure against the author initiated on 21 April 1992 for the offence of slander has not been terminated;

(d) no fair and impartial investigation into the bombing of the headquarters of his party on 1 March 1992 in Vinkovci was ever conducted;

(e) no impartial investigation into the alleged rigging of the elections of 2 August 1992 was carried out;

(f) no investigation into the alleged assassination scheme against the author in March 1993, claimed to have been plotted by members of the Government, was ever carried out;

(g) and finally, after the author was stripped of the leadership of the HSP, his (former) party was turned into a "satellite" of the ruling party.

4.2 The author affirms that he is a victim of a violation of article 26, on the grounds that he has been discriminated against because of his political opinions. On 7 October 1997, the County Court of Zagreb initiated proceedings against the author on the basis of article 191 of the Criminal Code of Croatia, for spreading false information; the author notes that he may be sentenced to six months' imprisonment if found guilty. On 4 December 1997, the author was arrested at the Austrian border, allegedly after misinformation about the purpose of the author's visit had wilfully been given to the Austrian authorities by the Croatian Ministry of Foreign Affairs - the author was kept 16 hours in Austrian detention. A similar event had already occurred on the occasion of a visit by the author to Canada, when he was kept detained for six days in Toronto in June 1996, allegedly because the Croatian Government had accused him of subversive activities.

4.3 The author rejects as incorrect the Government's argument that the legal procedures

related to the evacuation and dispossession of the flat used as an office of the author's political party had nothing to do with discrimination on the basis of political opinion. Rather, he asserts, it was only because of international public pressure and due to the intervention of the flat's owner, who has dual (Croatian/Canadian) citizenship, that the court decision of 25 March 1996 was not enforced.

4.4 As to the possibility of having the Constitutional Court rule on claims of unlawful discrimination and illegal expropriation and violations of other fundamental rights, the author contends that the Court "is an instrument of the governing oligarchy and that [on] essential matters, the decisions of ... President Tudjman" are not questioned. Therefore, such constitutional remedies are said to be ineffective, and the author argues that in respect of all the above issues and claims, he has exhausted domestic remedies.

Admissibility considerations

5.1 During its sixty-third session, the Committee considered the admissibility of the communication.

5.2 The Committee recalled that upon acceding to the Optional Protocol, the State party entered a declaration restricting the Committee's competence to events following the entry into force of the Optional Protocol for Croatia on 12 January 1996. The Committee noted that most of the alleged violations of Mr. Paraga's rights under the Covenant result from a series of acts and events which occurred between 1991 and 1995 and thus precede the date of entry into force of the Optional Protocol for Croatia.

5.3 The Committee considered, however, that the author's claims that he cannot initiate an action for compensation for his allegedly unlawful arrest and detention of 22 November 1991, since the proceedings have never been formally finalized, as well as his claim that the procedure initiated against him on 21 April 1992 for slander has never been terminated, relate to incidents that have continuing effects which *in themselves* may constitute a violation of the Covenant. The Committee considered therefore that these claims were admissible and should be examined on the merits.

5.4 The Committee considered that it was precluded *ratione temporis*, in light of the declaration made by the State party upon accession to the Optional Protocol, from considering the remainder of the communication in so far as it related to events which occurred before 12 January 1996, since the continuing effects claimed by Mr. Paraga did not appear to constitute *in themselves* a violation of the Covenant, nor could they be interpreted as an affirmation, by act or clear

implication, of the alleged previous violations of the State party.¹

5.5 In relation to the court order ordering the author to vacate the apartment he uses as an office of his political party, the Committee noted the State party's argument that complaints about unlawful and arbitrary dispossession of property and unlawful discrimination may be adjudicated by the Constitutional Court. The author merely contended that this remedy is not effective, as the Constitutional Court is "an instrument of the governing oligarchy". The Committee recalled that mere doubts about the effectiveness of domestic remedies do not absolve a complainant from resorting to them; the Committee noted in this context that in respect of other alleged violations of his rights, Croatian tribunals had ruled in the author's favour in the past. In the circumstances, the Committee concluded that recourse to the Constitutional Court in relation to the order to vacate the apartment used as office premises by the author would not be a priori futile. Accordingly, the requirements of article 5, paragraph 2 (b), of the Optional Protocol had not been met in this respect.

5.6 With regard to the author's claim that he is a victim of a violation of article 26, referred to in paragraph 4.2 above, the Committee considered that this claim was admissible and should be examined on its merits.

6. Accordingly, on 24 July 1998, the Human Rights Committee decided that the communication was admissible in so far as it related to the author's arrest and detention on 22 November 1991, the slander proceedings initiated against him on 21 April 1992, and his claim that he was a victim of discrimination.

The State party's merits information and the author's comments

7.1 In its submission on the merits, the State party provides further information on the proceedings involving the author's arrest and detention in November 1991, and on the charges of "dissemination of false information" of April 1992, and confirms that proceedings with respect to all related charges have now been terminated.

7.2 The State party confirms that Mr. Paraga was arrested on 22 November 1991, that his detention was ordered by the investigating judge with reference to articles 191, paragraph 2, points 2 and 3 of the Criminal Procedures Act, and that he was

released on 18 December 1991, by the Zagreb County Court.

7.3 The State party states that on 25 November 1991 the Zagreb County Public Attorney's Office filed a request under No. KT - 566/91 to initiate an investigation against Mr. Paraga on charges of "armed rebellion" and charges of "illegal possession of weapons and explosives", pursuant to article 236 (f), paragraphs 1 and 2, and article 209, paragraphs 2 and 3, respectively, of the Croatian Penal Code, which was in force at the time. A request for custody was also made under article 191, paragraph 2, points 2 and 3 of the Criminal Procedures Act.

7.4 The investigating judge rejected the request to conduct an investigation and delivered the case to a panel of judges who decided to conduct an investigation with respect to article 209, paragraphs 2 and 3 only. However, the County Public Attorney's Office failed to issue an indictment, and did not ask the investigating judge to proceed with the investigation. Therefore, the investigating judge forwarded the file to the panel of three judges again, who decided to discontinue further proceedings against Mr. Paraga, pursuant to article 162, paragraph 1, point 3, of the Criminal Procedures Act, in a decision dated No. Kv-48/98 of 10 June 1998. According to the State party, the decision was sent to Mr. Paraga on 17 June 1998 and received by him on 19 June 1998.

7.5 The State party claims that Mr. Paraga's arrest was conducted legally, in accordance with the Criminal Procedures Act in force at the time and that, therefore, the Republic of Croatia did not violate article 9, paragraph 1, of the Covenant. Moreover, the State party notes that since the procedure has been terminated the author may take an action for compensation before the Croatian courts, in accordance with article 9, paragraph 5, of the Covenant.

7.6 The State party confirms that proceedings were instituted by the Municipal Public Attorney's Office, in April 1992, for "dissemination of false information", under article 191 of the Penal Code (Article 197, paragraph 1, of the earlier Code), pursuant to article 425, paragraph 1, with reference to article 260, paragraph 1, point 1 of the Criminal Proceedings Act. (See further below). The State party states that due to amendments made to the respective provisions of the Penal Code, and the passage of time, the Split Municipal Court, who had received the indictment from the Public Attorney's office, dismissed the charges against Mr. Paragon in a decision, No. IK-504/92, issued on 26 January 1999.

7.7 As for the alleged discrimination due to the author's political views, especially after his interviews with *Novi list* daily, the State party

¹ See the Committee's Views on communication No. 516/1992 (*Simunek et al. v. Czech Republic*), adopted 19 July 1995, paragraph 4.5.

confirms that the Zagreb Municipal Public Attorney's Office instituted proceedings against Mr. Paraga on 7 October 1997, for "dissemination of false information", pursuant to article 191 of the Penal Code in force at that time. However, upon completion of the ensuing inquiry, the criminal proceedings were dismissed on 26 January 1998.

7.8 The State party explains, that the dissemination of false information, pursuant to the then applicable article 191 of the Penal Code, could have been "committed by a person who transmits or spreads news or information known by the person to be false, and likely to disturb a greater number of citizens, and also intended to cause such disturbance." Under the new Penal Code, in force since 1 January 1998, the same criminal offence is now referred to as "dissemination of false and disturbing rumours" (Article 322 of the Penal Code) and to be convicted thereon "the perpetrator must know that the rumours he/she spreads are false, his/her purpose is to disturb a greater number of citizens, and a greater number of citizens are disturbed." What is required, therefore, is that the effect corresponds to the intent. According to the State party, as this was not the case in this instance, the criminal charges were dropped and proceedings against Mr. Paraga were terminated on 26 January 1998.

7.9 Regarding the author's allegation that he was arrested and detained on the Austrian border on 4 December 1997 and on the Canadian border in June 1996, on the basis of false information given earlier by the Croatian Ministry of Foreign Affairs about the purpose of his travel, the Croatian Ministry of Foreign Affairs strongly reject such allegations as malicious and entirely unfounded. According to the State party, the Croatian Embassy in Vienna requested and received an official explanation from the Austrian authorities about Mr. Paraga's detention which, it claims, was only brought to its attention by the Austrian press. The State party was informed that Mr. Paraga had entered Austria as a Slovenian citizen, and was detained until certain facts were established on why Mr. Paraga had been denied entry to Austria back in 1995. It was also informed that a complaint filed by Mr. Paraga himself against his detention was still being processed. The State party claims that as Mr. Paraga had not notified the Croatian diplomatic mission of the incident, it was not possible to protect him under the international conventions.

7.10 Similarly, the State party claims that it was only informed by the press of Mr. Paraga's detention by the Canadian Immigration Office in Toronto and that on becoming aware of his detention, the Consul General of the Republic of Croatia in Mississauga contacted Mr. Paraga's attorney who refused to give him any information. The Consul General then

attempted to contact Mr. Henry Ciszek, supervisor of the Canadian Immigration Office at Toronto Airport, who informed him that Mr. Paraga travelled with a Slovenian passport (his Croatian passport did not have a valid Canadian visa), and that he refused consular protection by refusing to speak to the Consul General.

8.1 The author rejects the State party's submissions on the merits as "completely untrue". With respect to his arrest and detention in November 1991, the author claims that he was arrested "without charge" and arrested and detained "arbitrarily and absolutely without basis" for political reasons only. The author alleges that the President of the Republic of Croatia exerted pressure on the then president of the Supreme Court to sentence him "illegally" and that when he refused to do so, he was dismissed from his position as the President of the Supreme Court on 24 December 1991.²

8.2 The author confirms that the court decision terminating these proceedings against him was issued on 10 June 1998. However, he states that this was only issued after he had filed a communication with the Human Rights Committee, and after filing a fourth "rush note" for termination of the procedure, with the County Court of Zagreb. In addition, the author states that at least from 1991 to 1998 he was under criminal investigation and that this deprived him of his civil and political rights as "person under investigation cannot have any permanent job, he is not allowed to use social and health care or to be employed".

8.3 With regard to the charges initiated against Mr. Paraga in April 1992 for slander, the author concedes that these charges were terminated but contends that this took seven years from the date he was charged.

8.4 In relation to the charges made on 7 October 1997 for the dissemination of false information the author contends that, despite the State party's claim to the contrary, these proceedings have not yet been finalized. The author states that he has not received any decision on the termination of these proceedings. The author reiterates his belief that his arrest by border guards in Canada in 1996 and in Austria in 1997 resulted from the Croatian authorities information to the border controls of both countries that the author was involved in subversive activities. In fact, the author claims that he was informed of such by both the Canadian and Austrian immigration authorities. He refutes the State party's contention that they were prepared to offer him help during his detention in Canada and Austria and claims that on neither occasion did the Croatian

² The author does not provide any details that may substantiate this claim.

authorities assist to have him released. The author claims that he lodged a complaint against the Government of Croatia for compensation for damages after his detention in Canada and Austria for what he refers to as “misuse of power”.

Reconsideration of admissibility decision and examination of the merits

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 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.³

9.3 With respect to the author’s alleged unlawful arrest and detention of 22 November 1991 the Committee decided, in its admissibility decision of 24 July 1998, that the communication was admissible in so far as it related to the continuing effects of the criminal proceedings, which were instituted against the author at this time and were still pending at the time of the submission of the communication. The Committee recalls that its decision on admissibility was predicated on the alleged continuing effects of violations that are said to have occurred prior to the entry into force of the Optional Protocol for Croatia.

9.4 The Committee notes the State party’s contention that these proceedings were terminated on 17 June 1998, and its contention that the author can now file a claim for compensation in the domestic courts. Given this new information provided since the decision on admissibility, the Committee reviews its previous decision on admissibility, in accordance with rule 93 (4) of its rules of procedure, and declares that the claims relating to an alleged violation of article 9, paragraph 5, is inadmissible because of the author’s failure to exhaust domestic remedies in this respect, under article 5, paragraph 2 (b), of the Optional Protocol. The author should avail himself of domestic remedies in this regard.

9.5 The Committee proceeds without delay to the consideration of the merits of the claim with respect to the slander proceedings and the alleged discrimination.

9.6 In relation to the slander proceedings, the Committee has noted the author’s contention that

proceedings were instituted against him because he referred to the President of the Republic as a dictator. While the State party has not refuted that the author was indeed charged for this reason, it has informed the Committee that the charges against the author were finally dismissed by the court in January 1999. The Committee observes that a provision in the Penal Code under which such proceedings could be instituted may, in certain circumstances, lead to restrictions that go beyond those permissible under article 19, paragraph 3, of the Covenant. However, given the absence of specific information provided by the author and the further fact of the dismissal of the charges against the author, the Committee is unable to conclude that the institution of proceedings against the author, by itself, amounted to a violation of article 19 of the Covenant.

9.7 The Committee observes, that the charges brought against Mr. Paraga in November 1991 and the slander charges brought against him in April 1992 raise the issue of undue delay (article 14, paragraph 3 (c), of the Covenant). The Committee is of the view that this issue is admissible as the proceedings were not terminated until two and a half years and three years, respectively, after the entry into force of the Optional Protocol in respect of the State party. The Committee notes that both procedures took seven years altogether to be finalized, and observes that the State party, although it has provided information on the course of the proceedings, has not given any explanation on why the procedures in relation to these charges took so long and has provided no special reasons that could justify the delay. The Committee considers, therefore, that the author was not given a trial “without undue delay”, within the meaning of article 14, paragraph 3 (c), of the Covenant.

9.8 As to the author’s claim that he is a victim of discrimination because of his political opposition to the then Government of Croatia, the Committee notes that the proceedings which were instituted against the author on 7 October 1997 were dismissed, a few months later, on 26 January 1998. In view of this fact, and lacking any further information that would substantiate this claim, the Committee cannot find a violation of any of the articles of the Covenant in this regard.

9.9 With regard to the author’s allegation that he was subjected to defamation by the Croatian authorities in Austria and Canada, the Committee notes that the State party has stated that in neither case did the author inform the Croatian authorities of his detention and that with respect to his entry into Canada he was travelling on a Slovenian passport. The Committee notes that the author has not further commented on these points. Therefore, the Committee concludes that the author has not

³ It is noted that the claimant registered two communications with the European Court of Human Rights in 1999, however, the issues raised therein differ from those raised in the present communication.

substantiated his claim and considers that there has been no violation in this respect.

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 a violation by Croatia of article 14, paragraph 3 (c).

11. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the author is entitled to an effective remedy, including appropriate compensation.

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 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.

Communication No. 736/1997

Submitted by: Malcolm Ross [represented by counsel]

Alleged victim: The author

State party: Canada

Date of the adoption of Views: 18 October 2000 (seventieth session)

Subject matter: Dismissal of teacher for public dissemination of anti-semitic statements

Procedural issues: Incompatibility of claim *ratione materiae* – Substantiation of claim – Exhaustion of domestic remedies

Substantive issues: Freedom to manifest one's religious beliefs – Freedom of thought and expression – Advocacy of religious hatred – Legitimate restrictions on right to freedom of expression.

Articles of the Covenant: 18, 19, and 26

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

Finding: No violation.

1. The author of the communication is Malcolm Ross, a Canadian citizen. He claims to be a victim of a violation by Canada of articles 18 and 19 of the Covenant. He is represented by counsel, Mr. Douglas H. Christie.

The facts as submitted by the author

2.1 The author worked as a teacher for remedial reading in a school district of New Brunswick from September 1976 to September 1991. Throughout this period, he published several books and pamphlets and made other public statements, including a television interview, reflecting controversial, allegedly religious opinions. His books concerned abortion, conflicts between Judaism and Christianity,

and the defence of the Christian religion. Local media coverage of his writings contributed to his ideas gaining notoriety in the community. The author emphasises that his publications were not contrary to Canadian law and that he was never prosecuted for the expression of his opinions. Furthermore, all writings were produced in his own time, and his opinions never formed part of his teaching.

2.2 Following concern expressed, the author's in-class teaching was monitored from 1979 onwards. Controversy around the author grew and, as a result of publicly expressed concern, the School Board, on 16 March 1988, reprimanded the author and warned him that continued public discussion of his views could lead to further disciplinary action, including dismissal. He was, however, allowed to continue to teach, and this disciplinary action was removed from his file in September 1989. On 21 November 1989, the author made a television appearance and was again reprimanded by the School Board on 30 November 1989.

2.3 On 21 April 1988, a Mr. David Attis, a Jewish parent, whose children attended another school within the same School District, filed a complaint with the Human Rights Commission of New Brunswick, alleging that the School Board, by failing to take action against the author, condoned his anti-Jewish views and breached section 5 of the Human Rights Act by discriminating against Jewish and other minority students. This complaint ultimately led to the sanctions set out in para. 4.3 below.

Relevant domestic procedures and legislation

3.1 As a result of its federal structure, Canada's human rights law is bifurcated between the federal and the provincial jurisdictions. Each province, as well as the federal and territorial jurisdictions, has enacted human rights legislation. The details of the different legislative regimes may differ, but their overall structure and contour are similar.

3.2 According to the State party, the human rights codes protect Canadian citizens and residents from discrimination in numerous areas, including employment, accommodation and services provided to the public. Any individual claiming to be a victim of discrimination may file a complaint with the relevant human rights commission, which will in turn inquire into the complaint. The burden of proof to be met by the complainant is the civil standard based on a balance of probabilities, and the complainant need not show that the individual intended to discriminate. A tribunal appointed to inquire into a complaint has the authority to impose a wide range of remedial orders, but has no authority to impose penal sanctions. Individuals concerned about speech that denigrates particular minorities may choose to file a complaint with a human rights commission rather than or in addition to filing a complaint with the police.

3.3 The complaint against the School Board was lodged under section 5 (1) of the New Brunswick Human Rights Code. This section reads:

"No person, directly or indirectly, alone or with another, by himself or by the interpretation of another, shall

(a) deny to any person or class of persons with respect to any accommodation, services or facilities available to the public, or

(b) discriminate against any person or class of persons with respect to any accommodation, services or facilities available to the public,

because of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation or sex."

3.4 In his complaint, Mr. Attis submitted that the School Board had violated section 5 by providing educational services to the public which discriminated on the basis of religion and ancestry in that they failed to take adequate measures to deal with the author. Under section 20 (1) of the same Act, if unable to effect a settlement of the matter, the Human Rights Commission may appoint a board of inquiry composed of one or more persons to hold an inquiry. The board appointed to examine the complaint against the School Board made its orders pursuant to section 20 (6.2) of the same Act, which reads:

"Where, at the conclusion of an inquiry, the Board finds, on a balance of probabilities, that a violation of this Act has occurred, it may order any party found to have violated the Act

(a) to do, or refrain from doing, any act or acts so as to effect compliance with the Act,

(b) to rectify any harm caused by the violation

(c) to restore any party adversely affected by the violation to the position he would have been in but for the violation,

(d) to reinstate any party who has been removed from a position of employment in violation of the Act

(e) to compensate any party adversely affected by the violation for any consequent expenditure, financial loss or deprivation of benefit, in such amount as the Board considers just and appropriate, and

(f) to compensate any party adversely affected by the violation for any consequent emotional suffering, including that resulting from injury to dignity, feeling or self-respect, in such amount as the Board considers just and appropriate."

3.5 Since 1982, the Canadian Charter of Rights and Freedoms ("the Charter") has been part of the Canadian Constitution, and consequently any law that is inconsistent with its provisions is, to the extent of that inconsistency, of no force or effect. The Charter applies to the federal, provincial and territorial governments in Canada, with respect to all actions of those governments, whether they be legislative, executive or administrative. Provincial human rights codes and any orders made pursuant to such codes are subject to review under the Charter. The limitation of a Charter right may be justified under section 1 of the Charter, if the Government can demonstrate that the limitation is prescribed by law and is justified in a free and democratic society. Sections 1, 2 (a) and 2 (b) of the Charter provide:

"1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;"

3.6 There are also several other legislative mechanisms both at the federal and provincial level to deal with expressions that denigrate particular groups in Canadian society. For example, the Criminal Code prohibits advocating genocide, the

public incitement of hatred and the willful promotion of hatred. The consent of the Attorney General is required to commence a prosecution with respect to these offences. The burden of proof on the Crown is to demonstrate that the accused is guilty beyond a reasonable doubt and the Crown must prove all the requisite elements of the offence, including that the accused possessed the requisite *mens rea*.

Procedure before domestic tribunals

4.1 On 1 September 1988, a Human Rights Board of Inquiry was established to investigate the complaint. In December 1990 and continuing until the spring of 1991, the first hearing was held before the Board. All parties were represented at the hearing and, according to the State party, were given full opportunity to present evidence and make representations. There were in total twenty-two days of hearing, and testimony was given by eleven witnesses. The Board found that there was no evidence of any classroom activity by the author on which to base a complaint of discrimination. However, the Board of Inquiry also noted that

"a teacher's off-duty conduct can impact on his or her assigned duties and thus is a relevant consideration... An important factor to consider, in determining if the Complainant has been discriminated against by Mr. Malcolm Ross and the School Board, is the fact that teachers are role models for students whether a student is in a particular teacher's class or not. In addition to merely conveying curriculum information to children in the classroom, teachers play a much broader role in influencing children through their general demeanour in the classroom and through their off-duty lifestyle. This role model influence on students means that a teacher's off-duty conduct can fall within the scope of the employment relationship. While there is a reluctance to impose restrictions on the freedom of employees to live their independent lives when on their own time, the right to discipline employees for conduct while off-duty, when that conduct can be shown to have a negative influence on the employer's operation has been well established in legal precedent".

4.2 In its assessment of the author's off-duty activities and their impact, the Board of Inquiry made reference to four published books or pamphlets entitled respectively *Web of Deceit*, *The Real Holocaust*, *Spectre of Power* and *Christianity vs. Judeo-Christianity*, as well as to a letter to the editor of *The Miramichi Leader* dated 22 October 1986 and a local television interview given in 1989. The Board of Inquiry stated, inter alia, that it had

"no hesitation in concluding that there are many references in these published writings and comments by Malcolm Ross which are *prima facie*

discriminatory against persons of the Jewish faith and ancestry. It would be an impossible task to list every prejudicial view or discriminatory comment contained in his writings as they are innumerable and permeate his writings. These comments denigrate the faith and beliefs of Jews and call upon true Christians to not merely question the validity of Jewish beliefs and teachings but to hold those of the Jewish faith and ancestry in contempt as undermining freedom, democracy and Christian beliefs and values. Malcolm Ross identifies Judaism as the enemy and calls on all Christians to join the battle.

Malcolm Ross has used the technique in his writings of quoting other authors who have made derogatory comments about Jews and Judaism. He intertwines these derogatory quotes with his own comments in a way such that he must reasonably be seen as adopting the views expressed in them as his own. Throughout his books, Malcolm Ross continuously alleges that the Christian faith and way of life are under attack by an international conspiracy in which the leaders of Jewry are prominent.

The writings and comments of Malcolm Ross cannot be categorized as falling within the scope of scholarly discussion which might remove them from the scope of section 5 [of the Human Rights Act]. The materials are not expressed in a fashion that objectively summarizes findings and conclusions or propositions. While the writings may have involved some substantial research, Malcolm Ross' primary purpose is clearly to attack the truthfulness, integrity, dignity and motives of Jewish persons rather than the presentation of scholarly research."

4.3 The Board of Inquiry heard evidence from two students from the school district who described the educational community in detail. Inter alia, they gave evidence of repeated and continual harassment in the form of derogatory name calling of Jewish students, carving of swastikas into desks of Jewish children, drawing of swastikas on blackboards and general intimidation of Jewish students. The Board of Inquiry found no direct evidence that the author's off-duty conduct had impacted on the school district, but found that it would be reasonable to anticipate that his writings were a factor influencing some discriminatory conduct by the students. In conclusion, the Board of Inquiry held that the public statements and writings of Malcolm Ross had continually over many years contributed to the creation of a «poisoned environment within School District 15 which has greatly interfered with the educational services provided to the Complainant and his children». Thus, the Board of Inquiry held that the School Board was vicariously liable for the discriminatory actions of its employee and that it was directly in violation of the Act due to its failure to discipline the author in a timely and appropriate manner, so endorsing his out-of-school activities and

writings. Therefore, on 28 August 1991, the Board of Inquiry ordered

"(2) That the School Board

(a) immediately place Malcolm Ross on a leave of absence without pay for a period of eighteen months;

(b) appoint Malcolm Ross a non-teaching position if, a non-teaching position becomes available in School District 15 for which Malcolm Ross is qualified.

(c) terminate his employment at the end of the eighteen months leave of absence without pay if, in the interim, he has not been offered and accepted a non-teaching position.

(d) terminate Malcolm Ross' employment with the School Board immediately if, at any time during the eighteen month leave of absence or of at any time during his employment in a non-teaching position, he:

(i) publishes or writes for the purpose of publication, anything that mentions a Jewish or Zionist conspiracy, or attacks followers of the Jewish religion, or

(ii) publishes, sells or distributes any of the following publications, directly or indirectly: *Web of Deceit, The Real Holocaust (The attack on unborn children and life itself), Spectre of Power, Christianity vs Judeo-Christianity (The battle for truth).*"

4.4 Pursuant to the Order, the School Board transferred the author to a non-classroom teaching position in the School District. The author applied for judicial review requesting that the order be removed and quashed. On 31 December 1991, Creaghan J. of the Court of Queen's Bench allowed the application in part, quashing clause 2 (d) of the order, on the ground that it was in excess of jurisdiction and violated section 2 of the Charter. As regards clauses (a), (b), and (c) of the order, the court found that they limited the author's Charter rights to freedom of religion and expression, but that they were saved under section 1 of the Charter.

4.5 The author appealed the decision of the Court of Queen's Bench to the Court of Appeal of New Brunswick. At the same time, Mr. Attis cross-appealed the Court's decision regarding section 2 (d) of the Order. The Court of Appeal allowed the author's appeal, quashing the order given by the Board of Inquiry, and accordingly rejected the cross-appeal. By judgement of 20 December 1993, the Court held that the order violated the author's rights under section 2 (a) and (b) of the Charter in that they penalised him for publicly expressing his sincerely held views by preventing him from continuing to teach. The Court considered that, since it was the

author's activities outside the school that had attracted the complaint, and since it had never been suggested that he used his teaching position to further his religious views, the ordered remedy did not meet the test under section 1 of the Charter, i.e. it could not be deemed a specific purpose so pressing and substantial as to override the author's constitutional guarantee of freedom of expression. To find otherwise would, in the Court's view, have the effect of condoning the suppression of views that are not politically popular any given time. One judge, Ryan J.A., dissented and held that the author's appeal should have been dismissed and that the cross-appeal should have been allowed, with the result that section 2 (d) of the Order should have been reinstated.

4.6 Mr. Attis, the Human Rights Commission and the Canadian Jewish Congress then sought leave to appeal to the Supreme Court of Canada, which allowed the appeal and, by decision of 3 April 1996, reversed the judgment of the Court of Appeal, and restored clauses 2 (a), (b) and (c) of the order. In reaching its decision, the Supreme Court first found that the Board of Inquiry's finding of discrimination contrary to section 5 of the Human Rights Act on the part of the School Board was supported by the evidence and contained no error. With regard to the evidence of discrimination on the part of the School Board generally, and in particular as to the creation of a poisoned environment in the School District attributable to the conduct of the author, the Supreme Court held

"that a reasonable inference is sufficient in this case to support a finding that the continued employment of [the author] impaired the educational environment generally in creating a 'poisoned' environment characterized by a lack of equality and tolerance. [The author's] off-duty conduct impaired his ability to be impartial and impacted upon the educational environment in which he taught. (para. 49)

The reason that it is possible to 'reasonably anticipate' the causal relationship in this appeal is because of the significant influence teachers exert on their students and the stature associated with the role of a teacher. It is thus necessary to remove [the author] from his teaching position to ensure that no influence of this kind is exerted by him upon his students and to ensure that educational services are discrimination free" (para. 101)

4.7 On the particular position and responsibilities of teachers and on the relevance of a teacher's off duty conduct, the Supreme Court further commented:

"Teachers are inextricably linked to the integrity of the school system. Teachers occupy positions of trust and confidence, and exert considerable influence over their students as a result of their positions. The conduct of a teacher

bears directly upon the community's perception of the ability of the teacher to fulfill such a position of trust and influence, and upon the community's confidence in the public school system as a whole.

By their conduct, teachers as "medium" must be perceived to uphold the values, beliefs and knowledge sought to be transmitted by the school system. The conduct of a teacher is evaluated on the basis of his or her position, rather than whether the conduct occurs within the classroom or beyond. Teachers are seen by the community to be the medium for the educational message and because of the community position they occupy, they are not able to "choose which hat they will wear on what occasion".

It is on the basis of the position of trust and influence that we can hold the teacher to high standards both on and off duty, and it is an erosion of these standards that may lead to a loss in the community of confidence in the public school system. I do not wish to be understood as advocating an approach that subjects the entire lives of teachers to inordinate scrutiny on the basis of more onerous moral standards of behaviour. This could lead to a substantial invasion of the privacy rights and fundamental freedoms of teachers. However, where a «poisoned» environment within the school system is traceable to the off-duty conduct of a teacher that is likely to produce a corresponding loss of confidence in the teacher and the system as a whole, then the off-duty conduct of the teacher is relevant." (paras. 43-45)

4.8 Secondly, the Court examined the validity of the impugned Order under the Canadian Constitution. In this regard, the Court first considered that the Order infringed Sections 2 (a) and 2 (b) of the Charter as it in effect restricted respectively the author's freedom of religion and his freedom of expression. The Court went on to consider whether these infringements were justifiable under section 1 of the Charter, and found that the infringements had occurred with the aim of eradicating discrimination in the provision of educational services to the public, a 'pressing and substantial' objective. The Court further found that the measures (a) (b) and (c) imposed by the order could withstand the proportionality test, that is there existed a rational connection between the measures and the objective, the impairment of the author's right was minimal, and there was proportionality between the effects of the measures and their objective. Clause (d) was found not to be justified since it did not minimally impair the author's constitutional freedoms, but imposed a permanent ban on his expressions.

The complaint

5.1 The author claims that his rights under articles 18 and 19 of the Covenant have been violated in that

he is refused the right to express freely his religious opinions. In this context, his counsel emphasises, which was recognised by the Courts, that the author never expressed his opinions in class and that he had a good record as a teacher. Counsel further states that there is no evidence that any of the students at the school had been adversely affected by the author's writings or were influenced by them, nor that the author ever committed any act of discrimination. In this context, it is pointed out that there were no Jewish students in the author's class.

5.2 Counsel argues that there is no rational connection between expressing a discriminatory religious opinion (i.e. this religion is true and that is false) and an act of discrimination (i.e. treating someone differently because of religion). In this regard, it is submitted that the author's opinions are sincere and of a religious character, opposing the philosophy of Judaism, since he feels that Christianity is under attack from Zionist interests. Counsel asserts that the requirement that an employee's conscience and religious expression be subject to State scrutiny or employer regulation in their off-duty time would make religious freedom meaningless.

5.3 Counsel further claims that the author's opinions and expressions are not contrary to Canadian law, which prohibits hate propaganda, and that he had never been prosecuted for expressing his ideas. Counsel submits that the author's case is not comparable to *J.R.T. and W.G. v Canada*,¹ but rather draws comparison to the case of *Vogt v. Germany*,² decided by the European Court of Human Rights. Counsel submits that the order destroyed the author's right to teach which was his professional livelihood.

5.4 Counsel further argues that, if the Board of Inquiry was of the opinion that there was an anti-Semitic atmosphere among the students in the school district, it should have recommended measures to discipline the students committing such acts of discrimination. The author denies that his views are racist, any more than atheism is racist or Judaism itself. It is further stated that criticism of Judaism or Zionism for religious reasons cannot be equated to anti-Semitism. The author feels discriminated against, because he is convinced that a teacher

¹ Communication No. 104/1981, Inadmissibility decision adopted on 6 April 1983.

² Case No. 7/1994/454/535, Judgment passed 26 September 1995. In the case, Mrs. Vogt maintained, *inter alia*, that her dismissal from the civil service (as a schoolteacher) on account of her political activities as a member of the German Communist Party had infringed her right to freedom of expression secured under article 10 of the European Convention. In the circumstances, the Court found that article 10 had been violated.

publicly attacking Christianity would not be disciplined in a similar way.

State party's submission and author's comments thereon

6.1 In its submission of 7 September 1998, the State party offers its observations both on the admissibility and the merits of the communication. It submits that the communication should be deemed inadmissible both for lack of substantiation and because it is incompatible with the relevant provisions of the Covenant. Alternatively, in the event that the Committee decides that the author's communication is admissible, the State party submits that it has not violated articles 18 and 19 of the Covenant.

6.2 The State party submits that the communication should be deemed inadmissible as incompatible with the provisions of the Covenant because the publications of the author fall within the scope of article 20, paragraph 2, of the Covenant, i.e. they must be considered «advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence». In this regard, the State party points out that the Supreme Court of Canada found that the publications denigrated the faith and beliefs of Jewish people and called upon "true Christians" to not merely question the validity of those beliefs but to hold those of the Jewish faith in contempt. Furthermore, it is stated that the author identified Judaism as the enemy and called upon "Christians" to join in the battle.

6.3 The State party argues that articles 18, 19 and 20 of the Covenant must be interpreted in a consistent manner, and that the State party therefore cannot be in violation of articles 18 or 19 by taking measures to comply with article 20. It is submitted that freedom of religion and expression under the Covenant must be interpreted as not including the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. In this regard, the State party also invokes article 5, paragraph 1, of the Covenant, and submits that to interpret articles 18 and 19 as protecting the dissemination of anti-Semitic speech cloaked as Christianity denies Jews the freedom to exercise their religion, instills fear in Jews and other religious minorities and degrades the Christian faith.

6.4 With regard to the interpretation and application of article 20, the State party makes reference to the jurisprudence of the Committee, in particular the case of *J.R.T. and W.G. v Canada*.³

³ The case concerned tape-recorded telephone messages from the author and a political party warning the callers "of the dangers of international finance and

The State party notes that the author's counsel contends that the present case is distinguishable from *J.R.T. and W.G. v Canada* in that Mr. Ross did not introduce his opinions into the workplace; his opinions were of a religious nature; and none of his publications were contrary to Canadian law. While acknowledging that there are some factual differences between the two cases, the State party submits that there are also important similarities between them and that the rule concerning the inadmissibility of communications incompatible with the Covenant is equally applicable. First, it is pointed out that both communications concerned anti-Semitic speech. The State party denies counsel's contention that the author's views are of a religious nature, and argues that they promote anti-Semitism and cannot be said to be religious beliefs or part of the Christian faith. Second, it is pointed out that both communications involved orders made pursuant to human rights legislation and not charges under the hate propaganda provisions of the Criminal Code. In this regard, it is submitted that counsel is wrong when he argues that the author's writings and public statements were not contrary to Canadian law. The writings and statements did, according to the State party, contravene the New Brunswick Human Rights Act as they were found to be discriminatory and to have created a poisoned environment in the school district.

6.5 The State party further submits that the author's claim under article 18 should be held inadmissible as being incompatible with the Covenant also because his opinions "do not express religious beliefs and certainly do not fall within the tenets of Christian faith." The State party argues that the author has "cloaked his views under the guise of the Christian faith but in fact his views express hatred and suspicion of the Jewish people and their religion." It is further submitted that the author has not provided any evidence showing how anti-Semitic views are part of the Christian faith, and that no such evidence would be forthcoming. Similarly, it is asserted that the author's expressions are not manifestations of a religion, as he did not publish them for the purpose of worship, observance, practice or teaching of a religion.

international Jewry leading the world into wars, unemployment and inflation and the collapse of world values and principles". Pursuant to section 3 of the Human Rights Act, the Canadian Human Rights Commission ordered the author and the political party to cease using the telephone to communicate such matters. The Human Rights Committee decided that the communication from the political party was inadmissible for lack of standing, while the communication from the author was inadmissible as incompatible with the Covenant because the disseminated messages "clearly constitute[d] advocacy of racial or religious hatred".

6.6 On the compatibility of the communication with the provisions of the Covenant, the State party invokes article 18, paragraphs 2 and 4, and claims that States parties have an obligation under these provisions to ensure that teachers within their public education systems promote respect for all religions and beliefs and actively denounce any forms of bias, prejudice or intolerance. The State party argues that if it were to permit the author to continue teaching, it could be in violation of these provisions for impeding the rights of Jewish students to express their faith and to feel comfortable and self-confident in the public school system. Thus, it is submitted that the author's claim under article 18 should be held inadmissible as being incompatible also with article 18, paragraphs 2 and 4, of the Covenant.

6.7 Furthermore, the State party submits that both the claim under article 18 and the claim under article 19 should be held inadmissible on the ground that the author has not submitted sufficient evidence to substantiate a *prima facie* claim. Noting that the author only provided the Committee with copies of his own submissions to the Supreme Court and the decisions of the courts, the State party argues that beyond making the bald assertion that the decision of the Supreme court infringes the author's rights under articles 18 and 19, the communication provides no specificity of terms sufficient to support its admissibility. In particular, it is submitted that nowhere is the expansive and carefully reasoned decision of a unanimous nine-person Bench of the Supreme Court subjected to a sustained critique which would support the allegations made by the author.

6.8 On the merits of the communication, the State party first submits that the author has not established how his rights to freedom of religion and expression have been limited or restricted by the Order of the Board of Inquiry as upheld by the Supreme Court. It is argued that the author is free to express his views while employed by the school board in a non-teaching position or while employed elsewhere.

6.9 Should the Committee find that the author's rights to freedom of religion and/or expression have been limited, the State party submits that these limitations are justified pursuant to article 18, paragraph 3, and 19, paragraph 3, respectively, as they were (i) provided by law, (ii) imposed for one of the recognized purposes, and (iii) were necessary to achieve its stated purpose. The State party submits that the analysis that must be undertaken by the Committee in this respect is very similar to that which was employed by the Supreme Court of Canada under section 1 of the Charter, and that the Committee should give considerable weight to the Court's decision.

6.10 With regard to the requirement that any limitations must be provided by law, the State party

points out that the author's writings and public statements were found to be discriminatory and to have created a poisoned environment in violation of subsection 5 (1) of the New Brunswick Human Rights Act. It is further stated that the Order rendered by the Board of Inquiry was the remedy granted for the violation of subsection 5 (1) and was made pursuant to the Act.

6.11 With regard to the requirement that the limitation must be imposed for one of the purposes set out in articles 18, paragraph 3, and 19, paragraph 3, respectively, the State party submits that the Order was imposed both for the protection of the fundamental rights of others⁴ and for the protection of public morals. As regards the first of these purposes, the State party makes reference to the case of *Faurisson v France*,⁵ and submits that the Order was imposed on the author for the purposes of protecting the freedom of religion and expression and the right to equality of the Jewish community. The State party points out that the Supreme Court found that the Order protected the fundamental rights and freedoms of Jewish parents to have their children educated and for Jewish children to receive an education in the public school system free from bias, prejudice and intolerance. As regards the protection of public morals, the State party submits that Canadian society is multicultural and that it is fundamental to the moral fabric that all Canadians are entitled to equality without discrimination on the basis of race, religion or nationality.

6.12 The State party submits that any restrictions contained in the Order were clearly necessary to protect both the fundamental rights and freedoms of the Jewish people and Canadian values of respect for equality and diversity (public morals). The State party argues that the Order was necessary to ensure that children in the school district could be educated in a school system free from bias, prejudice and intolerance and in which Canadian values of equality and respect for diversity could be fostered. Furthermore, it is argued that it was necessary to remove the author from teaching in order to remedy the poisoned environment that his writings and public statements had created. In this last regard, the State party submits, as the Supreme Court found, that teachers occupy positions of trust and confidence and exert considerable influence over their students. As a result, it is submitted that teachers should be held to a higher standard with respect to their conduct while teaching, as well as

⁴ Article 18, paragraph 3, refers to the 'fundamental rights and freedoms of others' while article 19, para. 3, refers to the 'rights and reputations of others'.

⁵ Communication No. 550/1993, Views adopted on 8 November 1996.

during their off-duty activities. According to the State party, the author, as a public school teacher, was in a position to exert influence on young persons who did not yet possess the knowledge or judgment to place views and beliefs into a proper context. Moreover, the Board of Inquiry heard witnesses who testified that Jewish students experienced fear, injury to self-confidence and a reluctance to participate in the school system because of the author's statements. It is submitted that to remedy this situation, it was necessary to pass the Order.

6.13 Finally, the State party notes that the author draws comparison to the European Court of Human Rights' decision in *Vogt v Germany*,⁶ but argues that that decision is distinguishable from the instant case in several important respects: First, the applicant in *Vogt* was an active member of a lawful political party for the stated purpose of promoting peace and combating neo-fascism. Secondly, the nature of speech involved in the two cases is profoundly different, as the political expression in *Vogt* was not of a discriminatory character as in this case.

7.1 In his comments of 27 April 1999, the author reiterates that there is no evidence that he ever expressed any of his opinions in class. Furthermore, there exists no evidence that his privately established beliefs had any effect on his workplace, i.e. that they created a poisoned environment. The Board of Inquiry only found that it was reasonable to anticipate such effects.

7.2 The author denies that his writings and statements undermine democratic values and that they are anti-Semitic. He also denies that they amount to advocacy of religious hatred that constitutes incitement to discrimination, hostility and violence. With regard to the State party's claim in relation to article 20 of the Covenant, the author submits that nowhere in his writings does he attempt to incite hatred, but rather to "defend his religion from the hatred of others". As regards article 5 of the Covenant, the author argues that he has never stated anything to the effect that Jews cannot practice their religion without restriction. On the contrary, it is submitted that the State party denied *him* the rights and freedoms recognized in the Covenant, when the Supreme Court ruled that the author cannot exercise his religious freedom and still be a teacher.

7.3 Furthermore, it is submitted that, as opposed to what is held by the State party, his statements express religious beliefs within the meaning of the Covenant. The author argues that his books were written "to defend the Christian Faith and Heritage against those who would denigrate them, and to encourage people to worship God, the Holy Trinity,

as revealed in the Christian Faith". According to the author, "a perusal of his books point to his desire to work with other Christians to fulfill the ancient Christian mandate to establish the Kingship of Christ in Society". In this connection, the author also points out that the Supreme Court of Canada in its judgment held that the case involved religious expression, and that it found that the Order of the Board of Inquiry infringed the author's freedom of religion.

7.4 With regard to the State party's contention that the author has not submitted evidence as to how the Order, removing him from his teaching position but allowing him to express himself while in a non-teaching position, has impinged upon the freedoms to profess his religious beliefs or his freedom to express his opinions, the author claims that in June 1996 he was handed a lay off notice by his employer. The author claims that this is "severe punishment for exercising his constitutionally guaranteed rights to freedom of religion and freedom of expression", and implies that the notice was a result of, or at least linked to, the previous Order and Supreme Court judgment against him. It is further claimed that he received no compensation or severance pay, and that the only reason given was that the job had been terminated. The author states that he has never been interviewed for, nor offered another position even though he at the time had worked in the school district for almost 25 years.

Further submission by the State party and the author's comments thereon

8.1 In its further submission of 28 September 1999, the State party notes the author's assertion that there was no evidence to support the finding of a "poisoned environment" within the School District attributable to the author's writings and public statements. To contest this assertion, the State party refers to the unanimous decision of the Supreme Court and, in particular, its findings quoted in para. 4.7 supra. The State party argues that the Supreme Court extensively reviewed the findings of fact as to discrimination and held that there was sufficient evidence. Thus, it is submitted, the author's assertions on this question must be rejected.

8.2 With regard to the issue of whether or not the author's opinions can be deemed religious beliefs within the meaning of the Covenant, the State party recognizes that the Supreme Court of Canada considered the opinions to be 'religious beliefs' within the meaning of the Canadian Charter. However, the State party points out that even if Canadian law places virtually no limits on what it considers to be religious beliefs under section 2 of the Charter, it nevertheless protects against abuses of the right to religious freedom by the limitation clause in section 1. The

⁶ See footnote No. 3.

State party argues that while this is the approach taken under Canadian law, the jurisprudence of the Human Rights Committee suggests that it has applied a narrower interpretation with regard to article 18. In particular, the State party refers to the case of *M.A.B., W.A.T. and J.-A.Y.T. v Canada*.⁷ It is due to this difference in approach that the State party submits that the claim under article 18 should be held inadmissible under article 3 of the Optional Protocol, even if the similar, Canadian provisions are interpreted differently in domestic law.

8.3 With regard to the author's employment status, the State party notes that the author "has been laid off his job since 1996", but contests that this was "severe punishment for exercising his constitutionally guaranteed rights to freedom of religion and freedom of expression" or that it in any manner was connected to the previous actions against the author. It is submitted that the author's security of employment was only minimally affected by the Order of the Board of Inquiry, as upheld by the Supreme Court. It is stated that, after the Order was issued on 28 August 1991, the author was placed on leave without pay for one week only, from 4-10 September 1991. As of 11 September 1991, he was assigned to a full time position in the District office, providing assistance in the delivery of programs to students 'at risk'. According to the State party, that position, originally in place for the duration of the 1991-92 school year was specifically based on the availability of funding, but in fact continued to be funded through to June 1996. The funding was lost as part of a general reorganization of the New Brunswick School System, effective 1 March 1996. This entailed the abolition of School Boards and the vesting of authority for the administration of the educational system in the Minister of Education, with a consequent reduction of both teaching and administrative positions throughout the Province.

8.4 In any event, it is submitted, the author's non-teaching position was specifically noted to fall under the terms and conditions of the collective agreement between the Board of Management and the New Brunswick Teachers' Federation, which allows for any employee to complain of an improper lay off or dismissal and, if the complaint is upheld, to obtain relief. As the author has failed to seek such relief, it is submitted that he cannot now bring unsubstantiated allegations to the Committee that his loss of employment is a result of the Order or the judgment of the Supreme Court.

9. In his submission of 5 January 2000, the author reiterates his arguments with regard to the

⁷ Communication No. 570/1993, Inadmissibility decision adopted on 8 April 1994.

lack of direct evidence and again points out that his controversial views never formed part of his teaching. As regards his employment status, the author notes that the Supreme Court on 3 April 1996 upheld the Order against the School Board, following which he was to be offered a non-teaching post. It is submitted that he was never offered such a post, but that in fact he was laid off as of 1 July 1996. According to counsel, the fact that the author has not been offered further employment since his lay off in 1996 «is further evidence of the contempt with which the government» treats him.

Consideration of the admissibility of the communication:

10.1 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.

10.2 The Committee notes that both parties have addressed the merits of the communication. This enables the Committee to consider both the admissibility and the merits of the case at this stage, pursuant to rule 94, paragraph 1, of the rules of procedure. However, pursuant to rule 94, para. 2, of the rules of procedure, the Committee shall not decide on the merits of a communication without having considered the applicability of the grounds of admissibility referred to in the Optional Protocol.

10.3 With regard to the author's claim that his dismissal in 1996 was connected to the order of the Supreme Court and thus a result of the restrictions imposed upon his freedom of speech and freedom to manifest his religion, the Committee notes that the author has failed to make use of the domestic remedies that were in place. This part of the author's claim is thus inadmissible under article 5, paragraph 2 (b) of the Optional Protocol.

10.4 Insofar as the author claims that he is a victim of discrimination, the Committee considers that his claim is unsubstantiated, for purposes of admissibility, and thus inadmissible under article 2 of the Optional Protocol.

10.5 The Committee notes that the State party has contested the admissibility of the remainder of the communication on several grounds. First, the State party invokes article 20, paragraph 2, of the Covenant, claiming that the author's publications must be considered "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence". Citing the decision of the Committee in *J.R.T. and W.G. v Canada*, the State party submits that, as a matter of consequence, the communication must be deemed inadmissible under article 3 of the Optional Protocol as being incompatible with the provisions of the Covenant.

10.6 While noting that such an approach indeed was employed in the decision in *J.R.T. and W.G. v Canada*, the Committee considers that restrictions on expression which may fall within the scope of article 20 must also be permissible under article 19, paragraph 3, which lays down requirements for determining whether restrictions on expression are permissible. In applying those provisions, the fact that a restriction is claimed to be required under article 20 is of course relevant. In the present case, the permissibility of the restrictions is an issue for consideration on the merits.

10.7 Similarly, the Committee finds that the questions whether there were restrictions on the author's right to manifest religious belief and whether any such restrictions were permissible under article 18, paragraph 3, are admissible.

10.8 The State party has also submitted that the communication should be held inadmissible as the author has not submitted sufficient evidence to support a *prima facie* case. The State party argues that the author, instead of filing a detailed submission to the Committee, merely relied on the decisions of the domestic courts and his own submissions to the Supreme Court. Thus, it is held, the communication "provides no specificity of terms sufficient to support its admissibility". The Committee finds, however, that the author has stated his claims of violation clearly and that the adduced material sufficiently substantiates those claims, for purposes of admissibility. Thus, the Committee proceeds with the examination of the merits of the author's claims, in the light of the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

Consideration of the merits:

11.1 With regard to the author's claim under article 19 of the Covenant, the Committee observes that, in accordance with article 19 of the Covenant, any restriction on the right to freedom of expression must cumulatively meet several conditions set out in paragraph 3. The first issue before the Committee is therefore whether or not the author's freedom of expression was restricted through the Board of Inquiry's Order of 28 August 1991, as upheld by the Supreme Court of Canada. As a result of this Order, the author was placed on leave without pay for a week and was subsequently transferred to a non-teaching position. While noting the State party's argument (see para. 6.8 supra) that the author's freedom of expression was not restricted as he remained free to express his views while holding a non-teaching position or while employed elsewhere, the Committee is unable to agree that the removal of the author from his teaching position was not, in effect, a restriction on

his freedom of expression. The loss of a teaching position was a significant detriment, even if no or only insignificant pecuniary damage is suffered. This detriment was imposed on the author because of the expression of his views, and in the view of the Committee this is a restriction which has to be justified under article 19, paragraph 3, in order to be in compliance with the Covenant.

11.2 The next issue before the Committee is whether the restriction on the author's right to freedom of expression met the conditions set out in article 19, paragraph 3, i.e. that it must be provided by law, it must address one of the aims set out in paragraph 3 (a) and (b) (respect of the rights and reputation of others; protection of national security or of public order, or of public health or morals), and it must be necessary to achieve a legitimate purpose.

11.3 As regards the requirement that the restriction be provided by law, the Committee notes that there was a legal framework for the proceedings which led to the author's removal from a teaching position. The Board of Inquiry found that the author's off-duty comments denigrated the Jewish faith and that this had adversely affected the school environment. The Board of Inquiry held that the School Board was vicariously liable for the discriminatory actions of its employee and that it had discriminated against the Jewish students in the school district directly, in violation of section 5 of the New Brunswick Human Rights Act, due to its failure to discipline the author in a timely and appropriate manner. Pursuant to section 20 (6.2) of the same Act, the Board of Inquiry ordered the School Board to remedy the discrimination by taking the measures set out in para. 4.3 supra. In effect, and as stated above, the discrimination was remedied by placing the author on leave without pay for one week and transferring him to a non-teaching position.

11.4 While noting the vague criteria of the provisions that were applied in the case against the School Board and which were used to remove the author from his teaching position, the Committee must also take into consideration that the Supreme Court considered all aspects of the case and found that there was sufficient basis in domestic law for the parts of the Order which it reinstated. The Committee also notes that the author was heard in all proceedings and that he had, and availed himself of, the opportunity to appeal the decisions against him. In the circumstances, it is not for the Committee to reevaluate the findings of the Supreme Court on this point, and accordingly it finds that the restriction was provided for by law.

11.5 When assessing whether the restrictions placed on the author's freedom of expression were

applied for the purposes recognized by the Covenant, the Committee begins by noting⁸ that the rights or reputations of others for the protection of which restrictions may be permitted under article 19, may relate to other persons or to a community as a whole. For instance, and as held in *Faurisson v France*, restrictions may be permitted on statements which are of a nature as to raise or strengthen anti-semitic feeling, in order to uphold the Jewish communities' right to be protected from religious hatred. Such restrictions also derive support from the principles reflected in article 20 (2) of the Covenant. The Committee notes that both the Board of Inquiry and the Supreme Court found that the author's statements were discriminatory against persons of the Jewish faith and ancestry and that they denigrated the faith and beliefs of Jews and called upon true Christians to not merely question the validity of Jewish beliefs and teachings but to hold those of the Jewish faith and ancestry in contempt as undermining freedom, democracy and Christian beliefs and values. In view of the findings as to the nature and effect of the author's public statements, the Committee concludes that the restrictions imposed on him were for the purpose of protecting the "rights or reputations" of persons of Jewish faith, including the right to have an education in the public school system free from bias, prejudice and intolerance.

11.6 The final issue before the Committee is whether the restriction on the author's freedom of expression was necessary to protect the right or reputations of persons of the Jewish faith. In the circumstances, the Committee recalls that the exercise of the right to freedom of expression carries with it special duties and responsibilities. These special duties and responsibilities are of particular relevance within the school system, especially with regard to the teaching of young students. In the view of the Committee, the influence exerted by school teachers may justify restraints in order to ensure that legitimacy is not given by the school system to the expression of views which are discriminatory. In this particular case, the Committee takes note of the fact that the Supreme Court found that it was reasonable to anticipate that there was a causal link between the expressions of the author and the "poisoned school Environment" experienced by Jewish children in the School district. In that context, the removal of the

⁸ As it did in General Comment No. 10 and Communication No. 550/1993, *Faurisson v. France*, Views adopted on 8 November 1996.

author from a teaching position can be considered a restriction necessary to protect the right and freedom of Jewish children to have a school system free from bias, prejudice and intolerance. Furthermore, the Committee notes that the author was appointed to a non-teaching position after only a minimal period on leave without pay and that the restriction thus did not go any further than that which was necessary to achieve its protective functions. The Human Rights Committee accordingly concludes that the facts do not disclose a violation of article 19.

11.7 As regards the author's claims under article 18, the Committee notes that the actions taken against the author through the Human Rights Board of Inquiry's Order of August 1991 were not aimed at his thoughts or beliefs as such, but rather at the manifestation of those beliefs within a particular context. The freedom to manifest religious beliefs may be subject to limitations which are prescribed by law and are necessary to protect the fundamental rights and freedoms of others, and in the present case the issues under paragraph 3 of article 18 are therefore substantially the same as under article 19. Consequently, the Committee holds that article 18 has not been violated.

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 facts before it do not disclose a violation of any of the articles of the International Covenant on Civil and Political Rights.

APPENDIX

Individual opinion of Committee Member Hipólito Solari-Yrigoyen (dissenting)

In my opinion, paras 11.1 and 11.2 of the Committee's Views should read as follows:

Concerning the author's claim of a violation of the right protected by article 19 of the Covenant, the Committee observes that the exercise of the right to freedom of expression covered by paragraph 2 of that article entails special duties and responsibilities enumerated in paragraph 3. It cannot, therefore, accept the claim that the author's freedom of expression was restricted by the Board of Inquiry's Order of 28 August 1991 as upheld by the Supreme Court of Canada, since that Order was in keeping with article 19, paragraph 3, of the Covenant. It must also be pointed out that the exercise of freedom of expression cannot be regarded in isolation from the requirements of article 20 of the Covenant, and that it is that article that the State party invokes to justify the measures applied to the author, as indicated in paragraph 6.3 above.

Communication No. 747/1997

Submitted by: Karel Des Fours Walderode et al. [represented by counsel].

Alleged victims: The authors

State party: Czech Republic

Declared admissible: 30 July 1999 (sixty- fifth session)

Date of the adoption of Views: 30 October 2001 (seventy-third session)

Subject matter: Denial of restitution of confiscated property to former citizens of State party

Procedural issues: Exhaustion of domestic remedies – Effectiveness of remedies – Remedies unreasonably prolonged

Substantive issues: Right to have the determination of one's rights in a suit of law by independent and impartial courts – Right to equality before the law – Equal protection of the law and non discrimination

Articles of the Covenant: 2, 14, paragraph 1, and 26

Articles of the Optional Protocol: 4, paragraph 2, and 5, paragraph 2 (b)

Finding: Violation

1. The original author of the communication was Dr. Karel Des Fours Walderode, a citizen of the Czech Republic and Austria, residing in Prague, Czech Republic. He was represented by his spouse, Dr. Johanna Kammerlander, as counsel. He claimed to be a victim of violations of article 14, paragraph 1, and article 26 of the International Covenant on Civil and Political Rights by the Czech Republic. The Covenant was ratified by Czechoslovakia in December 1975, the Optional Protocol in March 1991.¹ The author passed away on 6 February 2000, and his surviving spouse maintains the communication before the Committee.

The facts as submitted

2.1 Dr. Des Fours Walderode was born a citizen of the Austrian-Hungarian empire on 4 May 1904 in Vienna, of French and German descent. His family had been established in Bohemia since the seventeenth century. At the end of the First World War in 1918, he was a resident of Bohemia, a kingdom in the former empire, and became a citizen of the newly created Czechoslovak State. In 1939, because of his German mother tongue, he automatically became a German citizen by virtue of

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.

Hitler's decree of 16 March 1939, establishing the Protectorate of Bohemia and Moravia. On 5 March 1941, the author's father died and he inherited the Hruby Rohozec estate.

2.2 At the end of the Second World War, on 6 August 1945, his estate was confiscated under Benes Decree 12/1945, pursuant to which the landed properties of German and Magyar private persons were confiscated without any compensation. However, on account of his proven loyalty to Czechoslovakia during the period of Nazi occupation, he retained his Czechoslovak citizenship, pursuant to paragraph 2 of Constitutional Decree 33/1945. Subsequently, after a Communist government came to power in 1948, he was forced to leave Czechoslovakia in 1949 for political and economic reasons. In 1991, after the "velvet revolution" of 1989, he again took up permanent residence in Prague. On 16 April 1991 the Czech Ministry of Interior informed him that he was still a Czech citizen. Nevertheless, Czech citizenship was again conferred on him by the Ministry on 20 August 1992, apparently after a document was found showing that he had lost his citizenship in 1949, when he left the country.

2.3 On 15 April 1992, Law 243/1992 came into force. The law provides for restitution of agricultural and forest property confiscated under Decree 12/1945. To be eligible for restitution, a claimant had to have Czech citizenship under Decree 33/1945 (or under Law 245/1948, 194/1949 or 34/1953), permanent residence in the Czech Republic, having been loyal to the Czechoslovak Republic during the period of German occupation, and to have Czech citizenship at the time of submitting a claim for restitution. The author filed a claim for restitution of the Hruby Rohozec estate within the prescribed time limit and on 24 November 1992 concluded a restitution contract with the then owners, which was approved by the Land Office on 10 March 1993 (PU-R 806/93). The appeal by the town of Turnov was rejected by the Central Land Office by decision 1391/93-50 of 30 July 1993. Consequently, on 29 September 1993, the author took possession of his lands.

2.4 The author alleges State interference with the judiciary and consistent pressure on administrative authorities and cites in substantiation from a letter dated 29 April 1993 by the then Czech Prime

Minister Vaclav Klaus, addressed to party authorities in Semily and to the relevant Ministries, enclosing a legal opinion according to which the restitution of property confiscated before 25 February 1948 was "legal" but nevertheless "unacceptable". The author states that this political statement was subsequently used in court proceedings. The author further states that, because of increasing political pressure at the end of 1993 the Ministry of Interior reopened the issue of his citizenship. Furthermore, the former owners of the land were persuaded to withdraw their consent to the restitution to which they had previously agreed.

2.5 On 22 December 1994 the Public Prosecutor's Office in the Semily District filed an application with the District Court under paragraph 42 of Law 283/1993 to declare the Land Office's decision of 10 March 1993 null and void. On 29 December 1994, the District Court rejected this application. On appeal, the matter was referred back to the first instance.

2.6 On 7 August 1995, a "citizens' initiative" petitioned revision of the Semily Land Office's decision of 10 March 1993. On 17 October 1995, the Central Land Office examined the legality of the decision and rejected the request for revision. Nevertheless, on 2 November 1995 the author was informed by the Central Land Office that it would, after all, begin to revise the decision. On 23 November 1995, the Minister of Agriculture annulled the Semily Land Office decision of 10 March 1993, purportedly because of doubts as to whether the author fulfilled the requirement of permanent residence, and referred the matter back. On 22 January 1996, the author applied to the High Court in Prague against the Minister's decision.

2.7 On 9 February 1996, Law 243/1992 was amended. The condition of permanent residence was removed (following the judgement of the Constitutional Court of 12 December 1995, holding the residence requirement to be unconstitutional), but a new condition was added, of uninterrupted Czechoslovak/Czech citizenship from the end of the war until 1 January 1990. The author claims that this law specifically targeted him and submits evidence of the use of the term "Lex Walderode" by the Czech media and public authorities. On 3 March 1996 the Semily Land Office applied the amended Law to his case to invalidate the restitution agreement of 24 November 1992, since Dr. Des Fours did not fulfil the new eligibility requirement of continuous citizenship. On 4 April 1996, the author lodged an appeal with the Prague City Court against the Land Office's decision.

2.8 As regards the exhaustion of domestic remedies, the late author contended that the proceedings were being deliberately drawn out

because of his age and, moreover, that the negative outcome was predictable. He therefore requested the Committee to consider his communication admissible, because of the delay in the proceedings and the unlikelihood of the effectiveness of domestic remedies.

The complaint

3.1 The late author and his surviving spouse claim that the restitution of the property in question was annulled for political and economic reasons and the legislation was amended to exclude him from the possibility of obtaining redress for the confiscation of his property. It is claimed that this constitutes a violation of article 26 of the Covenant, as well as of article 14, paragraph 1, because of political interference with the legal process (such as the Minister's decision of 23 November 1995). In this context, the author also refers to the long delays in the hearing of his case.

3.2 Further, he claims that the requirement of continuous citizenship for the restitution of property is in violation of article 26 of the Covenant and refers to the Committee's jurisprudence on this point. The author also claims that the restitution conditions applying to him are discriminatory in comparison with those applying to post-1948 confiscations.

The State party's observations

4.1 By submission of 13 June 1997, the State party noted that the author appealed to the Prague City Court from the decision of the District Land Office in Semily of 8 March 1996. As of June 1997, the proceedings were not completed, since the Land Office could not send the files concerning the case to the City Court, since these were still with the High Court.

4.2 Considering that the author commenced proceedings in the High Court in January 1996 against the decision of the Minister of Agriculture to annul the restitution, and that by December 1996, the preparatory stage of obtaining all necessary documentary evidence was completed, the State party argued that no undue prolongation had occurred.

4.3 The State party indicated that remedies exist when the author feels that the proceedings are being intentionally delayed. The author could have complained to the Chairman of the court, from where a possibility of review with the Ministry of Justice exists. Another remedy available to the author is a constitutional complaint, which may be accepted even if he has not exhausted domestic remedies if the application of remedies is unduly delayed and he has suffered serious harm as a result.

4.4 According to the State party, the rights invoked by the author are rights that can be asserted through a constitutional complaint, since international treaties regarding human rights are directly applicable and superior to law.

4.5 The State party rejects the author's suggestion that any attempts to assert his rights through the courts is useless because of the political interference with the judicial process. As regards the Prime Minister's letter concerning the interpretation of Law No. 243/1992, the State party denies that this letter was a political instruction for the courts. It notes that the letter was not addressed to a court and that it was merely a reply to an information request from the chairman of the local branch of his party and the contents were general in nature. If the author nevertheless fears that the letter may affect the impartiality of the court, he may ask the Constitutional Court to order that the letter should be removed from the court file on the ground of interference by a public authority with the exercise of his right to a fair hearing.

4.6 The State party submits that difference in treatment between the Restitution Law No. 243/1992 and the laws applying to the post-1948 confiscations does not constitute discrimination, as the two sets of laws serve different purposes and cannot be compared.

4.7 The State party concluded that the author has failed to exhaust domestic remedies and that the communication is thus inadmissible under article 5, paragraph 2 (b), of the Optional Protocol. The State party also submits that since the author's allegations are not substantiated and/or do not disclose an appearance of a violation of any of the rights set forth in the Covenant, the communication is inadmissible *ratione materiae*.

Author's comments

5.1 In his comments, the author refers to his original communication and submits that the State party has basically failed to contradict any of his claims.

5.2 He emphasizes that he retained his Czech citizenship under Benes Decree No. 33/1945, and that thus all the requirements of the original Law 243/1992 had been fulfilled when the Land Office approved the return of his property. The author notes that the State party remains silent about amendment 30/1996, introducing a further condition of continuous Czech citizenship, which did not apply when his restitution contract was approved in 1993. According to the author, this amendment made it possible to expropriate him again.

5.3 According to the author, the application of further domestic remedies would be futile because of

the political interests in his case. He moreover points to the delays in the handling of the case, whether intentional or not.

5.4 The author dismisses the State party's attempt to explain away the Minister's letter as a simple expression of opinion and maintains that the opinion of the Prime Minister was equated with an interpretation of the law, and submits that the political dimension of his restitution procedure is evident from the interaction of several components.

5.5 With regard to the petition received by the Ministry of Agriculture from local residents, the author points out that the decision of the Semily Land Office was handed down on 10 March 1993 and the petition against it was submitted on 7 August 1995, two years and five months later. The Minister of Agriculture's order quashing the Semily Land Office's earlier decision followed on 23 November 1995, three and half months after the petition. It becomes evident that the 30-day time limit stipulated in Law 85/1990 concerning the right of petition was not observed.

5.6 In a further submission, the author states that his complaint against the Minister's decision of 23 November 1995 was rejected by the High Court on 25 August 1997. The author claims that the reasons given by the court again illustrate the political nature of the process.

5.7 On 25 March 1998, the Prague City Court rejected the author's appeal against the refusal of the restitution of his property by the Land Office in 1996, since he no longer fulfilled the requirements added to the law in amendment 30/1996. On 24 July 1998, the author filed a complaint against this decision with the Czech Constitutional Court.

5.8 The author further submits that even if the Constitutional Court would find in his favour, the decision would again be referred to the first instance (the Land Office), thus entailing considerable further delay and opening the door for more political intervention. According to the author, the whole procedure could easily take another five years. He considers this to be unjustifiably long, also in view of his age.

5.9 In this context, the author recalls the salient aspects of his case. The restitution contract which he concluded was approved by the Land Office on 10 March 1993, and the appeal against the approval was rejected by the Central Land Office on 30 July 1993, after which the restitution was effected in accordance with Law 243/1992. Only on 25 November 1995, that is more than two years after he had taken possession of his lands, did the Minister of Agriculture quash the Land Office's decision, on the ground that the Office had not sufficiently verified whether the author complied

with the requirement of permanent residence. It appears from the Court judgements in the case, that at the time of the Minister's decision, it was expected that the Constitutional Court would declare this residence requirement unconstitutional (it subsequently did so, on 12 December 1995, less than a month after the Minister's decision). After a requirement of continued citizenship was added to Law 243/1992 by law 30/1996 of 9 February 1996, the Land Office then reviewed the legality of the restitution agreement in the author's case, and applying the new law declared the agreement invalid on 3 March 1996. The two court proceedings which the author then initiated, were delayed, as acknowledged by the State party, in one case because the Ministry was not in a position to furnish the papers needed by the Court, and in the other because of a backlog at the court in handling cases.

Admissibility considerations

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 During its sixty-fifth session in March 1999, the Committee considered the admissibility of the communication. It noted the State party's objection to the admissibility of the communication on the ground that the author had failed to exhaust all domestic remedies available to him. The Committee noted, however, that in August 1997, the High Court rejected the author's complaint against the Minister's decision, and on 25 March 1998, the City Court in Prague rejected his appeal against the Land Office's decision of 1996. The text of these decisions shows that no further appeal is possible. The effect is to preclude any further attempt by the author to validate and seek approval of the restitution agreement of 1992.

6.3 The author has since filed a constitutional complaint against the Prague City Court decision that the requirement of continued citizenship is legitimate. The Committee noted that in the instant case, the Constitutional Court had already examined the constitutionality of Law 243/1992. In the opinion of the Committee and having regard to the history of this case, a constitutional motion in the author's case 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 purposes of article 5, paragraph 2 (b), of the Optional Protocol.

6.4 In this context, the Committee also took note of the author's arguments that even if he were to win a constitutional appeal, the case would then be referred back, and the proceedings could take

another five years to become finalized. In the circumstances, taking into account the delays which had already been incurred in the proceedings and which were attributable to the State party, the delays which would likely occur in future and the author's advanced age, the Committee also found that the application of domestic remedies had been unreasonably prolonged.

7. On 19 March 1999, the Committee held that the communication was admissible insofar as it might raise issues under articles 14, paragraph 1, and 26 of the Covenant.

Consideration of the merits

8.1 Pursuant to article 5, paragraph 1, of the Optional Protocol, the Committee proceeds to an examination of the merits, in the light of the information submitted by the parties. It notes that it has received sufficient information from the late author and his surviving spouse, and that no further information on the merits has been received from the State party subsequent to the transmittal of the Committee's admissibility decision, notwithstanding two reminders. The Committee recalls that a State party has an obligation under article 4, paragraph 2, of the Optional Protocol to cooperate with the Committee and to submit written explanations or statements clarifying the matter and the remedy, if any, that may have been granted.

8.2 The Committee has noted the author's claims that the State party has violated article 14, paragraph 1, of the Covenant because of alleged interference by the executive and legislative branches of government in the judicial process, in particular through the letter of the Prime Minister dated 29 April 1993, and because of the adoption of retroactive legislation aimed at depriving the author of rights already acquired by virtue of prior Czech legislation and decisions of the Semily Land Office. With regard to the adoption of retroactive legislation, the Committee observes that, whereas an allegation of arbitrariness and a consequent violation of article 26 is made in this respect, it is not clear how the enactment of law 30/1996 raises an issue under article 14, paragraph 1. As to the Prime Minister's letter, the Committee notes that it was part of the administrative file in respect of the author's property which was produced in Court, and that there is no indication whether and how this letter was actually used in the court proceedings. In the absence of any further information, the Committee takes the view that the mere existence of the letter in the case file is not sufficient to sustain a finding of a violation of article 14, paragraph 1, of the Covenant.

8.3 With regard to the author's allegation of a violation of article 26 of the Covenant, the Committee begins by noting that Law No. 243/1992

already contained a requirement of citizenship as one of the conditions for restitution of property and that the amending Law No. 30/1996 retroactively added a more stringent requirement of continued citizenship. The Committee notes further that the amending Law disqualified the author and any others in this situation, who might otherwise have qualified for restitution. This raises an issue of arbitrariness and, consequently, of a breach of the right to equality before the law, equal protection of the law and non-discrimination under article 26 of the Covenant.

8.4 The Committee recalls its Views in cases No. 516/1993 (*Simunek et al.*), 586/1994 (*Joseph Adam*) and 857/1999 (*Blazek et al.*) that a requirement in the law for citizenship as a necessary condition for restitution of property previously confiscated by the authorities makes an arbitrary, and, consequently a discriminatory distinction between individuals who are equally victims of prior state confiscations, and constitutes a violation of article 26 of the Covenant. This violation is further exacerbated by the retroactive operation of the impugned Law.

9.1 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that article 26, in conjunction with article 2 of the Covenant, has been violated by the State party.

9.2 In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the late author's surviving

spouse, Dr. Johanna Kammerlander, with an effective remedy, entailing in this case prompt restitution of the property in question or compensation therefor, and, in addition, appropriate compensation in respect of the fact that the author and his surviving spouse have been deprived of the enjoyment of their property since its restitution was revoked in 1995. 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.

9.3 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.

9.4 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 these Views. The State party is also requested to publish the Committee's Views.

Communication No. 760/1997

Submitted by: J.G.A Diergaardt (late Captain of the Rehoboth Baster Community) et al.

Alleged victim: The authors

State party: Namibia

Declared admissible: 7 July 1998 (sixty-third session)

Date of the adoption of Views: 20 July 2000 (sixty-ninth session)

Subject matter: Expropriation of communal land of a community

Procedural issues: State party's duty to cooperate with the Committee - Substantiation of a claim

Substantive issues: Right to self determination - Right to equality before the courts - Right not to be subjected to arbitrary or unlawful interference with one his/her privacy - Political rights - Right not to be discriminated - Right of persons belonging to a minority - Denial of the use of a community's mother tongue in administration, justice, education and public life

Articles of the Covenant: 1, 14, 17; 25 (a) and (c), 26 and 27

Article of the Optional Protocol and Rule of procedure: 4 and Rule 86

Finding: Violation.

1. The authors of the communication are J.G.A. Diergaardt, Captain of the Rehoboth Baster Community,¹ D.J. Izaaks, Captain a.i. of the Rehoboth Baster Community, Willem van Wijk and

¹ On 10 May 1998, the Committee was informed about the passing away of Captain Diergaardt, and that Mr. D. Izaaks had been appointed acting chief.

Jan Edward Stumpf, members of the Legislative Council of the Rehoboth Baster Community, Andreas Jacobus Brendell, Speaker of the Rehoboth Baster Community, and J. Mouton and John Charles Alexander McNab, members of the Rehoboth Baster Community. They present the communication on their own behalf and on behalf of the Rehoboth Baster Community and claim to be a victim of a violation by Namibia of articles 1, 14, 17, 25 (a) & (c), 26 and 27 of the Covenant. They are represented by Dr. Y.J.D. Peeters, their legal counsel.

The facts as submitted by the authors

2.1 The members of the Rehoboth Baster Community are descendants of indigenous Khoi and Afrikaans settlers who originally lived in the Cape, but moved to their present territory in 1872. They were governed by their 'paternal laws', which provided for the election of a Captain, and for rights and duties of citizens. At present, the community numbers some 35,000 people and the area they occupy (south of Windhoek) has a surface of 14,216 square kilometres. In this area the Basters developed their own society, culture, language and economy, with which they largely sustained their own institutions, such as schools and community centers.

2.2 Their independence continued throughout the German colonial reign of Namibia, and was recognized by South Africa when it became the mandatory for South West Africa. However, in 1924, because of disagreement among the Basters about an agreement concluded with South Africa concerning the administration of the district of Rehoboth, the South African government enacted proclamation No. 31 whereby all powers of the Captain, the courts and officials appointed by the Council, were transferred to the Magistrate and his Court, thereby suspending the agreement on self-government. In 1933, a gradual process of restoring some form of local government was introduced by the establishment of an Advisory Council, members of which were elected by the community.

2.3 By Act No. 56 of 1976, passed by the South African parliament, the Rehoboth people were granted "self-government in accordance with the Paternal Law of 1872". The law provided for the election of a Captain every five years, who appointed the Cabinet. Laws promulgated by the Cabinet had to be approved by a 'Volksraad' (Council of the people), consisting of nine members.

2.4 According to counsel, in 1989, the Rehoboth Basters accepted under extreme political pressure, the temporary transfer of their legislative and executive powers into the person of the Administrator-General of South West Africa, so as

to comply with UN Security Council resolution 435 (1978). In the motion, adopted by the Council of Rehoboth on 30 June 1989, the Administrator General was requested to administer the territory as an agent of the Captain and not to make any law or regulation applicable to Rehoboth without consent of the Captain, the Cabinet and the Council; at the end of the mandate the Government of Rehoboth would resume authority. The proclamation by the Administrator-General on the transfer of powers of legislative authority and government of Rehoboth, of 30 August 1989, suspends the powers of the Legislative Council and the Captain's Council of Rehoboth "until the date immediately before the date upon which the territory becomes independent". It is therefore submitted that the effect of this transfer expired on the day before independence of Namibia, and that thus on 20 March 1990, the traditional legal order and Law 56 of 1976 were in force on the territory of Rehoboth. A resolution restoring the power of the Captain, his Council and the legislative Council was adopted by the Rehoboth People's Assembly on 20 March 1990. On 21 March 1990, Namibia became independent, and the Constitution came into force.

2.5 The authors submit that the Government of Namibia did not recognize their independence and the return to the status quo ante, but expropriated all communal land of the community through application of schedule 5 of the Constitution, which reads:

1) All property of which the ownership or control immediately prior to the date of independence vested in the Government of the Territory of South West Africa, or in any Representative Authority constituted in terms of the Representative Authorities Proclamation, 1980 (Proclamation AG 8 of 1990) or in the Government of Rehoboth, or in any other body, statutory or otherwise, constituted by or for the benefit of any such Government or Authority immediately prior to the date of independence, or which was held in trust for or on behalf of the Government of an independent Namibia, shall vest in or be under the control of the Government of Namibia. ..."

According to the counsel, this has had the effect of annihilating the means of subsistence of the community, since communal land and property was denied.

2.6 On 22 June 1991, the Rehoboth people organized general elections for a Captain, Council and Assembly according to the Paternal Laws. The new bodies were entrusted with protecting the communal properties of the people at all cost. Subsequently, the Rehoboth Baster Community and its Captain initiated a case against the Government of Namibia before the High Court. On 22 October 1993 the Court recognized the

community's locus standi. Counsel argues that this implies the recognition by the Court of the Rehoboth Basters as a people in its own right. On 26 May 1995, the High Court however rejected the community's claim to the communal property. On 14 May 1996, the Supreme Court rejected the Basters' appeal. With this, it is submitted that all domestic remedies have been exhausted.

2.7 On 28 February 1995, the International Covenant on Civil and Political Rights and the Optional Protocol thereto entered into force for Namibia.

The complaint

3.1 Counsel submits that the Government continues to confiscate the assets of the Rehoboth Basters, and that the Captain and other leaders and organizations were evicted from and deprived of the Captain's residence, the administrative offices, the community hall, the communal land and of the assets of the Rehoboth Development Corporation. Counsel submits that this policy endangers the traditional existence of the community as a collective of mainly cattle raising farmers. He explains that in times of drought (as at the time when the communication was submitted) the community needs communal land, on which pasture rights are given to members of the community on a rotating basis. The expropriation of the communal land and the consequential privatization of it, as well as the overuse of the land by inexperienced newcomers to the area, has led to bankruptcy for many community farmers, who have had to slaughter their animals. As a consequence, they cannot pay their interests on loans granted to them by the Development Corporation (which used to be communal property but has now been seized by the Government), their houses are then sold to the banks and they find themselves homeless. Counsel emphasizes that the confiscation of all property collectively owned by the community robbed the community of the basis of its economic livelihood, which in turn was the basis of its cultural, social and ethnic identity. This is said to constitute a violation of article 27.

3.2 In this context, the authors claim to be victims of a violation by the Government of Namibia of article 1 of the Covenant. They point out that the Namibian High Court has recognised them as a distinct community with a legal basis. They claim that their right to self-determination inside the republic of Namibia (so-called internal self-determination) has been violated, since they are not allowed to pursue their economic social and cultural development, nor are they allowed to freely dispose of their community's national wealth and resources. By enactment of the law on regional government 1996, the 124 year long existence of Rehoboth as a

continuously organised territory was brought to an end. The territory is now divided over two regions, thus preventing the Basters from effectively participating in public life on a regional basis, since they are a minority in both new districts. Counsel claims that this constitutes a violation of article 25 of the Covenant.

3.3 The authors further claim a violation of article 14 of the Covenant, since they were forced to use English throughout the court proceedings, a language they do not normally use and in which they are not fluent. Moreover, they had to provide sworn translations of all documents supporting their claims (which were in Afrikaans) at very high cost. They claim therefore that their right to equality before the Courts was violated, since the Court rules favour English speaking citizens.

3.4 In this context, counsel points out that article 3 of the Constitution declares English to be the only official language in Namibia. Paragraph 3 of this article allows for the use of other languages on the basis of legislation by Parliament. Counsel states that seven years after independence such a law has still not been passed, and claims that this constitutes discrimination against non-English speakers. According to counsel, attempts by the opposition to have such legislation enacted have been thwarted by the Government which has declared to have no intention to take any legislative action in this matter. In this connection, counsel refers to the 1991 census, according to which only 0.8 percent of the Namibian population uses English as mother tongue.

3.5 As a consequence the authors have been denied the use of their mother tongue in administration,² justice, education and public life. This is said to be a violation of their rights under articles 26 and 27 of the Covenant.

3.6 The authors further claim a violation of article 17 of the Covenant, since they and their cattle have been expelled from the lands which they held in collective property.

3.7 Counsel requests the Committee for interim measures of protection under rule 86 of the rules of procedure. He requests that the Committee demand that no expropriation, buying or selling of the community lands take place, that no rent be collected from tenants, and that no herds be prevented from grazing on the community lands while the communication is under consideration by the Committee.

² Counsel provides a copy of a circular issued by the Regional Commissioner, Central Region, Rehoboth, dated 4 March 1992, in which the use of Afrikaans during telephone conversations with regional public authorities is explicitly excluded.

The State party's observations and counsel's comments thereon

4. On 23 June 1997, the Committee, acting through its Special Rapporteur on New Communications, transmitted the communication to the State party, requesting information and observations, without however requesting interim measures of protection under rule 86.

5. By note of 6 November 1997, the State party confirmed that domestic remedies had been exhausted. The State party denied however, that it had violated international obligations. The State party submitted that it was prepared to supply any relevant information which the Committee might request, either orally or in writing.

6. In his comments on the State party's submission, counsel noted that the State party conceded that domestic remedies had been exhausted and that it did not adduce any other grounds on the basis of which the communication should be inadmissible. Counsel agreed that the matter should be considered on its merits.

The Committee's admissibility decision

7. At its 63rd session, the Committee considered the admissibility of the communication. It ascertained, as required under article 5, para. 2 (a), of the Optional Protocol, that the same matter was not being examined under another procedure of international investigation or settlement. The Committee noted that the State party had confirmed that all domestic remedies had been exhausted.

8. Consequently, on 7 July 1998 the Committee declared the communication admissible and decided that the question whether or not the State party has violated its obligations under the Covenant in the authors' case should be examined on the merits.

Further developments

9.1 On 3 August 1998, the Committee's decision on admissibility was transmitted to the State party, with the request that the State party provide written explanations or statements on the substance of the authors' claims. No information was received, despite two reminders sent to the State party.

9.2 On 28 January 1999, counsel for the authors informed the Committee that Mr. John Macnab had been elected Captain of the Rehoboth community. In a further letter, dated 25 April 1999, counsel informed the Committee that the community's water supply had been cut off. He reiterated his request for interim measures of protection.

Consideration of the merits

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

10.2 The Committee regrets that the State party has not provided any information with regard to the substance of the authors' claims. It recalls that it is implicit in the Optional Protocol that States parties make available to the Committee all information at its disposal. In the absence of a reply from the State party, due weight must be given to the authors' allegations to the extent that they are substantiated.

10.3 The authors have alleged that the termination of their self-government violates article 1 of the Covenant. The Committee recalls that while all peoples have the right of self-determination and the right freely to determine their political status, pursue their economic, social and cultural development and dispose of their natural wealth and resources, as stipulated in article 1 of the Covenant, the question whether the community to which the authors belong is a "people" is not an issue for the Committee to address under the Optional Protocol to the Covenant. 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 of the Covenant, articles 6 to 27, inclusive.³ As shown by the Committee's jurisprudence, there is no objection to a group of individuals, who claim to be commonly affected, to submit a communication about alleged breaches of these rights. Furthermore, the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular articles 25, 26 and 27.

10.4 The authors have made available to the Committee the judgement which the Supreme Court gave on 14 May 1996 on appeal from the High Court which had pronounced on the claim of the Baster community to communal property. Those courts made a number of findings of fact in the light of the evidence which they assessed and gave certain interpretations of the applicable domestic law. The authors have alleged that the land of their community has been expropriated and that, as a consequence, their rights as a minority are being violated since their culture is bound up with the use of communal land exclusive to members of their community. This is said to constitute a violation of article 27 of the Covenant.

³ See the Committee's Views on case No. 167/1984 (*Ominayak v. Canada*), adopted on 26 March 1990.

10.5 The authors state that, although the land passed to the Rehoboth Government before 20 March 1976, that land reverted to the community by operation of law after that date. According to the judgement, initially the Basters acquired for and on behalf of the community land from the Wartbooi Tribe but there evolved a custom of issuing papers (papieren) to evidence the granting of land to private owners and much of the land passed into private ownership. However, the remainder of the land remained communal land until the passing of the Rehoboth Self-Government Act No. 56 of 1976 by virtue of which ownership or control of the land passed from the community and became vested in the Rehoboth Government. The Baster Community had asked for it. Self-Government was granted on the basis of proposals made by the Baster Advisory Council of Rehoboth. Elections were held under this Act and the Rehoboth area was governed in terms of the Act until 1989 when the powers granted under the Act were transferred by law to the Administrator General of Namibia in anticipation and in preparation for the independence of Namibia which followed on 21 March 1990. And in terms of the Constitution of Namibia, all property or control over property by various public institutions, including the Government of South West Africa, became vested in, or came under the control, of the Government of Namibia. The Court further stated:

"In 1976 the Baster Community, through its leaders, made a decision opting for Self-Government. The community freely decided to transfer its communal land to the new Government. Clearly it saw advantage in doing so. Then in 1989, the community, through the political party to which its leaders were affiliated, subscribed to the Constitution of an independent Namibia. No doubt, once again, the Community saw advantage in doing so. It wished to be part of the new unified nation which the Constitution created. One aim of the Constitution was to unify a nation previously divided under the system of apartheid. Fragmented self-governments had no place in the new constitutional scheme. The years of divide and rule were over."

10.6 To conclude on this aspect of the complaint, the Committee observes that it is for the domestic courts to find the facts in the context of, and in accordance with, the interpretation of domestic laws. On the facts found, if "expropriation" there was, it took place in 1976, or in any event before the entry into force of the Covenant and the Optional Protocol for Namibia on 28 February 1995. As to the related issue of the use of land, the authors have claimed a violation of article 27 in that a part of the lands traditionally used by members of the Rehoboth community for the grazing of cattle no longer is in the de facto exclusive use of the members of the community. Cattle raising is said to be an essential element in the culture of the community. As the

earlier case law by the Committee illustrates, the right of members of a minority to enjoy their culture under article 27 includes protection to a particular way of life associated with the use of land resources through economic activities, such as hunting and fishing, especially in the case of indigenous peoples.⁴ However, in the present case the Committee is unable to find that the authors can rely on article 27 to support their claim for exclusive use of the pastoral lands in question. This conclusion is based on the Committee's assessment of the relationship between the authors' way of life and the lands covered by their claims. Although the link of the Rehoboth community to the lands in question dates back some 125 years, it is not the result of a relationship that would have given rise to a distinctive culture. Furthermore, although the Rehoboth community bears distinctive properties as to the historical forms of self-government, the authors have failed to demonstrate how these factors would be based on their way of raising cattle. The Committee therefore finds that there has been no violation of article 27 of the Covenant in the present case.

10.7 The Committee further considers that the authors have not substantiated any claim under article 17 that would raise separate issues from their claim under article 27 with regard to their exclusion from the lands that their community used to own.

10.8 The authors have also claimed that the termination of self-government for their community and the division of the land into two districts which were themselves amalgamated in larger regions have split up the Baster community and turned it into a minority with an adverse impact on the rights under article 25 (a) and (c) of the Covenant. The right under article 25 (a) is a right to take part in the conduct of public affairs directly or through freely chosen representatives and the right under article 25 (c) is a right to have equal access, on general terms of equality, to public service in one's country. These are individual rights. Although it may very well be that the influence of the Baster community, as a community, on public life has been affected by the merger of their region with other regions when Namibia became sovereign, the claim that this has had an adverse effect on the enjoyment by individual members of the community of the right to take part in the conduct of public affairs or to have access, on general terms of equality with other citizens of their country, to public service has not been substantiated. The Committee finds therefore that the facts before it do not show that there has been a violation of article 25 in this regard.

⁴ See *Kitok v. Sweden* (197/1985), *Ominayak v. Canada* (167/1984), *I. Länsman et al. v. Finland* (511/1992), *J. Länsman et al. v. Finland* (671/1995), as well as General Comment No. 23 [50], para. 7.

10.9 The authors have claimed that they were forced to use English during the proceedings in court, although this is not their mother tongue. In the instant case, the Committee considers that the authors have not shown how the use of English during the court proceedings has affected their right to a fair hearing. The Committee is therefore of the opinion that the facts before it do not reveal a violation of article 14, paragraph 1.

10.10 The authors have also claimed that the lack of language legislation in Namibia has had as a consequence that they have been denied the use of their mother tongue in administration, justice, education and public life. The Committee notes that the authors have shown that the State party has instructed civil servants not to reply to the authors' written or oral communications with the authorities in the Afrikaans language, even when they are perfectly capable of doing so. These instructions barring the use of Afrikaans do not relate merely to the issuing of public documents but even to telephone conversations. In the absence of any response from the State party the Committee must give due weight to the allegation of the authors that the circular in question is intentionally targeted against the possibility to use Afrikaans when dealing with public authorities. Consequently, the Committee finds that the authors, as Afrikaans speakers, are victims of a violation of article 26 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 it disclose a violation of article 26 of the Covenant.

12. Under article 2, paragraph 3(a), of the Covenant, the State party is under the obligation to provide the authors and the other members of their community an effective remedy by allowing its officials to respond in other languages than the official one in a nondiscriminatory manner. The State party is under an obligation to ensure that similar violations do not occur in the future.

13. 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.

Individual opinion by Committee member Abelfattah Amor (dissenting)

I cannot subscribe to the Committee's finding of a violation of article 26 of the Covenant, for the following reasons:

1. In article 3 of its Constitution, Namibia, which had declared its independence on 21 March 1991, made English the country's official language out of a legitimate concern to improve the chances of integration. It was thought that granting any privilege or particular status to one of the many other minority or tribal languages in the country would be likely to encourage discrimination and be an obstacle to the building of the nation. Since then, all languages other than English have been on an equal footing under the Constitution: no privileges, and no discrimination. It is the same for all languages, including Afrikaans, the introduction of which into Namibia was tied up with the history of colonization and which, in any case, ceased to be used as an official language on 21 March 1991.

2. Article 3 (3) of the Constitution of Namibia permits the use of other languages in accordance with legislation adopted by Parliament. No such legislation, which in any case could have no effect on the use of English as the official language, has yet been adopted. The guarantees it might have provided or the restrictions it might have introduced have not been decreed and as the situation is the same for everyone, no distinction could have been established legislatively in either a positive or a negative sense. Naturally this also applies to the Afrikaans language.

3. The use of minority languages as such has not been limited, far less questioned, at any level other than the official level. In their personal relationships, among themselves or with others, people speaking the same language are able to use that language without interference – which would be difficult to imagine anyway – from the authorities. In other words, there is nothing to limit the use of Afrikaans as the language of choice of the Basters in their relations between themselves or with others who know the language and agree to communicate with them in that language.

4. Whatever legislative weaknesses there may have been so far, the right to use one's mother tongue cannot take precedence, in relations with official institutions, over the official language of the country, which is, or which is intended to be, the language of all and the common denominator for all citizens. The State may impose the use of the common language on everyone; it is entitled to refuse to allow a few people to lay down the law. In other words, everyone is equal in relation to the official language and any linguistic privileges – unless they apply to all, in which case they would no longer be privileges – would be unjustifiable and discriminatory. The Basters complain that they are not able to use their mother tongue for administrative purposes or in the courts. However, they are not the only ones in this situation. The situation is exactly the same for everyone speaking the other minority languages. In support of their complaint, the Basters provide a copy of a circular issued by the Regional

Commissioner of the Central Region of Rehoboth dated 4 March 1992, in which, according to their counsel, "the use of Afrikaans during telephone conversations with regional public authorities is explicitly excluded". This circular, although not very skillfully drafted, actually says something else and, in any case, certainly says more than that. It deserved closer attention from the Committee, in order to avoid the danger of not seeing the wood for the trees and to prevent the specific problem from hiding the general solution. In that connection, it is important to remember the structure of this circular, which consists of a statement of fact, a reminder, a ban and a requirement:

The statement of fact is that officials, in the course of their duties, continue to hold their official telephone conversations and to write official letters in Afrikaans;

The reminder refers to the fact that on 21 March 1992 Afrikaans ceased to be the official language and that since then English has been the official language of Namibia. As a result, Afrikaans has the same official status as the other tribal languages, of which there are many;

The ban is on the continuing use by State officials of Afrikaans in their replies, in the exercise of their official duties, to telephone calls and letters;

The requirement is that all telephone calls and official correspondence should be carried out exclusively in English, the official language of Namibia.

In other words, State services must use English, and English only, and refrain from giving privileged status to any unofficial language. From this point of view, Afrikaans is neither more nor less important than the other tribal languages. This means that minority languages must be treated without discrimination. Consequently, there is no justification, unless one wishes to discriminate against the other minority languages and disregard article 3 of the Constitution of Namibia, for continuing to deal with the linguistic problem in a selective manner by favouring one particular language, Afrikaans, at the expense of the others. In that respect, the Regional Commissioner's circular does not reveal any violation of the principle of equality and certainly not of the provisions of article 26 of the Covenant.

5. All things considered, it is questionable whether there has been any violation of article 26 of the Covenant in the case in point, and the Committee has, in the belief that it was denouncing discrimination, given the impression that it has, rather, granted a privilege - that it has, in short, undermined the principle of equality as expressed in article 26 of the Covenant. That being the case, the reasons for giving this individual opinion will be apparent.

Individual Opinion by Committee member Nisuke Ando (dissenting)

I am unable to agree with the Committee's Views that the authors in this case are victims of a violation of article 26 of the Covenant because the State party has instructed its civil servants not to reply to their written or oral communications with the authorities in the Afrikaans language. Article 26 provides for everyone's right to equality before the law as well as to equal protection of

the law without discrimination. It further provides that "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language etc."

Certainly the instruction in question will put a great burden on speakers of Afrikaans in their official correspondence with the authorities. However, according to the circular by which the instruction is given, "All phone calls and correspondence should be treated exclusively in English which is the official language of the Republic of Namibia" and Afrikaans which "was for a very long time the official language... now officially enjoys the same status as other tribal languages." In other words, now that English has become the official language of the State party, civil servants shall "refrain from using Afrikaans when responding to phone calls and ... correspondence."

Nevertheless, it is undoubtedly clear that the instruction puts the Afrikaans language exactly on the same footing as any other native languages spoken in Namibia, thus guaranteeing Afrikaans equal treatment without discrimination. Of course English is treated differently from all native languages including Afrikaans, but considering that each sovereign State may choose its own official language and that the official language may be treated differently from non-official languages, I conclude that this differentiation constitutes objective and reasonable distinction which is permitted under article 26.

My concern with respect to this instruction is whether it might unduly restrict communication between Namibian population and its authorities by apparently prohibiting not only written but also oral correspondence in any tribal language. This may raise issues under article 19, although I prefer to reserve my position on the subject in this particular case.

Individual opinion by Committee members P.N. Bhagwati, Lord Colville, and Maxwell Yalden (dissenting)

We find ourselves unable to agree with the view taken by some of our colleagues in regard to the applicability of article 19, paragraph 2, and article 26 of the Covenant, though we do agree with them so far as articles 17, 25 and 27 are concerned. Our reasons for taking a different view from that taken by our other colleagues are the following:

Re: article 19 paragraph 2

1. So far as the alleged violation of article 19, paragraph 2, is concerned, it may be pointed out that when the admissibility decision was given by the Committee on 7 July 1998, the Committee declared the communication admissible without specifying what were the articles of the Covenant which appeared to have been violated. The only question raised in the admissibility decision was whether or not the State party had violated its obligations under the Covenant. However, the Complaint in the communication which was sent to the State party related only to violation of articles 17, 25, 26 and 27 of the Covenant. The communication did not allege violation of article 19, paragraph 2, and the State party was therefore not called

upon to meet the challenge of article 19, paragraph 2. We do not therefore think that it would be right for the Committee to make out a case of violation of article 19, paragraph 2, when that was not the case put forward by the authors in the communication. We can appreciate that if the authors had not claimed violation of any particular articles of the Covenant but had made a general complaint of violation by the State party of its obligations under the Covenant on the facts alleged in the communication, the Committee might have been justified in holding that on the facts as found by it, any particular article or articles of the Covenant were violated. But when specific articles of the Covenant were relied upon by the authors in the communication, especially when advised by counsel, we do not think that it would be right for the Committee to make out a new case for the authors.

2. Moreover, we find that the only allegation in the communication as set out in paragraphs 3.4 and 3.5 is that the authors were denied "the use of their mother tongue in administration, justice, education and public life." In our view this allegation does not make out a case of violation of article 19, paragraph 2. So far as the administration is concerned, English being the official language of the State party, it is obvious that no other language could be allowed to be used in the administration or in the Courts or in public life. The authors could not legitimately contend that they should be allowed to use their mother tongue in administration or in the Courts or in public life, and the insistence of the State party that only the official language shall be used cannot be regarded as violation of their right under article 19, paragraph 2. In regard to the use of Afrikaans, the mother tongue of the authors, in education there is nothing to show that the authors were not allowed to use Afrikaans in the schools or colleges run by them and this allegation of violation of article 19, paragraph 2, also therefore remains unsubstantiated.

3. Of course, the authors might have argued that their language rights under article 27 were being denied, and this allegation could then have been examined by the Committee; however, this is hypothetical, as in fact their article 27 submission related entirely to land use (paragraphs 10.4 and 10.6), and not to language. In the circumstances, as has just been suggested in respect of article 19, paragraph 2, it is not for the Committee to construct a case on this ground under article 27, in the absence of a complaint from the authors.

4. The majority members of the Committee have relied on the circular of the Regional Commissioner but we do not think that the circular in any way supports the claim of violation of article 19, paragraph 2. The circular is in the following terms:

"1. It has come to the attention of the office of the Regional Commissioner that some Government officials handle (answer) official phone calls and correspondence in Afrikaans contrary to the Constitutional provision that Afrikaans ceased to be the official language in this country after 21 March 1990.

While it is understood that Afrikaans was for a very long time the official language, it now officially enjoys the same status as other tribal languages.

All employees of the Government are thus advised to, in future, refrain from using Afrikaans when

responding to phone calls and their correspondence.

All phone-calls and correspondence should be treated exclusively in English which is the official language of the Republic of Namibia."

It is clear from the first paragraph of the circular that it is intended to apply only in relation to "official phone calls and correspondence" handled by Government officials. The circular points out that the handling of official phone calls and correspondence in Afrikaans was alright when Afrikaans was the official language of the territory of the State, but since English has now become the official language, Afrikaans is in the same position as other tribal languages and consequently official phone calls and correspondence should be responded to by Government employees only in English, which is the official language and not in Afrikaans.

5. We fail to see how the circular can be construed as imposing any restriction on the right to freedom of expression and to freedom to receive and impart information. When English is the official language of the State, it is legitimate for the State to insist that all official phone calls and correspondence should be responded to by Government officials in the official language, namely English, and not in Afrikaans. The advice given by the Government to its officials not to use Afrikaans, which has ceased to be the official language, but to use only English, which has now become the official language, is confined only to official phone calls and official correspondence and does not prevent any Government official from carrying on any conversation or correspondence which is private and not of an official character. If any other view were taken, namely that anyone in the territory of a State is entitled to carry on any official conversation or correspondence with a Government official in any language other than the official language of the State and that Government official is free to respond to such conversation or correspondence in that language, it would create a chaotic situation because there would, in that event, be multiplicity of languages in the official records of the State. The whole object of making a particular language as the official language of the State would be defeated. We are therefore of the view that the circular in question does not in any way violate article 19, paragraph 2 of the Covenant.

6. The suggestion implicit in the argument of the authors as set out in paragraphs 3.4 and 3.5 is that the State party should have languages as Afrikaans in administration, Courts, education and public life and that the absence of such legislation in the context of making English the official language was violative of the Covenant. But this suggestion overlooks the fact that it is for a State party to decide what shall be its official language and it is not competent to the Committee to direct the State party to adopt any other language or languages as official language or languages of the State. Once a State party has adopted any particular language or languages as its official language or languages, it would be legitimate for the State party to prohibit the use of any other language for official purposes and if the State party does so, its action cannot be branded being in violation of article 19, paragraph 2.

Re. article 26

7. We are also of the view that the circular does not violate article 26. Article 26 is a free-standing guarantee of equality and strikes at discrimination. The only argument which seems to have been advanced by the authors in paragraphs 3(4) and 3(5) in support of its claim of violation of article 26 is that by reason of English being declared as the only official language of the State and the failure of the State to enact legislation allowing the use of other languages, the authors have been denied the use of their mother tongue in administration, justice, education and public life. This argument has already been rejected by us while dealing with article 19, paragraph 2, and the same reasoning must apply in relation to the challenge under article 26. It is significant to note that it is nowhere alleged in the communication that the action of the State in declaring English as the official language and not allowing the use of other languages was directed only against the use of Afrikaans while permitting the other languages to be used. The action of the State in declaring English as the official language and not allowing the use of other languages by enacting appropriate legislation was clearly not violative of article 26 because all languages other than English were treated on the same footing and were not allowed to be used for official purposes and there was no discrimination against Afrikaans *vis-a-vis* other languages.

8. The reliance on the circular referred to above would also not help the authors to substantiate their claim under article 26. The circular is clearly intended to provide that all official phone calls and correspondence should be treated exclusively in English, which is the official language of the State. That is the thrust, the basic object and purpose of the circular and it is in pursuance of this object and purpose that the circular directs that the Government officials should refrain from using Afrikaans when responding to official phone calls and correspondence. The circular refers specifically only to Afrikaans and seeks to prohibit its use by Government officials in official phone calls and correspondence, because the problem was only in regard to Afrikaans which was at one time, until replaced by English, the official language and which continued to be used by Government officials in official phone calls and correspondence, though it had been ceased to be the official language of the State. There was apparently no problem in regard to the tribal languages because they were at no time used in administration or for official business. But Afrikaans was being used earlier for official purposes and hence it became necessary for the State to issue the circular prohibiting the use of Afrikaans in official phone calls and correspondence. That is why the circular specifically referred only to Afrikaans and not to the other languages. This is also evident from the statement in the circular that Afrikaans now enjoys the same status as other tribal languages. It is therefore not correct to say that the circular singled out Afrikaans for unfavourable treatment as against other languages in that there was hostile discrimination against Afrikaans. We consequently hold that there was no violation of the principle of equality and non-discrimination enshrined in article 26.

9. We therefore hold, contrary to the conclusion reached by some of our colleagues, that there was no violation of article 19 paragraph 2 or article 26 committed by the State party.

Individual opinion by Committee members Elizabeth Evatt, Eckart Klein, David Kretzmer and Cecilia Medina Quiroga (concurring)

We agree with the Committee's Views in this matter. However, we consider that the instruction given by the State party to civil servants not to respond in the Afrikaans language, even if they have the personal capacity to do so, restricts the freedom of the authors to receive and impart information in that language (art. 19, para. 2 of the Covenant). In the absence of a justification for this restriction, which meets the criteria set out in paragraph 3 of article 19, we consider that there has been a violation of the authors' right to freedom of expression under article 19 of the Covenant.

Individual opinion by Committee members Elizabeth Evatt and Cecilia Medina Quiroga (concurring)

It is clear on the facts and from the 1996 decision of the High Court that the ownership of the communal lands of the community had been acquired by the government of Namibia before the coming into force of the Covenant and the Optional Protocol and that the authors cannot substantiate a claim on the basis of any expropriation. However, the significant aspect of the authors' claim under article 27 is that they have, since that date, been deprived of the use of lands and certain offices and halls that had previously been held by their government for the exclusive use and benefit of members of the community. Privatization of the land and overuse by other people has, they submit, deprived them of the opportunity to pursue their traditional pastoral activities. The loss of this economic base to their activities has, they claim, denied them the right to enjoy their own culture in community with others. This claim raises some difficult issues as to how the culture of a minority which is protected by the Covenant is to be defined, and what role economic activities have in that culture. These issues are more readily resolved in regard to indigenous communities which can very often show that their particular way of life or culture is, and has for long been, closely bound up with particular lands in regard to both economic and other cultural and spiritual activities, to the extent that the deprivation of or denial of access to the land denies them the right to enjoy their own culture in all its aspects. In the present case, the authors have defined their culture almost solely in terms of the economic activity of grazing cattle. They cannot show that they enjoy a distinct culture which is intimately bound up with or dependent on the use of these particular lands, to which they moved a little over a century ago, or that the diminution of their access to the lands has undermined any such culture. Their claim is, essentially, an economic rather than a cultural claim and does not draw the protection of article 27.

Individual opinion by Committee member Rajsoomer Lallah (dissenting)

1. I am unable to agree with the finding of the Committee (paragraph 10.10) that there has been a violation of article 26 of the Covenant.

2. I agree that, since the State party has not provided any explanations on the merits of the complaint, the Committee must give due weight to the allegations of the authors. However, where inferences are to be drawn from the material provided by the authors, these inferences must clearly be legitimate and must be seen in the context of the complaints made.

3. The material allegations of the authors with regard to this particular complaint are set out in paragraph 3.4 and 3.5. The authors complain of a violation of Articles 26 and 27. They have also provided the Committee with a copy of the circular advising civil servants not to respond to official phone calls and correspondence in Afrikaans and to do so in the official language. It is perhaps useful to reproduce the circular so that it may be seen in its proper perspective. The circular reads as follows:

Office of the Regional Commissioner

Central Region

4 March 1992

CIRCULAR

1. It has come to the attention of the office of the Regional Commissioner that some Government officials handle (answer) official phone calls and correspondence in Afrikaans contrary, to the Constitutional provision that Afrikaans ceased to be the official language in this country after 21 March 1990.

2. While it is understood that Afrikaans was for a very long time the official language, it now officially enjoys the same status as other tribal languages.

3. All employees of the Government are thus advised to, in future, refrain from using Afrikaans when responding to phone calls and their correspondence.

4. All phone-calls and correspondence should be treated in English which is the official language of the Republic of Namibia.

Thank you for your cooperation.

N. Angermund

Regional Commissioner Central

4. It is to be noted that the date of the circular is 4 March 1992 whereas the Covenant and the Optional Protocol came into force for Namibia on 28 February 1995. I proceed on the assumption, in the absence of any explanation from the State party, that the circular is still operative.

5. It is to be observed that the authors claim a violation of article 27, in addition to article 26. The Committee presumably found no violation of article 27 which, *inter alia*, deals with the right of linguistic minorities not to be denied the right, in community with the other members of their group, to use their own language. Indeed, it would be stretching the language of article 27 too far to suggest, as the Committee might in effect be perceived to have done, that public authorities must make it possible to use a non – official language

(Afrikaans) in official business when the official language is different. In this regard it is to be observed that the Committee itself finds in paragraph 10.9 that the authors have not shown how the use of English during Court proceedings has affected their right to a fair hearing. And a fair hearing requires that a person understands what is happening in court so as to brief his or her legal representative appropriately in the conduct of his or her case.

6. But it may very well be said that the gravamen of the reasoning of the Committee lies in that part of the finding which is to the effect that the circular is "targeted" against the possibility of using Afrikaans in official business. I am unable to follow this reasoning.

7. First, "targeted" connotes aiming at one particular object from among other objects: in this case singling out at "Afrikaans" from other non-official languages for the purpose of affording it discriminatory treatment. It may very well be said that in assimilating Afrikaans to a "tribal" language, the circular was perhaps unintentionally derogatory of Afrikaans. However, a reasonable construction of the circular would suggest that a difference was being made essentially between the official language and all unofficial languages.

8. Secondly, of course, the circular specifically mentions Afrikaans. The reason is stated in the first paragraph of the circular. The important point, however, is that neither the complaint of the authors nor the terms of the circular suggest that a more favourable treatment was being given to other unofficial languages. Indeed, the terms of the circular suggest quite the contrary. In my view, therefore, there is no basis for a finding of discriminatory treatment in violation of article 26.

9. The real complaint of the authors with regard to article 26, when seen in the context of their other complaints, would suggest that they still hanker after the privileged and exclusive status they previously enjoyed in matters of occupation of land, self-government and use of language under a system of fragmented self-governments which apartheid permitted. Such a system no longer avails under the unified nation which the Constitution of their country has created.

Individual opinion by Committee member Martin Scheinin (concurring)

I share the Committee's conclusions in relation to all aspects of the case. On one particular point, however, I find that the Committee's reasoning is not fully consistent with the general line of its argumentation. In para. 10.8, the Committee, in my opinion unnecessarily, emphasizes the individual nature of rights of participation under article 25. In my view there are situations where article 25 calls for special arrangements for rights of participation to be enjoyed by members of minorities and, in particular, indigenous peoples. When such a situation arises, it is not sufficient under article 25 to afford individual members of such communities the individual right to vote in general elections. Some forms of local, regional or cultural autonomy may be called for in order to comply with the requirement of effective rights of participation. As is

emphasized at the end of paragraph 10.3 of the Views, the right of self-determination under article 1 affects the interpretation of article 25. This obiter statement represents, in my opinion, proper recognition of the interdependence between the various rights protected by the Covenant, including article 1 which according to the Committee's jurisprudence cannot, on its own, serve as the basis for individual communications under the Optional Protocol.

Irrespective of what has been said above, I concur with the Committee's finding that there was no violation of article 25. In my opinion, the authors have failed to substantiate how the 1996 law on regional government has adversely affected their exercise of article 25 rights, in particular the operation and powers of local or traditional authorities. On the basis of the material they presented to the Committee, no violation of article 25 can be established.

Communication No. 765/1997

Submitted by: Eliska Fábryová

Alleged victim: The author

State party: Czech Republic

Declared admissible: 9 July 1999 (sixty- sixth session)

Date of the adoption of Views: 30 October 2001 (seventy-third session)

Subject matter: Denial of restitution of confiscated property to former citizens of State party

Procedural issues: Exhaustion of domestic remedies – Duty to cooperate with the Committee

Substantive issues: Right to equality before the law – Equal protection of the law and non discrimination

Articles of the Covenant: 2, 14, paragraph 1, and 26

Articles of the Optional Protocol: 4, paragraph 2, and 5, paragraph 2 (b)

Finding: Violation

1. The author of the communication is Eliska Fábryová, née Fischmann, a Czech citizen, born on 6 May 1916. The author claims to be a victim of discrimination by the Czech Republic. The Optional Protocol entered into force for the Czech Republic on 12 June 1991.¹

The facts as submitted by the author

2.1 The author's father Richard Fischmann owned an estate in Puklice in the district of Jihlava, Czechoslovakia. In 1930, at a national census, he and his family registered as Jews. In 1939, after the occupation by the Nazis, the estate was "aryanised"²

¹ The Czech and Slovak Federal Republic ratified the Optional Protocol in March 1991, but on 31 December 1992 the Czech and Slovak Federal Republic ceased to exist. On 22 February 1993, the Czech Republic notified its succession to the Covenant and the Optional Protocol.

² i. e. that the property was taken away from Jews as "non-Aryans" and transferred to the German State or German natural or juridical persons.

and a German sequestrator was appointed. Richard Fischmann died in 1942 in Auschwitz. The author is not represented by counsel.

2.2 The rest of the family was interned in concentration camps and only the author and her brother Viteslav returned. In 1945, the estate of Richard Fischmann was confiscated under Benes decree 12/1945 because the district committee decided that he was German as well as a traitor to the Czech Republic,³ the assumption that he was German being based on the assertion that he had lived "in a German way".

2.3 The author's appeal against the confiscation was dismissed. The decision of the district committee was upheld by a judgment of the highest administrative court in Bratislava on 3 December 1951.

2.4 After the end of communist rule in Czechoslovakia, the author lodged a complaint to the General procurator, on 18 December 1990, for denial of justice with regard to her claim for restitution. Her complaint was dismissed on 21 August 1991 for being out of time, having been lodged more than five years after the confiscation. The author states that under Communist rule it was not possible to lodge a complaint within the time limit of five years as prescribed by law.

2.5 The author states that on 17 June 1992, she applied for restitution according to the law

³ The author states that according to the edict Nr. A 4600 9/11 45 VI/2 of the Ministry of the Interior of 13 November 1945 the district committees had the competence to examine the reliability of those persons who in 1930 had registered as Jews.

No. 243/1992.⁴ Her application was dismissed on 14 October 1994 by the Land Office of Jihlava.

The complaint

3. The author claims to be a victim of discrimination as under Law No. 243/1992 she is not entitled to restitution of her father's property.

State party's observations

4.1 By submission of 20 October 1997, the State party stated that the author's application for restitution of her father's property was dismissed by the Jihlava Land Office on 14 October 1994, on grounds of non-compliance with the legal requirements. It explained that the confiscated property of persons who were deprived of Czechoslovak citizenship under the Benes decrees in 1945, may be restituted in cases where the claimant has his citizenship renewed through the procedures set by law. However, the law did not expressly address the situation of persons who never lost their citizenship and whose property was confiscated in violation of the laws operative at that time. Since the author's father never lost his Czechoslovak citizenship, he could not be considered to be an entitled person and the property could not be restored.

4.2 The State party further explained that the author's appeal was dismissed for being filed out of time. The author's lawyer then raised the objection that the Land Office's decision had not been served properly, since it had not been served to the lawyer directly, but to a member of his staff, who was not authorized to receive it. The Land Office accepted the objection, and served the decision again. The author subsequently appealed against the decision. The City Court dismissed the appeal by a ruling dated 6 August 1996, on the ground that the decision had been properly served the first time and should not have been served a second time. On 11 October 1996, the author filed a constitutional complaint, which was dismissed by the Constitutional Court as inadmissible *ratione temporis*.

4.3 On the basis of the all the reasons given, the State party argued that the author's communication was inadmissible for non-exhaustion of domestic remedies since she missed the deadlines for the appeals.

⁴ Law No. 243/1992 provides for the restitution of property which was confiscated as a result of Benes decrees Nos. 12/1945 and 108/1945. One of the conditions to be eligible for restitution is that the claimant must have been granted Czech citizenship by decree 33/1945, Act No. 245/1948, 194/1949 or 34/1953.

4.4 The State party further submitted that, since the present communication had been submitted to the Committee, the Constitutional Court had decided, in cases similar to that of the author's father, that applicants who never lost their citizenship were also entitled to restitution under law No. 243/1992. As a consequence, the Central Land Office, which examined the author's file, decided that the Land Office's decision in the author's case should be reviewed, since it was inconsistent with the Constitutional Court's ruling. On 27 August 1997, the Central Land Office initiated administrative proceedings and on 9 October 1997, it quashed the Land Office's decision of 14 October 1994, and decided that the author should restart her application for restitution *ab initio*. Normal appeal possibilities would be open to the author if she was not satisfied with the outcome of the proceedings. Also for this reason, the State party argued that the communication was inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

Author's comments

5.1 By a letter of 21 January 1998, the author rejected the State party's argument that her communication was inadmissible, since she had already appealed up to the Constitutional Court and no further appeal was available. However, the author confirmed that after her communication was registered for consideration by the Human Rights Committee, new proceedings were ordered.

5.2 In a further submission, the author forwarded a copy of a letter by the Ministry for Agriculture, dated 25 May 1998, in which she was informed that the decision of the Central Land Office of 9 October 1997 to quash the decision of the Land Office of 14 October 1994 had been served to other interested parties after the expiration term of three years of the latter decision, and that it therefore did not attain legal force.

5.3 The author claimed that the pattern of arbitrariness in her case constitutes a flagrant violation of human rights by denying her a remedy for the abuses committed against her and her family in the past.

6. No further observations were received from the State party, although the author's comments had been transmitted to it.

Decision on admissibility

7. At its sixty-sixth session, on 9 July 1999, the Committee considered the admissibility of the communication. Having ascertained, pursuant to article 5, paragraph 2, of the Optional Protocol, that

the author had exhausted all available domestic remedies and that the same matter was not being examined under another procedure of international investigation or settlement, the Committee also noted that the State party reopened the author's case by a decision of the Central Land Office of 9 October 1997 and that, as a result of errors apparently committed by the State party's authorities, the decision to quash the original decision of the Land Office had never come into effect. In the circumstances, the Committee declared the communication admissible.

Merits observations by the parties

8.1 Despite having been invited to do so by the decision of the Committee of 9 July 1999 and by a reminder of 19 September 2000, the State party has not submitted any observations or comments on the merits of the case.

8.2 By letters of 25 January 2000, 29 August 2000 and 25 June 2001, the author brought to the attention of the Committee that despite the adoption by the State party's Parliament of new legislative measures governing the restitution of property confiscated as a result of the Holocaust (Act No. 212/2000), the authorities had not been willing to apply such a legislation and have never compensated her.

8.3 Despite having been transmitted the above information by a letter of 24 July 2001, the State party has not made any additional comments.

Issues and proceeding 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 provided in article 5, paragraph 1 of the Optional Protocol. Moreover, in the absence of any submission from the State party following the Committee's decision on admissibility, the Committee relies on the detailed submissions made by the author so far as they raise issues concerning Law 243/1992 as amended. The Committee recalls in this respect that a State party has an obligation under article 4, paragraph 2, of the Optional Protocol to cooperate with the Committee and to submit written explanations or statements clarifying the matter and the remedy, if any, that may have been granted. The complaint of the author raises issues under article 26 of the Covenant.

9.2 The Committee notes that the State party concedes that under Law 243/1992, individuals in a similar situation as that of the author qualify for restitution as a result of the subsequent

interpretation given by the Constitutional Court (para. 4.4). The State Party further concedes that the decision of the Jihlava Land Office of 14 October 1994 was wrong and that the author should have had the opportunity to enter a fresh application before the Jihlava Land Office. The author's renewed attempt to obtain redress has, however, been frustrated by the State party itself which, through a letter of the Ministry of Agriculture of 25 May 1998, informed the author that the decision of the Jihlava Land Office of 14 October 1994 had become final on the ground that the decision of the Central Land Office reversing the decision of the Jihlava Land Office had been served out of time.

9.3 Given the above facts, the Committee concludes that, if the service of the decision of the Central Land Office reversing the decision of the Jihlava Land Office was made out of time, this was attributable to the administrative fault of the authorities. The result is that the author was deprived of treatment equal to that of persons having similar entitlement to the restitution of their previously confiscated property, in violation of her rights under 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 therefore of the view that the facts before it disclose a violation of article 26 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 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. 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.

13. 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.

APPENDIX

Individual opinion by Committee member Ms. Christine Chanet

The State party did not consider it necessary to provide any explanation as to the substance of the case since, in its view, domestic remedies had not been exhausted.

In paragraphs 10.2 and 10.3 of its decision, the Committee finds a violation of the Covenant in administrative decisions but fails to take into account the State party's observations, which maintained that those decisions could have been through the remedy of the courts, and that the author of the communication had sought to avail herself of that remedy but had done so out of time.

Accordingly, in my opinion, this communication ought to have been considered inadmissible.

Communication No. 770/1997

Submitted by: Dimitry Gridin

Alleged victim: The author

State party: Russian Federation

Date of the adoption of Views: 20 July 2000 (sixty-ninth session)

Subject matter: Arbitrary detention, ill-treatment and unfair trial of individual under sentence of death

Procedural Issue: Non-substantiation of claim

Substantive issues: Arbitrary detention - Right to be treated with humanity – Right to be tried by an impartial tribunal – Right to be presumed innocent – Right to have access to legal assistance

Articles of the Covenant: 9, 10, and 14, paragraphs 1, 2, and 3 (b)

Articles of the Optional Protocol: 1 and 2

Finding: Violation

1. The author of the communication is Mr. Dimitriy Leonodovich Gridin, a Russian student, born on 4 March 1968. He claims to be a victim of a violation by Russia of articles 14, paragraphs 1, 2, 3 (b),(e) and (g). The case also appears to raise issues under articles 9 and 10 of the Covenant. He is represented by Mr. A. Manov of the Centre for Assistance to the International Protection.

The facts as submitted by the author

2. The author was arrested on 25 November 1989 on charges of attempted rape and murder of one Ms. Zykina. Once in detention, he was also charged with six other assaults. On 3 October 1990, the Chelyabinsk Regional Court found him guilty of the charges and sentenced him to death. His appeal to the Supreme Court was rejected on 21 June 1991. Further appeals were rejected on 21 October 1991 and 1 July 1992. Appeals to the Prosecutor's Office were likewise rejected, respectively on 12 December 1991, 16 January and 11 March 1992. On 3 December 1993,

the author's death sentence was commuted to life imprisonment.

The complaint

3.1 The author alleges that a warrant for his arrest was only issued on 29 November 1989, over three days after he was detained. He further states that he was denied access to a lawyer, despite his requests, until 6 December 1989.

3.2 He claims that he was interrogated during 48 hours, without being given any food and without being allowed to sleep. His glasses had also been taken away from him and he could not see much because of his shortsightedness. During the interrogation, he was beaten.¹ He states that he was told that his family was letting him down and that the only way to avoid the death penalty would be to confess. He then confessed to the six charges as well as to three other charges.

3.3 It is alleged that the author's lawyer was not informed by the investigator of scheduled court actions. In particular, in January 1990 the author was sent for a medical expertise and his lawyer was not informed.

3.4 The author claims that the handling of the evidence violated the Russian Code of Criminal Procedure. It is said that the author's clothes were transported to the laboratory in the same bag as the victims', and that therefore no value can be attached to the outcome of the examination that fibers of his clothes were found on the victims'. It is also claimed that there were irregularities in the identification process. The author alleges that he was led through

¹ It is said that medical expert opinions of 18 January and 30 August confirm this.

the hall where the victims were sitting on the day of the identification. When one of the victims failed to point him out as the perpetrator, allegedly the investigator took her hand and pointed to the author. It is further submitted that the description by the victims of their attacker completely differs with the author's appearance.

3.5 The author claims that his right to presumption of innocence was violated. Between 26 and 30 November 1989 radio stations and newspapers announced that the author was the feared "lift-boy" murderer, who had raped several girls and murdered three of them. Also, on 9 December 1989, the head of the police announced that he was sure that the author was the murderer, and this was broadcasted on television. Furthermore, the author alleges that the investigator pronounced the author guilty in public meetings before the court hearing and called upon the public to send prosecutors. As a consequence, the author states that at his trial ten social prosecutors were present whereas he was defended by one social defender,² who was later forced to leave the court room.³ According to the author, the court room was crowded with people who were screaming that the author should be sentenced to death. He also states that the social prosecutors and the victims were threatening the witnesses and the defense and that the judge did not do anything to stop this. Because of this, there was no proper opportunity to examine the main witnesses in court.

3.6 At the first day of the hearing, the author pleaded not guilty.⁴ He was then placed in a lock-up. He complains that he was never allowed to discuss matters with his lawyer in private.

3.7 He also complains that the witnesses who could have confirmed his alibi were not examined in court. Moreover, some statements given during the preliminary examination disappeared from the record.

3.8 It is further claimed that in violation of Russian law, the records of the trial were only compiled and signed on 25 February 1991, whereas the hearing finished on 3 October 1990. Three witnesses filed complaints to the Supreme Court,

² The author refers to social prosecutors and social defenders as provided for under the Russian system, who act in addition to the public prosecutor and defence counsel.

³ From the file it appears that two social defenders were available to the author and that it was one of these who was forced to leave the court room.

⁴ From the file it appears that the author pleaded not guilty to all charges, except for the assault on Ms. Zykina.

because of discrepancies between the record and what they had in fact testified.

3.9 The above is said to constitute violations of article 14, paragraphs 1, 2, 3 (b),(e) and (g).

The State party's submission and author's comments

4.1 By submission dated 16 February 1998, the State party contends that the communication should be declared inadmissible since it was not submitted by the author himself, but by counsel on his behalf.

4.2 In a further submission, dated 26 February 1999, the State party addresses the merits of the communication. In this respect it submits that in order to respond to the Committee's request the Russian Federation Procurator's Office reviewed the author's case. It verified the statements of the victims and witnesses, the inspection of the place where the incidents took place, and the conditions under which the author was identified. In this respect, the State party contends that the argument that the author was innocent of the charges and that the investigation methods used violated his rights to a defence, as well as the issue of public pressure were all reviewed by the Supreme Court in its capacity as an Appeal Court, which considered them to be unfounded.

4.3 The State party contends that neither the author nor his lawyer ever raised the issue of police coercion before the courts. It further contends that the author was represented by a lawyer throughout the preliminary investigation, during which the author provided detailed information in respect of the crimes. According to the State party the author only retracted from these statements in court due to pressure placed on him by members of his family.

4.4 With respect to the allegation that the author was unable to read the statements since he was denied reading glasses, the State party notes that from the court records the author stated that he could read at a distance of 10 to 15 centimetres without glasses and furthermore, the investigators provided the author with glasses. Consequently, the State party rejects any violation of the Covenant in this respect.

4.5 Finally, the State party states that Mr. Gridin was questioned in the presence of the defence lawyer who was assigned to him in accordance with the law. The State party notes that Mr. Gridin was arrested on 25 November 1989 and on 1 December 1989 his mother V.V. Gridina, wrote requesting that the defence lawyer should be invited to participate in the investigations. On 5 December 1989 an agreement was concluded between Gridin's relatives and the lawyer who, from that time, was allowed to participate.

5. The author's counsel in a letter dated 14 September 1999, reiterates the claims of the

original submission and points out that by the State party's own admission the author was unrepresented from 25 November to 1 December 1989.

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 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 The Committee observes that the State party has objected to the admissibility of the communication, since the communication had been submitted by counsel and not by the author himself. The Committee points out that according to its rules and practice, the author may be represented by counsel and it is not therefore precluded from examining the merits of the communication. The Committee rejects the State party's contention that the communication should be declared inadmissible in this respect.

6.4 With respect to the allegations of ill-treatment and police coercion during the investigation period including denying the author the use of reading glasses, it appears from the material before it that most of these allegations were not raised before the trial court. All the arguments were raised on appeal but the Supreme Court found them to be unsubstantiated. In these circumstances, the Committee finds that the author has not substantiated a claim within the meaning of article 2 of the Optional Protocol.

6.5 With regard to the allegation that his lawyer was not informed of the dates of the court actions which dealt with medical issues the Committee notes that this matter was reviewed by the Supreme Court which found it to be in accordance with law and consequently considers that this claim remains unsubstantiated for purposes of admissibility.

7. The Committee declares the remaining claims admissible, and proceeds with the examination of the merits of all admissible claims, in the light of the information made available to it by the parties, as required by article 5 paragraph 1, of the Optional Protocol.

8.1 With respect to the allegation that the author was arrested without a warrant and that this was only issued more than three days after the arrest, in contravention of national legislation which stipulates that a warrant must be issued within 72 hours of

arrest, the Committee notes that this matter has not been addressed by the State party. In this regard, the Committee considers that in the circumstances of the present case the author was deprived of his liberty in violation of a procedure as established by law and consequently it finds that the facts before it disclose a violation of article 9, paragraph 1.

8.2 With regard to the author's claim that he was denied a fair trial in violation of article 14, paragraph 1, in particular because of the failure by the trial court to control the hostile atmosphere and pressure created by the public in the court room, which made it impossible for defence counsel to properly cross-examine the witnesses and present his defence, the Committee notes that the Supreme Court referred to this issue, but failed to specifically address it when it heard the author's appeal. The Committee considers that the conduct of the trial, as described above, violated the author's right to a fair trial within the meaning of article 14, paragraph 1.

8.3 With regard to the allegation of a violation of the presumption of innocence, including public statements made by high ranking law enforcement officials portraying the author as guilty which were given wide media coverage, the Committee notes that the Supreme Court referred to the issue, but failed to specifically deal with it when it heard the author's appeal. The Committee refers to its General Comment No. 13 on article 14, where it has stated that: "It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial". In the present case the Committee considers that the authorities failed to exercise the restraint that article 14, paragraph 2, requires of them and that the author's rights were thus violated.

8.4 With regard to the remaining allegations contained in paragraphs 3.4 and 3.7 supra, the Committee notes that the Supreme Court addressed the specific allegations by the author that, the evidence was tampered with, that he was not properly identified by the witnesses and that there were discrepancies between the trial and its records. However, the rejection by the court of these specific allegations did not address the fairness of the trial as a whole and therefore does not affect the Committee's finding that article 14, paragraph 1, of the Covenant was violated.

8.5 With respect to the allegation that the author did not have a lawyer available to him for the first 5 days after he was arrested, the Committee notes that the State party has responded that the author was represented in accordance with the law. It has not, however, refuted the author's claim that he requested a lawyer soon after his detention and that his request was ignored. Neither has it refuted the author's claim that he was interrogated without the benefit of consulting a lawyer after he repeatedly requested

such a consultation. The Committee finds that denying the author access to legal counsel after he had requested such access and interrogating him during that time constitutes a violation of the author's rights under article 14, paragraph 3 (b). Furthermore, the Committee considers that the fact that the author was unable to consult with his lawyer in private, allegation which has not been refuted by the State party, also constitutes a violation of article 14, paragraph 3 (b), 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 a violation of article 14, paragraphs 2 and 3 (b), of the Covenant.

10 In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an

obligation to provide Mr. Gridin with an effective remedy, entailing compensation and his immediate release. The State party is under an obligation to ensure that similar violations do not occur in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether 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.

Communication No. 774/1997

Submitted by: Robert Brok et al. [not represented by counsel]

Alleged victim: The authors

State party: Czech Republic

Date of the adoption of Views: 31 October 2001 (seventy-third session)

Subject matter: Denial of restitution of confiscated property to former citizens of State party

Procedural issues: Committee's competence *ratione temporis* – Exhaustion of domestic remedies

Substantive issues: Right to equality before the law – Equal protection of the law and non discrimination

Article of the Covenant: 26

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

Finding: Violation

1. The original author of the communication dated 23 December 1996, Robert Brok, was a Czech citizen, born in September 1916. When he passed away on 17 September 1997, his wife Dagmar Brokova maintained his communication. It is claimed that the Czech Republic has violated arts 6, 9, 14 (1), 26 and 27 of the Covenant. The Optional Protocol entered into force for the Czech Republic on 12 June 1991. The Czech and Slovak Federal Republic ratified the Optional Protocol in March 1991, but on 31 December 1992 the Czech and Slovak Federal Republic ceased to exist. On 22 February 1993, the Czech Republic notified its

succession to the Covenant and the Optional Protocol.¹ The author is not represented by counsel.

The facts as submitted

2.1 Robert Brok's parents owned a house in the centre of Prague since 1927 (hereinafter called the property). During 1940 and 1941, the German authorities confiscated their property with retroactive effect to 16 March 1939, because the owners were Jewish. The property was then sold to the company Matador on 7 January 1942. The author himself, was deported by the Nazis, and returned to Prague on 16 May 1945, after having been released from a concentration camp. He was subsequently hospitalized until October 1945.

2.2 After the end of the war, on 19 May 1945, President Benes' Decree No. 5/1945, followed up later by Act 128/1946, declared null and void all property transactions effected under pressure of the occupation regime on the basis of racial or political

¹ The Czech and Slovak Federal Republic ratified the Optional Protocol in March 1991, but on 31 December 1992 the Czech and Slovak Federal Republic ceased to exist. On 22 February 1993, the Czech Republic notified its succession to the Covenant and the Optional Protocol.

persecution. National administration was imposed on all enemy assets. This included the author's parents' property pursuant to a decision taken by the Ministry of Industry on 2 August 1945. However, in February 1946, the Ministry of Industry annulled that decision. It also annulled the prior property confiscation and transfers, and the author's parents were reinstated as the rightful owners, in accordance with Benes Decree No. 5/1945.

2.3 However, the company Matador, which had been nationalized on 27 October 1945, appealed against this decision. On 7 August 1946, the Land Court in Prague annulled the return of the property to the author's parents and declared Matador to be the rightful owner. On 31 January 1947, the Supreme Court confirmed this decision. The Court found that since the company with all its possessions had been nationalized in accordance with Benes Decree No. 100/1945 of 24 October 1945, and since national property was excluded from the application of Benes Decree No. 5/1945, the Ministry had wrongfully restored the author's parents as the rightful owners. The property thereby stayed in possession of Matador, and was later, in 1954, transferred to the state company Technomat.

2.4 Following the change to a democratic government at the adoption of restitution legislation, the author applied for restitution under Act No. 87/1991 as amended by Act No. 116/1994. The said law provides restitution or compensation to victims of illegal confiscation carried out for political reasons during the Communist regime (25 February 1948 -1 January 1990). The law also matter provisions for restitution or compensation to victims of racial persecution during the Second World War, who have an entitlement by virtue of Decree No. 5/1945. The courts (District Court decision 26 C 49/95 of 20 November 1995 and Prague City Court decision 13 Co 34/94-29 of 28 February 1996), however, rejected the author's claim. The District Court states in its decision that the amended Act extends the right to restitution to persons who lost their property during the German occupation and who could not have their property restituted because of political persecution, or who went through legal procedures that violated their human rights subsequent to 25 February 1948, on condition that they comply with the terms set forth in Act No. 87/1991. However, the court was of the opinion that the author was not eligible for restitution, because the property was nationalized before 25 February 1948, the retroactive cut-off date for claims under Act No. 87/1991 Section 1, paragraph 1, and Section 6. This decision was confirmed by the Prague City Court.

2.5 Pursuant to section 72 of Act No. 182/1993, the author filed a complaint before the Constitutional court that his right to property had been violated.

This provision allows an individual to file a complaint to the Constitutional Court if the public authority has violated the claimant's fundamental rights guaranteed by a constitutional law or by an international treaty in particular the right to property.

2.6 The Constitutional Court concluded that since the first and second instances had decided that the author was not the owner of the property, there were no property rights that could have been violated. In its decision, the Constitutional Court invoked the question of fair trial on its own motion and concluded that "the legal proceedings were conducted correctly and all the legal regulations have been safeguarded". Accordingly, the Constitutional Court rejected the author's constitutional complaint on 12 September 1996.

The complaint

3.1 The author alleges that the court decisions in this case are vitiated by discrimination and that the courts' negative interpretation of the facts is manifestly arbitrary and contrary to the law.

3.2 The author's widow contends that the Act No. 87/1991, amended by Act No. 116/1994, is not applied to all Czech citizens equally. She deems it obvious that Robert Brok met all the conditions for restitution set forth in the law, but contends that the Czech courts were not willing to apply these same criteria to his case, in violation of articles 14, paragraph 1, and 26 of the Covenant.

3.3 The author's widow contends that the decision by the Supreme Court in 1947 was contrary to the law, in particular Benes Decree No. 5/1945 and Act No. 128/1946, which annul all property transfers after 29 September 1938 taken for reasons of national, racial or political persecution. She points out that at the time that Benes Decree No. 5/1945 was issued (10 May 1945), the company Matador had not yet been nationalized and that the exclusion of restitution therefore did not apply.

3.4 The author's widow states that the Act No. 87/1991 amended by Act No. 116/1994 Section 3, paragraph 2 contains an exception to the time limitations and enables the author as entitled through Benes Decree No. 5/1945 to claim restitution. According to the author's widow, the intention of this exception is to allow restitution of property that was confiscated before 25 February 1948 owing to racial persecution, and especially to allow restitution of Jewish property.

3.5 The author's widow further claims that since the initial expropriations happened as part of genocide, the property should be restored regardless of the positive law in the Czech Republic. The author points to other European countries where confiscated Jewish properties are restituted to the

rightful owners or to Jewish organizations if the owners could not be identified. Article 6 of the Covenant refers to obligations that arise from genocide. In the authors' opinion, the provision should not be limited to obligations arising from complainants killed in genocide, but also to those, like Robert Brok, who survived genocide. The refusal to restitute property thereby constitutes violation of article 6, paragraph 3, of the Covenant.

3.6 The Czech Republic has, according to the author's widow, systematically refused to return Jewish properties. She claims that since the Nazi expropriation targeted the Jewish community as a whole, the Czech Republic's policy of non-restitution also affects the whole group. As a result and for the reason of lacking economical basis, the Jewish community has not had the same opportunity to maintain its cultural life as others, and the Czech Republic has thereby violated their right under article 27 of the Covenant.

State party's admissibility observations

4.1 By note verbale of 16 October 2000, the State party objects to the admissibility of the communication. The grounds for the State party's objections are the following:

(1) It argues that the author invoked only the right to own property in the domestic procedure, and not the rights covered by the Covenant. Thus, the vindication of domestic remedies for Covenant rights are not engaged;

(2) The State party points out that the events complained of occurred prior to the entry into force of the Optional Protocol for the Czech Republic, when the property was subject to confiscation in the 1940s, and the communication is therefore inadmissible *ratione temporis*; and

(3) The State party notes that the communication concerns the right to own property, which is not covered by the Covenant, and the communication is therefore inadmissible *ratione materiae*.

4.2 The State party contends that the author on 19 February 1946 obtained restitution of his property on the basis of the Industry Ministry Decision No. II/2-7540/46 and not on the basis of the National Committee decision as empowered by Decree No. 5/1945. It further states that the procedure chosen by the author was inconsistent with the special legislation governing exemptions from national administration. In addition, the author's father did not avail himself of Decree No. 108/1945 that regulated the confiscation of enemy assets and the establishment of National Restoration Funds. He thereby waived enlarged avenues for appeals against dismissal of claims for exemptions from national administration, to the Ministry of Interior.

4.3 Furthermore, the State party contends that the author in his claim to the courts in 1995/1996 did not complain about discrimination nor challenge the handling of the case by the courts in 1946 and 1947.

4.4 The State party points out that in communication No. 670/1995 (*Schlosser v. the Czech Republic*) and in communication No. 669/1995 (*Malik v. the Czech Republic*), the Committee concluded that the said legislation applied in these cases was not *prima facie* discriminatory within the meaning of article 26 of the Covenant merely because it did not compensate victims of injustices committed in the period before the Communist regime.

4.5 The State party contends that all formal restoration of title according to Decree No. 5/1945 was completed before 25 February 1948, whereas the Act No. 87/1991 as amended only covers restitution of property that was confiscated between 25 February 1948 and 1 January 1990.

Author's comments on State party's submission

5.1 By letter of 29 January 2001, the author's widow contends that the State party has not addressed her arguments concerning the amendment to Act No. 87/1991 by Act No. 116/1994, which she considers crucial for the evaluation of the case.

5.2 She further states that the property would never have become subject to nationalization if it were not for the prior transfer of the assets to the German Reich which was on racial basis, and therefore the decisions allowing nationalization were discriminatory. The author's widow concedes that the communication concerns a property right, but explains that the core of the violation is the element of discrimination and the denial of equality in contravention of articles 6, 14, 26 and 27 of the Covenant.

5.3 The author's widow further contends that the claim complies with the *ratione temporis* condition, since the claim relates to the decisions made by the Czech courts in 1995 and 1996.

5.4 With regard to the State party's claim that the author's father could have claimed the property pursuant to Act No. 128/1946 until 31 December 1949, the author's widow contends that the author's father had good reason to fear political persecution from the Communist regime after 25 February 1948. Moreover, the violations of the Communist regime are not before the Committee, but rather the ratification and continuation of those violations by the arbitrary denial of redress following the adoption of restitution legislation in the 1990s. The author's submission was transmitted to the State party on 7 February 2001. The State party, however, has not responded to the author's comments.

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

6.3 The Committee has noted the State party's objections to the admissibility and the author's comments thereon. It considers that the State party's allegations that the author has not met the *ratione temporis* condition for admissibility, is not relevant to the case, viewing that the author specifically noted that his claim relates to the decisions of the Czech courts in 1995 and 1996.

6.4 With regard to the State party's objections *ratione materiae*, the Committee notes that the author's communication does not invoke a violation of the right to property as such, but claims that he is denied a remedy in a discriminatory manner.

6.5 Furthermore, to the State party's objections that the communication is inadmissible for non-exhaustion of domestic remedies, the Committee notes that the facts 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. However, the issues relating to article 6, 9 and 27 appear not to have been raised before the domestic courts. The Committee considers that it is not precluded from considering the remaining claims in the communication by the requirement contained in article 5, paragraph 2 (b), of the Optional Protocol.

6.6 In its inadmissibility decisions on communications No. 669/1995 (*Malik v. the Czech Republic*) and 670/1995 (*Schlosser v. the Czech Republic*), the Committee held that the author there had failed to substantiate, for purposes of admissibility, that Act No. 87/1991 was *prima facie* discriminatory within the meaning of article 26. The Committee observes that in this case, the late author and his widow have made extensive submissions and arguments which are more fully substantiated, thus bringing the case over the threshold of admissibility so that the issues must be examined on the merits. Moreover, the instant case is distinguishable from the above cases in that the amendment of Act No. 87/1991 by Act No. 116/1994 provides for an extension for a claim of restitution for those entitled under Benes Decree No. 5/1945. The non-application of this extension to the author's case

raises issues under article 26, which should be examined on the merits.

6.7 The Committee finds that the author has failed to substantiate for purposes of admissibility, his claims under articles 14, paragraph 1 of the Covenant. Thus, this part of the claim is inadmissible under article 2 of the Optional Protocol.

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 in article 5, paragraph 1, of the Optional Protocol.

7.2 The question before the Committee is whether the application of Act No. 87/1991, as amended by Act No. 116/1994, to the author's case entails a violation of his right to equality before the law and to the equal protection of the law.

7.3 These laws provide restitution or compensation to victims of illegal confiscation carried out for political reasons during the Communist regime. The law also provides for restitution or compensation to victims of racial persecution during the Second World War who had an entitlement under Benes Decree No. 5/1945. The Committee observes that legislation must not discriminate among the victims of the prior confiscation to which it applies, since all victims are entitled to redress without arbitrary distinctions.

7.4 The Committee notes that Act No. 87/1991 as amended by Act No. 116/1994 gave rise to a restitution claim of the author which was denied on the ground that the nationalization that took place in 1946/47 on the basis of Benes Decree No. 100/1945 falls outside the scope of laws of 1991 and 1994. Thus, the author was excluded from the benefit of the restitution law although the Czech nationalization in 1946/47 could only be carried out because the author's property was confiscated by the Nazi authorities during the time of German occupation. In the Committee's view this discloses a discriminatory treatment of the author, compared to those individuals whose property was confiscated by Nazi authorities without being subjected, immediately after the war, to Czech nationalization and who, therefore, could benefit from the laws of 1991 and 1994. Irrespective of whether the arbitrariness in question was inherent in the law itself or whether it resulted from the application of the law by the courts of the State party, the Committee finds that the author was denied his right to equal protection of the law in violation of article 26 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of

the view that the facts before it substantiate a violation of article 26 in conjunction with article 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. Such remedy should include restitution of the property or compensation, and appropriate compensation for the period during which the author and his widow were deprived of the property, starting on the date of the court decision of 20 November 1995 and ending on the date when the restitution has been completed. The State party should review its relevant legislation and administrative practices to ensure that neither the law nor its application entails discrimination in contravention of article 26 of the Covenant.

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 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 by Committee member Martin Scheinin (partly concurring, partly dissenting)

While I concur with the main part in the Views of the Committee, I dissent as to the remedy proposed. As established by the Committee, the author was a victim of a violation of article 26 in that his claim for restitution of property was arbitrarily denied. This is the human rights violation suffered by the author after the entry into force of the Covenant and its Optional Protocol.

Whether the author is entitled to the restitution of his parent's property is an issue of domestic law. What the Covenant requires is that the domestic law and its application must be free of discrimination and must secure that any restitution claim is decided without discrimination and through a fair trial. Consequently, the proper remedy for the violation found by the Committee is that the State party secures to the author's widow a fresh possibility to have the restitution claim considered, without discrimination or arbitrariness and with all the guarantees of a fair trial if the matter cannot be decided without a judicial determination of the claim. If the State party fails to afford that remedy, for instance due to the unwillingness of its legislature to amend discriminatory laws, the alternative remedy is compensation for the discrimination the author suffered, duly taking into

account the economic loss and moral suffering caused by the discrimination established by the Committee.

The case of *Des Fours Walderode*, decided by the Committee is to be distinguished from the present case, because in that case the title had already been recognized before the State party, through retroactive and discriminatory legislation, interfered in that recognition. Therefore the restitution of the property is the proper remedy in that case.

Individual Opinion by Committee member Mr. Nisuke Ando (dissenting)

While I heartily sympathize with the situation in which the author found himself and his widow still finds herself with respect to the property in question, I am unable to share the Committee's Views finding a violation of article 26 of the Covenant in the present case. The relevant facts of the case as I see them are as follows:

During 1940 and 1941 a house in Prague owned by Mr. Brok's parents was confiscated by the German authorities then occupying Czechoslovakia because the owners were Jewish. In January 1942 the house was sold to the company Matador. In May 1945, after the end of the war, President Benes' Decree No. 5/1945 declared null and void all property transactions effected under the occupant's pressure on the basis of racial or political persecution, imposing national administration on all enemy assets. On 2 August 1945 the Ministry of Industry decided to include the house in question among the enemy assets, but on 19 February 1946 the Ministry reversed its decision and reinstated the author's parents as the rightful owners of the house. However, the company Matador, which had been nationalized with its all possessions in October 1945 under the Benes Decree No. 100/1945, appealed against the Ministry's decision, and on 7 August 1946 the Land Court in Prague annulled the return of the property to the author's parents and declared the company Matador as its rightful owner for the reason that the national property had been excluded from the application of Benes Decree No. 5/1945. On 31 January 1947 the Supreme Court confirmed this decision. (See paras. 2.1 and 2.3). The state party contends that the author's father did not avail himself of Decree No. 108/1945 (No. 126/1946) which regulated the confiscation of enemy assets and the establishment of National Restoration Fund, thereby waiving avenues for appeals against dismissal of claims for exemptions from national administration to the Ministry of Interior. (para. 5.1) It also contends that all formal restoration of title according to Benes Decree No. 5/1945 was completed before 25 January 1948. (para. 5.4) Against these contentions the author's widow asserts that the author's father had good reason to fear political persecution from the Communist regime after 25 February 1948. (para. 6.4).

After the collapse of Communist regimes in Czechoslovakia Act No. 87/1991 as amended by Act No. 116/1994 was legislated, providing for restitution or compensation to victims of illegal confiscation carried out for political reasons during the Communist regime. The amendment refers to victims affected under Benes Decree No. 5/1945, but the Act applies only to "certain property losses and other injustices caused by civil and

labour law provisions as well as by some administrative acts *between the dates of 25 February 1948 and 1 January 1990*". (Part One, Section One). The author applied for restitution of the property in question under the Act, but despite the author's widow's contention that the reference to victims affected under Benes Decree No. 5/1945 was to allow restitution of property which was confiscated before 25 February 1948 due to racial persecution (para. 3.3), the Czech courts (District Court and Prague City Court. See para. 2.4) as well as its Constitutional Court (para. 2.6) rejected the authors claim because the house had been confiscated before 25 February 1948, the retroactive cut-off date for claims under the Act.

As far as these facts are concerned, I consider it difficult to find any intent for discriminating a certain category of persons from others. Act No. 87/1991 as amended by Act. No. 116/1994 generally aims to mitigate the consequences of confiscation of private property under the Communist regime. As such it covers the period between 25 February 1948 and 1 January 1990. The author's widow asserts that the amendment is to allow restitution of property confiscated before 25 February 1948, but the State party, contends that all formal restitution of title according to Benes Decree No. 5/1945 was completed before 25 January 1948. Moreover, the "good reason to fear political persecution from the Communist regime after 25 February 1948" which the author's widow claims as having prevented her father from availing himself of possible remedies is not sufficiently specific to establish that he was unable to pursue them before 25 January 1948. It is unfortunate that the Act fails to recover the property, which belongs to the author and persons in similar situations. Nevertheless, since the Act is not intended to recover all and every property confiscated in the past on political or racial grounds, I consider it difficult to find a violation of article 26 of the Covenant in the present case.

Individual Opinion by Committee member Ms. Christine Chanet (dissenting)

This decision by the Committee constitutes a break with the position taken by all international jurisdictions and upheld by the Committee thus far, namely the principle of subsidiarity with regard to the rule of non-exhaustion of domestic remedies.

In the case at hand, only the question of the right to property was raised in the domestic courts: at no time did the author of the communication submit a complaint to the courts alleging discrimination.

The decisions of the domestic courts that were transmitted to the Committee clearly show that the Committee is the first instance in which discrimination has been alleged.

Furthermore, by its decision the Committee is setting a disturbing precedent by taking the domestic courts to task for not automatically providing a means of action or defence to address the violation of a right guaranteed by the Covenant.

The Committee has also gone against its jurisprudence a third time by involving itself in the assessment of evidence by the domestic courts (para. 3.1).

Lastly, the Committee is substituting its own interpretation of the domestic law of a State for the interpretation recognized by the courts of that State; in so doing, the Committee is overstepping the bounds of its competence as defined by the Covenant and the Optional Protocol.

It is therefore to be hoped that this particular decision by the Committee will remain an isolated exception.

Communication No. 779/1997

Submitted by: Anni Äärelä et al. [represented by counsel]

Alleged victim: The authors

State party: Finland

Declared admissible: 24 October 2001 (seventy-third session)

Date of the adoption of Views: 24 October 2001 (seventy-third session)

Subject matter: Logging and road construction and their effects on affecting reindeer husbandry

Procedural issues: Non-exhaustion of domestic remedies – Substantiate of claim

Substantive issues: Equality of arms in domestic judicial proceedings - Imposition of legal costs in violation of fair trial requirements - Right of individuals belonging to minorities to enjoy their culture in community with other individuals of the minority

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

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

Finding: Violation

1. The authors of the communication, dated 4 November 1997, are Anni Äärelä and Jouni Näkkäläjärvi, both Finnish nationals. They claim to be victims of a violation by Finland of articles 2, paragraph 3, 14, paragraphs 1 and 2, and 27 of the Covenant. They are represented by counsel.

The facts as submitted

2.1 The authors are reindeer breeders of Sami ethnic origin and members of the Sallivaara Reindeer Herding Co-operative. The Co-operative has 286,000 hectares of State-owned land available for reindeer husbandry. On 23 March 1994, the Committee declared a previous communication, brought by the authors among others and which alleged that logging and road-construction activities in certain reindeer husbandry areas violated article 27 of the Covenant, inadmissible for non-exhaustion of domestic remedies.¹ In particular, the Committee considered that the State party had shown that article 27 could be invoked in the relevant domestic proceedings, which the authors should have engaged before coming to the Committee. Thereafter, following unsuccessful negotiations, the authors brought a suit in the Lappi District Court of first instance against the National Forestry and Park Service (Forestry Service). The suit sought the enjoinder, on the basis *inter alia* of article 27 of the Covenant, of any logging or road-construction in the Mirhaminmaa-Kariselkä area. This area is said to be amongst the best winter herding lands of the Sallivaara Co-operative.

2.2 On 30 August 1996, the District Court decided, following an on-site forest inspection at the authors' request, to prohibit logging or road construction in the 92 hectare Kariselkä area, but to allow it in the Mirhaminmaa area.² The Court applied a test of "whether the harmful effects of felling are so great that they can be deemed to deny to the Sami a possibility of reindeer herding that is part of their culture, is adapted to modern developments, and is profitable and rational". The Court considered that logging in the Mirhaminmaa area would be of long-term benefit to reindeer herding in the area and would be convergent with those interests. In the Kariselkä area, differing environmental conditions meant that there would be a considerable long-term decrease in lichen reserves. Relying *inter alia* on the decisions of the Committee,³ the Court found that these effects of logging, combined with the fact that the area was an emergency feeding ground, would prevent reindeer herding in that area. A factor in the decision was the disclosure that an expert testifying for the Forestry

Service disclosed he had not visited the forest in question. After the decision, logging duly proceeded in the Mirhaminmaa area.

2.3 On appeal by the Forestry Service to the Rovaniemi Court of Appeal, the Forestry Board sought the then exceptional measure of oral hearings. The Court granted this motion, while rejecting the author's motion that the appellate court itself conduct an on-site inspection. The expert witness, having in the meanwhile examined the forest, repeated his first instance testimony for the Forestry Service. Another expert witness for the Forestry Service testified that the authors' herding co-operative would not suffer greatly in the reduction of herding land through the logging in question, however the Court was not informed that the witness already had proposed to the authorities that the authors' herd should be reduced by 500 owing to serious overgrazing.

2.4 On 11 July 1997, the Appeal Court, reversing the first instance decision, allowed logging also in the Kariselkä area, and awarded costs of 75,000 Finnish marks against the authors.⁴ The Court took a different view of the expert evidence. It found that the small area of logging proposed (which would not involve further roadworks) would have minimal effects on the quantities of arboreal lichen and, over time, increase the amounts of ground lichen. In light of the finding that the area was not the main winter pasture and in recent years had not been used as a back-up area, the Court concluded it had not been shown that there would be adverse effects on reindeer in the long run and even the immediate effects would be small. The authors were not made aware by the Appeal Court or the Forestry Service that the latter had presented allegedly distorted arguments to the Court based on the Committee's finding of no violation of article 27 of the Covenant in the separate case of *Jouni Länsman et al. v. Finland*.⁵ The authors learned of this brief only upon receiving the Appeal Court's judgement, in which it stated that the material had been taken into account, but that an opportunity for the authors to comment was "manifestly unnecessary". On 29 October 1997, the Supreme Court decided, in its discretion and without giving reasons, not to grant leave to appeal. Thereafter, logging took place in the Kariselkä area, but no roads were constructed.

2.5 On 15 December 1997, the Ombudsman decided that the municipality of Inari and its mayor had exerted inappropriate pressure on the authors by formally asking them to withdraw from their legal

¹ *Sara et al. v. Finland*, Communication 431/1990.

² The State party points out that the 92 hectares area amounts to some 3 per cent of the 6,900 hectares of the Co-operative's lands used for forestry.

³ *Sara v. Finland* (Communication 431/1990), *Kitok v. Sweden* (Communication 197/1985), *Ominayak v. Canada* (Communication 167/1984), *Ilmari Länsman v. Finland* (Communication 511/1992); and moreover the Committee's General Comments 23 (50).

⁴ Costs, for which the authors were jointly liable, totalled 73,965.28 Finnish marks, with 11 per cent annual interest.

⁵ Communication 671/1995.

proceedings, but did not find that the Forestry Service had acted unlawfully or otherwise wrongly.⁶ The Ombudsman limited his remedy to bringing this conclusion to the attention of the parties. On 1 June 1998, a decision of the Ministry of Agriculture and Forestry (of 13 November 1997) entered into effect reducing the permissible size of the Sallivaara herd by 500 head from 9,000 to 8,500 animals. On 3 and 11 November 1998, the Forestry Service required a total sum of over 20,000 Finnish marks from the authors towards meeting the costs judgement.⁷ This sum distrained by the Forestry Service corresponds to a major share of the authors' taxable income.

The complaint

3.1 The authors claim a violation of article 27 of the Covenant in that the Appeal Court allowed logging and road construction in the Kariselkä area, comprising the best winter lands of the authors' herding co-operative. The authors contend that this logging in the herding lands, coupled with a reduction at the same time of the permissible number of reindeer, amounts to a denial of their right to enjoy their culture, in community with other Sami, for which the survival of reindeer herding is essential.

3.2 The authors claim a violation of article 14, paragraphs 1 and 2, of the Covenant, contending that the Appeal Court was not impartial, having prejudged the outcome of the case and violated the principle of equality of arms in (i) allowing oral hearings while denying an on-site inspection and (ii) taking into account material information without providing an opportunity to the other party to comment. The authors also contend that the award of costs against the authors at the appellate level, having succeeded at first instance, represents bias and effectively prevents other Sami from invoking Covenant rights to defend their culture and livelihood. There is no State assistance available to impecunious litigants to satisfy the imposition of costs.⁸

3.3 The authors also claim improper influence was exerted by the Forestry Service while the case was before the courts. They claim to have been harassed, to have had public meetings arranged to criticise them, to have had the municipality formally request withdrawal of the suit or risk endangering the herding co-operative's economic development,

⁶ The complaint had been submitted almost three years earlier.

⁷ No information is provided on whether the Forestry Service is pursuing the outstanding portion of costs awarded to it (some 55,000 Finnish marks).

⁸ The authors were also represented pro bono throughout the proceedings.

and to have had the Forestry Service make unfounded allegations of criminal conduct against one of the authors.

3.4 The authors claim that the Supreme Court's unreasoned decision denying leave to appeal violated the right to an effective remedy within the meaning of article 2, paragraph 3, of the Covenant. They contend that the denial of leave to appeal to the Supreme Court, where a miscarriage of justice, in violation of article 14, had been demonstrated, means no effective remedy existed for that violation.

The State party's submissions with respect to the admissibility and merits of the communication

4.1 The State party responded to the communication by submission dated 10 April 1999. The State party contests the admissibility of the case. It argues that, in respect of some claims, domestic remedies have not been exhausted. As the authors did not appeal against the part of the first instance judgement that allowed logging and road construction in the Mirhaminmaa area, they have not exhausted available domestic remedies and that part of the claim is not admissible under article 5, paragraph 2 (b), of the Optional Protocol.

4.2 The State party argues that no violation of any provision of the Covenant has been shown. As to the claims under article 27, the State party accepts that the Sami community is an ethnic minority protected under that provision, and that individuals are entitled to its protection. It accepts further that reindeer husbandry is an accepted part of Sami culture and is accordingly protected under article 27 insofar as is essential to the Sami culture and necessary for its survival.

4.3 The State party argues however, referring to *Lovelace v. Canada*⁹ and *Ilmari Länsman et al. v. Finland*,¹⁰ that not every interference which in some limited way alters previous conditions can be regarded as a denial of article 27 rights. In the *Länsman* case, the Committee articulated a test of whether the impact is "so substantial that it does effectively deny [article 27 rights]". The State party also refers to jurisprudence of the Norwegian Supreme Court and the European Commission on Human Rights requiring serious and significant interference with indigenous interests before justiciable issues arise.¹¹

⁹ Communication 24/1977.

¹⁰ Communication 511/1992.

¹¹ *Alta* case, Norwegian Supreme Court, 26 February 1982, and *G. and E. v. Norway*, Application No. 9278/1981 and 9415/1981 (joined), Decisions and Reports of the European Commission of Human Rights, Vol. 35.

4.4 In the present case, the State party emphasises the limited extent of the Kariselkä logging, amounting to 92 hectares of a total of 286,000 hectares of the Co-operative's total lands. The State party refers to the facts in the *Jouni Länsman et al. v. Finland*¹² case, where the Committee considered logging covering 3,000 of 255,000 hectares not to disclose a violation of article 27.

4.5 The State party points out that the author's claims were thoroughly examined in two courts, which considered the case explicitly in the light of article 27 of the Covenant. The courts heard expert witnesses, examined extensive documentary material and conducted an on-site inspection before coming to an evaluation of the facts. The Court of Appeal determined that the lichen pastures were poor, and that logging would assist the recovery of such lichen.¹³ The intermediate cutting envisaged was also a lower impact form of logging that would have less significant effects, and was less than the logging envisaged in the *Jouni Länsman* case where the Committee found no breach. The State party also contests whether the Kariselkä area could be described as "best (winter) herding lands", noting that the Court found that the area was not the main pasture area in winter, and in recent years had not even been used as a back-up area.

4.6 The State party also emphasises that, as required by the Committee in *Jouni Länsman*, the affected persons effectively participated in the decisions affecting them. The Forestry Service plans were developed in consultation with reindeer owners as key stakeholder groups. The Sallivaara Committee's opinion resulted in a course being adopted different to that originally recommended by the Wilderness Committee to reconcile forestry and herding, including a reduced area available to forestry. In this connection the State party refers extensively to the legal obligations on the Forestry Service to sustainably manage and protect natural resources, including the requirements of Sami reindeer herding culture.¹⁴ Accordingly, the State party argues that the different interests of forestry and reindeer husbandry have been properly weighed in coming to the most appropriate forestry management measures.

¹² Communication 671/1995.

¹³ The State party notes that another Co-operative had proposed this form of logging in their area in order to stimulate lichen growth.

¹⁴ The State party refers to s.2, Act on the National Forestry and Park Service 1993; s.11, Decree on the Finnish Forestry and Park Service 1993; and documentation of the Ministry of Agriculture and Forestry's working group on reindeer husbandry.

4.7 The State party points to the Committee's approval of this kind of reconciliation in *Ilmari Länsman*, where it considered that for planned economic activities to be consistent with article 27 the authors had to be able to continue to benefit from husbandry. The measures contemplated here also assist reindeer husbandry by stabilizing lichen supplies and are compatible with it. Moreover, many herdsmen, including the authors, practise forestry on their lands in addition to pursuing husbandry.

4.8 Finally, the State party contends that, contrary to the authors' assertion, no decision to reduce reindeer numbers has been made, although the Herdsmen's Committees and the Sami Parliament have provided opinions.

4.9 In sum, the State party argues with respect to this claim that the authors' right to enjoy Sami culture, including reindeer husbandry, has been appropriately taken into consideration in the case. While the logging and consequential waste will temporarily have certain adverse effects on the pasture, it has not been shown that the consequences would create considerable and long-term effects which would prevent the authors from continuing reindeer herding in the area to its present extent. On the contrary, it has been indicated that due to heavy grazing the pastures were in bad condition and needed to recover. Furthermore, the area in question is a very small proportion of the Co-operative's area, and during winter the area has been used mostly at times of crisis in the 1970s and 1980s.

4.10 As to the authors' claims under article 14, the State party rejects that either the imposition of legal costs or the procedures pursued by the courts reveal violations of article 14.

4.11 As to the imposition of costs, the State party points out that under its law there is an obligation for the losing party to pay, when sought, the reasonable legal costs of the successful party.¹⁵ The law does not alter this situation when the parties are a private individual and public authority, or when the case involves human rights issues. These principles are the same in many other States, including Austria, Germany, Norway and Sweden, and are justified as a means of avoiding unnecessary legal proceedings and delays. The State party argues this mechanism, along with free legal aid for lawyers' expenses, ensures equality in the courts between plaintiffs and defendants. The State party notes however that, from 1 June 1999 on, an amendment to the law will permit a court ex officio to reduce a costs order that would otherwise be manifestly unreasonable or inequitable with regard to the facts resulting in the proceedings,

¹⁵ Chapter 21, section 1, Code of Judicial Procedure 1993.

the position of the parties and the significance of the matter.

4.12 In the present case, the award of costs against the authors was 10,000 Finnish marks lower than the sum of 83,765.59 Finnish marks actually sought by the Forestry Service.

4.13 As to the procedure adopted by the Court of Appeal, the State party argues that under its law (as it then was), it is not for the parties to decide on an oral hearing, but for the court to arrange one where it was necessary to assess the reliability and weight of oral witness statements taken in the district court. As to the refusal to make an on-site inspection, the Court considered, *after* the full oral hearing and evidence, that such an inspection would not provide any further relevant evidence. The District Court records of inspection were not in dispute, and accordingly an inspection was not necessary. The State party notes that a witness could go and see the relevant area, and such a visit cannot have jeopardised the interests of justice. However, the Court's judgement does not show whether the witness had in fact gone to the forest, or how decisive that evidence was. The authors also had a witness familiar with the forest in question.

4.14 As to the observations on the *Jouni Länsman* case submitted by the Forestry Service after the expiry of the appeal time limit, the State party notes that this occurred simply because the Committee's Views were delivered after that point. The Forestry Service letter contained only factual description of the decision and no detailed comment,¹⁶ and the State party therefore considered it manifestly unnecessary to request comments from the other party. The State party notes that the court could in any event have taken the Committee's Views into account *ex officio* as a source of law, and that both parties could have commented on the Views in the oral hearing.

¹⁶ The full text of the relevant parts of the letter reads: "The decision of the Human Rights Committee concerns the communication made by the authors who consider that their case was not duly considered by the Finnish courts and that the outcome of the case was not correct. The Human Rights Committee rejected the communication considering that the Supreme Court came to the right conclusion. At the same time the Human Rights Committee found that the logging executed and planned by the National Forest and Park Service in the Angeli area did not constitute a denial of the authors' right to practice reindeer herding as a part of their cultural heritage in accordance with article 27 of the Covenant on Civil and Political Rights. Since the Human Rights Committee came to the same conclusion as the Supreme Court, the decision supports the observations of the National Forest and Park Service."

4.15 The State party rejects the authors' contentions that there is no right to an effective remedy, in breach of article 2. The Covenant is directly incorporated into Finnish law and can be (and was) directly pleaded before all levels of the courts. Any first instance decision may be appealed, while appellate judgements may only be appealed with leave. This is granted only when necessary to ensure consistent court practice, when there is a procedural or other fault requiring annulment of the lower decision, or where other weighty reasons exist. Here, two full instances gave comprehensive consideration to the authors' claims and arguments.

4.16 As to the general claims of harassment and interference, the State party observes that the Forestry Service reported to the police a suspected offence of unauthorized felling of timber on State land by one author's husband. While the matter is still under police investigation, the author in question has paid the Forestry Service compensation for the damage and costs of investigation. However, these matters have not affected the Forestry Service's conduct in the issues raised by the communication.

Authors' response to the State party's submissions

5.1 The authors responded to the State party's submissions on 10 October 1999.

5.2 As to the admissibility of the communication, the authors state that they did not seek remedies for the logging in the Mirhaminmaa area, concentrating in the Court of Appeal on defending the District Court's decision on the Kariselkä area.

5.3 On the merits, the authors argue, however, that the logging of the Mirhaminmaa area immediately and necessarily affect the authors' article 27 rights. This logging in the best winterlands of the Co-operative increasingly encroaches on the authors' husbandry and increases the strategic significance of the Kariselkä area for herding, and should therefore be taken into account. The Kariselkä area becomes especially crucial during crisis situations in winter and spring, when the reindeer are suffering from lack of nourishment due to the paucity of such areas. The authors argue that the Kariselkä area's significance has also increased since other activities in the area limit the possibilities for herding, including large-scale gold mining, other mineral mining, large-scale tourism, and the operation of a radar station. They point out that the reduced amount of land available for herding after such encroachments has contributed to overgrazing of the remaining pastures. The authors point out that in any event the logging in the Kariselkä area has been undertaken.

5.4 The authors dispute the State party's observation that no decision aimed at reducing reindeer numbers has been made, and in substantiation submit the text of a decision of the Ministry of Agriculture and Forestry, dated 13 November 1997 which entered into effect on 1 June 1998, reducing the Sallivaara herd by 500 head from 9,000 to 8,500 animals. This reduction was a consequence of poor pasture conditions (itself acknowledged by the State party), while the Court of Appeal allegedly concluded that the pastures were sufficient and in good condition. The authors also object to the State party's reference to the authors' own logging activities, stating these were necessary to secure their subsistence in poor economic conditions and were in any event not comparable in scale to the logging undertaken by the State party.

5.5 As to the State party's arguments on the issues raised under article 14 in the communication, the authors clarify, on the issue of the award of legal costs, that the now amended and more flexible regime regarding costs did not apply to them. That amendment was made partly as a result of the filing of this communication. The authors point out that the Forestry Authority, in enforcing the award of costs, publicly announced that it sought to "prevent unnecessary trials". However, the fact that the authors prevailed at first instance demonstrates that this trial at least could not be considered unnecessary.

5.6 On the issue of the oral hearing and failure to undertake an on-site inspection by the Court of Appeal, the authors note that, while an oral hearing was at the time exceptional, they do not object to the oral hearing as such but to the proceedings as a whole. The overall proceedings were unfair, because whereas an oral hearing was granted, an on-site inspection was denied. The authors contend that the request for an on-site inspection was denied by the Court before all witnesses at the hearing had been heard. In any case, according to Finnish procedure an on-site inspection should have been carried out *before* the main hearing. The authors also contend that the records of inspection (comprising one page of minutes and some photographs) do not and cannot replace an on-site inspection lasting a day.

5.7 As to the submissions by the Forestry Service to the Court of Appeal after the expiry of time, the authors state that the submissions included the Committee's *Jouni Länsman* Views and a brief. At the commencement of the oral hearing, the authors sought to provide the decision to the Court and were informed that the Forestry Service had already provided it. The Court did not mention the brief, which did not come to the notice of the authors during the hearings. According to the authors, the brief included an incorrect interpretation of the

Committee's Views, as shown by the translation supplied by the State party. It could not mean, as the Forestry Service claimed, that no violation of the Covenant had occurred in the *present* case. The two cases were clearly different, as the *Jouni Länsman* Views rested on the treatment afforded in that case by the national courts, which in the present case was still continuing. The authors consider the brief had a relevant impact on the Court's decision, and the authors were unable to respond to it, in violation of their rights under article 14. That violation was not cured by the Supreme Court, which denied leave to appeal. Article 27 was also violated as the logging proceeded as a consequence of proceedings conducted in breach of article 14.

5.8 On 7 August 2001, the authors supplied a further decision of the Ministry of Agriculture of 17 January 2000 to reduce the Sallivaara Co-operative's herd by a further 1,000 head (from 8,500 to 7,500 animals) on account of poor pasture condition. This constitutes a 17 per cent reduction in the total size of the herd in two and a half years.

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 As the authors' complaints do not relate to the Mirhaminmaa area *per se*, it is not necessary for the Committee to pronounce on the arguments on admissibility adduced by the State party related to this area.

6.3 As to the authors' claim of inappropriate interference by the municipality of Inari, the Committee considers that, in circumstances where the legal proceedings subject to attempted interference were in fact pursued, the authors have failed to substantiate their arguments that these facts give rise to a violation of a right contained in the Covenant.

6.4 As to the authors' claims that they suffered harassment and intimidation in the course of the proceedings in that the Forestry Authority convened a public meeting to criticise the authors and made an unfounded allegation of theft, the authors have failed to detail their allegations in this regard. The lack of any materials in substantiation beyond those allegations themselves leaves the Committee unable to properly consider the substance of the allegations and their effects on the proceedings. Accordingly, this part of the communication has not been substantiated sufficiently, for purposes of admissibility, and is inadmissible under article 2 of the Optional Protocol.

7.1 The Committee finds the remaining portions of the communication admissible and proceeds to a consideration of the merits. The Committee has considered the 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.

7.2 As to the authors' argument that the imposition of a substantial award of costs against them at the appellate level violated their rights under article 14, paragraph 1, to equal access to the courts, the Committee considers that a rigid duty under law to award costs to a winning party may have a deterrent effect on the ability of persons who allege their rights under the Covenant have been violated to pursue a remedy before the courts. In the particular case, the Committee notes that the authors were private individuals bringing a case alleging breaches of their rights under article 27 of the Covenant. In the circumstances, the Committee considers that the imposition by the Court of Appeal of substantial costs award, without the discretion to consider its implications for the particular authors, or its effect on access to court of other similarly situated claimants, constitutes a violation of the authors' rights under article 14, paragraph 1, in conjunction with article 2 of the Covenant. The Committee notes that, in the light of the relevant amendments to the law governing judicial procedure in 1999, the State party's courts now possess the discretion to consider these elements on a case by case basis.

7.3 As to the authors' claims under article 14 that the procedure applied by the Court of Appeal was unfair in that an oral hearing was granted and an on-site inspection was denied, the Committee considers that, as a general rule, the procedural practice applied by domestic courts is a matter for the courts to determine in the interests of justice. The onus is on the authors to show that a particular practice has given rise to unfairness in the particular proceedings. In the present case, an oral hearing was granted as the Court found it necessary to determine the reliability and weight to be accorded to oral testimony. The authors have not shown that this decision was manifestly arbitrary or otherwise amounted to a denial of justice. As to the decision not to pursue an on-site inspection, the Committee considers that the authors have failed to show that the Court of Appeal's decision to rely on the District Court's inspection of the area and the records of those proceedings injected unfairness into the hearing or demonstrably altered the outcome of the case. Accordingly, the Committee is unable to find a violation of article 14 in the procedure applied by the Court of Appeal in these respects.

7.4 As to the author's contention that the Court of Appeal violated the authors' right to a fair trial contained in article 14, paragraph 1, by failing to

afford the authors an opportunity to comment on the brief containing legal argument submitted by the Forestry Authority after expiry of filing limits, the Committee notes that it is a fundamental duty of the courts to ensure equality between the parties, including the ability to contest all the argument and evidence adduced by the other party.¹⁷ The Court of Appeal states that it had "special reason" to take account of these particular submissions made by the one party, while finding it "manifestly unnecessary" to invite a response from the other party. In so doing, the authors were precluded from responding to a brief submitted by the other party that the Court took account of in reaching a decision favourable to the party submitting those observations. The Committee considers that these circumstances disclose a failure of the Court of Appeal to provide full opportunity to each party to challenge the submissions of the other, thereby violating the principles of equality before the courts and of fair trial contained in article 14, paragraph 1, of the Covenant.

7.5 Turning to the claim of a violation of article 27 in that logging was permitted in the Kariselkä area, the Committee notes that it is undisputed that the authors are members of a minority culture and that reindeer husbandry is an essential element of their culture. The Committee's approach in the past has been to inquire whether interference by the State party in that husbandry is so substantial that it has failed to properly protect the authors' right to enjoy their culture. The question therefore before the Committee is whether the logging of the 92 hectares of the Kariselkä area rises to such a threshold.

7.6 The Committee notes that the authors, and other key stakeholder groups, were consulted in the evolution of the logging plans drawn up by the Forestry Service, and that the plans were partially altered in response to criticisms from those quarters. The District Court's evaluation of the partly conflicting expert evidence, coupled with an on-site inspection, determined that the Kariselkä area was necessary for the authors to enjoy their cultural rights under article 27 of the Covenant. The appellate court finding took a different view of the evidence, finding also from the point of view of article 27, that the proposed logging would partially

¹⁷ In *Jansen-Gielen v. The Netherlands* (Communication 846/1999), the Committee stated: "Consequently, it was the duty of the Court of Appeal, which was not constrained by any prescribed time limit to ensure that each party could challenge the documentary evidence which the other filed or wished to file and, if need be, to adjourn proceedings. In the absence of the guarantee of equality of arms between the parties in the production of evidence for the purposes of the hearing, the Committee finds a violation of article 14, paragraph 1 of the Covenant." (emphasis added)

contribute to the long-term sustainability of reindeer husbandry by allowing regeneration of ground lichen in particular, and moreover that the area in question was of secondary importance to husbandry in the overall context of the Collective's lands. The Committee, basing itself on the submissions before it from both the authors and the State party, considers that it does not have sufficient information before it in order to be able to draw independent conclusions on the factual importance of the area to husbandry and the long-term impacts on the sustainability of husbandry, and the consequences under article 27 of the Covenant. Therefore, the Committee is unable to conclude that the logging of 92 hectares, in these circumstances, amounts to a failure on the part of the State party to properly protect the authors' right to enjoy Sami culture, in violation of article 27 of the Covenant.

7.7 In the light of the Committee's findings above, it is not necessary to consider the authors' additional claims brought under article 2 of the Covenant.

8.1 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 facts before it reveal of a violation by Finland of article 14, paragraph 1, taken in conjunction with article 2 of the Covenant, and additionally a violation of article 14, paragraph 1, of the Covenant taken alone.

8.2 Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the authors are entitled to an effective remedy. In terms of the award of costs against the authors, the Committee considers that as the costs award violated article 14, paragraph 1, of the Covenant and, moreover, followed proceedings themselves in violation of article 14, paragraph 1, the State party is under an obligation to retribute to the authors that proportion of the costs award already recovered, and to refrain from seeking execution of any further portion of the award. As to the violation of article 14, paragraph 1, arising from the process applied by the Court of Appeal in handling the brief submitted late by the Forestry Service (para. 7.4), the Committee considers that, as the decision of the Court of Appeal was tainted by a substantive violation of fair trial provisions, the State party is under an obligation to reconsider the authors' claims. The State party is also under an obligation to ensure that similar violations do not occur in the future.

9. 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 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 requested also to give publicity to the Committee's Views.

APPENDIX

Individual opinion of Committee member Prafullachandra N. Bhagwati (concurring)

I have gone through the text of the Views expressed by the majority members of the Committee. I agree with those Views save in respect of paragraph 7.2 and, partly, in respect of paragraph 8.2. Since I am in substantial agreement with the majority on most of the issues, I do not think it necessary to set out the facts again in my opinion and I will therefore straightaway proceed to discuss my dissenting opinion in regard to paragraphs 7.2 and 8.2.

So far as the alleged violation of article 14, paragraph 1, in conjunction with article 2, by the imposition of substantial costs is concerned, the majority members have taken the view that such imposition, on the facts and circumstances of the case, constitutes a violation of those articles. While some of the members have expressed a dissenting view, I agree with the majority view but I would reason in a slightly different way.

It is clear that under the law as it then stood, the Court had no discretion in the matter of award of costs. The Court was under a statutory obligation to award costs to the winning party. The Court could not tailor the award of costs – even refuse to award costs – against the losing party taking into account the nature of the litigation, the public interest involved, and the financial condition of the party. Such a legal provision had a chilling effect on the exercise of the right of access to justice by none too wealthy litigants, and particularly those pursuing an *actio popularis*. The imposition of substantial costs under such a rigid and blind-folded legal provision in the circumstances of the present case, where two members of the Sami tribe were pursuing public interest litigation to safeguard their cultural rights against what they felt to be a serious violation, would, in my opinion, be a clear violation of article 14, paragraph 1, in conjunction with article 2. It is a matter of satisfaction that such a situation would not arise in the future, because we are told that the law in regard to the imposition of costs has since been amended. Now the Court has a discretion whether to award costs at all to the winning party, and, if so, what the amount of such costs should be depending upon various circumstances such as those I have mentioned above.

So far as paragraph 8.2 is concerned, I would hold that the authors are entitled to the relief set out in paragraph 8.2 in regard to the costs, not only because the award of costs followed upon the proceedings in the appellate Court which were themselves in violation of article 14, paragraph 1, for the reasons set out in para. 7.4, but also because the award of costs was itself in violation of article 14, paragraph 1, read in conjunction with

article 2, for the reasons set out in paragraph 7.2. I entirely agree with the rest of paragraph 8.2

Individual opinion of Committee members Abdelfattah Amor, Nisuke Ando, Christine Chanet, Eckart Klein, Ivan Shearer and Max Yalden (partly dissenting)

While we share the Committee's general approach with regard to the award of costs (see also *Lindon v Australia* (Communication 646/1995), we cannot agree that in the present case it has convincingly been argued and proven that the authors were in fact so seriously affected by the relevant decision taken at the appellate level that access to the court was or would in future be closed to them. In our view, they have failed to substantiate a claim of financial hardship.

Concerning possible deterrent effects in future on the authors or other potential authors, due note must be given to the amendment of the code of judicial procedure according to which a court has the power to reduce a costs order that would be manifestly unreasonable or inequitable, having regard to the concrete circumstances of a given case (see paragraph 4.11 above).

However, given that we share the view that the Court of Appeal's judgment is vitiated by a violation of article 14, paragraph 1, of the Covenant (see paragraph 7.4 above), its decision relating to the costs is necessarily affected as well. We therefore join the Committee's finding that the State party is under an obligation to refund to the authors that proportion of the costs award already recovered, and to refrain from executing any further portion of the award (see paragraph 8.2 of the Committee's views).

Communication No. 788/1997

Submitted by: Geniuval Cagas, Wilson Butin and Julio Astillero [represented by counsel]

Alleged victim: The authors

State party: The Philippines

Date of adoption of Views: 23 October 2004

Subject matter: Pre-trial detention and ill-treatment.

Procedural issues: None

Substantive issues: Right to be presumed innocent affected by excessive period of pre-trial detention – Unreasonable delay in pre-trial detention – Right to be tried without undue delay

Articles of Covenant: 7; 9, paragraph 3; 10, paragraph 1; and 14, paragraphs 2 and 3 (c)

Articles of the Optional Protocol and Rules of procedure: None

Finding: Violation

1. The authors of the communication, dated 17 September 1996, are Mr. Geniuval M. Cagas, Mr. Wilson Butin and Mr. Julio Astillero, all citizens of the Philippines and currently detained in Tinangis Jail and Penal Farm, Philippines. They claim to be victims of a violation by the Philippines of article 14 (2) of the Covenant. They are represented by Crusade against Miscarriage of Justice, Inc., a non-governmental organization.

The facts as presented by the authors

2.1 On 23 June 1992, the police of Libmanan, Camarines Sur, Philippines, found the bodies of six women in the house of Dr. Dolores Arevalo, one of the victims. Their hands had been bound and their heads smashed.

2.2 Although there was no eyewitness to the actual killings, a neighbour, Mr. Publio Rili, claims to have seen four men entering the house of Dr. Arevalo during the evening of 22 June 1992. Mr. Rili later identified the three authors as being among the individuals he saw on the evening in question. Soon after the four men entered the house, the same witness heard "thudding sounds" emanating from the house of Dr. Arevalo. He then saw a car driving away from the premises.

2.3 During the same night, a policeman saw the car in question and wrote down its number plate. The investigation later revealed that the number plate was that of a car owned by Mr. Cagas. The two other co-accused and authors are Mr. Cagas' employees.

2.4 According to the investigation, Mr. Cagas was a supplier of medicine in a hospital where Dr. Arevalo was appointed Chief of Hospital sometime before the incident. It was also reported that Dr. Arevalo refused to purchase medical supplies from Mr. Cagas.

2.5 The prosecution submitted to the Court a certified copy of a telegram that had allegedly been sent by Mr. Cagas to Dr. Arevalo's husband, asking him to tell his wife, Dr. Arevalo, not to ask for rebates in medical supplies any longer.

2.6 The authors were arrested on 26, 29 and 30 June 1992, on suspicion of murder (the so-called Libmanan massacre). They claim that they are innocent.

2.7 On 14 August 1992, the authors appeared in Court and were ordered detained until the trial. On 11 November 1992, the authors filed a petition for bail and on 1 December 1992, they filed a motion to quash the arrest warrants. On 22 October 1993, the regional Trial Court refused to grant bail. On 12 October 1994, the Court of Appeals in Manila confirmed the Trial Court Order of 22 October 1993. A motion for reconsideration of the Court of Appeals' decision was dismissed on 20 February 1995. On 21 August 1995, the Supreme Court dismissed the authors' appeal against the Court of Appeals' decision.

2.8 On 5 June 1996, Mr. Cagas sent a letter on behalf of the authors to the Court Administrator of the Supreme Court, submitting additional facts in support of their claim that their right to bail had been wrongly denied.

2.9 On 26 July 1996, the Court Administrator replied to the authors that they were no longer entitled to raise issues that were not raised before the Supreme Court.

2.10 In a further submission of 29 May 1998⁹, the authors allege that on 24 and 25 March 1997, one of them, Mr. Julio Astillero had been subjected to "alcohol torture or treatment"¹ by prison guards with the purpose to force him to become a "State witness". The alleged ill-treatment had been reported to Judge Martin Badong, the then presiding judge of the regional trial court, but the latter took no action in this respect.

The complaint

3.1 The authors alleged a violation of article 14 (2) of the Covenant. They claim that the order for pre-trial detention is based solely on circumstantial evidence, which is not sufficient to justify a denial of bail and that this order has not been properly reviewed by higher courts, which have refused to reconsider the facts as they were assessed by the trial judge.

3.2 The authors claim that, by rejecting their claim on 26 July 1996, the Court Administrator relied on a technicality rather than on the substance of the law, while the issue was related to fundamental constitutional rights.

3.3 The authors note that while the presumption of innocence is a principle embodied in the Philippine Constitution, accused who are denied bail are denied their right to presumption of innocence. They further contend that a denial of bail deprives them of adequate time and facilities to prepare their

defence properly, which constitutes a breach of the principle of due process.

3.4 Although not expressly invoked by the authors, the facts as submitted raise issues under articles 9 (3) and 14 (3) of the Covenant in relation to the time that the authors have spent in pre-trial detention, and under articles 7 and 10 of the Covenant in relation to the alleged ill-treatment to which Mr. Julio Astillero was allegedly subjected on 24 and 25 March 1997.

State party's observations

4.1 In a submission dated 16 March 1998, the State party transmitted its observations on the merits of the case.

4.2 Emphasizing that the right to due process of law is the cornerstone of criminal prosecution in its jurisdiction, the State party considers that this principle is complied with as long as an accused has been heard by a competent court, prosecuted under the orderly process of law, and punished only after a judgement has been handed down in conformity with constitutional law.

4.3 The State party also points out that the right to bail can be denied whenever the charges are related to an offence punishable by "perpetual reclusion" and when the evidence is strong, an assessment that is left to the judge's discretion.

4.4 In the present case, the State party is of the opinion that the authors, although they were denied bail, have not been denied the right to be presumed innocent, because only a full trial on the merits would allow to declare them guilty beyond reasonable doubt.

4.5 Moreover, the State party considers that, although pre-trial detention is a situation in which the authors might lack adequate time and facilities to prepare their defence, the principle of such a detention does not detract from the essence of due process of law as long as the elements of due process referred to in paragraph 4.2 are present.

4.6 The State party emphasizes that Mr. Cagas had admitted in his letter of 5 June 1996 to the Court Administrator that "the defect noted in the Order of [22 October 1993] was never raised in the certiorari that reached the Court of Appeals and the Supreme Court" and that Mr. Cagas admitted to have directly addressed his grievance to the Court Administrator. The State party notes in this respect that the Office of the Court Administrator is under the authority of the Supreme Court and is not in any manner involved in the adjudication of cases; it therefore lacks the competence to review decisions taken by the Supreme Court. The State party further indicates that the authors were duly represented by a prominent human rights attorney.

¹ The authors do not explain in their communication what such a treatment entails.

Comments by the authors

5.1 In a letter dated 29 May 1998, the authors submitted their comments on the observations of the State party.

5.2 The authors reiterate their claim that when bail is denied, the constitutional right of an accused to be presumed innocent is substantially impaired. Moreover, when an accused is detained before the trial, he lacks adequate time and facilities for the preparation of his defence, which eventually leads to the loss of substantive due process.

5.3 As a general rule, bail may be granted in all criminal proceedings. The only exception to this rule is when an accused is charged with a capital offence carrying a severe penalty and, most importantly, when the evidence against the accused is strong. This also requires that any exception to the right to bail must be adequately justified in the decision.

5.4 In the present case, the authors are of the opinion that the justification for the denial of bail is absent from the Order of the Trial Court of 22 October 1993. Moreover, they suggest that the requirement of strong evidence was not satisfied. In this regard, the authors note that the prosecution merely showed that they were suspects who might have committed the crime, basing their findings on circumstantial evidence. The authors consider that, in the absence of an eyewitness who saw the actual murders, circumstantial evidence presented in the case is not sufficient to prove that the authors were the perpetrators of the crime.

5.5 The authors also note that both the Court of Appeals and the Supreme Court have limited their consideration on a procedural aspect of the case, considering that the assessment of facts was at the trial judge's discretion, and have not addressed the issue of the right to bail by assessing the constitutional requirement of strong evidence to deny bail. The authors have thereafter raised this issue with the Court Administrator, claiming that the latter has the power and duty to call the attention of trial judges when a travesty of justice is manifestly occurring within his jurisdiction.

5.6 In order to enable the Committee to take its decision in the light of all appropriate information, the authors also draw the attention of the Committee on the following latest developments:

- A motion for reinvestigation was denied on 20 May 1998.

- The original telegram allegedly sent by Mr. Cagas to Mrs. Arevalo's husband and primarily used by the prosecution to establish the motive for the crime was never produced and is apparently lost. The authors provide certificates according to which the original of this document cannot be found.

Further observations by the State party

6. The preceding comments were submitted to the State party on 30 October 1998. On 20 September 2000, another letter was sent to the State party inviting it to submit its observations on the merits of the case. By a note verbale of 2 October 2000, the State party informed the Committee that it did not wish to make any further comments on the case and referred to its previous submission of 16 March 1998.

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 87 of its Rules of Procedure, decide whether or not the complaint is admissible under the Optional Protocol to the Covenant.

7.2 Noting that the State party has not raised any objections to the admissibility of the communication, that the authors have exhausted all available domestic remedies and that the same matter is not being examined under another procedure of international investigation or settlement, the Committee declares the communication admissible.

7.3 With regard to the allegation of violation of article 14 (2), on account of the denial of bail, the Committee finds that this denial did not a priori affect the right of the authors to be presumed innocent. Nevertheless, the Committee is of the opinion that the excessive period of preventive detention, exceeding nine years, does affect the right to be presumed innocent and therefore reveals a violation of article 14 (2).

7.4 With regard to the issues raised under articles 9 (3) and 14 (3) of the Covenant, the Committee notes that, at the time of the submission of the communication, the authors had been detained for a period of more than four years, and had not yet been tried. The Committee further notes that, at the time of the adoption of the Committee's Views, the authors appear to have been detained without trial for a period in excess of nine years, which would seriously affect the fairness of the trial. Recalling its General Comment 8 according to which "pre-trial detention should be an exception and as short as possible, and noting that the State party has not provided any explanation justifying such a long delay, the Committee considers that the period of pre-trial detention constitutes in the present case an unreasonable delay. The Committee therefore concludes that the facts before it reveal a violation of articles 9 (3) of the Covenant. Furthermore, recalling the State party's obligation to ensure that an accused person be tried without undue delay, the Committee finds that the facts before it also reveal a violation of article 14 (3) (c) of the Covenant.

7.5 With regard to the allegations of ill-treatment suffered by Mr. Julio Astillero, the Committee notes that the allegations are very general in nature, and fail to describe the nature of the acts which were allegedly carried out. Thus, while the State party did not respond to the Committee's invitation to comment on the authors' submission of 29 May 1998, the Committee is of the opinion that the authors have not sufficiently substantiated that the rights of Mr. Astillero under articles 7 and 10 of the Covenant were violated.

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 articles 9, paragraph 3, 14, paragraph 2, and 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 authors with an effective remedy, which shall entail adequate compensation for the time they have spent unlawfully in detention. The State party is also under an obligation to ensure that the authors be tried promptly with all the guarantees set forth in article 14 or, if this is not possible, released.

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 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.

APPENDIX

Individual opinion by Committee members Ms. Cecilia Medina Quiroga and Mr. Rafael Rivas Posada (dissenting)

In this case, the Committee has decided that the Philippines violated, to the detriment of Mr. Cagas, Mr. Butin and Mr. Astillero, articles 9 (3), 14 (2) and 14 (3) of the International Covenant on Civil and Political Rights. In this respect we concur with the majority vote, but we dissent from that vote in that we believe that the Committee should also have found that the State had violated article 14 (1) of the Covenant. We explain our reasons below:

(a) In the file before the Committee there is no indication that the three authors of the communication have been tried and have been convicted and sentenced to

a custodial penalty. It may therefore be presumed that they have been deprived of their liberty for a period of nine years without a trial and without a conviction, since it was the responsibility of the State to inform the Committee about this matter, and this has not so far been done. This is a clear violation of articles 9 (3) and 14 (3) of the Covenant. It should be noted that such a lengthy deprivation of liberty can only be considered as equivalent to the serving of a sentence, in this case without a conviction to back it up. This, in our opinion, calls into question the State party's compliance with the provisions of article 9 (1) of the Covenant, which prohibits arbitrary detention.

(b) The fact that for so many years no trial has been held, apart from constituting a violation of article 14 (3), inevitably jeopardizes the production of evidence. This vitiates any trial of the authors that may possibly be held. Thus, for example, the possibility that the judgement may be based on statements by witnesses, made many years after the events occurred, places the accused in a situation of defencelessness, contrary to the guarantees granted by the Covenant. It is not possible for a trial for homicide or murder, whichever the case may be, held nine or more years after the events to be a "fair trial" in the terms established by article 14 (1).

(c) Lastly, through having allowed time to pass without providing the accused with due process as laid down by the Covenant, the State has not only violated article 14 (1) by omission, but has placed itself in a position where it will be impossible for it to comply with the Covenant in the future. Consequently, and in addition, we cannot agree with paragraph 9 of the Views of the majority. We consider that, in the present case, it is incumbent on the State to release the detainees immediately. Obviously, there is a State interest in criminal prosecution, but this prosecution can be carried out only within the limits permitted by international law. If the organs of criminal justice in a State are ineffective, the State must solve the problem in a manner other than that of infringing the guarantees of the accused.

Individual opinion by Committee member Mr. Hipólito Solari Yrigoyen (dissenting)

I base my dissenting vote, rejecting the majority vote concerning the violation of articles 7 and 10 suffered by Mr. Julio Astillero, on the following considerations:

In a communication of 29 May 1998, the authors stated that one of their number, Julio Astillero, had been subjected to torture on two occasions, on 24 and 25 March 1997. They called the kind of torture which he suffered "alcohol treatment" and named the principal perpetrator of this treatment as Marlon Argarin, who at that time was working as a prison guard at Tinangis Jail - Penal Farm in Pili, Camarines Sur region (Philippines), where they were being held. They further stated that the guard Argarin later became Chief of Security of the Operations Service and that in the practice of torture he enjoyed the complicity of other guards in the same prison where the events in question occurred. They also complained that the purpose of the torture inflicted on prisoner Astillero was to force him to become a "State witness".

In addition, the authors stated that a complaint concerning all these events was made before Judge Martín Badong, the President of the Court of First Instance, Branch 33, Pili, Camarines Sur region, who, according to them, took no action to investigate the complaint.

Although the authors did not explain what the so-called "alcohol treatment" consisted of, there is no doubt, in view of the complaint's terminology, which is consistent with the text of article 7 of the Covenant, that what was involved was torture or cruel, inhuman or degrading treatment or punishment, to which no one may be subjected. Since Mr. Astillero was deprived of his liberty and subjected to torture, he was not treated humanely or with the respect inherently due to the human individual.

The complaint about violation of articles 7 and 10 of the Covenant was fully substantiated by the following details:

- (a) Dates on which the torture occurred;
- (b) Place in which torture was perpetrated;
- (c) Name of the alleged torturer;
- (d) His job at the time of the torture;
- (e) The post he later occupied;
- (f) Existence of other accomplices;
- (g) Jobs of the alleged accomplices;
- (h) Specific reference to the complaint lodged about the torture;

- (i) Name of the judge who received the complaint;
- (j) Title of the judge;
- (k) Precise identification of the court with which the complaint was lodged.

All these comments by the authors, linked to the complaint of torture, together with other types of comments, were brought to the attention of the State party on 30 October 1998. The State party remained silent in the face of these comments, a fact which, as the Committee has declared on other occasions, constitutes a lack of cooperation through non-compliance with its obligation under article 4 (2) of the Optional Protocol to submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

The State party's lack of cooperation was, moreover, repeated when, in reply to a further request by the Committee of 20 September 2000, in a note verbale it again stated that it wished to make no further comment on the question, referring to its initial communication of 16 March 1998. The observations made by the State party in that communication in no way clarify the acts of torture complained of, since these acts were notified to the Committee after the submission of the State's observations.

Consequently, the Committee should take the authors' complaints into account and, on the basis of all the elements before it, consider that there has been a violation of articles 7 and 10 of the Covenant to the detriment of the prisoner Julio Astillero.

Communication No. 806/1998

Submitted by: Eversley Thompson [represented by counsel]

Alleged victim: The author

State party: St. Vincent and the Grenadines

Date of adoption of Views: 18 October 2000

Subject matter: Permissibility of mandatory death sentence

Procedural issues: None

Substantive issues: Right to life – Mandatory death sentences for certain categories of offences – Right to be treated with humanity and with respect for the inherent dignity of the human person

Articles of Covenant: 6, paragraphs 1 and 4; 7; 10, paragraph 1; 14, paragraph 1; and 26

Article of the Optional Protocol and Rules of procedure: None

Finding: Violation

1. The author of the communication is Eversley Thompson, a Vincentian national born on 7 July 1962. He is represented by Saul Lehrfreund of Simons, Muirhead & Burton, London. Counsel claims that the author is a victim of violations of articles 6 (1) and (4), 7, 10 (1), 14 (1) and 26 of the Covenant.

The facts as submitted

2.1 The author was arrested on 19 December 1993 and charged with the murder of D'Andre Olliviere, a four-year old girl who had disappeared the day before. The High Court (Criminal Division) convicted him as charged and sentenced him to death on 21 June 1995. His appeal was dismissed on 15 January 1996. In his

petition for special leave to appeal to the Judicial Committee of the Privy Council, counsel raised five grounds of appeal, relating to the admissibility of the author's confession statements and to the directions of the judge to the jury. On 6 February 1997, the Judicial Committee of the Privy Council granted leave to appeal, and after having remitted the case to the local Court of Appeal on one issue, it rejected the appeal on 16 February 1998. With this, all domestic remedies are said to have been exhausted.

2.2 At trial, the evidence for the prosecution was that the little girl disappeared on 18 December 1993 and that the author had been seen hiding under a tree near her home. Blood, faecal material and the girl's panty were found on the beach near the family's home. The girl's body was never found.

2.3 According to the prosecution, police officers apprehended the author at his home early in the morning of 19 December 1993. They showed him a red slipper found the evening before and he said that it was his. After having been brought to the police station, the author confessed that he had sexually abused the girl and then thrown the girl into the sea from the beach. He went with the policemen to point out the place where it happened. Upon return, he made a confession statement.

2.4 The above evidence by the police was subject to a *voir dire* during trial. The author contested ever having made a statement. He testified that the police officers had beaten him at home and at the police station, and that he had been given electric shocks and had been struck with a gun and a shovel. His parents gave evidence that they had seen him on 20 December 1993 with his face and hands badly swollen. After the *voir dire*, the judge ruled that the statement was voluntary and admitted it into evidence. Before the jury, the author gave sworn evidence and again challenged the statement.

The complaint

3.1 Counsel claims that the imposition of the sentence of death in the author's case constitutes cruel and unusual punishment, because under the law of St. Vincent the death sentence is the mandatory sentence for murder. He also points out that no criteria exist for the exercise of the power of pardon, nor has the convicted person the opportunity to make any comments on any information which the Governor-General may have received in this respect.¹ In this context, counsel argues that the

¹ Under section 65 of the Constitution, the Governor General may exercise the prerogative of mercy, in accordance with the advice of the Minister who acts as Chairman of the Advisory Committee on the prerogative of mercy. The Advisory Committee consists of the Chairman (one of the Cabinet Ministers), the Attorney-

death sentence should be reserved for the most serious of crimes and that a sentence which is indifferently imposed in every category of capital murder fails to retain a proportionate relationship between the circumstances of the actual crime and the offender and the punishment. It therefore becomes cruel and unusual punishment. He argues therefore that it constitutes a violation of article 7 of the Covenant.

3.2 The above is also said to constitute a violation of article 26 of the Covenant, since the mandatory nature of the death sentence does not allow the judge to impose a lesser sentence taking into account any mitigating circumstances. Furthermore, considering that the sentence is mandatory, the discretion at the stage of the exercise of the prerogative of mercy violates the principle of equality before the law.

3.3 Counsel further claims that the mandatory nature of the death sentence violates the author's rights under article 6 (1) and (4).

3.4 Counsel also claims that article 14 (1) has been violated because the Constitution of St Vincent does not permit the Applicant to allege that his execution is unconstitutional as inhuman or degrading or cruel or unusual. Further, it does not afford a right to a hearing or a trial on the question whether the penalty should be either imposed or carried out.

3.5 Counsel submits that the following conditions in Kingstown prison amount to violations of articles 7 and 10 (1) in relation to the author. He is detained in a cell measuring 8 feet by 6 feet; there is a light in his cell that remains constantly lit 24 hours a day; there is no furniture or bedding in his cell; his only possessions in his cell are a blanket and a slop pail and a cup; there is no adequate ventilation as there is no window in his cell; sanitation is extremely poor and inadequate; food is of bad quality and unpalatable and his diet consists of rice every day; he is allowed to exercise three times a week for half an hour in the dormitory. Counsel also alleges that the conditions in prison are in breach of the domestic prison rules of St Vincent and the Grenadines. Counsel concludes that the author's punishment is being aggravated by these conditions.

General and three to four other members appointed by the Governor General on the advice of the Prime Minister. Of the three or four Committee members at least one shall be a Minister and one other shall be a medical practitioner. Before deciding on the exercise of the prerogative of mercy in any death penalty case, the Committee shall obtain a written report of the case from the trial judge (or the Chief Justice, if a report from the trial judge cannot be obtained) together with such other information derived from the record of the case or elsewhere as he may require.

3.6 Counsel further argues that the author's detention in these conditions renders unlawful the carrying out of his sentence of death.

3.7 Counsel also claims a violation of article 14 (1) because no legal aid is available for constitutional motions and the author, who is indigent, is therefore denied the right of access to court guaranteed by section 16 (1) of the Constitution.

The Committee's request for interim measures of protection

4.1 On 19 February 1998, the communication was submitted to the State party, with the request to provide information and observations in respect of both admissibility and merits of the claims, in accordance with rule 91, paragraph 2, of the Committee's rules of procedure. The State party was also requested, under rule 86 of the Committee's rules of procedure, not to carry out the death sentence against the author, while his case was under consideration by the Committee.

4.2 On 16 September 1999, the Committee received information to the effect that a warrant for the author's execution had been issued. After having sent an immediate message to the State party, reminding it of the rule 86 request in the case, the State party informed the Committee that it was not aware of having received the request nor the communication concerned. Following an exchange of correspondence between the Special Rapporteur for New Communications and the State party's representatives, and after a constitutional motion had been presented to the High Court of St. Vincent and the Grenadines, the State party agreed to grant the author a stay of execution in order to allow the Committee to examine his communication.

The State party's submission

5.1 By submission of 16 November 1999, the State party notes that the author has sought redress for his grievances by way of constitutional motion, which was dismissed by the High Court on 24 September 1999. The Court rejected declarations sought by counsel for the author that he was tried without due process and the protection of the law, that the carrying out of the death sentence was unconstitutional because it constituted inhuman or degrading punishment, that the prison conditions amounted to inhuman and degrading treatment, and that the author had a legal right to have his petition considered by the United Nations Human Rights Committee. The State party submits that, in order to expedite the examination by the Committee, it will raise no objection to the admissibility of the communication for reasons of non-exhaustion of domestic remedies.

5.2 The State party submits that the mandatory nature of the death penalty is allowed under international law. It explains that a distinction is made in the criminal law in St. Vincent and the Grenadines between different types of unlawful killing. Killings which amount to manslaughter are not subject to the mandatory death penalty. It is only for the offence of murder that the death sentence is mandatory. Murder is the most serious crime known to law. For these reasons the State party submits that the death penalty in the present case was imposed in accordance with article 6 (2) of the Covenant. The State party also denies that a violation of article 7 occurred in this respect, since the reservation of the death penalty to the most serious crime known to law retains the proportionate relationship between the circumstances of the crime and the penalty. The State party likewise rejects counsel's claim that there has been discrimination within the meaning of article 26 of the Covenant.

5.3 The State party also notes that the author had a fair trial, and that his conviction was reviewed and upheld by the Court of Appeal and the Privy Council. Accordingly, the death penalty imposed upon the author does not constitute arbitrary deprivation of his life within the meaning of article 6 (1) of the Covenant.

5.4 As to the alleged violation of article 6 (4) of the Covenant, the State party notes that the author has the right to seek pardon or commutation and that the Governor General may exercise the prerogative of mercy pursuant to sections 65 and 66 of the Constitution in the light of advice received from the Advisory Committee.

5.5 With regard to prison conditions and treatment in prison, the State party notes that the author has not shown any evidence that his conditions of detention amount to torture or cruel, inhuman or degrading treatment or punishment. Nor is there any evidence that he was treated in violation of article 10 (1) of the Covenant. According to the State party, the general statements made in the communication do not evidence any specific breach of the relevant articles. Moreover, the State party notes that this matter was considered by the High Court when hearing the constitutional motion, and that the Court rejected it. The State party refers to the Committee's constant jurisprudence that the Committee is not competent to reevaluate the facts and evidence considered by the Court, and concludes that the author's claim should be rejected. The State party further refers to the Committee's jurisprudence that prolonged periods of detention cannot be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely availing himself of appellate remedies.

5.6 The State party also argues that even if there had been a violation of the author's rights in relation to prison conditions, this would not render the carrying out of the death sentence unlawful and a violation of articles 6 and 7 of the Covenant. In this context, the State party makes reference to the Privy Council's decision in *Thomas and Hilaire v Attorney General of Trinidad and Tobago*, where the Privy Council considered that even if the prison conditions constituted a breach of the appellants' constitutional rights, commutation of the sentence would not be the appropriate remedy and the fact that the conditions in which the condemned man had been kept prior to execution infringed his constitutional rights did not make a lawful sentence unconstitutional.

5.7 As to counsel's claim that the author's right to access to the constitutional court was violated, the State party notes that the author has indeed presented and pursued a constitutional motion in the High Court, during which he was represented by experienced local counsel. After his motion was dismissed, the author gave notice of appeal. On 13 October 1999, he withdrew his appeal. During these proceedings he was again represented by the same counsel. The State party submits that this is evidence that there has been no conduct on the part of the State which has had the practical effect of denying the author access to court.

Counsel's comments

6.1 In his comments, counsel maintains that the author's death sentence violates various provisions of the Covenant because he was sentenced to death without the sentencing judge considering and giving effect to his character, his personal circumstances or those of the crime. In this connection, counsel refers to the report by the Inter-American Commission on Human Rights in the case of *Hilaire v. Trinidad and Tobago*.²

6.2 With respect to the prerogative of mercy, counsel argues that the State party has not appreciated that the right to apply for pardon must be an effective right. In the author's case, he cannot effectively present his case for mercy and thus the right to apply for mercy is theoretical and illusory. The author cannot participate in the process, and is merely informed of the outcome. According to counsel, this means that the decisions on mercy are taken on an arbitrary basis. In this connection, counsel notes that the Advisory Committee does not interview the prisoner or his family. Moreover, no opportunity is given to the condemned person to

² Commission report No. 66/99, case No. 11.816, approved by the Commission on 21 April 1999, not made public.

respond to possible aggravating information which the Advisory Committee may have in its possession.

6.3 With regard to the prison conditions, counsel produces an affidavit sworn by the author, dated 30 December 1999. He repeats that his cell in Kingstown prison, where he was detained from 21 June 1995 to 10 September 1999, was 8 feet by 6 feet in size, and that the only articles with which he was supplied in his cell were a blanket, a slop pail, a small water container and a bible. He slept on the floor. In the cell there was no electric lighting, but there was an electric light bulb in the corridor adjacent to the cell, which was kept on night and day. He states that he was unable to read because of the poor lighting. He was allowed exercise for at least three times a week in the corridor adjacent to his cell. He did not exercise in the open air and did not get any sunlight. Guards were always present. The food was unpalatable and there was little variety (mainly rice). During a fire on 29 July 1999 caused by a prison riot, he was locked in his cell and only managed to save himself when other prisoners broke in through the roof. He is only allowed to wear prison clothes, which are rough on the skin. On 10 September 1999, he was placed in a cell in Fort Charlotte, an 18th century prison. The cell in which he is now held is moist and the floor is damp. He is supplied with a small mattress. The cell is dark night and day, as the light of the electric bulb in the corridor does not penetrate into the cell. He is given exercise daily but inside the building and he does not get any sunlight. Because of the damp conditions, his legs started swelling and he reported this to the authorities, who took him to hospital for examination on 29 December 1999. He adds that he was scheduled to be hanged on 13 September 1999 and that he was taken from his cell to the gallows and that his lawyer was able to obtain a stay of execution only fifteen minutes before the scheduled execution. He states that he has been traumatised and disoriented.

6.4 Concerning the author's right of access to court, counsel submits that the fact that the author was fortunate enough to persuade counsel to take his recent constitutional case *pro bono* does not relieve the State party of its obligation to provide legal aid for constitutional motions.

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 it is admissible under the Optional Protocol to the Covenant.

7.2 The Committee notes that it appears from the facts before it that the author filed a constitutional motion before the High Court of St. Vincent and the

Grenadines. The Committee considers therefore that the author has failed to substantiate, for purposes of admissibility, his claim under article 14 (1) of the Covenant, that the State party denied the author the right of access to court in this respect.

7.3 The Committee considers that the author has sufficiently substantiated, for purposes of admissibility, that the remaining claims may raise issues under articles 6, 7, 10 and 26 of the Covenant. The Committee proceeds therefore without further delay to the consideration of the merits of these claims.

Consideration of the merits

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

8.2 Counsel has claimed that the mandatory nature of the death sentence and its application in the author's case, constitutes a violation of articles 6 (1), 7 and 26 of the Covenant. The State party has replied that the death sentence is only mandatory for murder, which is the most serious crime under the law, and that this in itself means that it is a proportionate sentence. The Committee notes that the mandatory imposition of the death penalty under the laws of the State party is based solely upon the category of crime for which the offender is found guilty, without regard to the defendant's personal circumstances or the circumstances of the particular offense. The death penalty is mandatory in all cases of "murder" (intentional acts of violence resulting in the death of a person). The Committee considers that such a system of mandatory capital punishment would deprive the author of the most fundamental of rights, the right to life, without considering whether this exceptional form of punishment is appropriate in the circumstances of his or her case. The existence of a right to seek pardon or commutation, as required by article 6, paragraph 4, of the Covenant, does not secure adequate protection to the right to life, as these discretionary measures by the executive are subject to a wide range of other considerations compared to appropriate judicial review of all aspects of a criminal case. The Committee finds that the carrying out of the death penalty in the author's case would constitute an arbitrary deprivation of his life in violation of article 6, paragraph 1, of the Covenant.

8.3 The Committee is of the opinion that counsel's arguments related to the mandatory nature of the death penalty, based on articles 6 (2), 7, 14 (5) and 26 of the Covenant do not raise issues that would be separate from the above finding of a violation of article 6 (1).

8.4 The author has claimed that his conditions of detention are in violation of articles 7 and 10 (1) of the Covenant, and the State party has denied this claim in general terms and has referred to the judgement by the High Court, which rejected the author's claim. The Committee considers that, although it is in principle for the domestic courts of the State party to evaluate facts and evidence in a particular case, it is for the Committee to examine whether or not the facts as established by the Court constitute a violation of the Covenant. In this respect, the Committee notes that the author had claimed before the High Court that he was confined in a small cell, that he had been provided only with a blanket and a slop pail, that he slept on the floor, that an electric light was on day and night, and that he was allowed out of the cell into the yard one hour a day. The author has further alleged that he does not get any sunlight, and that he is at present detained in a moist and dark cell. The State party has not contested these claims. The Committee finds that the author's conditions of detention constitute a violation of article 10 (1) of the Covenant. In so far as the author means to claim that the fact that he was taken to the gallows after a warrant for his execution had been issued and that he was removed only fifteen minutes before the scheduled execution constituted cruel, inhuman or degrading treatment, the Committee notes that nothing before the Committee indicates that the author was not removed from the gallows immediately after the stay of execution had been granted. The Committee therefore finds that the facts before it do not disclose a violation of article 7 of the Covenant in this respect.

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 articles 6 (1) and 10 (1) of the Covenant.

10. Under article 2, paragraph 3 (a), of the Covenant, the State party is under the obligation to provide Mr. Thompson with an effective and appropriate remedy, including commutation. The State party is under an obligation to take measures to prevent 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 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.

APPENDIX

Individual opinion by Committee member Lord Colville (dissenting)

The majority decision is based solely on the law which imposes a mandatory death sentence upon the category of crime, murder, for which the offender is found guilty, without regard to the defendant's personal circumstances or the circumstances of the particular offence. This conclusion has been reached without any assessment of either such set of circumstances, which exercise would in any case be beyond the Committee's jurisdiction. The majority, therefore, have founded their opinion on the contrast between the common law definition of murder, which applies in the State, and a gradation of categories of homicide in civil law jurisdictions and, by statute, in some States whose criminal law derives from common law. Thus the majority decision is not particular to this author but has wide application on a generalised basis. The point has now for the first time been taken in this communication despite Views on numerous earlier communications arising under (*inter alia*) a mandatory death sentence for murder; on those occasions no such stance was adopted.

In finding, in this communication, that the carrying out of the death penalty in the author's case would constitute an arbitrary deprivation of his life in violation of article 6 (1) of the Covenant, the wrong starting-point is chosen. The terms of paragraph 8.2 of the majority decision fail to analyse the carefully-constructed provisions of the entirety of article 6. The article begins from a position in which it is accepted that capital punishment, despite the exhortation in article 6 (6), remains an available sentence. It then specifies safeguards, and these are commented on as follows:

The inherent right to life is not to be subject to arbitrary deprivation. The subsequent provisions of the article state the requirements which prevent arbitrariness but which are not addressed by the majority except for article 6 (4), as to which there now exists jurisprudence which appears to have been overlooked (see below);

Article 6 (2) underlines the basic flaw in the majority's reasoning. There is no dispute that murder is a most serious crime; that is, however, subject to the majority's view that a definition of murder in common law may encompass offences which are not to be described as "most serious." Whilst this does not form part of their decision in those terms, the inevitable implication is that "murder" must be redefined.

The second point on article 6 (2) emphasises that the death penalty can only be carried out pursuant to a final decision by a competent court. It follows inescapably from this that the actual law which compels the trial judge to pass a sentence of death when a person is convicted of murder does not and cannot in itself offend article 6 (1) and certainly not because factual and personal circumstances are ignored: if the prosecuting authority decides, in a homicide case, to bring a charge of murder, a

number of avenues immediately exist for the defence to counter, in the trial court, this accusation. These include

- self-defence: unless the prosecution can satisfy the tribunal of fact that the defendant's actions, which led to the death, exceeded a proportional response, in his own perception of the circumstances, to the threat with which he was faced, the defendant must be completely acquitted of any crime;

- other circumstances, surrounding the crime and relating fundamentally to the prevailing situation or the defendant's state of mind, enable the tribunal of fact to find that, if these defences have not been disproved by the prosecution (the onus is never on the defendant), the charge of murder can be reduced to manslaughter which does not carry a mandatory death sentence. According to the approach adopted by the defence and the evidence adduced by the parties, the judge is bound to explain these issues; if this is not done in accordance with legal precedent the failure will lead to any conviction being quashed;

- the issues which may thus be raised by the defence need only be exemplified: one is diminished responsibility by the defendant for his actions (falling short of such mental disorder as would lead, not to a conviction, but to an order for treatment in a psychiatric hospital); or provocation, which by judicial decision has been extended to include the "battered partner syndrome", whether resulting from an instantaneous or cumulative basis of aggravation by the victim;

- as a result, the verdict indicates whether murder is the only possible crime for which the defendant can be convicted. Questions of law which may undermine a conviction for murder can be taken to the highest appellate tribunal. It was by such an appeal that the law has recognised prolonged domestic violence or abuse as constituting a "provocation", thereby reducing murder, in proper cases, to manslaughter.

No comments arise in this case under article 6 (3) or 6 (5). Article 6 (4) has, however, recently assumed a significance which the majority decision appears to have disregarded. It has always been the case that the Head of State must be advised by the relevant Minister or advisory body such as the Privy Council, whether the death penalty shall in fact be carried out. This system is necessitated by article 6 (4) and it involves a number of preliminary steps: as the majority says in paragraph 8.2, these discretionary measures by the executive are subject to a wide range of other considerations compared to appropriate judicial review of all aspects of a criminal case. This is not only a correct statement but constitutes the essence and virtue of article 6 (4); exactly this process is in place in the State.

The Judicial Committee of the Privy Council has, however, delivered its advice in the case of *Lewis and others v. A.G. of Jamaica & another*, dated 12 September 2000. Whilst Lord Slynn's majority opinion is not binding in any common law jurisdiction, it has such persuasive authority that it is certain to be given effect. He indicates that in Jamaica by its Constitution, but similarly elsewhere, a written report from the trial judge is available to the person or body advising on pardon or commutation of sentence. (It should be said, by way of gloss to this practice, that the trial judge will have seen the defendant

and the witnesses at first hand in the course of the trial, and also will have had access to other material relating to the circumstances of the case and of the defendant which was never used in the trial itself. Evidence, inadmissible for production to the tribunal of fact, may, for example, contain much revealing information).

"Such other information derived from the record of the case or elsewhere" shall be forwarded to the authority empowered to grant clemency.

In practice the condemned accused has never been denied the opportunity to make representations which will be considered by that authority.

Where *Lewis* breaks new ground is in the advice that the procedures followed in the process of considering a person's petition are open to judicial review. It is necessary that the condemned person should be given notice of the date on which the clemency authority will consider his case. That notice should be sufficient for him or his advisers to prepare representations before a decision is taken. *Lewis* thus formalises a defendant's right to make representations and requires that these be considered.

The inevitable result of this analysis of article 6 as a whole together with judicial ruling likely to be given effect on all common law jurisdictions, including St. Vincent and the Grenadines, is that questions of arbitrariness do not depend on the trial and sentence at first instance, let alone in the mandatory nature of the sentence to be imposed on conviction for murder. There is no suggestion that arbitrariness has arisen in the course of the appellate procedures. The majority's view, therefore, must depend on a decision that the terms of article 6 (4), as given effect in a common law jurisdiction, must incorporate an arbitrary decision, "without considering whether this exceptional form of punishment is appropriate in the circumstances" of the particular case (para. 8.2). This is manifestly incorrect, as a matter of long-standing practice and now of persuasive advice from the Privy Council; it is no longer merely a matter of conscientious consideration by the authority but a matter of judicial reviewability of its decision.

Any interpretation finding arbitrariness in the light of existing common law procedures can only imply that full compliance with article 6 (4) does not escape the association of arbitrariness under article 6 (1). Such internal inconsistency should not be applied to interpretation of the Covenant, and can only be the result of a mistaken straining of the words of article 6.

On the facts of this case and the course of any clemency process which may yet ensue, I cannot agree that there has been any violation of article 6 (1) of the Covenant.

Individual opinion by Committee member Mr. David Kretzmer, co-signed by Committee members Mr. Abdelfattah Amor, Mr. Maxwell Yalden and Mr. Abdallah Zakhia (dissenting)

A. Past jurisprudence

1. Like many of my colleagues, I find it unfortunate that the Covenant does not prohibit the death penalty. However, I do not find this a reason to depart from

accepted rules of interpretation when dealing with the provisions of the Covenant on the death penalty. I am therefore unable to agree with the Committee's view that by virtue of the fact that the death sentence imposed on the author was mandatory, the State party would violate the author's right, protected under article 6, paragraph 1, not to be arbitrarily deprived of his life, were it to carry out the sentence.

2. Mandatory death sentences for murder are not a novel question for the Committee. For many years the Committee has dealt with communications from persons sentenced to death under legislation that makes a death sentence for murder mandatory. 3 In none of these cases has the Committee intimated that the mandatory nature of the sentence involves a violation of article 6 (or any other article) of the Covenant. Furthermore, in fulfilling its function under article 40 of the Covenant, the Committee has studied and commented on numerous reports of States parties in which legislation makes a death sentence for murder mandatory. While in dealing with individual communications the Committee usually confines itself to arguments raised by the authors, in studying State party reports the initiative in raising arguments regarding the compatibility of domestic legislation with the Covenant lies in the hands of the Committee itself. Nevertheless, the Committee has never expressed the opinion in Concluding Observations that a mandatory death sentence for murder is incompatible with the Covenant. (See, e.g., the Concluding Observations of the Committee of 19.1.97 on Jamaica's second periodic report, in which no mention is made of the mandatory death sentence).

It should also be recalled that in its General Comment No.6 that concerns article 6 of the Covenant, the Committee discussed the death penalty. It gave no indication that mandatory death sentences are incompatible with article 6.

The Committee is not bound by its previous jurisprudence. It is free to depart from such jurisprudence and should do so if it is convinced that its approach in the past was mistaken. It seems to me, however, that if the Committee wishes States parties to take its jurisprudence seriously and to be guided by it in implementing the Covenant, when it changes course it owes the States parties and all other interested persons an explanation of why it chose to do so. I regret that in its Views in the present case the Committee has failed to explain why it has decided to depart from its previous position on the mandatory death sentence.

B. Article 6 and mandatory death sentences

3. In discussing article 6 of the Covenant, it is important to distinguish quite clearly between a mandatory death sentence and mandatory capital punishment. The Covenant itself makes a clear distinction between imposition of a death sentence and carrying out the sentence. Imposition of the death sentence by a court of law after a trial that meets all the requirements of article 14 of the Covenant is a *necessary*, but *insufficient*,

³ See, e.g., Communication No. 719/1996, *Conroy Levy v. Jamaica*; Communication No. 750/1996, *Silbert Daley v. Jamaica*; Communication No. 775/1997, *Christopher Brown v. Jamaica*.

condition for carrying out the death penalty. Article 6, paragraph 4, gives every person sentenced to death the right to seek pardon or commutation of the sentence. It is therefore obvious that the Covenant expressly prohibits a mandatory death penalty. However, the question that arises in this case does not relate to mandatory capital punishment or a mandatory death penalty, but to a mandatory death sentence. The difference is not a matter of semantics. Unfortunately, in speaking of the mandatory death penalty the Committee has unwittingly conveyed the wrong impression. In my mind this has also led it to misstate the issue that arises. That issue is not whether a State party may carry out the death penalty without regard to the personal circumstances of the crime and the defendant, but whether the Covenant requires that courts be given discretion in determining whether to impose the death sentence for murder.

4. Article 6, paragraph 1, protects the inherent right to life of every human being. It states that no one shall be arbitrarily deprived of his life. Had this paragraph stood alone, a very strong case could have been made out that capital punishment itself is a violation of the right to life. This is indeed the approach which has been taken by the constitutional courts of two states when interpreting their constitutions.⁴ Unfortunately, the Covenant precludes this approach, since article 6 permits the death penalty in countries which have not abolished it, provided the stringent conditions laid down in paragraphs 2, 4 and 5 and in other provisions of the Covenant are met. When article 6 of the Covenant is read in its entirety, the ineluctable conclusion must be that carrying out a death penalty cannot be regarded as a violation of article 6, paragraph 1, *provided all these stringent conditions have been met*. The ultimate question in gauging whether carrying out a death sentence constitutes violation of article 6 therefore hinges on whether the State party has indeed complied with these conditions.

5. The first condition that must be met is that sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the offence. In the present case the Committee does not expressly base its finding of a violation on breach of this condition. However, the Committee mentions that "mandatory imposition of the death penalty under the laws of the State party is based solely upon the category of crime for which the offender is found guilty" and that the "death penalty is mandatory in all cases of murder". While the Committee does not mention article 6, paragraph 2, in the absence of any other explanation it would seem that the Committee has doubts about the compatibility with the Covenant of imposition of the death sentence for murder (the category of crime for which the death sentence is mandatory in the law of the State party). One can only assume that these doubts are based on the fear that the category of murder may include crimes that are not the most serious. I find it quite disturbing that the Committee is prepared to intimate that cases of murder may not be a most serious crime. The

⁴ See the decision of the South African Constitutional Court in *State v. Makwanyane* [1995] 1 LRC 269; Decision No. 23/1990 (X.31) AB of the Hungarian Constitutional Court.

Committee itself has stated that the right to life is the supreme right (see General Comment No. 6). Intentional taking of another person's life in circumstances which give rise to criminal liability must therefore, by its very nature, be regarded as a most serious crime. From the materials presented to the Committee in this communication it appears that a person is guilty of the crime of murder under the law of the State party if, with malice aforethought, he or she causes the death of another. The State party has explained (and this has not been contested) that the crime of murder does not include "killings which amount to manslaughter (for example by reason of provocation or diminished responsibility)." In these circumstances every case of murder, for which a person is criminally liable, must be regarded as a most serious crime. This does not mean, of course, that the death penalty should be imposed, nor that a death sentence should be carried out, if imposed. It does mean, however, that imposition of the death sentence cannot, *per se*, be regarded as incompatible with the Covenant.

6. In determining whether a defendant on a charge of murder is criminally liable the court must consider various personal circumstances of the defendant, as well as the circumstances of the particular act which forms the basis of the crime. As has been demonstrated in the opinion of my colleague, Lord Colville, these circumstances will be relevant in determining both the *mens rea* and *actus reus* required for criminal liability, as well as the availability of potential defences to criminal liability, such as self-defence. These circumstances will also be relevant in determining whether there was provocation or diminished responsibility, which, under the law of the State party, remove an act of intentional killing from the category of murder. As all these matters are part of the determination of the criminal charge against the defendant, under article 14, paragraph 1, of the Covenant they must be decided by a competent, independent and impartial tribunal. Were courts to be denied the power to decide on any of these matters, the requirements of article 14 would not be met. According to the jurisprudence of the Committee, in a case involving the death penalty this would mean that carrying out the death sentence would constitute a violation of article 6. It has not been argued that the above conditions were not complied with in the present case. Nevertheless, the Committee states that it would be a violation of the author's right not to be arbitrarily deprived of his life, if the State party were to carry out the death penalty "without regard to the defendant's personal circumstances or the circumstances of the particular offence." (See para. 8.2 of the Committee's Views). As it has not been claimed that personal circumstances of the particular offence relevant to the criminal liability for murder of the author were not taken into account by the courts, it is obvious that the Committee is referring to other circumstances, which have no bearing on the author's liability for murder. Article 6, paragraph 4, of the Covenant does indeed demand that the State party have regard to such circumstances before carrying out sentence of death. There is absolutely nothing in the Covenant, however, that demands that the *courts* of the State party must be the domestic organ that has regard to these circumstances, which, as stated, are not relevant in determination of the criminal charge.

7. In many societies, the law lays down a maximum punishment for a given crime and courts are given

discretion in determining the appropriate sentence in a given case. This may very well be the best system of sentencing (although many critics argue that it inevitably results in uneven or discriminatory sentencing). However, in dealing with the issue of sentencing, as with all other issues relating to interpretation of the Covenant, the question that the Committee must ask is not whether a specific system seems the best, but whether such a system is demanded under the Covenant. It is all too easy to assume that the system with which Committee members are most familiar is demanded under the Covenant. But this is an unacceptable approach in interpreting the Covenant, which applies at the present time to 144 State parties, with different legal regimes, cultures and traditions.

8. The essential question in this case is whether the *Covenant demands that courts* be given discretion in deciding the appropriate sentence in each case. There is no provision in the Covenant that would suggest that the answer to this question is affirmative. Furthermore, an affirmative answer would seem to imply that minimum sentences for certain crimes, such as rape and drug-dealing (accepted in many jurisdictions) are incompatible with the Covenant. I find it difficult to accept this conclusion.

Mandatory sentences (or minimum sentences, which are in essence mandatory) may indeed raise serious issues under the Covenant. If such sentences are disproportionate to the crimes for which they are imposed, their imposition may involve a violation of article 7 of the Covenant. If a mandatory death sentence is imposed for crimes that are not the most serious crimes, article 6, paragraph 2 of the Covenant is violated. However, whether such sentences are advisable or not, if all provisions of the Covenant regarding punishment are respected, the fact that the minimum or exact punishment for the crime is set by the legislature, rather than the court, does not of itself involve a violation of the Covenant. Carrying out such a sentence that has been imposed by a competent, independent and impartial tribunal established under law after a trial that meets all the requirements of article 14 cannot be regarded as an arbitrary act.

We are well aware that in the present case the mandatory sentence is the death sentence. Special rules do indeed apply to the death sentence. It may only be imposed for the most serious crimes. Furthermore, the Covenant expressly demands that persons sentenced to death be given the right to request pardon or commutation before the sentence is carried out. No parallel right is given to persons sentenced to any other punishment. There is, however, no provision in the Covenant that demands that courts be given sentencing discretion in death penalty cases that they do not have to be given in other cases.

In summary: there is no provision in the Covenant that requires that courts be given discretion to determine the exact sentence in a criminal case. If the sentence itself does not violate the Covenant, the fact that it was made mandatory under legislation, rather than determined by the court, does not change its nature. In death penalty cases, if the sentence is imposed for a most serious crime (and any instance of murder is, by definition, a most serious crime), it cannot be regarded as incompatible with the Covenant. I cannot accept that carrying out a death sentence that has been imposed by a court in accordance with article 6 of the Covenant after a

trial that meets all the requirements of article 14 can be regarded as an *arbitrary* deprivation of life.

9. As stated above, there is nothing in the Covenant that demands that courts be given sentencing discretion in criminal cases. Neither is there any provision that makes *sentencing* in cases of capital offences any different. This does not mean, however, that a duty is not imposed on States parties to consider personal circumstances of the defendant or circumstances of the particular offence before carrying out a death sentence. On the contrary, a death sentence is different from other sentences in that article 6, paragraph 4, expressly demands that anyone under sentence of death shall have the right to seek pardon or commutation and that amnesty, pardon or commutation may be granted in all cases. It must be noted that article 6, paragraph 4, recognizes a *right*. Like all other rights, recognition of this right by the Covenant imposes a legal obligation on States parties to respect and ensure it. States parties are therefore legally bound to consider in good faith all requests for pardon or commutation by persons sentenced to death. A State party that fails to do so violates the right of a condemned person under article 6, paragraph 4, with all the consequences that flow from violation of a Covenant right, including the victim's right to an effective remedy.

The Committee states that "existence of a right to seek a pardon or commutation does not secure adequate protection to the right to life, as these discretionary measures by the executive are subject to a wide range of other considerations compared to the appropriate judicial review of all aspects of a criminal case". This statement does not help to make the Committee's approach coherent. In order to comply with the requirements of article 6, paragraph 4, a State party is bound to consider in good faith all personal circumstances and circumstances of the particular crime which the condemned person wishes to present. It is indeed true that the decision-making body in the State party may also take into account other factors, which may be considered relevant in granting the pardon or commutation. However, a court which has discretion in sentencing may also take into account a host of factors other than the defendant's personal circumstances or circumstances of the crime.

10. We may now summarize my understanding of the legal situation regarding mandatory death sentences for murder:

(a) The question of whether a death sentence is compatible with the Covenant depends on whether the conditions laid down in article 6 and other articles of the Covenant, especially article 14, are complied with.

(b) Carrying out a death sentence imposed in accordance with the requirements of article 6 and other articles of the Covenant cannot be regarded as arbitrary deprivation of life.

(c) There is nothing in the Covenant that demands that courts be given discretion in sentencing. Neither is there a special provision that makes sentencing in death penalty cases different from other cases.

(d) The Covenant expressly demands that States parties must have regard to particular circumstances of the defendant or the particular offence before carrying out a death sentence.

A State party has a legal obligation to take such circumstances into account in considering applications for pardon or commutation. The consideration must be carried out in good faith and according to a fair procedure.

C. Violation of the author's rights in the present case

11. Even if we had agreed with the Committee on the legal issue we would have found it difficult to agree that the author's rights were violated in this case.

In the context of an individual communication under the Optional Protocol the issue is not the compatibility of legislation with the Covenant, but whether the author's rights were violated. (See, e.g., *Faurisson v. France*, in which the Committee stressed that it was not examining whether the legislation on the basis of which the author had been convicted was compatible with article 19 of the Covenant, but whether in convicting the author on the specific facts of his case the author's right to freedom of expression had been violated). In the present case the author was convicted of a specific crime: murder of a little girl. Even if the category of murder under the law of the State party may include some crimes which are not the most serious, it is clear that the crime of which the author was convicted is not among these. Neither has the author pointed to any personal circumstances or circumstances of the crime that should have been regarded as mitigating circumstances but could not be considered by the courts.

12. Finally we wish to emphasize that the Covenant imposes strict limitations on use of the death penalty, including the limitation in article 6, paragraph 4. In the present case, it has not been contested that the author has the right to apply for pardon or commutation of his sentence. An advisory committee must look into the application and make recommendations to the Governor-General on any such application. Under the rules laid down by the Privy Council in the recent case of *Neville Lewis et al v. Jamaica*, the State party must allow the applicant to submit a detailed petition setting out the circumstances on which he bases his application, he must be allowed access to the information before the committee and the decision on the pardon or commutation must be subject to judicial review.

While the author has made certain general observations relating to the pardon or commutation procedures in the State party, he has not argued that he has submitted an application for pardon or commutation that has been rejected. He therefore cannot claim to be a victim of violation of his rights under article 6, paragraph 4, of the Covenant. Clearly, were the author to submit an application for pardon or commutation that was not given due consideration as required by the Covenant and the domestic legal system he would be entitled to an effective remedy. Were that remedy denied him the doors of the Committee would remain open to consider a further communication.

Communication No. 818/1998

Submitted by: Sandy Sextus [represented by counsel]

Alleged victim: The author

State party: Trinidad and Tobago

Date of adoption of Views: 16 July 2001

Subject matter: Pre-trial detention and poor conditions of detention

Procedural issues: None

Substantive issues: Unreasonable delay in pre-trial detention – Right to be tried without undue delay – Right to review of a decision at trial without delay – Right to be treated with humanity and with respect for the inherent dignity of the human person

Articles of Covenant: 2, paragraph 3; 7; 9, paragraph 3; 10, paragraph 1; and 14, paragraphs 1, 3 (c) and 5

Articles of the Optional Protocol and Rules of procedure: None

Finding: Violation

1. The author of the communication, dated 23 April 1997, is Mr Sandy Sextus, a national of Trinidad and Tobago, presently an inmate at the State Prison, Trinidad. He claims to be a victim of

violations of Trinidad and Tobago of articles 2, paragraph 3, 7, 9, paragraph 3, 10, paragraph 1, 14, paragraphs 1, 3 (c) and 5, of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as presented by the author

2.1 On 21 September 1988, the author was arrested on suspicion of murdering his mother-in-law on the same day. Until his trial in July 1990, the author was detained on pre-trial remand at Golden Grove Prison, Arouca, in a cell measuring 9 feet by 6 feet which he shared with 7 to 11 other inmates. He was not provided with a bed, and forced to sleep on a concrete floor or on old cardboard and newspapers.

2.2 After a period of over 22 months, the author was brought to trial on 23 July 1990 in the High Court of Justice. On 25 July 1990, the author was convicted by unanimous jury verdict and sentenced to death for the murder charged. From this point (until commutation of his sentence), the author was

confined in Port-of-Spain State Prison (Frederick Street) in a solitary cell measuring 9 feet by 6 feet, containing an iron bed, mattress, bench and table.¹ In the absence of integral sanitation, a plastic pail was provided as toilet. A small ventilation hole measuring 8 inches by 8 inches, providing inadequate ventilation, was the only opening. In the absence of any natural light, the only light was provided by a fluorescent strip light illuminated 24 hours a day (located above the door outside the cell). Due to his arthritis, the author never left his cell save to collect food and empty the toilet pail. Due to stomach problems, the author was placed on a vegetable diet, and when these were not provided the author went without food. The author did not receive a response from the Ombudsman on a written complaint on this latter matter.

2.3 After a period of over 4 years and 7 months, on 14 March 1995, the Court of Appeal refused the author's application for leave to appeal.² On 10 October 1996, the Judicial Committee of the Privy Council in London rejected the author's application for special leave to appeal against conviction and sentence. In January 1997, the author's death sentence was commuted to 75 years' imprisonment.

2.4 From that point, the author has been detained in Port-of-Spain Prison in conditions involving confinement to a cell measuring 9 feet by 6 feet together with 9 to 12 other prisoners, which overcrowding causes violent confrontations between prisoners. One single bed is provided for the cell and therefore the author sleeps on the floor. One plastic bucket is provided as slop pail and is emptied once a day, such that it sometimes overflows. Inadequate ventilation consists of a 2 foot by 2 foot barred window. The prisoner is locked in his cell, on average 23 hours a day, with no educational opportunities, work or reading materials. The location of the prison food-preparation area, around 2 metres from where the prisoners empty their slop pails, creates an obvious health hazard. The contention is repeated that the provision of food does not meet the author's nutritional needs.

The Complaint

3.1 The author's complaint centres on alleged excessive delays in the judicial process in his case,

¹ Counsel's description of these conditions is derived from the author's correspondence and a personal visit by counsel to the author in custody in July 1996.

² On this date, after hearing argument, the Court refused leave to appeal and affirmed the conviction and sentence. The reasons for judgement (20 pages) were delivered shortly thereafter on 10 April 1995.

and the conditions of detention suffered by him at various stages in that process.

3.2 As to the allegation of delay, the author contends that his rights under articles 9, paragraph 3, and 14, paragraph 3 (c), were violated in that there was a 22-month delay in bringing his case to trial. That was the period from his arrest on 21 September 1988, being the day the offence for which he was convicted occurred, until the commencement of his trial on 23 July 1990. The author contends little investigation was performed by the police in his case.

3.3 The author cites the Committee's Views in *Celiberti de Casariego v. Uruguay*, *Milan Sequeira v. Uruguay* and *Pinkney v. Canada*,³ where comparable periods of delay were found to be in violation of the Covenant. Relying on *Pratt Morgan v. Attorney-General of Jamaica*,⁴ the author argues that the State party is responsible for avoiding such periods of delay in its criminal justice system, and it is therefore culpable in this case. The author contends that the delay was aggravated by the fact that there was little investigation that had to be performed by the police, with one eyewitness providing direct testimony and three others providing circumstantial evidence. The only forensic evidence adduced at trial was a post-mortem examination report and certificate of blood sample analysis.

3.4 The author also alleges violations of articles 14, paragraphs 1, 3 (c) and 5, in the unreasonably protracted delay of over 4 years and 7 months which elapsed before the Court of Appeal heard and dismissed the author's appeal against conviction. The author cites a variety of cases in which the Committee found comparable delays (as well as shorter ones) to breach the Covenant.⁵ The author states that a variety of approaches were made to the Registrar of the Court of Appeal, the Attorney-General and the Ministry of National Security and the Ombudsman. He states that by the time the appeal was heard, he had still not received the copies of depositions, notes of evidence and the trial judge's summing up he had requested. The author submits that in assessing the reasonableness of the delay it is relevant that he was under sentence of

³ Communications 56/1979, 6/1977 and 27/1978, respectively.

⁴ [1994] 2 AC 1 (Privy Council).

⁵ The author refers to *Pinkney v. Canada* (Communication 27/1978), *Little v. Jamaica* (Communication 283/1998), *Pratt and Morgan v. Jamaica* (Communications 210/1986 and 226/1987), *Kelly v. Jamaica* (Communication 253/1987) and *Neptune v. Trinidad and Tobago* (Communication 523/1992).

death, and detained throughout in unacceptable conditions.

3.5 The second portion of the complaint relates to the various conditions of detention described above which the author experienced pre-trial, post-conviction and, currently, post-commutation. These conditions are said to have been repeatedly condemned by international human rights organizations as breaching internationally accepted standards of minimum protection.⁶ The author claims that after his commutation, he remains in conditions of detention in manifest violation of, *inter alia*, a variety of both domestic Prison Rules standards and United Nations Standard Minimum Rules for the Treatment of Prisoners.⁷

3.6 Relying on the Committee's General Comments 7 and 9 on articles 7 and 10,⁸ respectively, and on a series of communications where conditions of detention were found to violate the Covenant,⁹ the author argues that the conditions suffered by the author at each phase of the proceedings breached a minimum inviolable standard of detention conditions (to be observed regardless of a State party's level of development) and accordingly violated articles 7 and 10, para. 1. In particular, the author refers to the case of *Estrella v. Uruguay*,¹⁰ where the Committee relied, in determining the existence of inhuman treatment at Libertad Prison, in part on "its consideration of other communications ... which confirms the existence of a practice of inhuman treatment at Libertad". In *Neptune v. Trinidad and Tobago*,¹¹ the Committee

⁶ The author refers to a general analysis of conditions in Port of Spain Prison described in Vivian Stern, *Deprived of their Liberty* (1990).

⁷ The author also refers, in terms of the general situation, to a media quotation of 5 March 1995 of the General Secretary of the Prison Officers' Association to the effect that sanitary conditions are "highly deplorable, unacceptable and pose a health hazard". He also stated that limited resources and the spread of serious communicable diseases make a prison officer's job more harrowing.

⁸ These General Comments have since been replaced by General Comments 20 and 21 respectively.

⁹ *Valentini de Bazzano v. Uruguay* (Communication 5/1977), *Buffo Carballal v. Uruguay* (Communication 33/1978), *Sendic Antonaccio v. Uruguay* (Communication 63/1979), *Gomez De Voituret v. Uruguay* (Communication 109/1981), *Wight v. Madagascar* (Communication 115/1982), *Pinto v. Trinidad and Tobago* (Communication 232/1987), *Mukong v. Cameroon* (Communication 458/1991).

¹⁰ Communication 27/1980.

¹¹ Communication 523/1992. The conditions described (and not contested by the State party) include a six foot by nine foot cell with six to nine fellow prisoners, with three

found circumstances very similar to the present case incompatible with article 10, paragraph 1, and called on the State party to improve the general conditions of detention in order to avoid similar violations in the future. The author underscores his claim of violation of articles 7 and 10, paragraph 1, by reference to a variety of international jurisprudence finding inappropriately severe conditions of detention to constitute inhuman treatment.¹²

3.7 Finally, the author alleges a violation of article 14, paragraph 1, in conjunction with article 2, paragraph 3, in that he is being denied the right of access to court. The author submits that the right to present a constitutional motion is not effective in the circumstances of the present case, owing to the prohibitive cost of instituting proceedings in the High Court to obtain constitutional redress, the absence of legal aid for constitutional motions and the well-known dearth of local lawyers willing to represent applicants free of charge. The author cites the case of *Champagnie et al. v. Jamaica*¹³ to the effect that in the absence of legal aid, a constitutional motion did not constitute an effective remedy for the indigent author in that case. The author cites jurisprudence of the European Court of Human Rights¹⁴ for the proposition that effective right of access to a court may require the provision of legal aid for indigent applicants. The author submits this is particularly pertinent in a capital case, and thus argues the lack of legal aid for constitutional motions per se violates the Covenant.

The State party's observations on the admissibility and merits of the communication

4.1 By submission dated 6 September 1999, the State party responded contesting the admissibility and merits of the communication. As to the allegations of pre-trial delay and delay in hearing appeal, contrary to articles 9, paragraph 3, and 14, paragraphs 3 (c) and 5, the State party argues that

beds, insufficient light, half an hour of exercise every two to three weeks and inedible food.

¹² In the European Court: *Greek Case* 12 YB 1 (1969) and *Cyprus v. Turkey* (Appln. No. 6780/74 and 6950/75); in the Supreme Court of Zimbabwe: *Conjwayo v. Minister of Justice, Legal and Parliamentary Affairs et al.* (1992) 2 SA 56, Gubay CJ for the Court.

¹³ Communication 445/1991, declared admissible on 18 March 1993.

¹⁴ *Golder v. United Kingdom* [1975] 1 EHRR 524 and *Airey v. Ireland* [1979] 2 EHRR 305. The author also cites the Committee's Views in *Currie v. Jamaica* (Communication 377/1989) to the effect that, where the interests of justice require, legal assistance should be available to a convicted applicant to pursue a constitutional motion in respect of irregularities in a criminal trial.

prior to the communication the author did not seek to challenge the time periods elapsing in bringing the case to trial. The nature of the breach is such that the author was aware of a possible breach at the latest at the date of trial, but the issue was not raised at that point or on appeal. The State party argues that authors should not be allowed to sleep on their rights for an extended period, only years later to present allegations of breach to the Committee. Accordingly, it is not unreasonable to expect authors to seek redress by way of constitutional motion or application to the Committee at the time alleged breach occurs rather than years later, and this part of the communication should be declared inadmissible.

4.2 As to the merits of the claims of delay, the State party contends that neither of the relevant periods were unreasonable in the circumstances then prevailing in the State party in the years immediately following an attempted coup. The increase in crime placed great pressures on the courts in that period, with backlogs resulting. Difficulties experienced in the timely preparation of complete and accurate court records caused delays in bringing cases to trial and in hearing appeals. The State party states that it has implemented procedural reforms to avoid such delays, including the appointment of new judges at trial and appellate level. Increases in financial and other resources, including computer-aided transcription, have meant appeals are now being heard within a year of conviction. Regard should be paid to these improvements which have occurred.

4.3 As to the claims of inappropriate conditions of detention, in violation of articles 7 and 10, paragraph 1, the State party denies that the conditions under which the applicant was held when under sentence of death, and is now being held, violate the Covenant.¹⁵ The State party refers to similar allegations made by others in respect of conditions at the same prison, which were held to be acceptable by the courts of the State party and which, on the information available, the Committee found itself not in a position to make a finding of violation on when the matter came before it.¹⁶ The Privy Council, in the case of *Thomas v. Baptiste*,¹⁷ found that unacceptable prison conditions in that case, which breached Prison Rules, did not necessarily sink to the level of inhuman treatment, and accepted the Court of Appeal's decision to that effect. The State party submits that these various findings in the courts of the State party, the Privy Council and the Committee should be preferred over

¹⁵ The State party makes no reference to the conditions of pre-trial detention.

¹⁶ See the majority view in *Chadee v. Trinidad and Tobago* (Communication 813/1998).

¹⁷ [1999] 3 WLR 249.

the unsubstantiated and general submissions of the author.

4.4 As to the claim of a breach of the right in article 14, paragraph 1, to access to the courts, the State party denies any denial of access to the courts by way of constitutional motions to seek redress for breaches of fundamental rights. Nineteen condemned prisoners currently have constitutional motions before the courts, and so it is incorrect and misleading to suggest any breach of article 14, paragraph 1.

The author's comments on the State party's submissions

5.1 By submission dated 19 November 1999, the author responded to the State party's submissions. On the arguments regarding delay, the author points to a contradiction in the State party denying that unreasonable delay had occurred but pointing to commonplace problems in the administration of criminal justice during the relevant period. The author considers the State party to have conceded the various delays were unreasonable, as otherwise there would have been no need to make improvements to avoid such delays. The author also points to the Committee's decision in *Smart v. Trinidad and Tobago*¹⁸ holding that a period of over two years from arrest until trial violated articles 9, paragraph 3, and 14, paragraph 3 (c).

5.2 The author contends that the issues of delay could not have been brought to the Committee at an earlier stage, because only with the Privy Council's denial of leave to appeal on 10 October 1996 were all available domestic remedies exhausted. The author also claims that, in any event, no constitutional remedy for the delays was available, as the Privy Council had determined in *DPP v. Tokai*¹⁹ that the Constitution of Trinidad and Tobago, while providing a right to a fair trial, did not provide a right to a speedy trial or a trial within a reasonable time.

5.3 As to the claims of inappropriate conditions of detention, contrary to articles 7 and 10, para. 1, the author points out that the Privy Council's *Thomas v. Baptiste* decision relied on by the State party accepted that the appellants in that case were detained in cramped and foul-smelling cells and were deprived of exercise or access to open air for long periods. When exercising in fresh air they were handcuffed. The Privy Council, by a majority, held that these conditions were in breach of Prison Rules and unlawful, but not necessarily cruel and inhuman treatment, stating that value judgement depended on

¹⁸ Communication 672/1995.

¹⁹ [1996] 3 WLR 149.

local conditions both in and outside the prison. It considered that, although the conditions were “completely unacceptable in a civilized society”, the cause of human rights would not be served to set such demanding standards that breaches were common.

5.4 The author points out that, while the Privy Council majority accepted lesser standards on the basis that third world countries “often fall lamentably short of the minimum which would be acceptable in more affluent countries”, the Committee has insisted on certain minimum standards of imprisonment that must always be observed irrespective of the country’s level of development.²⁰ The author insists accordingly that a fundamental breach of irreducible minimum standards of treatment recognized among civilized nations does amount to cruel and inhuman treatment.

5.5 As to the claim of a right of access to the courts, the author relies on the Committee’s admissibility decision in *Smart v. Trinidad and Tobago*²¹ that, in the absence of legal aid being available to enable pursuit of a constitutional remedy, it could not be considered an effective remedy in the circumstances. The author questions how many of the 19 constitutional cases the State party refers to were granted legal aid, stating that he understands most were represented pro bono (cases not generally taken by local lawyers).²²

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 As to the author’s allegations of delay, the Committee notes the State party’s argument that domestic remedies have not been exhausted as (i) no issues of delay were raised at trial, or on appeal, and (ii) the author has not pursued a constitutional motion. The State party has not shown that raising issues of delay before the trial court or upon appeal could have provided an effective remedy. As to the State party’s argument that a constitutional motion was and is available to the author, the Committee recalls its jurisprudence that for that remedy to be considered available to an indigent applicant, legal

aid must be available. While the State party has supplied figures that this remedy is being exercised by other prisoners, the State party has failed to demonstrate that the remedy would be available to this particular author in the circumstances of indigency he raises. In any event, with respect to the claims of undue delay, the Committee notes that, according to the Privy Council’s interpretation of the relevant constitutional provisions, there is no constitutional remedy available through which these allegations can be raised. The Committee finds therefore that it is not precluded under article 5, paragraph 2(b), of the Optional Protocol from considering the communication.

6.3 As to the allegations concerning inappropriate conditions of detention in violation of articles 7 and 10, the Committee notes that the author has provided specific and detailed allegations on the conditions suffered by him in detention. Rather than responding to the individual allegations, the State party states simply that the author has not substantiated his allegations. In the circumstances, the Committee considers that the author has substantiated these claims sufficiently, for the purposes of admissibility.

7.1 Accordingly, the Committee finds the communication admissible and proceeds to an examination of the substance of those claims 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.

7.2 As to the claim of unreasonable pre-trial delay, the Committee recalls its jurisprudence that “[i]n cases involving serious charges such as homicide or murder, and where the accused is denied bail by the court, the accused must be tried in as expeditious a manner as possible”.²³ In the present case, where the author was arrested on the day of the offence, charged with murder and held until trial, and where the factual evidence was straightforward and apparently required little police investigation, the Committee considers that substantial reasons must be shown to justify a 22-month delay until trial. The State party points only to general problems and instabilities following a coup attempt, and acknowledges delays that ensued. In the circumstances, the Committee concludes that the author’s rights under article 9, paragraph 3 and article 14, paragraph 3(c), have been violated.

7.3 As to the claim of a delay of over four years and seven months between conviction and the judgment on appeal, the Committee also recalls its jurisprudence that the rights contained in article 14, paragraphs 3(c) and 5, read together, confer a right

²⁰ *Mukong v. Cameroon* (Communication 458/1991). The dissenting judgement of Lord Steyn in *Thomas and Hilaire* is to similar effect.

²¹ *Op. cit.*

²² The author states that where a death warrant has been read free legal representation is provided.

²³ *Barroso v. Panama* (Communication 473/1991, at 8.5).

to a review of a decision at trial without delay.²⁴ In *Johnson v. Jamaica*,²⁵ the Committee established that, barring exceptional circumstances, a delay of four years and three months was unreasonably prolonged. In the present case, the State party has pointed again simply to the general situation, and implicitly accepted the excessiveness of the delay by explaining remedial measures taken to ensure appeals are now disposed of within a year. Accordingly, the Committee finds a violation of article 14, paragraphs 3 (c) and 5.

7.4 As to the author's claims that the conditions of detention in the various phases of his imprisonment violated articles 7 and 10, paragraph 1, the Committee notes the State party's general argument that the conditions in its prisons are consistent with the Covenant. In the absence of specific responses by the State party to the conditions of detention as described by the author,²⁶ however, the Committee must give due credence to the author's allegations as not having been properly refuted. As to whether the conditions as described violate the Covenant, the Committee notes the State party's arguments that its courts have, in other cases, found prison conditions in other cases satisfactory.²⁷ The Committee cannot regard the courts' findings on other occasions as answering the specific complaints made by the author in this instance. The Committee considers, as it has repeatedly found in respect of similar substantiated allegations,²⁸ that the author's conditions of detention as described violate his right to be treated with humanity and with respect for the inherent dignity of the human person, and are therefore contrary to article 10, paragraph 1. In the light of this finding in respect of article 10, a

²⁴ *Lubuto v. Zambia* (Communication 390/1990) and *Neptune v. Trinidad and Tobago* (Communication 523/1992).

²⁵ Communication 588/1994.

²⁶ In the case of *Chadee v. Trinidad and Tobago* (Communication 813/1998) which the State party refers to, the State party did provide details of fact and the Committee, by a majority, ultimately found itself not in a position to make a finding of a violation of article 10.

²⁷ These cases have interpreted a constitutional provision analogous in its terms to article 7 of the Covenant, and therefore might have bearing only upon the evaluation of the claims presently made under article 7 but not on the different standard contained in article 10.

²⁸ See, for example, *Kelly v. Jamaica* (Communication 253/1987) and *Taylor v. Jamaica* (Communication 707/1996).

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.

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 articles 9, paragraph 3, 10, paragraph 1, and 14, paragraphs 3 (c) and 5, 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. Sextus with an effective remedy, including adequate compensation. The State party is also under an obligation to improve the present conditions of detention of the author, or to release him.

10. On becoming a State party to the Optional Protocol, Trinidad and Tobago recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Trinidad and Tobago's denunciation of the Optional Protocol became effective on 27 June 2000; in accordance with article 12 (2) of the Optional Protocol it continues to be subject to the application of the Optional Protocol. 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 of Committee member Mr. Hipólito Solari Yrigoyen

I should like to express an individual opinion with regard to paragraph 9, which I believe should read:

“In accordance with article 2, paragraph 3 (a), of the International Covenant on Civil and Political Rights, the State party is under an obligation to provide Mr. Sextus with an effective remedy, including adequate compensation. The State party is also under an obligation to release the author.”

Communication No. 819/1998

Submitted by: Joseph Kavanagh [represented by counsel]

Alleged victim: The author

State party: Ireland

Date of adoption of Views: 4 April 2001

Subject matter: Extra-ordinary trial before a Special Criminal Court.

Procedural issues: None

Substantive issues: Fair trial – Equality before the law and equal protection of the law

Articles of Covenant: 2, paragraphs 1 and 3 (a); 4, paragraphs 1 and 3; 14, paragraphs 1, 2 and 3; and 26

Articles of the Optional Protocol and Rules of procedure: None

Finding: Violation

1. The author of the communication, dated 27 August 1998, is Mr. Joseph Kavanagh, an Irish national, born 27 November 1957. The author alleges breaches by the Republic of Ireland of article 2, paragraphs 1 and 3 (a), article 4, paragraphs 1 and 3, article 14, paragraphs 1, 2 and 3, and article 26 of the Covenant. The Covenant and Optional Protocol entered into force for Ireland on 8 March 1990. The author is represented by counsel.

Background

2.1 Article 38(3) of the Irish Constitution provides for the establishment by law of Special Courts for the trial of offences in cases where it may be determined, according to law, that the ordinary courts are “inadequate to secure the effective administration of justice and the preservation of public peace and order”. On 26 May 1972, the Government exercised its power to make a proclamation pursuant to Section 35(2) of the *Offences Against the State Act 1939* (the Act) which led to the establishment of the Special Criminal Court for the trial of certain offences. Section 35(4) and (5) of the Act provide that if at any time the Government or the Parliament is satisfied that the ordinary courts are again adequate to secure the effective administration of justice and the preservation of public peace and order, a rescinding proclamation or resolution, respectively, shall be made terminating the Special Criminal Court regime. To date, no such rescinding proclamation or resolution has been promulgated.

2.2 By virtue of s. 47(1) of the Act, a Special Criminal Court has jurisdiction over a “scheduled

offence” (i.e. an offence specified in a list) where the Attorney-General “thinks proper” that a person so charged should be tried before the Special Criminal Court rather than the ordinary courts. The scope of “scheduled offence” is set out in the *Offences Against the State (Scheduled Offences) Order 1972* as encompassing offences under the *Malicious Damage Act, 1861*, the *Explosive Substances Act, 1883*, the *Firearms Acts, 1925-1971* and the *Offences against the State Act, 1939*. A further class of offences was added by Statutory Instrument later the same year, namely offences under s.7 of the *Conspiracy and Protection of Property Act 1875*. The Special Criminal Court also has jurisdiction over non-scheduled offences where the Attorney-General certifies, under s.47(2) of the Act, that in his or her opinion the ordinary courts are “inadequate to secure the effective administration of justice in relation to the trial of such person on such charge”. The Director of Public Prosecutions (DPP) exercises these powers of the Attorney-General by delegated authority.

2.3 In contrast to the ordinary courts of criminal jurisdiction, which employ juries, Special Criminal Courts consist of three judges who reach a decision by majority vote. The Special Criminal Court also utilises a procedure different from that of the ordinary criminal courts, including that an accused cannot avail himself or herself of preliminary examination procedures concerning the evidence of certain witnesses.

The facts as presented

3.1 On 2 November 1993, a serious and apparently highly-organised incident took place in which the chief executive of an Irish banking company, his wife, three children and a baby-sitter were detained and assaulted in the family home by a gang of seven members. The chief executive was thereafter induced, by threat of violence, to steal a very large amount of money from the bank concerned. The author admits having been involved in this incident, but contends that he himself had also been kidnapped by the gang prior to the incident and acted under duress and threat of violence to himself and his family.

3.2 On 19 July 1994, the author was arrested on seven charges related to the incident; namely false imprisonment, robbery, demanding money with

menaces, conspiracy to demand money with menaces, and possession of a firearm with intent to commit the offence of false imprisonment. Six of those charges were non-scheduled offences, and the seventh charge (possession of a firearm with intent to commit the offence of false imprisonment) was a 'scheduled offence'.

3.3 On 20 July 1994 the author was charged directly before the Special Criminal Court with all seven offences by order of the Director of Public Prosecution (DPP), dated 15 July 1994, pursuant to s.47(1) and (2) of the Act, for the scheduled offences and the non-scheduled offences respectively.

3.4 On 14 November 1994, the author sought leave from the High Court to apply for judicial review of the DPP's order. The High Court granted leave that same day and the author had his application heard in June 1995. The author contended that the offences with which he was charged had no subversive or paramilitary connection and that the ordinary courts were adequate to try him. The author challenged the 1972 proclamation on the basis that there was no longer a reasonably plausible factual basis for the opinion on which it was grounded, and sought a declaration to that effect. He also sought to quash the DPP's certification in respect of the non-scheduled offences, on the grounds that the DPP was not entitled to certify non-scheduled offences for trial in the Special Criminal Court if they did not have a subversive connection. In this connection, he contended that the Attorney-General's representation to the Human Rights Committee at its 48th session that the Special Criminal Court was necessitated by the ongoing campaign in relation to Northern Ireland gave rise to a legitimate expectation that only offences connected with Northern Ireland would be put before the Court. He further contended that the decision to try him before the Special Criminal Court constituted unfair discrimination against him.

3.5 On 6 October 1995, the High Court rejected all of the author's arguments. The Court held, following earlier authority, that the decisions of the DPP were not reviewable in the absence of evidence of *mala fides*, or that the DPP had been influenced by improper motive or policy. In the Court's view, certifying non-scheduled offences of a non-subversive or non-paramilitary nature would not be improper. The Court concluded that a proper and valid decision was reasonably possible, and the certification was upheld. As regards the underlying attack upon the 1972 proclamation itself, the High Court considered that it was limited to examining the constitutionality of the Government's action in 1972 and the Court could not express a view on the Government's ongoing obligation under s.35(4) to end the special regime. The High Court considered

that for it to presume to quash the proclamation would be to usurp the legislative role in an area in which the courts had no role.

3.6 Concerning the contention that the author was subject to a mode of trial different from those charged with similar offences but who were not certified for trial before the Special Criminal Court, the High Court found that the author had not established that such a difference in treatment was invidious. Finally the High Court held that no utterance by a representative of the State before an international committee could alter the effect of a valid law or tie the discretion of the DPP exercised pursuant to that law.

3.7 On 24 October 1995, the author appealed to the Supreme Court. In particular, the author contended that the 1972 proclamation was intended to deal with subversive offences and the remit of the Special Criminal Court was never intended to encompass 'ordinary crime'. It was further argued that the Government was under a duty to review and revoke the proclamation as soon as it was satisfied that the ordinary courts were effective to secure the effective administration of justice and the preservation of public peace and order.

3.8 On 18 December 1996, the Supreme Court dismissed the author's appeal from the decision of the High Court. The Supreme Court held that the Government's decision in 1972 to issue the proclamation was essentially a political decision, and was entitled to a presumption of constitutionality which had not been rebutted. The Supreme Court held that both Government and Parliament were under a duty under s.35 of the Act to repeal the regime as soon as they were satisfied that the ordinary courts were again adequate for their tasks. Although the existence of the Special Criminal Court could in principle be judicially reviewed, the Supreme Court considered that it had not been shown that maintenance of the regime amounted to an invasion of constitutional rights in the light of evidence that the situation was being kept under review and the Government remained satisfied as to its need.

3.9 Following its earlier jurisprudence in *The People (Director of Public Prosecutions) v Quilligan*, [1986] I.R. 495, the Supreme Court considered that the Act also allowed for the trial of "non-subversive" offences by the Special Criminal Court, if the DPP was of the view that the ordinary courts were inadequate. With the dismissal of the appeal, the author claims therewith to have exhausted all possible domestic remedies within the Irish justice system in respect of these issues.

3.10 After denial of a series of bail applications, the author's trial before the Special Criminal Court commenced on 14 October 1997. On

29 October 1997, he was convicted of robbery, possession of a firearm, to wit a handgun, with intent to commit an indictable offence, namely false imprisonment, and demanding cash with menaces with intent to steal. The author was sentenced to terms of imprisonment of 12, 12 and 5 years respectively, backdated to run concurrently from 20 July 1994 (the date from which the author was in custody). On 18 May 1999, the Court of Criminal Appeal dismissed the author's application for leave to appeal against his conviction.

The Complaint

4.1 The author claims that the DPP's order to try him before the Special Criminal Court violated the principles of fairness and full equality of arms protected by article 14, paragraphs 1 and 3. The author complains that he has been seriously disadvantaged compared to other persons accused of similar or equal criminal offences, who unlike him were tried by ordinary courts and therefore could avail themselves of a wider range of possible safeguards. The author emphasises that in his case the trial by jury, as well as the possibility of preliminary examinations of witnesses, would be particularly important. The assessment of the credibility of several key witnesses would be the main issue of his case. Thus the author alleges to have been arbitrarily restrained and unequally treated in his procedural rights, since the DPP has not given any reasons or justification for his decision.

4.2 The author accepts that the right to be tried by jury and preliminarily to examine witnesses are not explicitly listed in article 14, paragraph 3, but states that the requirements of article 14, paragraph 3, only set out some but not always all requirements of fairness. He argues that the clear intention of the article as a whole is to provide significant safeguards that are equally available to all. The author argues accordingly that these rights, which he states are key safeguards in the State party's jurisdiction, equally are protected by article 14.

4.3 The author further complains that the decision of the DPP pursuant to s.47 of the Act was issued without any reason or justification and thereby violated the guarantee of article 14, paragraph 1, to a public hearing. The State party's highest court, the Supreme Court, had held in *H v Director of Public Prosecutions* [1994] 2 I.R. 589. that the DPP cannot be compelled to give reasons for the decision, short of exceptional circumstances such as *mala fides* being shown. The author claims that a crucial decision in relation to his trial, namely the choice of procedure and forum, was made in secret and on the basis of considerations which were not revealed to him or to the public and which therefore were not open to any rebuttal.

4.4 Furthermore, the author alleges that the decision of the DPP violated the presumption of innocence protected by article 14, paragraph 2. He considers that the re-installation of the Special Criminal Court by the Irish government in 1972 was due to growing violence in Northern Ireland, with the intention to better insulate juries from improper influence and external interference. The author argues that the decision of the DPP involves a determination either that the author is a member of, or is associated with, a paramilitary or subversive group involved in the Northern Ireland conflict, or that he, or persons associated with him, are likely to attempt to interfere with or otherwise influence a jury if tried before an ordinary court. He also states that being detained until trial in these circumstances also involves a determination of some measure of guilt.

4.5 The author denies that he is, or ever was, associated with any paramilitary or subversive group. He argues that the decision of the DPP in his case therefore implies that he would have to be associated with the criminal gang responsible for the abduction on 2 November 1993, which would be likely to interfere with, or otherwise influence, the decision of a jury. The author denies his involvement in the criminal gang, which he sees as the main issue to be solved in the trial and which therefore could not be decided upon by the DPP in advance.

4.6 The author argues that the State party has failed to provide an effective remedy, as required by article 2. In the circumstances of his case, a decision raising clear issues under the Covenant has been made and is not subject to effective judicial remedy. With the Courts tying their own hands and restricting their scrutiny to exceptional, and almost impossible to demonstrate, reasons of *mala fides*, improper motives or considerations on the part of the DPP, it could not be said that an effective remedy existed. As the author does not contend any such exceptional circumstances exist, no remedy is available to him.

4.7 The author also alleges a violation of the principle of non-discrimination under article 26, since he has been deprived, without objective reason, of important legal safeguards available to other accused persons charged with similar offences. In this regard, the author argues that the 1972 proclamation of the Irish government re-establishing the Special Criminal Court is a derogation pursuant to article 4, paragraph 1, of certain rights protected by article 14 of the Covenant. He states that the situation of growing violence in Northern Ireland leading to the government's decision has ceased and can no longer be characterised as a public emergency which threatens the life of the nation. The author argues that the continuing derogation from parts of the Covenant would therefore no longer be required.

By maintaining the Special Criminal Court in existence, Ireland would be in violation of its obligations under article 4, paragraph 1.

4.8 Finally, the author alleges that Ireland has also breached its obligation under article 4, paragraph 3. He claims that by not renouncing its proclamation of 1972, Ireland has, at least by now, *de facto* or informally derogated from article 14 of the Covenant without notifying the other State Parties to the Covenant as required.

The State party's observations with regard to the admissibility of the communication

5.1 The State party argues that the communication should be considered inadmissible under article 5, paragraph 2 (b), of the Optional Protocol for failure to exhaust domestic remedies. At the time of submission, the author had not prosecuted his appeal against conviction to the Court of Criminal Appeal. The State party also argues that aspects of the present complaint had not been brought before the local courts at all. The State party contends that the author never argued in the domestic courts that he did not receive a public hearing, or that his constitutional right to be presumed innocent had been violated. The State therefore argues that those aspects are inadmissible. Annexed to its submissions, the State party does provide a 1995 decision of its highest court, the Supreme Court, which held that the DPP decision did not violate the presumption of innocence.¹

5.2 The State party also argues at length that the author has enjoyed the full protection of the Covenant in relation to his arrest, detention, the charges against him and his trial. It further argues that various portions of the Covenant are inapplicable to the complaints, that the complaints are incompatible with the provisions of the Covenant, and that the complaints are insufficiently substantiated.

Author's comments on State party's submissions on admissibility

6.1 In addition to responding to the State party's arguments on substantiation and applicability of the Covenant, the author comments on the exhaustion of domestic remedies. He indicates that he was pursuing an appeal against conviction and that such an appeal deals only with the evidence given at trial and the inferences to be drawn therefrom. He argues that the issues raised concerning the DPP certification and his unequal and unfair treatment were fully litigated, prior to his trial, all the way to the Supreme Court. In response to the State party's

contentions that failure to receive a 'public' hearing and breach of the presumption of innocence were not raised before the domestic courts, the author declares that the substance of these claims was fully argued throughout the judicial review proceedings.

State party's observations on the merits of the communication

7.1 The State party declares that its Constitution specifically permits the creation of special courts as prescribed by law. The State party notes that, following the introduction of a regular Government review and assessment procedure on 14 January 1997, reviews taking into account the views of the relevant State agencies were carried out on 11 February 1997, 24 March 1998, and 14 April 1999, have concluded that the continuance of the Court was necessary, not only in view of the continuing threat to State security posed by instances of violence, but also of the particular threat to the administration of justice, including jury intimidation, from the rise of organised and ruthless criminal gangs, principally involved in drug-related and violent crime.

7.2 The State party submits that the Special Criminal Court regime satisfies all the criteria set out in article 14 of the Covenant. The State party notes that neither article 14, nor the Committee's General Comment on article 14, nor other international standards require trial by jury or a preliminary hearing where witnesses could be examined under oath. The requirement, rather, is simply that the trial be fair. The absence of either or both of those elements does not, of itself, make a hearing unfair. Within many States, different trial systems may exist, and the mere availability of different mechanisms cannot of itself be regarded as a breach.

7.3 As to the author's allegation that his inability to examine witnesses preliminarily under oath violates article 14 guarantees of fair trial, the State party emphasises that the parties were placed in the identical position, and therefore on an equal and level footing at the hearing. In any event, such a preliminary hearing serves simply to raise likely issues for cross-examination at trial and has no impact on the trial itself.

7.4 Concerning the author's argument that his rights were breached in that he was tried by a Special Criminal Court on 'ordinary' criminal charges, the State party argues that the proper administration of justice must be protected from threats which undermine it, including threats arising from subversive groups within society, from organised crime and the dangers of intimidation of jurors. In a case where such a threat to the integrity of the normal jury process exists, as the DPP had certified here, the accused's rights are in fact better protected

¹ O'Leary v Attorney-General [1995] 1 I.R. 254.

by a bench of three impartial judges who are less vulnerable to improper external influence than a jury would be. The State party points out that an inadequacy of the ordinary courts, as to which the DPP must be satisfied before the Special Criminal Court can be invoked, may arise not merely from 'political', 'subversive' or paramilitary offences but also from "ordinary gangsterism or well financed and well organised drug dealing, or other situations where it might be believed that juries were for some corrupt reason, or by virtue of threats, or of illegal interference, being prevented from doing justice".² The author's contention that his offence was not 'political' as such is therefore not a bar to the Special Criminal Court being invoked.

7.5 The State party argues that the author was also afforded all the rights contained in article 14, paragraph 3, of the Covenant. These rights are enjoyed by all persons before an ordinary criminal court in Ireland, but also by all before the Special Criminal Court pursuant to s.47 of the 1939 Act.

7.6 Concerning the author's allegation that he did not have a 'public' hearing as guaranteed by article 14, paragraph 1, because the DPP was not required to, and did not, give reasons for the decision certifying the ordinary courts as inadequate, the State party argues that the entitlement to a public hearing applies to the court proceedings, which in the Special Criminal Court too at all stages and at all levels were conducted openly and publicly. The right to a public hearing does not extend to the DPP's pre-trial decisions. Nor would it be desirable to require the DPP's decision to be justified or explained, for that would open up enquiries into information of a confidential nature with security implications, would nullify the very purpose for which the Special Criminal Court was established and would not be in the overall public interest.

7.7 Regarding the author's allegation that his right to be presumed innocent in accordance with article 14, paragraph 2, was violated, the State party asserts that this presumption is a fundamental principle enshrined in Irish law, to which the Special Criminal Court must and does adhere. The same burden of proof must be discharged in the Special Criminal Courts as in the ordinary criminal courts, that is, proof of guilt beyond all reasonable doubt. If this burden was not met, the author would therefore be entitled to an acquittal.

7.8 The State party notes that the accused successfully challenged one offence at the commencement of trial, was acquitted in respect of three offences, and was convicted with respect to a further three. More generally, the State party

observes that of 152 persons indicted before the Special Criminal Court between 1992 and 1998, 48 pleaded guilty, 72 were convicted, 15 were acquitted and 17 had *nolle prosequi* entered. With respect to the author's trial, the issue was raised before the Court of Criminal Appeal, which held that, on the totality of evidence, the presumption of innocence had not been violated.

7.9 The State party argues that, given that these elements as a whole demonstrate that the process applied by the Special Criminal Court process is fair and consistent with article 14 of the Covenant, the DPP's decision to try the author before that Court cannot be a violation of article 14.

7.10 As to the author's allegations concerning unequal and arbitrary treatment contrary to article 26, the State party contends that all persons are treated alike under the statutory regime set up in the Act. All persons are equally subject to the DPP's assessment that the ordinary courts may not be adequate to secure the effective administration of justice and the preservation of public peace and order. Further, the author was treated identically to anyone else whose case had been certified by the DPP. Even if the Committee regards a distinction to have been made between the author and other persons accused of similar or equally serious offences, reasonable and objective criteria are applied in all cases, namely that the ordinary courts had been assessed as being inadequate in the particular case.

7.11 The State party claims, contrary to the author's assertion, that its police authorities believe that the author *was* a member of an organised criminal group, and points to the gravity of the crimes, the highly planned nature of the criminal operation, and the brutality of the offences. Even though the author was in custody before trial, a risk of jury intimidation from other members of the gang could not be excluded. Nothing has been supplied to suggest that this assessment by the DPP was taken in bad faith, directed by improper motive or policy, or was otherwise arbitrary.

7.12 Finally, as to the author's allegations that the State party has not provided an effective remedy for violations of rights as required by article 2, the State party observes that its Constitution guarantees extensive rights to individuals and that a number of violations were alleged by the author and pursued in the courts, through to the highest court in the land. The courts fully addressed the issues placed before them by the author, accepting some of the author's contentions and rejecting others.

7.13 The State party also rejects as misplaced the author's argument that it is derogating, *de facto* or informally, from the Covenant, pursuant to article 4. The State party argues that article 4 permits

² Supreme Court, *People (DPP) v Quilligan* [1986] I.R. 495, 510.

derogation in certain circumstances, but the State is not invoking that right here and it is not applicable.

The author's comments on the State party's merits observations

8.1 In response to the State party's argument that there could have been a risk of jury or witness intimidation from other members of the gang, supporting the DPP's decision to try the author before the Special Criminal Court, the author states that at no time has the State party disclosed the DPP's reasons for that decision. Moreover, the DPP never argued at any bail application that there existed a risk of intimidation by the author. In any event, for the DPP to decide that the author or others in the gang would engage in such conduct – if indeed that was the reason for the decision – would be for the DPP to prejudge the outcome of the trial. Nor was the author given any opportunity to rebut the DPP's assumption.

8.2 Concerning the State party's assertion that the author was indeed a member of an organised criminal group, the author takes strong exception, observing that this is the first occasion the State party has ever made such an assertion. Indeed, at a bail application to the court the police specifically disclaimed any such link, and, during trial, no evidence to that effect was adduced beyond the evidence of participation in the offences themselves. In any event, the State party does not state whether this was the reason for the DPP's decision; if it was, that decision prejudged what was a trial issue.

8.3 Regarding the State party's specific submissions on article 14, the author points out the Committee's observation in its General Comment No. 13 that the requirements of paragraph 3 of article 14 are minimum guarantees, the observance of which is not always sufficient to ensure the fairness of hearing guaranteed by paragraph 1.

8.4 With regard to the Government reviews of the Special Criminal Court carried out in February 1997, March 1998 and April 1999, the author observes that these reviews were unannounced, that no input was invited from the public, NGOs or professional bodies, and that no information was given about who carried out the reviews or the detailed reasons why the Government decided that the Court remained necessary. Accordingly, the author argues that the reviews appear to be purely internal, with no independent content, and thus of no real value as a safeguard.

8.5 Regarding the State party's contention that the Court remains necessary due, *inter alia*, to the rise of highly organised criminal gangs, often involved in drug and violent crime, the author points out that the 1972 proclamation was clearly issued in the context

of 'politically-inspired violence' and that successive Government statements, including some made to the European Court of Human Rights in 1980 and the Human Rights Committee in 1993, Upon the consideration of the State party's initial periodic report, the State party's Attorney-General stated to the Committee that the Special Criminal Court "was needed to ensure the fundamental rights of citizens and protect democracy and the rule of law from the ongoing campaign related to the problem of Northern Ireland". The State party registered the same point in its submissions in *Holland v Ireland*.³ No other reason for the Court's establishment could have existed. Any threat from modern criminal gangs is outside the scope of the 1972 proclamation, and a new proclamation would be needed to deal with that threat. In any event, many cases involving drug dealing and violence by gangs are dealt with in ordinary courts, and there is no apparent reason why the author's case was treated differently from those others.

8.6 The author rejects the State party's contention that he was not disadvantaged by being denied a preliminary examination, as the prosecution was in the same position. The author states that the prosecution was able to deprive the author of that right, and did so after having already seen and interviewed the relevant witnesses, but the author was not able to deprive the prosecution of that right to a preliminary examination. Therefore, the author contends, there was no equality of arms.

8.7 Concerning the State party's assertion that there had been a "fair and public hearing", the author states that he does not argue that the trial proceedings themselves were not public, but that the DPP's decision, which was an integral and essential part of the determination of the charges, was not public. Nor was that hearing fair, for neither notice nor reasons were given, and there was no opportunity for rebuttal. Citing various decisions of the European Court of Human Rights,⁴ which suggest that effective judicial review of decisions cannot be entirely negated by the invocation of security concerns, the author argues that in this case there was no real avenue for effective independent review. The courts had strictly limited their jurisdiction to examine the DPP's decisions.

8.8 As to the right to be presumed innocent, the author argues that the DPP's decision to send him for trial before the Special Criminal Court was a part

³ Communication 593/1994, declared inadmissible on 25 October 1996.

⁴ *Tinnelly v United Kingdom* (Case 62/1997/846/1052-3), *Chahal v United Kingdom* (Case 70/1995/576/662) and *Fitt v United Kingdom* (Appln. No. 29777/96, decided 16 February 2000).

of the determination of the charges and that the DPP also is bound by this presumption. The DPP's decision, according to the author, effectively determined that the author was involved in a subversive organisation or was a member of the gang carrying out the kidnapping. The author argues that being sent for trial in the Special Criminal Court sent a signal to the Court that he was part of a dangerous criminal gang, and it is difficult to believe this factor had no influence on the outcome.

8.9 In response to the State party's arguments on equal treatment before the law, the author argues that the State party's contention that he was treated the same way as are others charged before the Special Criminal Courts, only means that he was treated in the same way as the small number of others who were tried before the Special Criminal Court but not like the majority of persons charged with similar offences, who were tried before the ordinary courts. In any event, most of the other 18 persons tried by special courts were charged with subversive-type offences. He was singled out to join this small group with no reasons given and with no effective means of challenging the decision to do so.

8.10 As to whether such differentiation is objective, reasonable and in pursuit of a legitimate aim under the Covenant, the author questions whether the continued use of the Court was appropriate in view of the sharp drop of paramilitary violence. Even if these procedures are a proportionate response to subversive activity, which the author does not concede, the question arises whether it is a legitimate response to non-subversive activity. The author argues that is impossible to determine whether the differentiation is reasonable and since the DPP's criteria are unknown and the DPP was responsible for the prosecution.

8.11 As to the State party's argument that it was not relying on its right to derogate from the provisions of the Covenant under article 4, the author submits that, while the State party had not declared any state of emergency, the 1972 proclamation establishing the Special Criminal Court in effect introduced a measure appropriate only in an emergency. The author states that the condition for permissibility of such a measure - that is, a threat to the life of the nation - did not exist then and does not now. In any case, if the State party disclaims reliance on article 4, it cannot seek to justify its conduct under the exceptions there provided for.

Issues and proceedings before the Committee

9.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 87 of its rules of procedure, whether the claim is admissible under the Optional Protocol to the Covenant.

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

9.3 As to the State party's contention that available domestic remedies have not been exhausted, the Committee notes that the pre-trial litigation on the DPP's decision was pursued through to the Supreme Court. Moreover, the author's appeal against conviction, raising trial issues affected by the DPP's decision, was rejected by the Court of Criminal Appeal. A complainant bringing the issues in question before the domestic courts need not use the precise language of the Covenant, for legal remedies differ in their form from State to State. The question is rather whether the proceedings in their totality raised facts and issues presently before the Committee. In the light of these proceedings, other controlling authority from the State party's courts and the absence of any suggestion that there are additional remedies available, the Committee accordingly finds that it is not precluded under article 5, paragraph 2 (b), of the Optional Protocol from considering the communication.

9.4 With respect to the author's claims under article 2, the Committee considers that the author's contentions in this regard do not raise issues additional to those considered under other articles invoked, which are considered below. With respect to the alleged violation of article 4, the Committee notes that the State party has not sought to invoke that article.

9.5 As to the State party's remaining arguments on admissibility, the Committee is of the view that these arguments are intimately linked with issues on the merits and cannot meaningfully be severed from a full examination of the facts and arguments presented. The Committee finds the communication admissible as far as it raises issues under articles 14 and 26 of the Covenant.

Consideration of the merits

10.1 The author claims a violation of article 14, paragraph 1, of the Covenant, in that, by subjecting him to a Special Criminal Court which did not afford him a jury trial and the right to examine witnesses at a preliminary stage, he was not afforded a fair trial. The author accepts that neither jury trial nor preliminary examination is in itself required by the Covenant, and that the absence of either or both of these elements does not necessarily render a trial unfair, but he claims that all of the circumstances of his trial before a Special Criminal Court rendered his trial unfair. In the Committee's view, trial before courts other than the ordinary courts is not necessarily, *per se*, a violation of the entitlement to a

fair hearing and the facts of the present case do not show that there has been such a violation.

10.2 The author's claim that there has been a violation of the requirement of equality before the courts and tribunals, contained in article 14, paragraph 1, parallels his claim of violation of his right under article 26 to equality before the law and to the equal protection of the law. The DPP's decision to charge the author before the Special Criminal Court resulted in the author facing an extraordinary trial procedure before an extra-ordinarily constituted court. This distinction deprived the author of certain procedures under domestic law, distinguishing the author from others charged with similar offences in the ordinary courts. Within the jurisdiction of the State party, trial by jury in particular is considered an important protection, generally available to accused persons. Under article 26, the State party is therefore required to demonstrate that such a decision to try a person by another procedure was based upon reasonable and objective grounds. In this regard, the Committee notes that the State party's law, in the *Offences Against the State Act*, sets out a number of specific offences which can be tried before a Special Criminal Court at the DPP's option. It provides also that any other offence may be tried before a Special Criminal Court if the DPP is of the view that the ordinary courts are "inadequate to secure the effective administration of justice". The Committee regards it as problematic that, even assuming that a truncated criminal system for certain serious offences is acceptable so long as it is fair, Parliament through legislation set out specific serious offences that were to come within the Special Criminal Court's jurisdiction in the DPP's unfettered discretion ("thinks proper"), and goes on to allow, as in the author's case, any other offences also to be so tried if the DPP considers the ordinary courts inadequate. No reasons are required to be given for the decisions that the Special Criminal Court would be "proper", or that the ordinary courts are "inadequate", and no reasons for the decision in the particular case have been provided to the Committee. Moreover, judicial review of the DPP's decisions is effectively restricted to the most exceptional and virtually undemonstrable circumstances.

10.3 The Committee considers that the State party has failed to demonstrate that the decision to try the author before the Special Criminal Court was based upon reasonable and objective grounds. Accordingly, the Committee concludes that the author's right under article 26 to equality before the law and to the equal protection of the law has been violated. In view of this finding with regard to article 26, it is unnecessary in this case to examine the issue of violation of equality "before the courts and tribunals" contained in article 14, paragraph 1, of the Covenant.

10.4 The author contends that his right to a public hearing under article 14, paragraph 1, was violated in that he was not heard by the DPP on the decision to convene a Special Criminal Court. The Committee considers that the right to public hearing applies to the trial. It does not apply to pre-trial decisions made by prosecutors and public authorities. It is not disputed that the author's trial and appeal were openly and publicly conducted. The Committee therefore is of the view that there was no violation of the right to a public hearing. The Committee considers also that the decision to try the author before the Special Criminal Court did not, of itself, violate the presumption of innocence contained in article 14, paragraph 2.

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 disclose a violation of article 26 of the Covenant.

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. The State party is also under an obligation to ensure that similar violations do not occur in the future: it should ensure that persons are not tried before the Special Criminal Court unless reasonable and objective criteria for the decision are provided.

13. Bearing in mind that, by becoming a party to the Optional Protocol, Ireland has recognised 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 recognised in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive, within ninety days, information from the Government of Ireland about the measures taken to give effect to the Committee's Views. The State party is requested also to give wide publicity to the Committee's Views.

APPENDIX

Individual opinion (partly dissenting) by Committee members Louis Henkin, Rajsoomer Lallah, Cecilia Medina Quiroga, Ahmed Tawfik Khalil and Patrick Vella

1. While the complaint of the author can be viewed in the perspective of article 26 under which States are bound, in their legislative, judicial and executive behaviour, to ensure that everyone is treated equally and in a non-discriminatory manner, unless otherwise justified on reasonable and objective criteria, we are of the view that there has also been a violation of the principle of equality enshrined in article 14, paragraph 1, of the Covenant.

2. Article 14, paragraph 1, of the Covenant, in its very first sentence, entrenches the principle of equality in the judicial system itself. That principle goes beyond and is additional to the principles consecrated in the other paragraphs of article 14 governing the fairness of trials, proof of guilt, procedural and evidential safeguards, rights of appeal and review and, finally, the prohibition against

double jeopardy. That principle of equality is violated where all persons accused of committing the very same offence are not tried by the normal courts having jurisdiction in the matter, but are tried by a special court at the discretion of the Executive. This remains so whether the exercise of discretion by the Executive is or is not reviewable by the courts.

Communication No. 839-841/1998

Submitted by: Anthony B. Mansaraj et al.; Gborie Tamba et al.; Abdul Karim Sesay et al.[represented by counsel]

Alleged victims: The authors

State party: Sierra Leone

Date of adoption of Views: 16 July 2001

Subject matter: Execution of petitioners following trial by a court martial with no possibility of appeal

Procedural issues: Communications joined at time of consideration – Interim measures of protection

Substantive issues: Right to life – Right to review of conviction and sentence by a higher tribunal

Articles of Covenant: 6; and 14, paragraph 5

Articles of the Optional Protocol and Rules of procedure: Grave breach of Optional Protocol by State party in executing authors prior to consideration and after receipt of rule 86 request

Finding: Violation

1.1 The authors of the communications are Messrs. Anthony Mansaraj, Gilbert Samuth Kandu-Bo and Khemalai Idrissa Keita (communication No. 839/1998), Gborie Tamba, Alfred Abu Sankoh (alias Zagalo), Hassan Karim Conteh, Daniel Kobina Anderson, Alpha Saba Kamara, John Amadu Sonica Conteh, Abu Bakarr Kamara (communication No. 840/1998), Abdul Karim Sesay, Kula Samba, Nelson Williams, Beresford R. Harleston, Bashiru Conteh, Victor L. King, Jim Kelly Jalloh and Arnold H. Bangura (communication No. 841/1998). The authors are represented by counsel.

1.2 On 16 July 2001, the Committee decided to join the consideration of these communications.

The facts as submitted by the authors

2.1 The authors of the communications (submitted 12 and 13 October 1998), at the time of submission, were awaiting execution at one of the prisons in Freetown. The following 12 of the

18 authors were executed by firing squad on 19 October 1998: Gilbert Samuth Kandu-Bo; Khemalai Idrissa Keita; Tamba Gborie; Alfred Abu Sankoh (alias Zagalo); Hassan Karim Conteh; Daniel Kobina Anderson; John Amadu Sonica Conteh; Abu Bakarr Kamara; Abdul Karim Sesay; Kula Samba; Victor L. King; and Jim Kelly Jalloh.

2.2 The authors are all members or former members of the armed forces of the Republic of Sierra Leone. The authors were charged with, inter alia, treason and failure to suppress a mutiny, were convicted before a court martial in Freetown, and were sentenced to death on 12 October 1998.¹ There was no right of appeal.

2.3 On 13 and 14 October 1998, the Committee's Special Rapporteur for New Communications requested the Government of Sierra Leone, under rule 86 of the Rules of Procedure, to stay the execution of all the authors while the communications were under consideration by the Committee.

2.4 On 4 November 1998, the Committee examined the State party's refusal to respect the rule 86 request by executing 12 of the authors. The Committee deplored the State party's failure to comply with the Committee's request and decided to continue the consideration of the communications in question under the Optional Protocol.²

The Complaint

3.1 Counsel submits that as there is no right of appeal from a conviction by a court martial the State

¹ This is the only information provided by counsel on the convictions.

² Vol. 1, A/54/40, chap. 6, para. 420, annex X.

party has violated article 14, paragraph 5, of the Covenant.

3.2 Counsel states that a right of appeal did originally exist under Part IV of the Royal Sierra Leone Military Forces Ordinance 1961, but was revoked in 1971.

The State party's submission

4. The State party has not provided any information in relation to these communications notwithstanding the Committee's repeated invitation to do so.

Issues and proceedings before the Committee

5.1 By adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (Preamble and article 1). Implicit in a State's adherence to the Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination to forward its Views to the State party and to the individual (article 5 (1), (4)). It is incompatible with these obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its Views.

5.2 Quite apart from any violation of the rights under the Covenant charged against a State party in a communication, the State party would be committing a serious breach of its obligations under the Optional Protocol if it engages in any acts which have the effect of preventing or frustrating consideration by the Committee of a communication alleging any violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile. In respect of the present communication, counsel submits that the authors were denied their right under article 14, paragraph 5 of the Covenant. Having been notified of the communication, the State party breached its obligations under the Protocol, by proceeding to execute the following alleged victims, Gilbert Samuth Kandu-Bo, Khemalai Idrissa Keita, Tamba Gborie, Alfred Abu Sankoh (alias Zagalo), Hassan Karim Conteh, Daniel Kobina Anderson, John Amadu Sonica Conteh, Abu Bakarr Kamara, Abdul Karim Sesay, Kula Samba, Victor L. King, and Jim Kelly Jalloh, before the Committee could conclude its examination of the communication, and the formulation of its Views. It was particularly inexcusable for the State to do so after the Committee had acted under its Rule 86 requesting the State party to refrain from doing so.

5.3 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 Optional 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.

5.4 The Human Rights Committee has considered the present communications 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. The Committee notes with concern that the State party has not provided any information clarifying the matters raised by these communications. The Committee recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol, that a State party examine in good faith all the allegations brought against it, and that it provide the Committee with all the information at its disposal. In the light of the failure of the State party to cooperate with the Committee on the matter before it, due weight must be given to the authors' allegations, to the extent that they have been substantiated.

5.5 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. The Committee notes that the State party has not claimed that there are any domestic remedies yet to be exhausted by the authors and has not raised any other objection to the admissibility of the claim. On the information before it, the Committee is of the view that the communication is admissible and proceeds immediately to a consideration of the merits.

5.6 The Committee notes the authors' contention that the State party has breached article 14, paragraph 5, of the Covenant in not providing for a right of appeal from a conviction by a court martial a fortiori in a capital case. The Committee notes that the State party has neither refuted nor confirmed the authors' allegation but observes that 12 of the authors were executed only several days after their conviction. The Committee considers, therefore, that the State party has violated article 14, paragraph 5, of the Covenant, and consequently also article 6, which protects the right to life, with respect to all 18 authors of the communication. The Committee's prior jurisprudence is clear that under article 6, paragraph 2, of the Covenant the death penalty can be imposed *inter alia* only, when all guarantees of a fair trial including the right to appeal have been observed.

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 facts as found by the Committee reveal a violation by Sierra Leone of articles 6 and 14, paragraph 5 of the Covenant.

6.2 The Committee reiterates its conclusion that the State committed a grave breach of its obligations under the Optional Protocol by putting 12 of the authors to death before the Committee had concluded its consideration of the communication.³

6.3 In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide, Anthony Mansaraj, Alpha Saba Kamara, Nelson Williams, Beresford R. Harleston, Bashiru Conteh and Arnold H. Bangura, with an effective remedy. These authors were sentenced on the basis of a trial that failed to provide the basic guarantees of a fair trial. The Committee considers, therefore, that they should be released unless Sierra Leonian law provides for the

³ *Piandiong, Morallos and Bulan v. The Philippines* (869/1999).

possibility of fresh trials that do offer all the guarantees required by article 14 of the Covenant. The Committee also considers that the next of kin of Gilbert Samuth Kandu-Bo, Khemalai Idrissa Keita, Gborie Tamba, Alfred Abu Sankoh (alias Zagalo), Hassan Karim Conteh, Daniel Kobina Anderson, John Amadu Sonica Conteh, Abu Bakarr Kamara, Abdul Karim Sesay, Kula Samba, Victor L. King, and Jim Kelly Jalloh should be afforded an appropriate remedy which should entail compensation.

6.4 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.

Communication No. 845/1998

Submitted by: Rawle Kennedy [represented by counsel]

Alleged victim: The author

State party: Trinidad and Tobago

Declared admissible: 2 November 1999

Date of adoption of Views: 26 March 2002

Subject matter: Imposition of mandatory death sentence on author

Procedural issues: Compatibility of reservation to Optional Protocol

Substantive issues: Right to life – Right to seek pardon or commutation of sentence – Unreasonable delay in pre-trial detention – Right to be tried without undue delay – Right to be promptly informed of charges – Right to be brought promptly before a judge – Freedom from torture or to cruel inhuman or degrading punishment - Right to be treated with humanity and with respect for the inherent dignity of the human person – Right to fair trial

Articles of Covenant: 2, paragraph 3; 6, paragraphs 1, 2 and 4; 7; 9, paragraphs 2 and 3; 10, paragraph 1; 14, paragraphs 1, 3 (c) and 5; and 26

Articles of the Optional Protocol and Rules of procedure: 4, paragraph 2 of the Optional Protocol and 93, paragraph 3 of the Rules

Finding: Violation

1. The author of the communication is Rawle Kennedy, a citizen of Trinidad and Tobago, at the time of submission awaiting execution under a sentence of death, which was subsequently commuted. He is currently serving a sentence of seventy-five years' imprisonment¹ in the State prison of Port-of-Spain. He claims to be a victim of

¹ Note: On an unspecified date after expiry of the five-year period set by the Privy Council as a threshold for commutation of death sentences, the author's death sentence was commuted to a sentence of seventy-five years' imprisonment. The author was so informed on 8 February 2000.

violations by Trinidad and Tobago of articles 2, paragraph 3; 6, paragraphs 1, 2 and 4; 7; 9, paragraphs 2 and 3; 10, paragraph 1; 14, paragraph 1, 3 (c) and 5; and 26 of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as submitted by the author

2.1 On 3 February 1987, one Norris Yorke was wounded in the course of a robbery of his garage. He died of the wounds the following day. The author was arrested on 4 February 1987, charged with murder along with one Wayne Matthews on 9 February 1987, and brought before a magistrate on 10 February 1987. He was tried from 14 to 16 November 1988 and found guilty as charged. On 21 January 1992, the Court of Appeal ordered a retrial, which took place between 15 and 29 October 1993. The author was again found guilty and sentenced to death. A new appeal was subsequently lodged, but on 26 January 1996, the Court of Appeal refused leave to appeal, providing its reasons on 24 March 1998. On 26 November 1998, the Judicial Committee of the Privy Council dismissed the author's petition for special leave to appeal as a poor person.

2.2 The prosecution's case was that Norris Yorke had been at work in his gasoline station along with the supervisor, one Ms. Shanghie, in the evening of 3 February 1987. While Mr. Yorke was checking the cash from the day's sale, the author and Mr. Matthews entered the station. The prosecution claimed that the author asked Ms. Shanghie for a quart of oil, and that when she returned, she found Mr. Yorke headlocked by the author, with a gun pointing to his forehead. Matthews allegedly told the author that Mr. Yorke was reaching for a gun, dealt Mr. Yorke several blows to the head with a piece of wood and left the room. Mr. Yorke then told the intruders to take the money. Ms. Shanghie, on Mr. Yorke's proposal, threw a glass at Matthews upon which the author pointed the gun at her and told her to be quiet. Matthews then ran and hit Mr. Yorke on the head a second time causing him to slump down. The two intruders thereafter escaped with the money, in a vehicle belonging to Mr. Yorke. The next day Mr. Yorke died from the head wounds.

2.3 All available domestic remedies are said to have been exhausted for the purposes of article 5, paragraph 2 (b), of the Optional Protocol. While a constitutional motion might be open to the author in theory, it is not available in practice because of the State party's unwillingness or inability to provide legal aid for such motions and the difficulty of finding a local lawyer who would represent an applicant pro bono in a constitutional motion.

The complaint

3.1 The author argues that article 9, paragraphs 2 and 3, was violated, as he was not informed of charges against him until five days after his arrest and was not brought before a magistrate until six days after his arrest. Counsel recalls that the Covenant requires that such actions be undertaken "promptly", and submits that the periods between arrest and charges in his case do not meet that test.

3.2 The author claims to be a victim of a violation of article 14, paragraphs 3 (c) and 5, on the ground of undue delays in the proceedings. He recalls that it took 1) 21 months from the date on which the author was charged until the beginning of his first trial, 2) 38 months from the conviction until the hearing of his appeal, 3) 21 months from the decision of the Court of Appeal to allow his appeal until the beginning of the re-trial, 4) 27 months from the second conviction to the hearing of the second appeal, and 5) 26 months from the hearing of the second appeal until the reasoned judgement of the Court of Appeal was delivered. Counsel argues that there is no reasonable excuse as to why the re-trial took place some six years after the offence and why the Court of Appeal took a further four years and four months to determine the matter, and submits that the State party must bear the responsibility for this delay.

3.3 The author claims violations of articles 6, 7, and 14, paragraph 1, on account of the mandatory nature of the death penalty for murder in Trinidad and Tobago. He recalls that the distinction between capital and non-capital murder, which exists in law in many other common law countries,² has never been applied in Trinidad and Tobago.³ It is argued that the stringency of the mandatory death penalty for murder is exacerbated by the Murder/Felony Rule in Trinidad and Tobago, under which a person who commits a felony involving personal violence does so at his own risk, and is guilty of murder if the violence results even inadvertently in the death of the victim. The application of the Murder/Felony Rule, it is submitted, is an additional and harsh feature for secondary parties who may not have

² Reference is made to the United Kingdom's Homicide Act 1957, which restricted the death penalty to the offence of capital murder (murder by shooting or explosion, murder committed in the furtherance of theft, murder committed for the purpose of resisting arrest or escaping from custody, and murders of police and prison officers on duty) pursuant to section 5, and murder committed on more than one occasion pursuant to section 6.

³ The law in Trinidad and Tobago does contain provisions reducing the offence of murder to manslaughter where murder was committed with diminished responsibility or under provocation.

participated with the foresight that grievous bodily harm or death could possibly result from that robbery.

3.4 It is submitted that, given the wide variety of circumstances under which murder may be committed, a sentence indifferently imposed on every category of murder, does not retain a proportionate relationship between the circumstances of the actual crime and the punishment and therefore becomes cruel and unusual punishment contrary to article 7 of the Covenant. It is similarly submitted that article 6 was violated, since to impose the death penalty irrespective of the circumstances of the crime constituted cruel, inhuman and degrading, and an arbitrary and disproportionate punishment which cannot justify depriving someone of the right to life. In addition, it is submitted that article 14, paragraph 1, was violated because the Constitution of Trinidad and Tobago does not permit the author to allege that his execution is unconstitutional as inhuman or degrading or cruel treatment, and because it does not afford the right to a judicial hearing or a trial on the question whether the death penalty should be imposed or carried out for the particular murder committed.

3.5 It is submitted that the imposition of the death penalty without consideration and opportunity for presentation of mitigating circumstances was particularly harsh in the author's case, as the circumstances of his offence were that he was a secondary party to the killing and thus would have been considered less culpable. Counsel makes reference to a Bill to Amend the Offences Against the Persons Act, which has been considered but never enacted by the Trinidadian Parliament. According to counsel, the author's offence would have fallen clearly within the non-capital category, had this bill been passed.

3.6 The author claims to be a victim of a violation of article 6, paragraphs 2 and 4, on the ground that the State party has not provided him with the opportunity of a fair hearing in relation to the exercise of the prerogative of mercy. In Trinidad and Tobago, the President has the power to commute any sentence of death under Section 87 of the Constitution, but he must act in accordance with the advice of a Minister designated by him, who in turn acts pursuant to the advice of the Prime Minister. Under Section 88 of the Constitution, there shall be an Advisory Committee on the Power of Pardon, chaired by the designated Minister. Under Section 89, the Advisory Committee must take into account certain materials, such as the trial judge's report, before tendering its advice. Counsel submits that in the practice of Trinidad and Tobago, the Advisory Committee has the power to commute death sentences, and it is free to regulate its own procedure; but in doing so, it does not have to afford

the prisoner a fair hearing or have regard to any other procedural protection for an applicant, such as a right to make written or oral submissions or to have the right to be supplied with the material upon which the Advisory Committee will make its decision.⁴

3.7 For counsel, the right to apply for mercy under article 6, paragraph 4, must be interpreted to be an effective right, i.e. it must be construed in such a way that it is practical and effective rather than theoretical or illusory. It must thus afford the following procedural rights to a person applying for mercy:

- The right to notification of the date on which the Advisory Committee is to consider the case
- The right to be supplied with the documentation before the Advisory Committee at the hearing
- The right to make representations in advance of the hearing both generally and with regard to the material before the Advisory Committee
- The right to an oral hearing before the Advisory Committee
- The right to place before the Advisory Committee, and have it considered, the findings and recommendations of any international body, such as the United Nations Human Rights Committee.

3.8 Counsel notes that in the author's case, the Advisory Committee may have met several times to consider the author's application without his knowledge, and may yet decide to reconvene, without notifying him, without giving him an opportunity to make representations and without supplying him with the material to be considered. Counsel argues that this constitutes a violation of article 6, paragraph 4, as well as article 6, para. 2, as the Advisory Committee can only make a reliable determination of which crimes constitute "the most serious crimes" if the prisoner is allowed to participate fully in the decision making process.

3.9 The author claims to be a victim of a violation of articles 7 and 10, paragraph 1, as he was tortured and beaten by police officers after his arrest, whilst awaiting to be charged and brought before a magistrate. He allegedly suffered repeated beatings and was tortured to admit to the offence. He notes that he was hit on the head with a traffic sign, jabbed in the ribs with a rifle butt, stamped on by named police officers, struck in the eyes by a named police officer, threatened with a scorpion and drowning, and denied food. The author complained about the beatings and

⁴ Counsel invokes the principles set down by the Judicial Committee in *Reckley v. Minister of Public Safety* (No.2) (1996) 2WLR 281 and *De Freitas v. Benny* (1976) A.C.

showed his bruises to the magistrate before whom he was brought on 10 February 1987, and the judge ordered that he be taken to hospital after the hearing.

3.10 The author claims to be a victim of a violation of articles 7 and 10, paragraph 1, on the ground that he was detained in appalling conditions both on remand and on death row. Thus, for the duration of the periods on remand (21 months before the first trial and 21 months before the second trial), the author was kept in a cell measuring 6 by 9 feet, shared with between five to ten other detainees. With regard to the period of altogether almost eight years on death row, it is submitted that the author has been subjected to solitary confinement in a cell measuring 6 by 9 feet, containing only a steel bed, table and bench, with no natural light or integral sanitation and only a plastic pail for use as a toilet. The author states that he is allowed out of his cell only once a week for exercise, that the food is inadequate and almost inedible and that no provisions are made for his particular dietary requirements. Medical and dental care is, despite requests, infrequently made available.

3.11 In view of paragraph 3.10 above, the author claims that carrying out the death sentence would constitute a violation of his rights under articles 6 and 7. Reference is made to the Judicial Committee's judgment in Pratt and Morgan, in which it was held that prolonged detention under sentence of death would violate, in that case, Jamaica's constitutional prohibition on inhuman and degrading treatment. Counsel argues that the same arguments apply in the present case.

3.12 Finally, the author claims a violation of articles 2, paragraph 3, and 14, paragraph 1, since because of the lack of legal aid he is de facto being denied the right to apply to the High Court for redress of violations of fundamental rights. He notes that the costs of instituting proceedings in the High Court are far beyond his own financial means and beyond the means of most of those charged with capital offences.

3.13 With regard to the State party's reservation made upon re-accession to the Optional Protocol on 26 May 1998, it is argued that the Committee has competence to deal with the communication notwithstanding the fact that it concerns a "prisoner who is under sentence of death in respect of [... matters] relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him".

The State party's submission and author's comments

4.1 By submission of 8 April 1999, the State party refers to its instrument of accession to the Optional Protocol of 26 May 1998, which included the following reservation:

"...Trinidad and Tobago re-accedes to the Optional Protocol to the International Covenant on Civil and Political Rights with a Reservation to article 1 thereof to the effect that the Human Rights Committee shall not be competent to receive and consider communications relating to any prisoner who is under sentence of death in respect of any matter relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him and any matter connected therewith."

4.2 The State party submits that because of this reservation and the fact that the author is a prisoner under sentence of death, the Committee is not competent to consider the present communication. It is stated that in registering the communication and purporting to impose interim measures under rule 86 of the Committee's rules of procedure, the Committee has exceeded its jurisdiction, and the State party therefore considers the actions of the Committee in respect of this communication to be void and of no binding effect.

5. In his comments of 23 April 1999, the author submits that the State party's claim that the Committee exceeded its jurisdiction in registering the present communication is wrong as a matter of international law. It is argued that, in conformity with the general principle that the body to whose jurisdiction a purported reservation is addressed decides on the validity and effect of that reservation, it must be for the Committee, and not the State party, to determine the validity of the purported reservation. Reference is made to the Committee's General Comment No. 24, paragraph 18,⁵ and to the Order of the International Court of Justice of 4 December 1998 in the Fisheries Jurisdiction case (*Spain v. Canada*).

The Committee's admissibility decision

6. At its 67th session, the Committee considered the admissibility of the communication. It decided that the reservation could not be deemed compatible with the object and purpose of the Optional Protocol, and that accordingly the Committee was not precluded from considering the communication under the Optional Protocol. The Committee noted that the State party had not challenged the admissibility of any of the author's claims on any other ground than its reservation and considered that the claims were sufficiently substantiated to be considered on the merits. On 2 November 1999, the Human Rights Committee therefore declared the communication admissible.⁶

⁵ I/GEN HR/1/Rev. 3, 15 August 1997, p. 48.

⁶ For the text of the decision, see the Annual Report of the Human Rights Committee for 2000, A/55/40, Vol. II, Annex XI.A.

Consideration of the merits

7.1 The State party's deadline for the submission of information on the merits of the author's allegations expired on 3 July 2000. No pertinent information has been received from the State party, in spite of two reminders addressed to it on 28 February and 13 August 2001.

7.2 The 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.

7.3 Counsel has claimed that the mandatory character of the death sentence, and its application in Mr. Kennedy's case, constitutes a violation of articles 6 (1), 7 and 14 (1) of the Covenant. The State party has not addressed this claim. The Committee notes that the mandatory imposition of the death penalty under the laws of Trinidad and Tobago is based solely on the particular category of crime of which the accused person is found guilty. Once that category has been found to apply, no room is left to consider the personal circumstances of the accused or the particular circumstances of the offence. In the case of Trinidad and Tobago, the Committee notes that the death penalty is mandatory for murder, and that it may be and in fact must be imposed in situations where a person commits a felony involving personal violence and where this violence results even inadvertently in the death of the victim. The Committee considers that this system of mandatory capital punishment would deprive the author of his right to life, without considering whether, in the particular circumstances of the case, this exceptional form of punishment is compatible with the provisions of the Covenant.⁷ The Committee accordingly is of the opinion that there has been a violation of article 6, paragraph 1, of the Covenant.

7.4 The Committee has noted counsel's claim that since Mr. Kennedy was at no stage heard in relation to his request for a pardon nor informed about the status of deliberations on this request, his right under article 6, paragraph 4, of the Covenant, was violated. In other words, counsel contends that the exercise of the right to seek pardon or commutation of sentence should be governed by the procedural guarantees of article 14 (see paragraph 3.8 above). The Committee observes, however, that the wording of article 6, paragraph 4, does not prescribe a particular procedure for the modalities of the exercise of the prerogative of mercy. Accordingly, States parties retain discretion for spelling out the modalities of the exercise of the rights under article 6, paragraph 4. It

⁷ Views on Communication 806/1998 (Thompson v St. Vincent and the Grenadines), adopted on 18 October 2000, para. 8.2 (A/56/40, Vol.II, Annex X.H.)

is not apparent that the procedure in place in Trinidad and Tobago and the modalities spelled out in Sections 87 to 89 of the Constitution are such as to effectively negate the right enshrined in article 6, paragraph 4. In the circumstances, the Committee finds no violation of this provision.

7.5 In connection with counsel's claim that the length of judicial proceedings in his case amounted to a violation of article 14, paragraphs 3 (c) and 5, the Committee notes that more than ten years passed from the time of the author's trial to the date of the dismissal of his petition for special leave to appeal by the Judicial Committee of the Privy Council. It considers that the delays invoked by counsel (see paragraph 3.2 above), in particular the delays in judicial proceedings after the ordering of a re-trial, i.e. over six years from the ordering of the re-trial in early 1992 to the dismissal of the second appeal in March 1998, were 'unreasonable' within the meaning of article 14, paragraphs 3 (c) and 5, read together. Accordingly, the Committee concludes to a violation of these provisions.

7.6 The author has alleged violations of articles 9, paragraphs 2 and 3, because he was not charged until five days after his arrest, and not brought before a judge until six days after arrest. It is uncontested that the author was not formally charged until 9 February 1987 and not brought before a magistrate until 10 February 1987. While the meaning of the term "promptly" in paragraphs 2 and 3 of article 9 must be determined on a case by case basis, the Committee recalls its jurisprudence under the Optional Protocol pursuant to which delays should not exceed a few days. While the information before the Committee does not enable it to determine whether Mr. Kennedy was "promptly" informed of the charges against him, the Committee considers that in any event he was not brought "promptly" before a judge, in violation of article 9, paragraph 3.

7.7 The Committee has noted the author's allegations of beatings sustained after arrest in police custody. It notes that the State party has not challenged these allegations; that the author has provided a detailed description of the treatment he was subjected to, further identifying the police officers allegedly involved; and that the magistrate before whom he was brought on 10 February 1987 ordered him to be taken to hospital for treatment. The Committee considers that the treatment Mr. Kennedy was subjected to in police custody amounted to a violation of article 7 of the Covenant.

7.8 The author claims that his conditions of detention are in violation of articles 7 and 10 (1). Once again, this claim has not been addressed by the State party. The Committee notes that the author was kept on remand for a total of 42 months with at least five and up to ten other detainees in a cell measuring

6 by 9 feet; that for a period of almost eight years on death row, he was subjected to solitary confinement in a small cell with no sanitation except for a slop pail, no natural light, being allowed out of his cell only once a week, and with wholly inadequate food that did not take into account his particular dietary requirements. The Committee considers that these – uncontested – conditions of detention amount to a violation of article 10, paragraph 1, of the Covenant.

7.9 The Committee has noted the claim (see paragraph 3.11 above) that the execution of the author would amount to a violation of articles 6 and 7 of the Covenant. It considers, however, that this particular claim has become moot with the commutation of the author's death sentence.

7.10 The author finally claims that the absence of legal aid for the purpose of filing a constitutional motion amounts to a violation of article 14, paragraph 1, read together with article 2, paragraph 3. The Committee notes that the Covenant does not contain an express obligation as such for any State party to provide legal aid to individuals in all cases but only in the determination of a criminal charge where the interests of justice so require (article 14 (3)(d)). It is further aware that the role of the Constitutional Court is not to determine the criminal charge itself, but to ensure that applicants receive a fair trial. The State party has an obligation, under article 2, paragraph 3, of the Covenant, to make the remedies in the Constitutional Court, provided for under Section 14 (1) of the Trinidadian Constitution, available and effective in relation to claims of violations of Covenant rights. As no legal aid was available to the author before the Constitutional Court, in relation to his claim of a violation of his right to a fair trial, the Committee considers that the denial of legal aid constituted a violation of article 14, paragraph 1, in conjunction with article 2, paragraph 3.

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 violations by Trinidad and Tobago of articles 6, paragraph 1, 7, 9, paragraph 3, 10 paragraph 1, 14, paragraphs 3 (c) and 5, and 14, paragraphs 1 and 3 (d), the latter read in conjunction with article 2, paragraph 3, of the Covenant.

9. Under article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Rawle Kennedy with an effective remedy, including compensation and consideration of early release. The State party is under an obligation to take measures to prevent similar violations in the future.

10. The Committee is aware that Trinidad and Tobago has denounced the Optional Protocol. The

present case however was submitted for consideration before Trinidad and Tobago's denunciation of the Optional Protocol became effective on 27 June 2000; in accordance with article 12 (2) of the Optional Protocol, it continues to be subject to the application of the Optional Protocol. 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.

APPENDIX

Individual opinion by Committee members Mr. Nisuke Ando, Mr. Eckart Klein and David Kretzmer

When the Committee considered the admissibility of this communication we were of the opinion that in the light of the State party's reservation quoted in paragraph 4.1 of the Committee's Views, the Committee was not competent to consider the communication and it should therefore be declared inadmissible. Our view was not accepted by the Committee, which held that it was competent to consider the communication. We respect the Committee's view as to its competence and so have joined in considering the communication on the merits.

Individual opinion (concurring) by Committee members Mr. David Kretzmer and Mr. Maxwell Yalden

In communication No. 806/1998 (*Thompson v. St. Vincent and the Grenadines*), I dissented from the Committee's view that the mandatory nature of the death sentence for murder according to the law of the State party necessarily meant that by sentencing the author to death the State party had violated article 6 (1) of the Covenant. One of the main grounds for my opinion was that according to the law of the State party the death penalty was mandatory only in the case of the intentional killing of another human being, a penalty which, while deeply repugnant to the undersigned, was not in our view in violation of the Covenant. In the present case which carries a mandatory death sentence, however, it has been shown that the definition of murder, may include participation in a crime which involves violence that results inadvertently in the death of another. Furthermore, the prosecution in this case did not claim that the author had intentionally killed Norris Yorke.

In these circumstances, it is not self-evident that the author was convicted of a most serious crime, which is a condition for imposing the death sentence under article 6, paragraph 2, of the Covenant. Furthermore, the mandatory nature of the sentence denied the court the opportunity of considering whether the specific crime of the author was indeed a most serious crime, within the meaning of article 6, paragraph 2. We are therefore of the opinion that in imposing a death sentence the State party violated the author's right to life protected under article 6, paragraph 2, of the Covenant.

Communication No. 869/1999

Submitted by: Alexander Padilla and Ricardo III Sunga [represented by counsel]

Alleged victim: Dante Piandiong, Jesus Morallas, and Archie Bulan

State party: The Philippines

Date of adoption of Views: 19 October 2000

Subject matter: Execution of petitioners despite request for interim protection

Procedural issues: Interim measures of protection

Substantive issues: "Most serious crime" and re-introduction of the death penalty - Freedom from torture, cruel, inhuman or degrading treatment or punishment - Fair trial

Articles of Covenant: 6, paragraphs 1, 2 and 6, 7, 14

Articles of the Optional Protocol and Rules of procedure: State party's breach of Optional Protocol on executing authors after receipt of rule 86 request

Finding: No violation

1.1 The authors of the communication are Alexander Padilla and Ricardo III Sunga. They present the communication as legal counsel to Mr. Dante Piandiong, Mr. Jesus Morallas and Mr. Archie Bulan, whom they claim are victims of violations of articles 6, 7 and 14 of the International Covenant on Civil and Political Rights by the Philippines.

The facts as presented by the authors

1.2 On 7 November 1994, Messrs. Piandiong, Morallas and Bulan were convicted of robbery with homicide and sentenced to death by the Regional Trial Court of Caloocan City. The Supreme Court denied the appeal, and confirmed both conviction and sentence by judgement of 19 February 1997. Further motions for reconsideration were denied on 3 March 1998. After the execution had been scheduled for 6 April 1999, the Office of the President, on 5 April 1999, granted a three month reprieve of execution. No clemency was however granted and on 15 June 1999, counsel presented a communication to the Committee under the Optional Protocol.

1.3 On 23 June 1999, the Committee, acting through its Special Rapporteur for New Communications, transmitted the communication to the State party with a request to provide information and observations in respect of both admissibility and merits of the claims, in accordance with rule 91, paragraph 2, of the Committee's rules of procedure. The State party was also requested, under rule 86 of

the Committee's rules of procedure, not to carry out the death sentence against Messrs. Piandiong, Morallas and Bulan, while their case was under consideration by the Committee.

1.4 On 7 July 1999, the Committee was informed by counsel that a warrant for execution of Messrs. Piandiong, Morallas and Bulan on 8 July 1999 had been issued. After having contacted the State party's representative to the United Nations Office at Geneva, the Committee was informed that the executions would go ahead as scheduled, despite the Committee's request under rule 86, since the State party was of the opinion that Messrs. Piandiong, Morallas and Bulan had received a fair trial.

1.5 Counsel for Messrs. Piandiong, Morallas and Bulan filed a petition with the Supreme Court seeking an injunction, which was refused by the Court on 8 July 1999. Counsel also met personally with the Government's Justice Secretary and asked him not to carry out the death sentence in view of the Committee's request. In the afternoon of 8 July 1999, however, Messrs. Piandiong, Morallas and Bulan were executed by lethal injection.

1.6 By decision of 14 July 1999, the Committee requested from the State party clarifications of the circumstances surrounding the executions. On 21 July 1999, the Special Rapporteur for New Communications and the Committee's Vice-chairperson met with the State party's representative.

The complaint

2.1 Counsel states that Messrs Piandiong and Morallas were arrested on 27 February 1994, on suspicion of having participated, on 21 February 1994, in the robbery of passengers of a jeepney in Caloocan City, during which one of the passengers, a policeman, was killed. After arriving in the police station, Messrs Piandiong and Morallas were hit in the stomach in order to make them confess, but they refused. During a line up, the eyewitnesses failed to recognize them as the robbers. The police then placed them in a room by themselves, and directed the eyewitnesses to point them out. No counsel was present to assist the accused. During the trial, Messrs. Piandiong, Morallas and Bulan testified under oath, but the judge chose to disregard their testimony, because of lack of independent corroboration.

2.2 Counsel further complains that the death sentence was wrongly imposed, because the judge considered that an aggravating circumstance existed, as the crime was committed by more than three armed persons. According to counsel, however, this was not proven beyond reasonable doubt. Moreover, counsel states that the judge should have taken into account the mitigating circumstance of voluntary surrender, since Messrs. Piandiong, Morillos and Bulan came with the police without resisting.

2.3 Counsel further states that the testimonies of the eyewitnesses deserved no credence, because the eyewitnesses were close friends of the deceased and their description of the perpetrators did not coincide with the way Messrs. Piandiong, Morillos and Bulan actually looked. Counsel also states that the judge erred when he did not give credence to the alibi defence.

2.4 Finally, counsel complains that the death penalty was unconstitutional and should not have been imposed for anything but the most heinous crime.

The State party's observations

3.1 By submission of 13 October 1999, the State party explains that domestic remedies were exhausted with the Supreme Court's decision of 3 March 1998, rejecting the supplemental motions for reconsideration. The convicts and their counsel could have filed a communication with the Human Rights Committee at that date. However, they did not do so, but instead petitioned the President for clemency. On 6 April 1999, the President granted a 90 days reprieve, in order to examine the request for pardon. The request was considered by the Presidential Review Committee, composed of the Secretary of Justice, the Executive Secretary and the Chief Presidential Counsel. After careful study of the case, the Committee found no compelling reason to recommend to the President the exercise of presidential prerogative. The State party explains that the President's power to grant pardon cannot reverse nor review the decision by the Supreme Court. The grant of pardon presupposes that the decision of the Supreme Court is valid and the President is merely exercising the virtue of mercy. According to the State party, in submitting themselves to the President's power, the convicts conceded to the decision of the Supreme Court. The State party argues that, having done so, it is highly inappropriate that they would then go back to the Human Rights Committee for redress.

3.2 The State party explains that the President will exercise his constitutional powers to grant pardon if it is proven that poverty pushed the convicts in committing the crime. According to the State party, this cannot be said to have been the case

for the crime of which Messrs. Piandiong, Morillos and Bulan were convicted. In this connection, the State party refers to the Supreme Court's judgement which found that the shooting of the police officer in the jeepney, the subsequent robbery of the shot policeman, and finally the second shooting of him while he was pleading to be brought to hospital, revealed brutality and mercilessness, and called for the imposition of the death penalty.

3.3 With regard to the claim of torture, the State party notes that this was not included in the grounds of appeal to the Supreme Court, and thus the Supreme Court did not look into the issue. According to the State party, the Supreme Court takes accusations of torture and ill-treatment very seriously, and would have reversed the lower court's judgment if it were proven.

3.4 Concerning the claim of lack of legal assistance, the State party notes that the accused had legal assistance throughout the trial proceedings and the appeal. With respect to the right to life, the State party notes that the Supreme Court has ruled on the constitutionality of the death penalty as well as the methods of execution and found them to be constitutional.

3.5 In respect to counsel's request to the Committee for interim measures of protection as a matter of urgency, the State party notes that counsel found no need to address the Committee during the year that his clients were on death row after all domestic remedies had been exhausted. Even after the President granted a 90 day reprieve, counsel waited until the end of that period to present a communication to the Committee. The State party argues that in doing so counsel makes a mockery of the Philippine justice system and of the constitutional process.

3.6 The State party assures the Committee of its commitment to the Covenant and states that its action was not intended to frustrate the Committee. In this connection, the State party informs the Committee that to further enhance the review of cases submitted to the President for pardon, a new body called Presidential Conscience Committee to Review Cases of Death Convicts Scheduled for Execution has been created. Chaired by the Executive Secretary, the Conscience Committee has the following members: one representative from the social sciences, one representative from an NGO involved in anti-crime campaign, and two representatives from church-based organizations. The Committee's function is two-fold, namely: to undertake a review of the cases of death convicts, taking into consideration both humanitarian concerns and the demands of social justice and to submit a recommendation to the President on the possible exercise of his power to grant reprieve, commutations and pardons.

Counsel's comments

4.1 Counsel argues that Messrs. Piandiong, Morillos and Bulan considered resort to the President as a domestic remedy necessary for them to exhaust before presenting their communication to the Human Rights Committee. They argue therefore that it was not improper for them to wait until it became clear that clemency was not going to be granted. With respect to the State party's argument that clemency could not be granted because the crime could not be considered as poverty driven, counsel notes that Messrs. Piandiong, Morillos and Bulan disputed the very finding of their supposed authorship of the crime.

4.2 With regard to the State party's argument that the torture was not made a ground of appeal, counsel submits that at trial Messrs. Piandiong, Morillos and Bulan testified under oath that they were ill-treated, and the matter was brought before the Supreme Court in the Supplemental Motion for Reconsideration. In the opinion of counsel, the ill-treatment betrayed the weakness of the prosecution's evidence, because if the evidence would have been strong, no ill-treatment would have been necessary. In reply to the State party's statement that the Supreme Court takes allegations of torture seriously, counsel argues that this is apparently not so, since the Supreme Court failed to take any action in the present case.

4.3 With regard to the State party's statement that the accused benefited from legal representation, counsel notes that this was only so as of the beginning of the trial. Before trial, at the crucial moment of the police line up, no counsel was present.

4.4 With regard to the State party's argument that the Supreme Court has ruled the death penalty and method of execution constitutional, counsel argues that the Supreme Court's judgement deserves to be reconsidered.

4.5 Concerning the request to the Committee for interim measures, counsel reiterates that they waited to present the communication to the Committee, until all domestic remedies, including the petition for clemency, had been exhausted. Counsel further states that it is hard to take the State party's expressed commitment to the Covenant seriously, in the light of the blatant execution of Messrs. Piandiong, Morillos and Bulan, despite the Committee's request not to do so.

State party's failure to respect the Committee's request for interim measures under Rule 86

5.1 By adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Human Rights Committee to receive and consider communications from individuals claiming to be

victims of violations of any of the rights set forth in the Covenant (Preamble and article 1). Implicit in a State's adherence to the Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination to forward its views to the State party and to the individual (Article 5 (1), (4)). It is incompatible with these obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its Views.

5.2 Quite apart, then, from any violation of the Covenant charged to a State party in a communication, a State party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile. In respect of the present communication, the authors allege that the alleged victims were denied rights under articles 6 and 14 of the Covenant. Having been notified of the communication, the State party breaches its obligations under the Protocol, if it proceeds to execute the alleged victims before the Committee concludes its consideration and examination, and the formulation and communication of its Views. It is particularly inexcusable for the State to do so after the Committee has acted under its rule 86 to request that the State party refrain from doing so.

5.3 The Committee also expresses great concern about the State party's explanation for its action. The Committee cannot accept the State party's argument that it was inappropriate for counsel to submit a communication to the Human Rights Committee after they had applied for Presidential clemency and this application had been rejected. There is nothing in the Optional Protocol that restricts the right of an alleged victim of a violation of his or her rights under the Covenant from submitting a communication after a request for clemency or pardon has been rejected, and the State party may not unilaterally impose such a condition that limits both the competence of the Committee and the right of alleged victims to submit communications. Furthermore, the State party has not shown that by acceding to the Committee's request for interim measures the course of justice would have been obstructed.

5.4 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 this 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

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 The Committee notes that the State party has not raised any objections to the admissibility of the communication. The Committee is not aware of any obstacles to the admissibility of the communication and accordingly declares the communication admissible and proceeds without delay with the consideration of the merits.

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

7.2 Counsel has claimed that the identification of Messrs. Piandiong and Morallos by eyewitnesses during the police line-up was irregular, since the first time around none of the eyewitnesses recognized them, upon which they were put aside in a room and policemen directed the eyewitnesses to point them out. The Court rejected their claim in this respect, as it was uncorroborated by any disinterested and reliable witness. Moreover, the Court considered that the accused were identified in Court by the eyewitnesses and that this identification was sufficient. The Committee recalls its jurisprudence that it is generally for the courts of States parties, and not for the Committee, to evaluate the facts and evidence in a particular case. This rule also applies to questions as to the lawfulness and credibility of an identification. Furthermore, the Court of Appeal, in addressing the argument about the irregularity of the line-up identification, held that the identification of the accused at the trial had been based on in-court identification by the witnesses and that the line-up identification had been irrelevant. In these circumstances, the Committee finds there is no basis for holding that the in-court identification of the accused was incompatible with their rights under article 14 of the Covenant.

7.3 With regard to the other claims, concerning the alleged ill-treatment upon arrest, the evidence against the accused, and the credibility of the eyewitnesses, the Committee notes that all these issues were before the domestic courts, which rejected them. The Committee reiterates that it is for the courts of States parties, and not for the Committee, to evaluate facts and evidence in a particular case, and to interpret the relevant domestic legislation. There is no information before the Committee to show that the decisions by the courts were arbitrary or that they amounted to denial of

justice. In the circumstances, the Committee finds that the facts before it do not reveal a violation of the Covenant in this respect.

7.4 The Committee has noted the claim made on behalf of Messrs. Piandiong, Morallos and Bulan before the domestic courts that the imposition of the death sentence was in violation of the Constitution of the Philippines. Whereas it is not for the Committee to examine issues of constitutionality, the substance of the claim appears to raise important questions relating to the imposition of the death penalty to Messrs. Piandiong, Morallos and Bulan, namely whether or not the crime for which they were convicted was a most serious crime as stipulated by article 6 (2), and whether the re-introduction of the death penalty in the Philippines is in compliance with the State party's obligations under article 6 (1), (2) and (6) of the Covenant. In the instant case, however, the Committee is not in a position to address these issues, since neither counsel nor the State party has made submissions in this respect.

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 it cannot make a finding of a violation of any of the articles of the International Covenant on Civil and Political Rights. The Committee reiterates its conclusion that the State committed a grave breach of its obligations under the Protocol by putting the alleged victims to death before the Committee had concluded its consideration of the communication.

APPENDIX

Individual opinion by Committee member Ms. Christine Chanet (partly dissenting)

I dissent from the Committee's view with regard to the single issue of its finding that there has been no violation of article 14 of the Covenant.

In my opinion, in cases involving criminal offences punishable by the death sentence, the presence of a lawyer should be required at all stages of the proceedings, regardless of whether the accused requests it or not or whether the measures carried out in the course of an investigation are admitted as evidence by the trial Court.

Since the State party did not provide the accused with a lawyer during the line-up identification, a violation of articles 14 (3) (b) and 14 (3) (d), and article 6, of the Covenant should, in my opinion, have been found.

Individual opinion by Committee members Ms. Elizabeth Evatt and Ms. Cecilia Medina Quiroga (partly dissenting)

We do not agree with the conclusions of the Committee concerning the alleged defects in the

identification parade. The author made allegations which cast doubt on the fairness of the procedure, particularly since this identification was carried out in the absence of a lawyer. The court referred to these allegations, but rejected them on the basis that it did not need to rely on the identification parade and that any problems relating to it had been overcome by the identification of the author by witnesses at the trial. However, the identification of accused in court by witnesses who had taken part in the allegedly faulty identification parade does not in itself overcome any defects which affected the earlier identification of the accused by those witnesses. The court gave no other reasons for rejecting the allegations, and thus the doubts raised by the author remain unanswered and must be given weight. In these circumstances, there remain serious questions about the fairness of the trial which in our view amount to a violation of article 14 (1).

Individual opinion by Committee member Mr. Martin Scheinin (partly dissenting)

I fully concur in the main finding of the Committee in the present case: that the State party has breached its obligations under the Optional Protocol by executing the three persons on whose behalf the communication was submitted, while their case was pending before the Committee, disregarding a duly communicated Rule 86 request. Also, I concur in that the issues related to the reintroduction of the death penalty after once abolished, and whether the crimes in question constituted "most serious crimes" in the meaning of article 6, paragraph 2, were not sufficiently substantiated to enable the

Committee to find a violation of article 6 on these grounds.

Where I dissent is the issue of denial of the assistance of a lawyer. In my opinion the communication included a sufficiently substantiated claim that the fact that all three accused persons were not assisted by a lawyer prior to the commencement of the actual trial constituted a violation of article 14 and, consequently, of article 6 of the Covenant. Although this claim is separate from the claim related to the issue of identification in relation to two of the accused, the importance of the assistance of a lawyer at earlier stages of the proceedings is manifest in the way the courts treated the identification issue when it was finally raised before them.

As has been emphasised by the Committee in several previous cases, it is axiomatic under the Covenant that persons facing the death penalty are assisted by a lawyer at all stages of the proceedings (see, e.g., *Conroy Levy v. Jamaica*, Communication No. 719/1996, and *Clarence Marshall v. Jamaica*, Communication No. 730/1996). The alleged victims were detained for 6 to 8 months prior to their trial. Irrespective of the characterization of the stages of investigation conducted prior to the commencement of the trial as judicial or non-judicial, and irrespective of whether the accused explicitly requested for a lawyer, the State party was under an obligation to secure the assistance of the lawyer to them during this period of time. Failure to do so in a case that resulted in the imposition of capital punishment constitutes a violation of article 14, paragraphs 3 (b) and 3 (d), and, consequently, of article 6.

Communication No. 884/1999

Submitted by: Antonina Ignatane [represented by counsel]

Alleged victim: The author

State party: Latvia

Date of adoption of Views: 25 July 2001

Subject matter: Refusal by State party authorities to let individual stand for the local elections on the basis of a language proficiency test

Procedural issues: None

Substantive issue: Freedom to take part in the conduct of public affairs

Articles of Covenant: 2 and 25

Articles of the Optional Protocol and Rules of procedure: None

Finding: Violation

1.1 The author of the communication is Ms. Antonina Ignatane, a Latvian citizen of Russian origin and a teacher, born in Riga on 21 February 1943. She claims to be the victim of violations of articles 2 and 25 of the International Covenant on

Civil and Political Rights by Latvia. The author is represented by counsel.

1.2 The International Covenant on Civil and Political Rights entered into force for Latvia on 14 July 1992, and the Optional Protocol on 22 September 1994.

The facts as submitted by the author

2.1 At the time of the events in question, Ms. Ignatane was a teacher in Riga. In 1993, she had appeared before a certification board to take a Latvian language test and had subsequently been awarded a language aptitude certificate stating that she had level 3 proficiency (the highest level).

2.2 In 1997, the author stood for local elections to be held on 9 March 1997, as a candidate of the Movement of Social Justice and Equal Rights in

Latvia list. On 11 February 1997, she was struck off the list by decision of the Riga Election Commission, on the basis of an opinion issued by the State Language Board (SLB) to the effect that she did not have the required proficiency in the official language.

2.3 On 17 February 1997, the author filed a complaint with the Central District Court concerning the Election Commission's decision, which she considered illegal. The Court transferred the case automatically to the Riga's Circuit Court, which dismissed the case on 25 February, with immediate effect.

2.4 On 4 March 1997, Ms. Ignatane filed a petition against the decision of 25 February with the President of the Civil Division of the Latvian Supreme Court. In a letter dated 8 April 1997, the Supreme Court refused to act on the petition.

2.5 The author had also filed a case with the Public Prosecutor's Office on 4 March 1997. Having considered the petition, the Public Prosecutor's Office stated on 22 April 1997 that there were no grounds to act on the complaint and that the decision in question had been taken with due regard to the law and did not violate the International Covenant on Civil and Political Rights.

2.6 The author has submitted to the Committee a translation of articles 9, 17 and 22 of the Law on Elections to Town Councils and Municipal Councils, of 13 January 1994. Article 9 of the Law lists the categories of people who may not stand for local elections. According to article 9, paragraph 7, no one who does not have level 3 (higher) proficiency in the State language may stand for election. According to article 17, if anyone standing for election is not a graduate of a school in which Latvian is the language of instruction, a copy of his or her language aptitude certificate showing higher level (3) proficiency in the State language must be attached to the "candidate's application". The author's counsel has explained that the copy of the certificate is required to enable SLB to check its authenticity, not its validity.

2.7 According to article 22 only the Election Commission registering a list of candidates is competent to alter the list, and then only:

(1) By striking a candidate from the list if: ...

(b) The conditions mentioned under article 9 of the present Law are applicable to the candidate, ..., and, in cases covered by paragraph 1 (a), (b) and (c) of the present article, a candidate may be struck off the list on the basis of an opinion from the relevant institution or by court decision.

In the case of a candidate who: ...

(8) Does not meet the requirements corresponding to the higher level (3) of language

proficiency in the State language, that fact must be certified by an opinion of the SLB.

2.8 Lastly, Ms. Ignatane recalls that, according to statements made by the SLB at the time of the case hearings, the certification board in the Ministry of Education had received complaints about her proficiency in Latvian. It so happens, the author says, that it was just that Ministry that, in 1996, had been involved in a widely publicized controversy surrounding the closure of No. 9 secondary school in Riga, where she was the head teacher. The school was a Russian-language school and its closure had had a very bad effect on the Russian minority in Latvia.

The complaint

3. The author claims that, by depriving her of the opportunity to stand for the local elections, Latvia violated articles 2 and 25 of the Covenant.

The State party's observations

4.1 In its observations of 28 April 2000, the State party contests the admissibility of the communication. It claims that the author has not exhausted the domestic remedies available to her.

4.2 The State party also submits that the author does not challenge the conclusions of the State Language Board that her proficiency in Latvian is not of the level required in order to stand for elections (level 3), but only the legality of the Election Commission's decision to strike her off the list of candidates. The State party considers that the court rulings are lawful and legitimate and in full accordance with Latvian law and, in particular, with article 9, paragraph 7, and article 22, paragraph 8, of the Law on Elections to Town Councils and Municipal Councils.

4.3 The State party is of the view that the provisions of the aforementioned Law comply with the requirements of the International Covenant on Civil and Political Rights, as provided in the Human Rights Committee's General Comment No. 25 on article 25, which states that "any conditions which apply to the exercise of the rights protected by article 25 should be based on objective and reasonable criteria". According to the State party, participation in public affairs requires a high level of proficiency in the State language and such a precondition is reasonable and based on objective criteria, which are set forth in the regulations on the certification of proficiency in the State language. The State party says that, according to those regulations, level 3 proficiency in the State language is required for several categories of persons, including elected representatives. The highest level (level 3) shows an ability to speak the official

language fluently, to understand texts chosen at random and to draft texts in the official language, in connection with his or her official duties.

4.4 The State party goes on to say that, as regards the plaintiff's real proficiency in the State language, there is extensive information provided in the court ruling, which states that, if there are complaints about proficiency in the State language, an examination is carried out in order to establish whether the real language proficiency corresponds to the level attested by the certificate. In this particular case, the State party claims that complaints had been received by the Ministry of Education and Science concerning the plaintiff's proficiency in Latvian, although it does not elaborate further or provide any evidence. On 5 February 1997, an examination was carried out which showed that her language proficiency did not meet the requirements of level 3. The Court subsequently referred to the material evidence (a copy of the examination, with the corrections) that the SLB had provided in support of the results of the examination concerning Ms. Ignatane's proficiency in Latvian.

4.5 The examination results served as a basis for barring the plaintiff from the list of candidates for the elections, in accordance with the law. The legality of the act had subsequently been confirmed by the Supreme Court and the Public Prosecutor's Office.

4.6 Regarding the alleged contradiction between the author's certificate and the SLB's conclusions, the State party notes that the SLB's conclusions relate only to the issue of the candidate's eligibility and in no way either imply the automatic invalidation of the certificate or may be used as a basis for revising its appropriateness, unless the holder of the certificate so wishes.

4.7 The State party argues that the author could have taken two further measures. In the first place, Ms. Ignatane could have asked for another language examination, as the SLB indicated during the hearings. The purpose of such an examination would have been to verify the appropriateness of the certificate held by Ms. Ignatane. Secondly, the author could have taken legal action on the basis of the discrepancy between her certificate and the SLB's conclusions with regard to her electoral qualification, which would have led the Court to order another examination in order to verify the appropriateness of the certificate.

4.8 Since none of these possibilities was used by the author, the State party argues that not all domestic remedies have been exhausted. The State party also dismisses the allegation of discrimination against the author on the basis of her political convictions, since all the other members of the same list were accepted as candidates in the elections.

Author's comments on State party's observations

5.1 In comments dated 22 September 2000, counsel addresses the State party's argument that Ms. Ignatane did not challenge the conclusions of the State Language Board that she did not have the highest level of proficiency in Latvian, but challenged the legality of the Election Commission's decision to strike her off the list of candidates. Counsel acknowledges that Ms. Ignatane certainly challenged the legality of the Electoral Commission's decision, but states that the only ground for that decision was the SLB's conclusion that her proficiency in Latvian did not meet the requirement for the highest level of aptitude. Therefore, according to counsel, the author challenged the legality of the decision by the Election Commission to strike her name from the list of election candidates, which was taken on the basis of the SLB's conclusion.

5.2 Counsel points out that the phrasing used by the State party - "the required third (highest) level to stand for election" - is open to misinterpretation. According to counsel, Latvian electoral law has no requirement for any special level of proficiency in the State language purely in order to stand for election; it is only the regulations on the certification of proficiency in the State language for employment that indicate the three levels required for various positions and professions, and the language aptitude certificate showing level 1, 2 or 3 proficiency in the State language is general in scope.

5.3 With regard to the State party's assertion that the relevant electoral law complies with the requirements of the International Covenant on Civil and Political Rights, as provided in the General Comment on article 25, counsel states that the conditions contained in article 9, paragraph 7, and article 22, paragraph 8, of the Law in question are not based on objective and reasonable criteria, as required by the Human Rights Committee's General Comment on non-discrimination.

5.4 According to article 9, paragraph 7, of the Law, persons whose proficiency in the State language does not meet the requirements of the highest level (level 3) may not be nominated as candidates for local council elections and may not be elected to councils. According to article 22, paragraph 8, a candidate may be struck off the list if his or her language skills do not meet the requirements of proficiency level 3 in the State language, on the basis of an opinion of the State Language Board. According to counsel, in practice, that provision is open to a practically infinite range of interpretations and opens the door to totally discretionary and arbitrary decisions.

5.5 Counsel then addresses the State party's point that an election candidate is given a language

examination if complaints have been received. If no complaints have been received, the SLB should submit opinions on every candidate, in the form of an authentication of the copy of each candidate's Latvian language aptitude certificate. Counsel maintains that an unsupported statement that complaints had been made about a candidate and the results of the subsequent examination, which was conducted by a single examiner, a senior inspector at the State Language Inspectorate, cannot be described as objective criteria. The full powers given to a senior inspector are not commensurate with the consequences they give rise to, i.e. the disqualification of an election candidate. Such an approach to the verification of proficiency in the State language makes it possible, if need be, to disqualify all candidates representing a minority.

5.6 Counsel goes on to describe the conditions in which the examination was carried out. Ms. Ignatane was at work, when the German lesson she was giving to a class of schoolchildren was interrupted and she was required to do a written exercise in Latvian. The examination was carried out by an inspector in the presence of two witnesses, who were teachers employed at the same school. Given the circumstances, counsel contends, the spelling mistakes and other errors that were used as evidence of the author's limited proficiency in Latvian should not be taken into account.

5.7 In the third place, with reference to the State party's assertion that participation in public affairs requires a high level of proficiency in the State language and that such a precondition is reasonable and based on objective criteria set forth in the regulations on the certification of proficiency in the State language, counsel contends that such a precondition for standing in local elections is not reasonable. There are no other preconditions for candidates in general, for example with regard to level of education or professional skills. The fact that the only precondition relates to proficiency in Latvian means, according to counsel, that the rights to vote and to be elected are not respected and guaranteed to all individuals with no distinction on the grounds of their language status. Counsel asserts that, for around 40 per cent of the population of Latvia, Latvian is not the mother tongue.

5.8 According to counsel, this precondition of a high level of proficiency in Latvian for participation in local elections is not based on objective criteria. However, that does not mean that the author is of the opinion that the criteria set forth in the regulations on the certification of proficiency in the State language are not objective. Simply, the latter criteria are not applied in the provision (in article 22, paragraph 8, of the Law) that a candidate may be struck off the list if he or she does not meet the requirements of the highest level (level 3) of

proficiency in Latvian, and that this must be certified by an opinion of the SLB. Counsel states that, according to the regulations on the certification of proficiency in the State language, language proficiency is certified by a special Certification Commission made up of at least five language specialists. The regulations describe in detail the testing and certification procedure, thereby ensuring its objectivity and reliability. Level 1, 2 and 3 certificates are valid for an unlimited period. According to article 17 of the Law, candidates who have not obtained their secondary school diploma from a school in which Latvian is the language of instruction must submit a copy of their level 3 certificate to the Election Commission. The author had submitted such a copy to the Riga Election Commission. Counsel maintains that the SLB opinion, issued on the basis of an ad hoc examination conducted by a single inspector from the State Language Inspectorate following complaints allegedly received by the Ministry of Education, was not consistent with the requirements of the regulations on the certification of proficiency in the State language. Moreover, the State party acknowledges that the SLB opinion relates only to the issue of eligibility and in no way either implies the automatic invalidation of the certificate or may be used as a basis for revising its appropriateness.

5.9 Fourth and last, counsel takes up the State party's contention that all domestic remedies have not been exhausted. Counsel recalls that the court judgement of 25 February 1997 confirming the Riga Election Commission's decision of 11 February 1997 was final and entered into force with immediate effect. The special procedure available for appealing such decisions is in fact the procedure that the author followed.

5.10 Counsel goes on to point out that remedies should not only be adequate and sufficient, but should also make it possible in practice to obtain the re-establishment of the situation in question. The remedy exhausted by the author – the special procedure for appealing the Election Commission's decision – was the only remedy that would have made it possible to achieve the objective of the complaint, namely, to allow the author to stand in the Riga City Council elections in 1997 by restoring her name to the electoral list.

5.11 Counsel maintains that the State party contradicts itself when it says, on the one hand, that it cannot agree that domestic remedies have been exhausted, since neither of the two possible remedies it mentions for verifying the appropriateness of the author's certificate has been used, and, on the other hand, that, according to the communication, the author challenges the legality of striking her off the list of candidates but not the SLB's opinion that her proficiency in Latvian was not of the required level

3. In any case, each of the procedures mentioned by the State party to verify the appropriateness of the author's certificate takes several months at least and therefore would not have allowed the author to stand in the 1997 elections. In that regard, counsel recalls that the decision to bar the author was taken 26 days before the elections. Time constraints precluded any effort on the author's part to avail herself subsequently of any other legal remedy.

Committee's admissibility decision

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 International Covenant on Civil and Political Rights.

6.2 The Committee observes that the State party contests the admissibility of the communication on the grounds that domestic remedies have not been exhausted, since the author did not contest the SLB's conclusion that her knowledge of the language was not of the required standard, but contested the Election Commission's decision to strike her off the list. The Committee cannot agree with the State party's argument that this shows that the author had not exhausted the available remedies, since at the time the author was in possession of a valid, legally issued certificate demonstrating her knowledge of the official language to the required standard, which the State party itself does not contest.

6.3 The Committee also notes counsel's arguments that the remedies listed by the State party are not effective remedies and that the State party has not proved that they are effective or indeed contested counsel's arguments. The Committee also takes account of counsel's comment that the remedies listed by the State party take several months to reach a conclusion in any case and to have exhausted them would have meant that the author would not have been able to stand in the elections. The Committee notes that counsel's reactions were brought to the attention of the State party, but that the latter did not respond. Under the circumstances, the Committee considers that there is no impediment to the admissibility of the communication.

6.4 The Committee therefore declares the communication admissible and decides to proceed to an examination of the case on its merits, in accordance with article 5, paragraph 2, of the Optional Protocol.

Examination of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information submitted to it in writing by the parties,

in accordance with article 5, paragraph 1, of the Optional Protocol.

7.2 The issue before the Committee is whether the rights of the author under articles 2 and 25 were violated by not allowing her to stand as candidate for the local elections held in March 1997.

7.3 According to the State party participation in public affairs requires a high level of proficiency in the State language and a language requirement for standing as a candidate in elections is hence reasonable and objective. The Committee notes that article 25 secures to every citizen the right and the opportunity to be elected at genuine periodic elections without any of the distinctions mentioned in article 2, including language.

7.4 The Committee notes that, in this case, the decision of a single inspector, taken a few days before the elections and contradicting a language aptitude certificate issued some years earlier, for an unlimited period, by a board of Latvian language specialists, was enough for the Election Commission to decide to strike the author off the list of candidates for the municipal elections. The Committee notes that the State party does not contest the validity of the certificate as it relates to the author's professional position, but argues on the basis of the results of the inspector's review in the matter of the author's eligibility. The Committee also notes that the State party has not contested counsel's argument that Latvian law does not provide for separate levels of proficiency in the official language in order to stand for election, but applies the standards and certification used in other instances. The results of the review led to the author's being prevented from exercising her right to participate in public life in conformity with article 25 of the Covenant. The Committee notes that the first examination, in 1993, was conducted in accordance with formal requirements and was assessed by five experts, whereas the 1997 review was conducted in an ad hoc manner and assessed by a single individual. The annulment of the author's candidacy pursuant to a review that was not based on objective criteria and which the State party has not demonstrated to be procedurally correct is not compatible with the State party's obligations under article 25 of the Covenant.

7.5 The Committee concludes that Mrs. Ignatane has suffered specific injury in being prevented from standing for the local elections in the city of Riga in 1997, because of having been struck off the list of candidates on the basis of insufficient proficiency in the official language. The Human Rights Committee considers that the author is a victim of a violation of article 25, read in conjunction with article 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. Ignatane with an effective remedy. It is also under an obligation to take steps to prevent similar violations from occurring 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 remedy when 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. In addition, it requests the State party to publish the Committee's Views.

Communication No. 919/2000

Submitted by: Michael Andreas Müller and Imke Engelhard [represented by counsel]

Alleged victim: The authors

State party: Namibia

Date of adoption of Views: 26 March 2002

Subject matter: Right of spouses to change surname after marriage

Procedural issues: None

Substantive issues: Right to equality before the law and equal protection of the law

Articles of Covenant: 17, 23 and 26

Articles of the Optional Protocol and Rules of procedure: None

Finding: Violation

1. The authors of the communication, dated 8 November 1999, are Mr. Michael Andreas Müller (hereinafter called Mr. Müller), a German citizen, born on 7 July 1962, and Imke Engelhard (hereinafter called Ms. Engelhard), a Namibian citizen, born on 16 March 1965, who claim to be victims of a violation by Namibia¹ of articles 26, 23 paragraph 4, and 17, paragraph 1, of the International Covenant on Civil and Political Rights (the Covenant). They are represented by counsel.

The facts as submitted by the authors

2.1 Mr. Müller, a jewellery maker, came to Namibia in July 1995 as a visitor, but was so taken with the country that he decided to settle in the city of Swakopmund. He started to work for Engelhard Design, a jewellery manufacturer since 1993, owned by Ms. Engelhard. The authors married on 25 October 1996. Before getting married, they sought legal advice concerning the possibility of

adopting Ms. Engelhard's surname. A legal practitioner informed them that this was possible. After the marriage, they returned to the same legal practitioner to complete the formalities to change the surname. They were then informed that whereas a wife could assume her husband's surname without any formalities, a husband would have to apply to change his surname.

2.2 The Aliens Act No. 1 of 1937 (hereinafter named the Aliens Act) Section 9, paragraph 1 as amended by Proclamation A.G. No. 15 of 1989, states that it is an offence to assume another surname than a person has assumed, described himself, or passed before 1937, without the authorisation by the Administrator General or an officer in the Government Service, and such authority has been published in the Official Gazette, or unless one of the listed exceptions apply. The listed exception in the Aliens Act Section 9, paragraph 1 (a), is when a woman on her marriage assumes the surname of her husband. Mr. Müller submits that the said section infringes his rights under the Namibian Constitution to equality before the law and freedom from discrimination on the grounds of sex (article 10), his and his family's right to privacy (article 13, paragraph 1), his right to equality as to marriage and during the marriage (article 14, paragraph 1), and his right to have adequate protection of his family life by the State party (article 14, paragraph 3).

2.3 Mr. Müller further submits that there are numerous reasons for his wife's and his own desire that he assumes the surname of Ms. Engelhard. He contends that his surname, Müller, is extremely common in Germany, and exemplifies this by explaining that the phonebook in Munich, where he comes from, contained several pages of the surname Müller. He contends that Engelhard is a far more

¹ The Optional Protocol entered into force for Namibia on 28 November 1994 (by accession).

unusual surname, and that the name is important to his wife and him because their business has established a reputation under the name Engelhard Design. It would be unwise to change the name to Müller Design because the surname is not distinctive. It is likewise important that jewellery manufacturers trade under a surname because the use of one's surname implies that one takes pride in one's work, and customers believe that it ensures a higher quality of workmanship. Mr. Müller submits that if he were to continue to use his surname, and his wife were to continue to use hers, customers and suppliers would assume that he was an employee. Mr. Müller and his wife also have a daughter who has been registered under the surname of Engelhard, and Mr. Müller would like to have the same surname as his daughter to avoid exposing her to unkind remarks about him not being the father.

2.4 Mr. Müller filed a complaint to the High Court of Namibia on 10 July 1997, alleging that Section 9, paragraph 1, of the Aliens Act was invalid because it conflicted with the Constitution with regard to the right to equality before the law and freedom from discrimination, the right to privacy, the right to equality as to marriage and during the marriage, and with regard to the right to family life.

2.5 Ms. Engelhard filed an affidavit with her husband's complaint, in which she stated that she supported the complaint and that she also wanted the joint family surname to be Engelhard rather than Müller, for the reasons given by her husband. The case was dismissed with costs on 15 May 1998.

2.6 The appeal to the Supreme Court of Namibia was dismissed with costs on 21 May 1999. The Supreme Court being the highest court of appeal in Namibia, the authors submit that they have exhausted domestic remedies.

The complaint

3.1 Mr. Müller claims that he is the victim of a violation of article 26 of the Covenant, as the Aliens Act Section 9, paragraph 1 (a) prevents Mr. Müller from assuming his wife's surname without following a described procedure of application to a government service, whereas women wanting to assume their husbands' surname may do so without following this procedure. Likewise, Ms. Engelhard claims that her surname may not be used as the family surname without complying with these same procedures, in violation of article 26. They submit that this section of the law clearly differentiates in a discriminatory way between men and women, in that women automatically may assume the surnames of their husbands on marriage, whereas men have to go through specified procedures of application. The procedure for a man wanting to assume his wife's surname requires that:

(i) he must publish, in two consecutive editions of the Official Gazette and two daily newspapers in a prescribed form, an advertisement of his intention and reasons to change his surname, and he must pay for these advertisements;

(ii) he must submit a statement to the Administrator-General or an officer in the Government Service authorised thereto by him;

(iii) the Commissioner of Police and the magistrate of the district must furnish reports about the author;

(iv) any objection to the person assuming another surname must be attached to the magistrate's report;

(v) the Administrator-General or an officer in the Government Service authorised thereto by him, must on the basis of these statement and reports be satisfied that the author is of good character and that there is sufficient reason for his assumption of another surname;

(vi) the applicant must pay prescribed fees and comply with such further requirements as may be prescribed by regulation.

3.2 The authors refer to a similar case of discrimination of the European Court of Human Rights, *Burghartz v. Switzerland*.² In that case, the European Court held that the objective of a joint surname reflecting the family unity, could be reached just as effectively by adopting the surname of the wife as the family surname, and allowing the husband to add his surname, as by the converse arrangement. The Court, before finding a violation of articles 14 and 8 of the European Convention on Human Rights, also stated that there was no genuine tradition at issue, but that in any event the Convention must always be interpreted in the light of present day conditions, particularly regarding the importance of the principle of non-discrimination. The authors further refer to the Committee's General Comment No. 18,³ where the Committee explicitly stated that any distinction based on sex is within the meaning of discrimination in article 26 of the Covenant, and that the prohibited discrimination includes that the content of a law should not be discriminatory. The authors submit, that by applying the Committee's interpretation of article 26 of the Covenant, as stated in General Comment No. 18, Aliens Act Section 9, paragraph 1 (a) discriminates against both men and women.

² See European Court of Human Rights, judgement A280-B of 22 February 1994.

³ See General Comment No. 18 of 10 November 1989, para. 7 and 12.

3.3 The authors claim that they are victims of a violation of article 23, paragraph 4 of the Covenant, as Section 9, paragraph 1 of the Aliens Act infringes their right to equality as to marriage and during their marriage, by allowing a wife's surname to be used as the common family name only if specified formalities are applied, whereas a husband's surname may be used without applying these formalities. The authors refer to the Committee's *General Comment No. 19*,⁴ where the Committee notes in respect of article 23, paragraph 4 of the Covenant, that the right of each spouse to retain the use of his or her original family name or to participate on an equal basis in the choice of the family name, should be safeguarded.

3.4 The authors refer to the jurisprudence of the Committee in the case *Coeriel et al v. the Netherlands*,⁵ and allege a violation of article 17, paragraph 1, in that a person's surname constitutes an important component of one's identity and that the protection against arbitrary and unlawful interference with one's privacy includes the protection of the right to choose and change one's surname.

3.5 With regard to a remedy, the authors seek the following:

(a) a statement that the authors' rights under the Covenant have been violated;

(b) that Aliens Act Section 9, paragraph 1 (a) is in violation of, in particular, articles 26, 23, paragraph 4, and 17, paragraph 1 of the Covenant;

(c) that Namibia should immediately allow Mr. Müller to assume Ms. Engelhard's surname without complying with the provisions of the Aliens Act;

(d) that the respondents in the High Court of Namibia and in the Supreme Court of Namibia should not recover costs awarded in their favour in these courts;

(e) and that Namibia should amend the Aliens Act Section 9, paragraph 1, to comply with its obligations under the Covenant.

State party's observations on the admissibility and the merits of the communication

4.1 By submission of 5 June 2000, the State party made its observations on the admissibility of the communication and by submission of 17 October 2000, it made its observations on the admissibility and the merits.

⁴ See General Comment No. 19 of 27 July 1990, para. 7.

⁵ See Views on Case No. 453/1991 of 31 October 1994.

4.2 With regard to Mr. Müller, the State party confirms that he has exhausted domestic remedies in that his claim was brought to the High Court of Namibia and appealed to the Supreme Court of Namibia. However, the State party points out that the author brought his claim directly to the courts, without complying with the terms of the Aliens Act. The State party further contends that the Committee has neither the power nor the authority to consider the author's claim of a specific remedy as in paragraph 3.5 (d) above, since the author in the national proceedings did not claim that the Supreme Court was incompetent to award costs, nor did he contend that Namibian laws on the award of costs by the national courts violated the Namibian Constitution or Namibia's obligations under the Covenant.

4.3 With regard to Ms. Engelhard, the State party submits that she has not exhausted domestic remedies and has not provided any explanation for not doing so. It is therefore contended that Ms. Engelhard's communication is not admissible under article 5 (2)(b) of the Optional Protocol, and the State party's response to the merits does not relate to her claims.

4.4 With regards to the author's claim of a violation of article 26 of the Covenant, the State party submits that it does not dispute that Aliens Act Section 9, paragraph 1, differentiates between men and women. However, it is submitted that the differentiation is reasonably justified by its object to fulfil important social, economic and legal functions. Surnames are used to ascertain an individual's identity for such purposes as social security, insurance, licenses, marriage, inheritance, voting, and being voted for, passports, tax, and public records, and constitutes therefore an important component of one's identity, see *Coeriel et al v. The Netherlands*. Aliens Act, Section 9 gives effect to a long-standing tradition in the Namibian community that the wife normally assumes the surname of her husband, and no other husband has expressed a wish to assume his wife's surname since the Aliens Act entered into force in 1937. The purpose of differentiation created by the Aliens Act was to achieve legal security and certainty of identity, and are thereby based upon reasonable and objective criteria.

4.5 It is further submitted that Section 9, paragraph 1 of the Aliens Act does not restrict Mr. Müller from assuming his wife's name, but provides a simple and uncomplicated procedure, which would enable the author to fulfil his wish. The present case distinguishes from *Burghartz v. Switzerland* by that the author in that case had no remedy to assume his surname in a hyphenated form to his wife's surname.

4.6 The State party contends that article 26 of the Covenant is characterised by an element of unjust, unfair and unreasonable treatment, which is not

applicable to the author's case, nor has it been contended that the purpose of Aliens Act Section 9, paragraph 1 was to impair males in Namibia individually or as a group.

4.7 In response to the author's claim under article 23, paragraph 4 of the Covenant, the State party contends that in accordance with this article, and the Committee's interpretation in *General Comment 19*, Namibian law permits the author to participate on equal basis with his spouse in choosing a new name, although he must proceed in accordance with laid down procedures.

4.8 Regarding Mr. Müller's claim under article 17, paragraph 1 of the Covenant, the State party contends that this right only protects the author from arbitrary, meaning unreasonable and purposelessly irrational, or unlawful interference with his privacy. Viewing the purpose of Aliens Act Section 9, paragraph 1 as described above, inasmuch the author may change his surname if he so wishes, the law is not unreasonable, and does not violate the State party's obligations under article 17, para. 1.

4.9 The State party contests the remedies sought by the author.

Author's comments

5.1 By submission of 5 March 2001, the authors responded to the State party's observations.

5.2 Mr. Müller does not dispute that he could have made an application to change his surname in the terms of the Aliens Act. However, he contends that it is the procedure required for men who wish to change their surname, which is discriminatory. It would therefore have been contradictory to comply with the prescribed procedure.

5.3 With regard to the State party's allegation that Ms. Engelhard has not exhausted domestic remedies, the authors submit that it would have been futile for her to bring a claim to court separately of her husband's case, since her claim would not have been different from the first claim, which the Supreme Court of Namibia dismissed. The authors refer to the Committee's jurisprudence, *Barzhig v. France*,⁶ where the Committee stated that domestic remedies need not be exhausted if it is inevitable that the claim will be dismissed or if a positive result is precluded by established jurisprudence of the highest domestic court. It is further submitted that throughout the national legal proceedings, Ms. Engelhard had supported her husband's application, and that, as such, her legal and factual situation was known to the domestic courts.

⁶ See Views on Case No. 327/1988, adopted on 11 April 1991.

5.4 In relation to article 26, it is submitted that once there is a differentiation based on sex alone, there would have to be an extremely weighty and valid reason therefor. It should be considered whether the objectives enunciated by the State party are of sufficient importance to justify this differentiation based on sex. It is not disputed that a person's surname constitutes an important component of one's identity, but it is submitted that, as a consequence thereof, the equal right of partners in a marriage to choose either surname as the family name is worthy of the highest protection.

5.5 Furthermore, the State party's notions of a "long-standing tradition" does not justify the differentiation, since it only occurred in the mid-nineteenth century, and, with reference to the European Court decision *Burghartz v. Switzerland*, the interpretation must be made in the light of present day conditions, especially the importance of the principle of non-discrimination. To exemplify that tradition should not support discriminatory laws and practices, the authors refer to *Apartheid* as South Africa's former traditional approach to promulgate laws to perpetuate a racially discriminatory process.

5.6 It is submitted that the State party's allegations that keeping the differentiation in Aliens Act Section 9, paragraph 1 in the interest of public administration and the public at large, is not a rational objective, since this interest would not be lesser served should a couple contracting in a marriage have the choice of which of their surnames is to be used as their family name.

5.7 The authors contend that the procedure set out for a man who would like to assume his wife's surname are not as simple as contended by the State party, and refers to the procedure as described above (paragraph 3.1).

5.8 The authors also refer to the European Court of Human Rights' judgement in, *Stjerna v. Finland*,⁷ where the Court stated that "For the purposes of article 14[of the European Convention on Human Rights], a difference of treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim ...", and they submit that there is no reasonable justification for the differentiation complained of. They contend that the Aliens Act, Section 9, paragraph 1 perpetuate the "long-standing tradition" of relegating a woman to a subservient status within marriage.

5.9 In relation to the State party's allegations regarding General Comment 19 on article 23 of the Covenant, it is submitted that it should be interpreted to include not only the choice of a family surname,

⁷ See European Court of Human Rights, judgement A299B of 25 November 1994, para. 48.

but also the method in which such choice is effected. In this connection, the authors submit that a husband's application to change his surname, may or may not be approved by the Minister of Home Affairs, for example where the costs of advertising or prescribed fees are out of reach for the applicant.

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 complaint is admissible under the Optional Protocol to the Covenant.

6.2 In relation to all the alleged violations of the Covenant by Mr. Müller, the Committee notes that the issues have been fully raised under domestic procedures, and the State party has confirmed that Mr. Müller has exhausted domestic remedies. There are therefore no obstacles for finding the communication admissible under the Optional Protocol article 5, paragraph 2 with regard to Mr. Müller.

6.3 In relation to the claims by Ms. Engelhard, the State party has contested that domestic remedies have been exhausted. Even if Ms. Engelhard could have pursued her claim through the Namibian court system, together with her husband or separately, her claim, being quite similar to Mr. Müller's, would inevitably have been dismissed, as Mr. Müller's claim was dismissed by the highest court in Namibia. The Committee has established jurisprudence,⁸ that an author need not pursue remedies that are indisputably ineffective, and therefore concludes that Ms. Engelhard's claims are not inadmissible under the Optional Protocol article 5, paragraph 2. Although the State party has abstained from commenting on the merits of Ms. Engelhard's claims, the Committee takes the view that it is not precluded from examining the substance of the case also with regard to her claims, as completely identical legal issues concerning both authors are involved.

6.4 The Committee has also ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

6.5 The Committee therefore decides that the communication is admissible as far as it may raise issues under articles 26, 23, paragraph 4, and 17, paragraph 1, of the Covenant.

6.6 The Committee has examined the substance of the authors' claims, 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.

6.7 With regard to the authors' claim under article 26 of the Covenant, the Committee notes the fact, undisputed by the parties to the case; that section 9, para. 1, of the Aliens Act differentiates on the basis of sex, in relation to the right of male or female persons to assume the surname of the other spouse on marriage. The Committee reiterates its constant jurisprudence that the right to equality before the law and to the equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26.⁹ A different treatment based on one of the specific grounds enumerated in article 26, clause 2 of the Covenant, however, places a heavy burden on the State party to explain the reason for the differentiation. The Committee, therefore, has to consider whether the reasons underlying the differentiation on the basis of gender, as embodied in section 9, para 1, remove this provision from the verdict of being discriminatory.

6.8 The Committee notes the State party's argument that the purpose of Aliens Act section 9, paragraph 1, is to fulfil legitimate social and legal aims, in particular to create legal security. The Committee further notes the States party's submission that the distinction made in section 9 of the Aliens Act is based on a long-standing tradition for women in Namibia to assume their husbands' surname, while in practice men so far never have wished to assume their wives' surname; thus the law, dealing with the normal state of affairs, is merely reflecting a generally accepted situation in Namibian society. The unusual wish of a couple to assume as family name the surname of the wife could easily be taken into account by applying for a change of surname in accordance with the procedures set out in the Aliens Act. The Committee, however, fails to see why the sex-based approach taken by section 9, paragraph 1, of the Aliens Act may serve the purpose of creating legal security, since the choice of the wife's surname can be registered as well as the choice of the husband's surname. In view of the importance of the principle of equality between men and women, the argument of a long-standing tradition cannot be maintained as a general justification for different treatment of men and women, which is contrary to the Covenant. To subject the possibility of choosing the wife's surname as family name to stricter and much more cumbersome conditions than the alternative (choice of husband's surname) cannot be judged to be

⁸ *Barzhig v. France*

⁹ *See Danning v. The Netherlands*, Case No. 180/1984, Views adopted on 2 April 1987.

reasonable; at any rate the reason for the distinction has no sufficient importance in order to outweigh the generally excluded gender-based approach. Accordingly, the Committee finds that the authors have been the victims of discrimination and violation of article 26 of the Covenant.

6.9 In the light of the Committee's finding that there has been a violation of article 26 of the Covenant, the Committee considers that it is not necessary to pronounce itself on a possible violation of articles 17 and 23 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 it disclose a violation of article 26 of the Covenant.

8. 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, avoiding any discrimination in the choice of their common surname. The State party should further abstain from enforcing the cost order of the Supreme Court or, in case it is already enforced, to refund the respective amount of money.

9. Bearing in mind that, by becoming a 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 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 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. 930/2000

Submitted by: Hendrick Winata and So Lan Li [represented by counsel]

Alleged victim: The authors and their son, Barry Winata

State party: Australia

Date of adoption of Views: 21 July 2001

Subject matter: Disruption of family unit by removal of child's parents from the State party

Procedural issues: None

Substantive issues: Arbitrary and unlawful interference with the family - Protection of the family - Protection of the child

Articles of Covenant: 17, 23, paragraph 1, and 24, paragraph 1

Articles of the Optional Protocol and Rules of procedure: None

Finding: Violation

1. The authors of the communication, dated 4 May 2000, are Hendrik Winata, born 9 November 1954 and So Lan Li, born 8 December 1957, both formerly Indonesian nationals but currently stateless, also writing on behalf of their son Barry Winata, born on 2 June 1988 and an Australian national. The authors complain that the proposed removal of the parents from Australia to Indonesia would constitute a violation of articles 17, 23, paragraph 1, and 24, paragraph 1, of the Covenant by the State party. They are represented by counsel.

The facts as presented

2.1 On 24 August 1985 and 6 February 1987, Mr. Winata and Ms. Li arrived in Australia on a visitor's visa and a student visa respectively. In each case, after expiry of the relevant visas on 9 September 1985 and 30 June 1988 respectively they remained unlawfully in Australia. In Australia Mr. Winata and Ms. Li met and commenced a de facto relationship akin to marriage, and have a thirteen year old son, Barry, born in Australia on 2 June 1988.

2.2 On 2 June 1998, by virtue of his birth in that country and residing there for 10 years, Barry acquired Australian citizenship. On 3 June 1998, Mr. Winata and Ms. Li lodged combined applications for a protection visa with the Department of Immigration and Multicultural Affairs (DIMA), based generally upon a claim that they faced persecution in Indonesia owing to their Chinese ethnicity and Catholic religion. On 26 June 1998, the Minister's delegate refused to grant a protection visa.

2.3 On 15 October 1998,¹ Mr. Winata and Ms. Li's representative in Jakarta lodged an

¹ The State party's chronology provides the date for this event as 20 October 1998.

application with the Australian Embassy to migrate to Australia on the basis of a “subclass 103 Parent Visa”. A requirement for such a visa, of which presently 500 are granted per year, is that the applicant must be outside Australia when the visa is granted. According to counsel, it thus could be expected that Mr. Winata and Ms. Li would face a delay of several years before they would be able to return to Australia under parent visas.

2.4 On 25 January 2000, the Refugee Review Tribunal (RRT) affirmed DIMA’s decision to refuse a protection visa. The RRT, examining the authors’ refugee entitlements under article 1A(2) of the Convention Relating to the Status of Refugees (as amended) only, found that even though Mr. Winata and Ms. Li may have lost their Indonesian citizenship having been absent from that country for such a long time, there would be little difficulty in re-acquiring it.² Furthermore, on the basis of recent information from Indonesia, the RRT considered that while the possibility of being caught up in racial and religious conflict could not be discounted, the outlook in Indonesia was improving and any chance of persecution in the particular case was remote. The RRT specifically found that its task was solely limited to an examination of a refugee’s entitlement to a protection visa, and could not take into account broader evidence of family life in Australia.

2.5 On the basis of legal advice that any application for judicial review of the RRT’s decision had no prospects of success, Mr. Winata and Ms. Li did not seek review of the decision. With the passing of the mandatory and non-extendable filing period of 28 days from the decision having now passed, Mr. Winata and Ms. Li cannot pursue this avenue.

2.6 On 20 March 2000,³ Mr. Winata and Ms. Li applied to the Minister for Immigration and Multicultural Affairs, requesting the exercise in their favour on compelling and compassionate grounds of his non-enforceable discretion.⁴ The application, relying *inter alia* on articles 17 and 23 of the Covenant, cited “strong compassionate circumstances such that failure to recognize them would result in irreparable harm and continuing hardship to an Australian family”. The application was accompanied by a two and a half page psychiatric report on the authors and possible effects of a removal to

Indonesia.⁵ On 6 May 2000, the Minister decided against exercising his discretionary power.⁶

The complaint

3.1 The authors allege that their removal to Indonesia would violate rights of all three alleged victims under articles 17, 23, paragraph 1, and 24, paragraph 1.

3.2 As to the protection of unlawful or arbitrary interference with family life, protected under article 17, the authors argue that *de facto* relationships are recognized under Australian law, including in migration regulations, and that there should be no doubt that their relationship would be so recognized by the Australian courts. Their relationship with Barry would also be recognized as a “family” by Australia. They contend that it is clear from the psychiatric report that there is strong and effective family life.

3.3 The authors contend that a removal which separates parents from a dependent child, as is claimed could occur in this case if Barry were to remain in Australia, amounts to an “interference” with that family unit. While conceding that the removal of Mr. Winata and Ms. Li is lawful under domestic law by virtue of the Migration Act, the authors cite the Committee’s General Comment 16 to the effect that any interference must also be in accordance with the provisions, aims and objectives of the Covenant and be reasonable in the particular circumstances.

3.4 The authors claim that if they are to be removed, the only way to avoid their separation from Barry is for him to leave with them and relocate to Indonesia. They claim however that Barry is fully integrated into Australian society, speaks neither Indonesian nor Chinese, and has no cultural ties to Indonesia since he has always lived in Australia. Barry is described by the psychologist’s report as “an Inner Western Sydney multicultural Chinese Australian boy, with all the best characteristics of that culture and subculture [who] would be completely at sea and at considerable risk if thrust

² The authors have not contested that re-acquisition of Indonesian citizenship would be unproblematic.

³ The State party’s chronology provides the date for this event as 20 October 1998.

⁴ Under s.417 of the Migration Act, the Minister may substitute the decision of the RRT with a more favourable one if it is considered in the public interest to do so.

⁵ The report, on file with the Secretariat, states in relation to the family’s life in Australia that (i) Barry is having a normal upbringing and education, has “several fairly close friends”, understands (but apparently does not speak) Indonesian, and (ii) the family is a strong and close one in the Chinese tradition, but outgoing and with a variety of multicultural friendships through work, church and social life. The report also refers to refugee issues relating to the family history which are not pursued in the present communication.

⁶ The authors were formally advised of the Minister’s decision on 17 May 2000, postdating the dispatch of the communication to the Committee on 11 May 2000.

into Indonesia". Alternatively, the authors contend it would be unconscionable and very damaging to break up the family unit and set Barry adrift in Australia if he was to be left there while they returned to Indonesia. Either way, say the authors, the removal would be arbitrary and unreasonable.

3.5 In coming to this conclusion, the authors refer to the jurisprudence of the European Court of Human Rights, which in its interpretation of the analogous article 8 of the European Convention has been generally restrictive towards those seeking entry into a State for purposes of "family creation", while adopting a more liberal approach to existing families already present in the State. The authors urge that a similar approach be taken by the Committee, while arguing that the right in article 17 of the Covenant is stronger than article 8 of the European Convention in that it is not expressed as subject to any conditions, and that therefore the individual's right to family life will be paramount rather than balanced against any State right to interfere with the family.

3.6 As to articles 23 and 24, the authors do not develop any specific argumentation other than to observe that article 23 is expressed in stronger terms than article 12 of the European Convention, and that article 24 specifically addresses the protection of the rights of the child as such or as a member of a family.

The State party's observations with regard to the admissibility and merits of the communication

4.1 The State party argues that the authors' claims are inadmissible for failure to exhaust domestic remedies, for incompatibility with provisions of the Covenant, and (in part) for insufficient substantiation.

4.2 As to non-exhaustion of domestic remedies, the State party submits that three remedies remain available and effective. Firstly, the authors failed to seek, as provided for in the Migration Act, judicial review in the Federal Court (along with subsequent possible appeals) of the RRT's decision of 25 January 2000. Although the time has now passed for bringing such an application, the State party refers to the Committee's decision in *N.S. v. Canada*⁷ that a failure to exhaust a remedy in time means that available domestic remedies have not been exhausted. Secondly, the authors could apply by way of constitutional remedy for judicial review in the High Court, which could direct the RRT to reconsider the matter according to law if a relevant error of law is established. The State party notes the Committee's jurisprudence that mere doubts as to the effectiveness of a remedy does not absolve an

author from pursuing them. In the absence of the legal advice provided to the authors that an application for judicial review would have no prospects of success, the authors cannot be said to have convincingly demonstrated that these remedies would not be effective.

4.3 Finally, the State party notes that the authors have applied for parent visas. While the authors would have to leave the country to await the grant of the visa and would be "queued" with other applicants, they would not have to wait an indefinite period. Barry could live with the authors in Indonesia until the visas were granted, or continue his schooling in Australia.

4.4 As to incompatibility with the provisions of the Covenant, the State party argues that the authors' allegations do not come within the terms of any right recognized by the Covenant. The State party argues that the Covenant recognizes, in articles 12, paragraph 1, and 13, the right of States parties to regulate the entry of aliens into their territories. If the authors are removed from Australia it will be due to the fact that they have illegally remained in Australia after the expiry of their visas. The Covenant does not guarantee the authors the right to remain in Australia or to establish a family here after residing in Australia unlawfully and knowingly.

4.5 As to non-substantiation of the allegations, the State party contends that in relation to articles 23, paragraph 1, and 24, paragraph 1, the authors have provided insufficient evidence to substantiate their claims. The authors simply allege that the State party would breach these provisions if it removed them, but they provide no details in respect of these allegations. The State party states that both the nature of these particular allegations and the way in which the evidence provided relates to them is unclear from the communication. The evidence and argument supplied relates only to article 17.

4.6 As to the merits of the claim under article 17, the State party notes at the outset its understanding of the scope of the right in that article. Unlike the corresponding provision of the European Convention, limitations on article 17 are not limited to those "necessary" to achieve a prescribed set of purposes, but, more flexibly, must simply be reasonable and not arbitrary in relation to a legitimate Covenant purpose. The State party refers to the *travaux préparatoires* of the Covenant which make clear that the intent was that States parties should not be unnecessarily restricted by a list of exceptions to article 17, but should be able to determine how the principle should be given effect to.⁸

⁷ Communication 26/1978, declared inadmissible on 28 July 1978.

⁸ Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (1987), at 347.

4.7 Turning to the particular case, the State party, while not objecting to the classification of the authors as a “family”, argues that the removal of the authors would not constitute “interference” with that family, and that in any event such a step would not be arbitrary or unreasonable in the circumstances.

4.8 As to “interference”, the State party argues that if the authors were removed, it would take no steps to prevent Barry also leaving with them to live in Indonesia, where the family could continue to live together. There is no evidence that they would be unable to live as a family, and the RRT found no danger of persecution for them. While acknowledging a disruption to Barry’s education in this event, the State party contends this does not amount to “interference with family”.⁹ It points out that it is common for children of all ages to relocate with parents to new countries for various reasons.

4.9 The State party observes that Barry has no relatives in Australia other than his parents, whereas there are a significant number of close relatives in Indonesia, with whom the authors stay in contact with and who would if anything enhance Barry’s family life. The State party submits therefore that, like the European Convention, the Covenant should be construed not so as to guarantee family life in a particular country, but simply to effective family life, wherever that may be.

4.10 Alternatively, if Barry were to remain in Australia, the family would be able to visit him and in any case maintain contact with him. This is the same situation as many children face at boarding schools, and such physical separation cannot mean that the family unit does not exist. In any event, the decision as to which of these options the parents elect is purely theirs and not the result of the State party’s actions, and therefore does not amount to “interference”. Moreover, whatever the decision, the State party will do nothing to prevent the family’s relations from continuing and developing.

4.11 Even if the removal can be considered an interference, the State party submits, the action would not be arbitrary. The authors came to Australia on short-term visas fully aware that they were required to leave Australia when the visas expired. Their removal will be the result of the applicants having overstayed their visas which they were aware only allowed temporary residence, and

⁹ The State party refers to the decision of the European Commission of Human Rights in *Family X v. the United Kingdom* (Decisions and Reports of the European Commission of Human Rights 30 (1983)), which found that the fact that expulsion would prevent the son from continuing his education in the United Kingdom did not constitute an interference with the right to respect for family life.

remaining unlawfully in Australia for over 10 years.¹⁰ The laws which require their removal in these circumstances are well-established and generally applicable. The operation of these laws regulating removal is neither capricious nor unpredictable, and is a reasonable and proportionate means of achieving a legitimate purpose under the Covenant, that is immigration control.

4.12 In the circumstances, the authors knew when Barry was born that that there was a risk that they would not be able to remain and raise Barry in Australia. It has not been shown that there are any significant obstacles to establishing a family in Indonesia, and they will be re-granted Indonesian citizenship if they apply for it. Both authors received their schooling in Indonesia, speak, read and write Indonesian and have worked in Indonesia. They will be able to raise Barry in a country whose language and culture they are familiar with, close to other family members. Barry understands a significant amount of domestic Indonesian, and hence any language barrier that Barry would face would be fairly minor and, given his young age, could be quite easily overcome. Nor would it be unreasonable if the authors elected for him to remain in Australia, for he would be able to maintain contact with his parents and have access to all the forms of support provided to children separated from their parents.

4.13 Further evidence of the reasonableness of removal is that the authors’ requests for protection visas were determined on their facts according to law laying down generally applicable, objective criteria based on Australia’s international obligations, and confirmed upon appeal. In due course, the authors’ applications for parent visas will be made according to law, and it is reasonable that the authors’ request be considered along with others making similar claims.

4.14 The State party refers to the Committee’s jurisprudence where it has found no violation of article 17 (or article 23) in deportation cases where the authors had existing families in the receiving State.¹¹ Furthermore, a factor of particular weight is whether the persons in question had a *legitimate* expectation to continuing family life in the particular State’s territory. The cases decided before the European Court support such a distinction between cases of families residing in a State lawfully and unlawfully respectively.

¹⁰ The 10-year period does not include the time the authors have been allowed to remain in Australia while they seek to legalize their status.

¹¹ *Stewart v. Canada* (Comm. 538/1993) and *Canepa v. Canada* (Comm. 558/1993).

4.15 By way of example, in *Boughanemi v. France*¹² the European Court found the applicants' deportation compatible with article 8 where he had been residing in France illegally, even though he had an existing family in France. In the circumstances of *Cruz Varas v. Sweden*,¹³ similarly, the Court found expulsion of illegal immigrants compatible with article 8. In *Bouchelka v. France*,¹⁴ where the applicant had returned to France *illegally* after a deportation and built up a family (including having a daughter), the Court found no violation of article 8 in his renewed deportation. By contrast, in *Berrehab v. The Netherlands*,¹⁵ the Court found a violation in the removal of the father of a young child from the country where the child lived where the father had *lawfully* resided there for a number of years.¹⁶

4.16 Accordingly, the State party argues that the element of unlawful establishment of a family in a State is a factor weighing heavily in favour of that State being able to take action which, if the family had been residing lawfully in the State, might otherwise have been contrary to article 17. As the European Court has noted, article 8 of the European Convention does not guarantee the most suitable place to live,¹⁷ and a couple cannot choose the place of residence for its family simply by *unlawfully* remaining in the State it wishes to raise its family and having children in that State. It follows that the authors, residing in Australia unlawfully and fully aware of the risk that they might not be able to remain and raise a family in Australia, cannot reasonably expect to remain in Australia, and their removal is not arbitrary contrary to article 17.

4.17 As to article 23, paragraph 1, the State party refers to the institutional guarantees afforded by that article.¹⁸ It states that the family is a fundamental social unit and its importance is given implicit and explicit recognition, including by allowing parents to apply for visas so they can live with their children in Australia (as the authors have done) and providing parents special privileges compared to other immigrants. Article 23, like article 17, must be read against Australia's right, under international law, to

take reasonable steps to control the entry, residence and expulsion of aliens. As the RRT found the authors are not refugees and do not suffer a real chance of harm in Indonesia,¹⁹ and as Barry can remain in Australia attending education or return to Indonesia at the authors' discretion, the existence of the family would not be threatened or harmed in the event of a return.

4.18 As to article 24, paragraph 1, the State party refers to a number of legislative measures and programmes designed specifically to protect children and to provide assistance for children at risk.²⁰ The removal of the authors from Australia is not a measure directed at Barry, who as an Australian citizen (since June 1998 only) is entitled to reside in Australia, regardless of where his parents live. The authors' removal would be a consequence of them residing in Australia illegally, rather than a failure to provide adequate measures of protection for children. When Barry was born, the authors were fully aware of the risk that they would one day have to return to Indonesia.

4.19 The State party argues that removal of the authors would neither involve a failure to adequately protect Barry as a minor or harm him. Both the delegate of the Minister for Immigration and Multicultural Affairs and the RRT found that there was no more than a remote risk that the authors would face persecution in Indonesia, and no evidence has been presented to suggest that Barry would be at any greater risk of persecution if he went to Indonesia with his parents.

4.20 Adopting its argumentation under article 17 on "interference" with the family, the State party argues that there are no significant obstacles to Barry continuing a normal life in Indonesia with his family. The State party disputes the psychiatric opinion to the effect that if Barry returned with the authors he would be "completely at sea and at considerable risk if thrust into Indonesia". It argues that while the interruption to Barry's routine may make the move to Indonesia difficult for him at first, his age, multicultural background²¹ and understanding of Indonesian mean he is likely to adjust quickly. Barry could continue a good schooling in Indonesia in the physical and emotional

¹² (1996) 22 EHRR 228.

¹³ Judgment of 20 March 1991 (Case 46/1990/237/307).

¹⁴ Judgment of 27 January 1997.

¹⁵ (1988) 11 EHRR 322.

¹⁶ The State party points out that in that case, unlike the present circumstances, the proposed action would have split the two *parents* between two countries.

¹⁷ *Ahmut v. The Netherlands* (Application No. 21702/93, judgment of 28 November 1996).

¹⁸ Nowak, *United Nations Covenant on Civil and Political Rights: CCPR Commentary*, NP Engel (1993) at 460.

¹⁹ The refugee application, so the State party, shows that Mr. Winata was never arrested, detained, imprisoned, interrogated or mistreated in Indonesia, nor that his property was damaged.

²⁰ Reference is made to its *Third Periodic Report under the International Covenant on Civil and Political Rights*, at paragraphs 323-332 and 1193.

²¹ The State party refers to the psychiatric report's classification of Barry as a "multicultural Chinese Australian boy".

company of the authors (who were born, raised and lived most of their lives there) and other close relatives; alternatively, if he chooses, as an Australian citizen he would also be entitled to complete his high schooling and tertiary education in Australia. While this would mean separation from the authors, it is common for children not to live with their parents during high school and while attending tertiary education, and it is common for children and young adults from south-east Asian countries to attend school and university in Australia. As an Australian citizen, he would be protected to the full extent possible under Australian law and would receive the same protection which is given to other Australian children who are living in Australia without their parents.

Author's comments on the State party's submissions

5.1 As to the admissibility of the communication, the author contests the State party's contentions on exhaustion of local remedies, incompatibility with the Covenant and insufficient substantiation.

5.2 Regarding the exhaustion of local remedies, the author argues that the requirement to exhaust domestic remedies must mean that the *particular complaint* is presented to any available State organs before that complaint is presented to the Committee. The remedies claimed by the State party still to be available relate to the refugee process and its evaluations of fear of persecution. Yet the complaint here is not related to any refugee issues, but rather concerns the interference with family life caused by the removal of the authors. Accordingly, the author submits that there can be no requirement to pursue a refugee claim when the complaint relates to family unity.

5.3 As for the joint parent visa application, the author notes that the authors would have to leave Australia pending determination of the application where, even if successful, they would have to remain for several years before returning to Australia. In any event, Department of Immigration statistics show that no parent visas at all were issued by the Australian authorities in Jakarta between 1 September 2000 and 28 February 2001, and the average processing time worldwide for such visas is almost four years. In view of current political disputes regarding these visas, these delays will by the State party's own admission increase.²² The author regards such delays as clearly unacceptable and manifestly unreasonable.

²² The author supplies a copy of a media release of 11 October 2000 by the Minister for Immigration and Multicultural Affairs to this effect.

5.4 As to the State party's submissions that the authors' allegations are incompatible with the provisions of the Covenant, in particular articles 12, paragraph 1, and 13, the authors refer to the Committee's General Comment 15. That states that while the Covenant does not recognize a right of aliens to enter or reside in a State party's territory, an alien may enjoy the protection of the Covenant even in relation to entry or residence where, *inter alia*, issues of respect for family life arise. The authors consider article 13 not relevant to this context.

5.5 The authors object to the State party's argument that the claim of violation of articles 23, paragraph 1, and 24, paragraph 1, have not been substantiated. The authors state that the facts of the claim relate to those provisions in addition to article 17, and argue that a breach of article 17 may also amount to a breach of the institutional guarantees in articles 23 and 24.

5.6 On the merits, the authors regard the State party's primary submission to be that there is no reason why Barry could not return to Indonesia to live with them if they are removed. The authors contend this is inconsistent with the available psychological evidence provided to the Minister and attached to the communication. The authors also claim, in respect of the suggestion that Barry remain (unsupervised) in Australia pending the outcome of their application for re-entry, that this would be clearly impractical and not in Barry's best interests. The authors do not have access to the funds required for Barry to study at boarding school, and there is no one available to take over Barry's care in their absence.

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 As to the State party's arguments that available domestic remedies have not been exhausted, the Committee observes that both proposed appeals from the RRT decision are further steps in the refugee determination process. The claim before the Committee, however, does not relate to the authors' original application for recognition as refugees, but rather to their separate and distinct claim to be allowed to remain in Australia on family grounds. The State party has not provided the Committee with any information on the remedies available to challenge the Minister's decision not to allow them to remain in Australia on these grounds. The processing of the authors' application for a parent visa, which requires them to leave Australia for an appreciable period of time, cannot be regarded

as an available domestic remedy against the Minister's decision. The Committee therefore cannot accept the State party's argument that the communication is inadmissible for failure to exhaust domestic remedies.

6.3 As to the State party's contention that the claims are in essence claims to residence by unlawfully present aliens and accordingly incompatible with the Covenant, the Committee notes that the authors do not claim merely that they have a right of residence in Australia, but that by forcing them to leave the State party would be arbitrarily interfering with their family life. While aliens may not, as such, have the right to reside in the territory of a State party, States parties are obliged to respect and ensure all their rights under the Covenant. The claim that the State party's actions would interfere arbitrarily with the authors' family life relates to an alleged violation of a right which is guaranteed under the Covenant to all persons. The authors have substantiated this claim sufficiently for the purposes of admissibility and it should be examined on the merits.

6.4 As to the State party's claims that the alleged violations of article 23, paragraph 1, and article 24, paragraph 1, have not been substantiated, the Committee considers that the facts and arguments presented raise cross-cutting issues between all three provisions of the Covenant. The Committee considers it helpful to consider these overlapping provisions in conjunction with each other at the merits stage. It finds the complaints under these heads therefore substantiated for purposes of admissibility.

6.5 Accordingly, the Committee finds the communication admissible as pleaded and proceeds without delay to the consideration of its merits. The Committee has considered the 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.

7.1 As to the claim of violation of article 17, the Committee notes the State party's arguments that there is no "interference", as the decision of whether Barry will accompany his parents to Indonesia or remain in Australia, occasioning in the latter case a physical separation, is purely an issue for the family and is not compelled by the State's actions. The Committee notes that there may indeed 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 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 such interference.

7.2 In the present case, the Committee considers that a decision of the State party to deport two parents and to compel the family to choose whether a 13-year old child, who has attained citizenship of the State party after living there 10 years, either remains alone in the State party or accompanies his parents 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 contrary to article 17 of the Covenant.

7.3 It is certainly unobjectionable under the Covenant that a State party may require, under its laws, the departure of persons who remain in its territory beyond limited duration permits. Nor is the fact that a child is born, or that by operation of law such a child receives citizenship either at birth or at a later time, sufficient of itself to make a proposed deportation of one or both parents arbitrary. Accordingly, there is significant scope for States parties to enforce their immigration policy and to require departure of unlawfully present persons. That discretion is, however, not unlimited and may come to be exercised arbitrarily in certain circumstances. In the present case, both authors have been in Australia for over fourteen years. The authors' son has grown in Australia from his birth 13 years ago, attending Australian schools as an ordinary child would and developing the social relationships inherent in that. In view of this duration of time, it is incumbent on the State party to demonstrate additional factors justifying the removal of both parents that go beyond a simple enforcement of its immigration law in order to avoid a characterisation of arbitrariness. In the particular circumstances, therefore, the Committee considers that the removal by the State party of the authors would constitute, if implemented, 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 alleged victims, and, additionally, a violation of article 24, paragraph 1, in relation to Barry Winata due to a failure to provide him with the necessary measures of protection as a minor.

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 removal by the State party of the authors would, if implemented, entail a violation of articles 17, 23, paragraph 1, and 24, paragraph 1, 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 authors with an effective remedy, including refraining from removing the authors from Australia before they have had an opportunity to have their application for parent visas

examined with due consideration given to the protection required by Barry Winata's status as a minor. The State party is under an obligation to ensure that violations of the Covenant in similar situations do not occur 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 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.

APPENDIX

*Individual opinion (dissenting) by Committee members
Prafullachandra Natwarlal Bhagwati, Tawfik
Khalil, David Kretzmer and Max Yalden*

1. The question in this communication is neither whether the case of the authors and their son arouses sympathy, nor whether Committee members think it would be a generous gesture on the part of the State party if it were to allow them to remain in its territory. It is only whether the State party is legally bound under the terms of the International Covenant on Civil and Political Rights to refrain from requiring the authors to leave Australia. We cannot agree with the Committee's view that the answer to this question should be in the affirmative.

2. The Committee bases its Views on three articles of the Covenant: articles 17, paragraph 1, in conjunction with article 23, and article 24. The authors provided no information whatsoever on measures of protection that the State party would be required to take in order to comply with its obligations under the latter article. Many families the world over move from one country to another, even when their children are of school age and are happily integrated in school in one country. Are States parties required to take measures to protect children against such action by their parents? It seems to us that a vague value judgment that a child might be better off if some action were avoided does not provide sufficient grounds to substantiate a claim that a State party has failed to provide that child with the necessary measures of protection required under article 24. We would therefore have held that the authors failed to substantiate, for the purposes of admissibility, their claim of a violation of article 24, and that this part of the communication should therefore have been held inadmissible under article 2 of the Optional Protocol.

3. As far as the claim of a violation of article 17 is concerned, we have serious doubts whether the State party's decision requiring the authors to leave its territory involves interference in their family. This is not a case in which the decision of the State party results in

the inevitable separation between members of the family, which may certainly be regarded as interference with the family.¹ Rather the Committee refers to "substantial changes to long-settled family life." While this term does appear in the jurisprudence of the European Court of Human Rights,¹ the Committee fails to examine whether it is an appropriate concept in the context of article 17 of the Covenant, which refers to interference in the family, rather than to respect for family life mentioned in article 8 of the European Convention. It is not at all evident that actions of a State party that result in changes to long-settled family life involve interference in the family, when there is no obstacle to maintaining the family's unity. We see no need to express a final opinion on this question in the present case, however, as even if there is interference in the authors' family, in our opinion there is no basis for holding that the State party's decision was arbitrary.

4. The Committee provides no support or reasoning for its statement that in order to avoid characterization of its decision as arbitrary the State party is duty-bound to provide additional factors besides simple enforcement of its immigration laws. There may indeed be exceptional cases in which the interference with the family is so strong that requiring a family member who is unlawfully in its territory to leave would be disproportionate to the interest of the State party in maintaining respect for its immigration laws. In such cases it may be possible to characterize a decision requiring the family member to leave as arbitrary. However, we cannot accept that the mere fact that the persons unlawfully in the State party's territory have established family life there requires a State party to "demonstrate additional factors justifying the removal of both parents that go beyond a simple enforcement of its immigration law in order to avoid a characterisation of arbitrariness." The implications of this interpretation, adopted by the Committee, are that if persons who are unlawfully in a State party's territory establish a family and manage to escape detection for a long enough period they in effect acquire a right to remain there. It seems to us that such an interpretation ignores prevailing standards of international law, which allow states to regulate the entry and residence of aliens in their territory.

5. As stated above, the State party's decision in no way forces separation among family members. While it may indeed be true that the authors' son would experience adjustment difficulties if the authors were to return with him to Indonesia, these difficulties are not such as to make the State party's decision to require the authors to leave its territory disproportionate to its legitimate interest in enforcing its immigration laws. That decision cannot be regarded as arbitrary and we therefore cannot concur in the Committee's view that the State party has violated the rights of the authors and their son under articles 17 and 23 of the Covenant.

6. Before concluding this opinion we wish to add that besides removing any clear meaning from the terms "interference with family" and "arbitrary", used in article 17, it seems to us that the Committee's approach to these terms has unfortunate implications. In the first place, it penalizes States parties which do not actively seek out illegal immigrants so as to force them to leave, but prefer to rely on the responsibility of the visitors themselves to

comply with their laws and the conditions of their entry permits. It also penalizes States parties, which do not require all persons to carry identification documents and to prove their status every time they have any contact with a state authority, since it is fairly easy for visitors on limited visas to remain undetected in the territory of such States parties for long periods of time. In the second place, the Committee's approach may provide an unfair advantage to persons who ignore the immigration

requirements of a State party and prefer to remain unlawfully in its territory rather than following the procedure open to prospective immigrants under the State party's laws. This advantage may become especially problematical when the State party adopts a limited immigration policy, based on a given number of immigrants in any given year, for it allows potential immigrants to "jump the queue" by remaining unlawfully in the State party's territory.

Communication No. 965/2000

Submitted by: Mümtaz Karakurt [represented by counsel]

Alleged victim: The author

State party: Austria

Date of adoption of Views: 4 April 2002

Subject matter: Distinction on basis of national origin for determination of eligibility for membership in work-council

Procedural issues: Compatibility of reservation to the Optional Protocol with the object and purpose of the Covenant

Substantive issues: Equality before the law and equal protection of the law

Articles of Covenant: 25, 26

Articles of the Optional Protocol and Rules of procedure: article 5, paragraph 2 (a), and State party's reservation to the Optional Protocol and to article 26

Finding: Violation

1. The author of the communication, dated 13 December 2000, is Mümtaz Karakurt, a Turkish national, born 15 June 1962. He alleges to be a victim of a breach by the Republic of Austria of article 26 of the Covenant. He is represented by counsel.

2. The State party has made two relevant reservations which affect consideration of the present case. Upon its ratification of the Covenant on 10 September 1978, the State party entered a reservation to the effect, *inter alia*, that: "Article 26 is understood to mean that it does not exclude different treatment of Austrian nationals and aliens, as is also permissible under article 1, paragraph 2, of the International Convention on the Elimination of All Forms of Racial Discrimination." Article 1, paragraph 2, of the Convention provides as follows: "2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens." Upon ratification of the Optional

Protocol on 10 December 1987, the State party entered a reservation to the effect that: "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."

The facts as presented by the author

3.1 The author possesses (solely) Turkish citizenship, while holding an open-ended residence permit in Austria. He is an employee of the 'Association for the Support of Foreigners' in Linz, which employs 10 persons in total. On 24 May 1994, there was an election for the Association's work-council ('Betriebsrat') which has statutory rights and responsibilities to promote staff interests and to supervise compliance with work conditions. The author, who fulfilled the formal legal requirements of being over 19 years old and having been employed for over six months, and another employee, Mr Vladimir Polak, were both elected to the two available spaces on the work-council.

3.2 On 1 July 1994, Mr Polak applied to the Linz Regional Court for the author to be stripped of his elected position on the grounds that he had no standing to be a candidate for the work-council. On 15 September 1994, the Court granted the application, on the basis that the relevant labour law, that is s.53 (1) Industrial Relations Act (Arbeitsverfassungsgesetz), limited the entitlement to stand for election to such work-councils to Austrian nationals or members of the European Economic Area (EEA). Accordingly, the author,

satisfying neither criteria, was excluded from standing for the work-council.

3.3 On 15 March 1995 the Linz Court of Appeal dismissed the author's appeal and upheld the lower Court's reasoning. It also held that no violation of Art. 11 of the European Convention on Human Rights (ECHR) was involved, considering that the right to join trade unions had not been interfered with. On 21 April 1995, the author appealed to the Supreme Court, including a request for a constitutional reference (including in terms of the ECHR) of s.53 (1) of the Act by the Constitutional Court.

3.4 On 21 December 1995, the Supreme Court discussed the author's appeal and denied the request for a constitutional reference. The Court considered that the work-council was not an 'association' within the meaning of Art. 11 ECHR. The work-council was not an association formed on a voluntary and private basis, but its organisation and functions were determined by law and was comparable to a chamber of trade. Nor were the staff as such an independent association, as they were not a group of persons associated on a voluntary basis. As to arguments of discrimination against foreigners, the Supreme Court, referring to the State party's obligations under the International Convention for the Elimination of All Forms of Racial Discrimination, considered the difference in treatment between Austrian nationals and foreigners to be justified both under the distinctions that the European economic treaties draw in labour matters between nationals and non-nationals, and also on account of the particular relationship between nationals and their home State. Moreover, as a foreigner's stay could be limited and subjected to administrative decision, the statutory period of membership in a work-council was potentially in conflict.

3.5 On 24 July 1996 the author applied to the European Court of Human Rights. On 14 September 1999, the Third Chamber of the Court, by a majority, found application 32441/96 manifestly ill-founded and accordingly inadmissible. The Court held that the work-council, as an elected body exercising functions of staff participation, could not be considered an 'association' within article 11 ECHR, or that the statutory provisions in question interfered with any such-rights under this article.

The complaint

4.1 The author contends that s.53 (1) of the Act and the State party's Courts' decisions applying that provision violate his rights to equality before the law and to be free of discrimination, contained in article 26 of the Covenant. The author refers to the Committee's findings of violations of gender-specific legislation in *Broeks v Netherlands* (Communication

No. 172/1984) and *Zwaan-de Vries v. Netherlands* (Communication No. 182/1984) in this connection. The author contends that the distinction made in the State party's law regarding eligibility to be elected to a work-council as between Austrian/EEA nationals and other nationals has no rational or objective foundation.

4.2 The author contends that where an employee receives the trust, in the form of the vote, of fellow employees to represent their interests upon the work-council, that choice should not be denied by law simply on the basis of citizenship. It is argued that there can be no justification for the law's assumption that an Austrian/EEA national can better represent employee's interests. Nor, according to the author, does the law limit the exclusion of non-nationals to, for instance, those who do not have a valid residence period for the term of office or are not fluent in the German language, and so the exclusion is overbroad. It is contended that the reservation of the State party to article 26 of the Covenant should not be interpreted as legitimising any unequal treatment between nationals and non-nationals.

4.3 As to issues of admissibility, the author concedes the State party's reservation to article 5 of the Optional Protocol, but argues that the Committee's competence to consider this communication is not excluded as the European Court only considered the 'association' issue under article 11 ECHR and did not examine issues of discrimination and equality before the law. The author points out that article 26 of the Covenant finds no equivalent in the European Convention, and so the communication should be held admissible.

The State party's observations on admissibility and merits

5.1 The State party, by submissions of 31 July 2001 and 14 March 2002, contests both the admissibility and the merits of the communication.

5.2 As to admissibility, the State party argues that the European Court of Human Rights has already considered the same matter, and that accordingly, by virtue of the State party's reservation to article 5 of the Optional Protocol, the Committee is precluded from examining the communication.

5.3 As to the merits, the State party advances three arguments as to why there is no violation of the Covenant. Firstly, the State party argues that the claim, properly conceived, is a claim under article 26 in conjunction with article 25, as the right to be elected to work-councils is a political right to conduct public affairs under article 25. Article 25, however, as confirmed in the Committee's General Comment 18, explicitly acknowledges the right of States parties to differentiate on the grounds of

citizenship in recognising this right. Accordingly, the Covenant does not prevent the State party from granting only its citizens the right to participate in the conduct of political affairs, and for this reason alone the claims must fail.

5.4 Secondly, the State party submits that the Committee is precluded by its reservation to article 26 of the Covenant from considering the communication. The State party argues that it has excluded any obligation to treat equally nationals and non-nationals, thereby harmonising its obligations under the Covenant with those it has assumed under the International Covenant on the Elimination of All Forms of Racial Discrimination (see article 1, paragraph 2). Accordingly, it has assumed no obligation under article 26 to confer the treatment accorded nationals also to foreigners, and the author has no right under article 26 to be treated in the same way as Austrian nationals in respect of eligibility to stand for election to the work-council.

5.5 Thirdly, the State party submits that, if the Committee reaches an assessment of whether the difference in treatment between the author and Austrian/EEA nationals is justified, the differentiation is based on reasonable and objective grounds. The State party argues that the privilege accorded EEA nationals is the result of an international law obligation entered into by the State party on the basis of reciprocity, and pursues the legitimate aim of abolishing differences in treatment of workers within European Community/EEA Member States. The State party refers to the jurisprudence of the Committee in the case of *Van Oord v the Netherlands*, (Communication No. 658/1995), for the proposition that a privileged position of members of certain states created by an agreement of international law is permissible from the perspective of article 26. The Committee observed that creating distinguishable categories of privileged persons on the basis of reciprocity operated on a reasonable and objective basis.

5.6 The State party refers to the decision of its Supreme Court of 21 December 1995, which, relying on the jurisprudence of the European Court of Human Rights on the justification for treating Community nationals preferentially, held that the European Accession Treaty constituted an objective justification for different legal status of Austrian/EEA nationals and nationals of third countries.

5.7 The State party points out in conclusion that the issue of whether, as a matter of directly applicable European law, Turkish employees have the right to stand for election to work-councils, is a matter currently being litigated before the European Court of Justice. The litigation revolves around the interpretation Article 10, paragraph 1, of Association

Council Decision No. 1/80, which requires Community Member States to grant Turkish employees belonging to their regular labour market a status vis-à-vis Community workers, excluding discrimination on the grounds of nationality, with regard to remuneration and “other working conditions”. The Federal Ministry for Labour, Health and Social Affairs took the view, on its interpretation of the relevant jurisprudence of the European Court of Justice, that the article was directly enforceable, and that the right to stand for work-council election was an ‘other working condition’. That interpretation favourable to persons in the author’s situation was challenged in the Constitutional Court, which has now referred the matter to the European Court of Justice for decision. It emphasises however that even if the outcome is that there is such a right, which would satisfy the object of the author’s current complaint, the distinction in the current law between Austrian/EEA nationals and others remains objectively justified and accordingly consistent with article 26.

Author’s comments on the State party’s submissions

6.1 The author, by submissions of 19 September 2001, rejects the State party’s arguments on both admissibility and merits.

6.2 As to admissibility, the author emphasises that the claim brought before the European Court related to the right of association protected in article 11 of the European Convention on Human Rights, while the claim now brought is one of discrimination and equality before the law under article 26 of the Covenant. Accordingly, the author, referring generally to the Committee’s jurisprudence, claims that it is not the “same matter” now before the Committee as has already been before the European Court. In any event, the author argues that a rejection of the communication as manifestly ill-founded cannot be considered an “examination” of the matter, within the meaning of the State party’s reservation.

6.3 As to the merits, the author argues that article 25 has no relevance to this case, concerning public matters rather than issues of organisational employment structures in the private sector. As the work-council concerns central representation of the employees of a private sector organisation, there is no public dimension which would attract article 25 and the claim falls to be considered alone by the general principles of article 26.

6.4 The author reiterates his contention that article 26 imposes a general obligation on the State party to avoid legal and practical discrimination in its law, and argues that no reasonable and objective grounds for the differentiation exist. A reasonable differentiation would, rather than imposing a blanket prohibition on non-Austrian/EEA nationals, permit

such nationals possessing, like the author, sufficient linguistic and legal capacities the right to stand for work-council election. The mere existence of the European association provision and the current proceedings before the European Court of Justice are said to underscore the problematic nature of the current blanket differentiation in this employment field between Austrian/EEA nationals and other nationals performing the same labour tasks.

Issues and proceedings before the Committee

7.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 87 of its rules of procedure, whether the claim is admissible under the Optional Protocol to the Covenant.

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

7.3 As required under article 5, paragraph 2 (b), of the Optional Protocol, the Committee has ascertained that domestic remedies have been exhausted.

7.4 As to the State party's contention that its reservation to article 5 of the Optional Protocol excludes the Committee's competence to consider the communication, the Committee notes that the concept of the "same matter" within the meaning of article 5 (2) (a) of the Optional Protocol must be understood as referring to one and the same claim of the violation of a particular right concerning the same individual. In this case, the author is advancing free-standing claims of discrimination and equality before the law, which were not, and indeed could not have been, made before the European organs. Accordingly, the Committee does not consider itself precluded by the State party's reservation to the Optional Protocol from considering the communication.

7.5 The Committee has taken note of the State party's reservation to article 26, according to which the State party understood this provision "to mean that it does not exclude different treatment of Austrian nationals and aliens, as is also permissible under article 1, paragraph 2, of the International Convention on the Elimination of All Forms of Racial Discrimination." The Committee considers itself precluded, as a consequence, from examining the communication insofar as it argues an unjustified distinction in the State party's law between Austrian nationals and the author. However, the Committee is not precluded from examining the claim relating to the further distinction made in the State party's law between aliens being EEA nationals and the author

as another alien. In this respect, the Committee finds the communication admissible and proceeds without delay to the examination on the merits.

Examination of the merits

8.1 The Committee has considered the 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.

8.2 As to the State party's argument that the claim is, in truth, one under article 25 of the Covenant, the Committee observes that the rights protected by that article are to participation in the public political life of the nation, and do not cover private employment matters such as the election of an employee to a private company's work-council. It accordingly finds article 25, and any adverse consequences possibly flowing for the author from it, not applicable to the facts of the present case.

8.3 In assessing the differentiation in the light of article 26, the Committee recalls its constant jurisprudence that not all distinctions made by a State party's law are inconsistent with this provision, if they are justified on reasonable and objective grounds.¹

8.4 In the present case, the State party has granted the author, a non-Austrian/EEA national, the right to work in its territory for an open-ended period. The question therefore is whether there are reasonable and objective grounds justifying exclusion of the author from a close and natural incident of employment in the State party otherwise available to EEA nationals, namely the right to stand for election to the relevant work-council, on the basis of his citizenship alone. Although the Committee had found in one case (No 658/1995, *Van Oord v. The Netherlands*) that an international agreement that confers preferential treatment to nationals of a State party to that agreement might constitute an objective and reasonable ground for differentiation, no general rule can be derived therefrom to the effect that such an agreement in itself constitutes a sufficient ground with regard to the requirements of article 26 of the Covenant. Rather, it is necessary to judge every case on its own facts. With regard to the case at hand, the Committee has to take into account the function of a member of a work council, i.e., to promote staff interests and to supervise compliance with work conditions (see para. 3.1). In view of this, it is not reasonable to base a distinction between aliens concerning their capacity to stand for election for a

¹ See, for example, *Broeks v The Netherlands* (Communication 172/1984), *Sprenger v The Netherlands* (Communication 395/1990) and *Kavanagh v Ireland* (819/1998).

work council solely on their different nationality. Accordingly, the Committee finds that the author has been the subject of discrimination in violation of article 26.

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 26 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 author with an effective remedy, consisting of modifying the applicable law so that no improper differentiation is made between persons in the author's situation and EEA nationals.

11. Bearing in mind that, by becoming a 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 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, and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive, within ninety days, information from the State party about the measures taken to give effect to the Committee's Views. The State party is requested to publish the Committee's Views.

APPENDIX

Individual opinion (partly dissenting) by Committee members Sir Nigel Rodley and Mr. Martin Scheinin

We share the Committee's views that there was a violation of article 26 of the Covenant. However, we take the position that the State party's reservation under that provision should not be understood to preclude the Committee's competence to examine the issue whether the distinction between Austrian nationals and aliens is contrary to article 26.

Both the wording of the reservation and the State party's submission in the present case refer to Austria's intention to harmonise its obligations under the Covenant with those it has undertaken pursuant to the Convention for the Elimination of All Forms of Racial Discrimination (CERD). Hence, the effect of the reservation, interpreted according to the ordinary meaning of its terms, is that the Committee is precluded from assessing whether a distinction made between Austrian nationals and aliens amounts to such discrimination on grounds of "race, colour, descent or national or ethnic origin"¹ that is incompatible with article 26 of the Covenant.

However, in its practice the Committee has not addressed distinctions based on citizenship from the perspective of race colour, ethnicity or similar notions but as a self-standing issue under article 26.² In our view distinctions based on citizenship fall under the notion of "other status" in article 26 and not under any of the grounds of discrimination covered by article 1, paragraph 1, of the CERD.

Consequently, the Austrian reservation to article 26 does not affect the Committee's competence to examine whether a distinction made between citizens and aliens amounts to prohibited discrimination under article 26 of the Covenant on other grounds that those covered also by the CERD. Consequently, the Committee is not prevented from assessing whether a distinction based on citizenship is per se incompatible with article 26 in the current case.

For us, therefore, the issue before the Committee is that of the compatibility with its obligations under article 26 of the State party's legislation as applied in the present case preventing an alien from standing for elective office in a work-council. Nothing in the State party's response persuades us that the restriction is either reasonable or objective. Therein lies the State party's violation of article 26 of the Covenant.

¹ The terms used in article 1, paragraph 1, of the CERD. Article 1, paragraph 2, of the CERD makes it clear that citizenship is not covered by the notion of "national origin".

² Ibrahima Gueye and 742 other retired Senegalese members of the French army v. France (Communication No. 196/1985).

ANNEX

SUMMARY OF STATES PARTIES' REPLIES PURSUANT TO THE ADOPTION OF VIEWS BY THE HUMAN RIGHTS COMMITTEE

NOTE: The full text of the replies is not reproduced hereafter. However, they are on file with the Committee's secretariat and references to follow-up on Views is regularly made in the Committee's annual reports. Pertinent references are indicated where possible.

Communication No. 688/1996

Submitted by: Carolina Teillier Arredondo
Alleged victim: María Sybila Arredondo
State party: Perú
Declared admissible: 23 October 1998 (sixty-fourth period of session)
Date of adoption of Views: 27 July 2000 (sixty-ninth session)

Follow-up information received from the State party

By note verbale of 16 December 2002, the State party informed the Committee that by decision of the 28th Criminal Judge of Lima, the author was released on 6 December 2002.

Communication No. 701/1996

Submitted by: Cesareo Gómez Vásquez [represented by counsel]
Alleged victim: The author
State party: Spain
Declared admissible: 23 October 1997 (sixty-first period of sessions)
Date of the adoption of Views: 20 July 2000 (sixty-ninth period of sessions)

Follow-up information received from the State party

By note verbales of 27 September 2001 and 4 January 2002, the State party informed the Committee of the legislative steps initiated to amend the law on criminal procedure.

Follow-up information received from the author

By letter of 25 August 2001, author's counsel stated that while the Sala General de Magistrados del Tribunal Supremo had decided to give effect to the Committee's Views, his petitions to the Sala de lo Penal del Tribunal Supremo had been unsuccessful. Author's counsel criticized the terms and tone of the judgment, and indicated that he had lodged an application before the Constitutional Court against this decision. By letter of 13 May 2002, author's counsel informed the Committee that the Constitutional Court had rejected his application on 3 April 2002. According to counsel, the Supreme Court had requested the Government to amend the law. By letter of 4 March 2003, he reported that on 8 January 2002 he filed *amparo* proceedings in the Constitutional Court.

Other information

On 26 December 2003, the Committee received information that the Spanish Official Gazette had published a Government Decree of the reform of the legal system, in accordance with the Committee's Views.

Communication No. 760/1997

Submitted by: J.G.A Diergaardt (late Captain of the Rehoboth Baster Community) et al.

Alleged victim: The authors

State party: Namibia

Declared admissible: 7 July 1998 (sixty-third session)

Date of the adoption of Views: 20 July 2000 (sixty-ninth session)

Follow-up information received from the State party

The State party informed the Committee, by note verbale of 28 May 2002, that its Constitution does not prohibit the use of languages other than English in schools, and the authors did not claim that they had established a non-English school and had been asked to close it. The State party states that there are no private courts, and no law barring the traditional courts of the authors from using their language of choice. Persons appearing before the official English-speaking tribunals are provided State-paid interpreters in any of the 12 State languages, and proceedings do not continue if interpreters are unavailable. The authors' community's proceedings were conducted, as others, in the language of choice, but all communities' proceedings are recorded in the official language of English. The State party notes that no African State provides translations for all persons wishing to communicate in non-English languages, and that, contrary to the previous regime, civil servants must work all over the country. If a civil servant speaks a non-official language, she or he will endeavour to assist a person using that language. The State party refers to a circular of the Minister of Justice of 9 July 1990 to the effect that civil servants may receive and process non-English correspondence, but should respond in writing in English.

Communication No. 747/1997

Submitted by: Karel Des Fours Walderode et al [represented by counsel].

Alleged victim: The authors

State party: Czech Republic.

Declared admissible: 30 July 1997 (sixty- fifth session)

Date of the adoption of Views: 30 October 2001 (seventy-third session)

Follow-up information received from the State party

By a note verbale of 15 January 2002, the State party advised the Committee, that with regard to Des Fours Walderode, legislative work concerning the implementation of the Committee's Views had commenced.

Follow-up information received from the author

By letter of 28 April 2003, the author informed the Committee that her case was returned for the third time by the Constitutional Court to the court of first instance, the Land Office of Semily. This Office again refused to grant her the restitution of her late husband's property in the mistaken belief that her husband had been a collaborator during the War.

Communication No. 765/1997

Submitted by: Eliska Fábryová

Alleged victim: The author

State party: Czech Republic.

Declared admissible: 9 July 1999 (sixty- sixth session)

Date of the adoption of Views: 30 October 2001 (seventy-third session)

Follow-up information received from the State party

The State party informed the Committee, by note verbale of 17 October 2002, that the restitution claim is now being dealt with through the program for the compensation of individuals to mitigate property injustices to holocaust victims. The aim of the program is to provide compensation to individuals who were deprived of their real estate during the Nazi occupation of

territory now belonging to the Czech Republic, as this property has not been returned to them according to legal restitution regulations and international agreements, or compensated in any other way. The program was announced on 26 June 2001, and the deadline for submitting applications was 31 December 2001. The Government supported this program with 100 million Czech Crowns.

Communication No. 779/1997

Submitted by: Anni Äärelä et al. [represented by counsel]

Alleged victim: The authors

State party: Finland

Declared admissible: 24 October 2001 (seventy-third session)

Date of the adoption of Views: 24 October 2001 (seventy-third session)

Follow-up information received from the State party

By submission of 24 January 2002, the State party informed the Committee that the authors had been returned the costs awarded against them. Part of the restitution may be considered compensation for non-pecuniary damage concerning non-communication of the Forestry Service brief. As to the reconsideration of the author's claims, under the Finnish legal system a final judgment may be challenged by means of a so-called "extraordinary appeal" which was provided for in Chapter 31 of the Code of Judicial Procedure. The injured party may lodge a request for the annulment of a judgment with the Supreme Court, which would examine the request and decide whether there was reason to annul the judgment. Furthermore, it was possible for the Chancellor of Justice to independently make a request for annulment in cases involving significant public interests. Thus, the Government would submit the Committee's views to the Chancellor of Justice, in order for an assessment of whether there still are grounds for extraordinary appeal. Moreover, the Committee's Views would, in accordance with standard procedure, be sent to the relevant authorities.

Communication No. 884/1999

Submitted by: Antonina Ignatane [represented by counsel]

Alleged victim: The author

State party: Latvia

Declared admissible: 25 July 2001

Date of adoption of Views: 25 July 2001

Follow-up information received from State party

By notes verbales of 24 October 2001 and 7 March 2002, the State party informed the Committee that a special working group had submitted to the Cabinet of Ministers proposals on measures to be taken to give effect to the Committee's Views. On 6 November 2001, the Cabinet accepted two legislative amendments to the "Statutes of the State Language Centre" and "Regulations on the Proficiency Degree in the State Language Required for the Performance of the Professional and Positional Duties on the Procedure of Language Proficiency Tests", thus removing the problematic issues identified by the Committee. The State party also informed the author on 3 December 2001 of the steps it had taken to give effect to the Committee's Views. During the 82nd session, the Committee considered that this case should no longer be considered within the context of follow-up, as the State party has complied with the Committee's Views.

Communication No. 919/2000

Submitted by: Michael Andreas Müller and Imke Engelhard [represented by counsel]

Alleged victim: The authors

State party: Namibia

Declared admissible: 26 March 2002

Date of adoption of Views: 26 March 2002

Follow-up information received from the State party

By note verbale of 23 October 2002, the State party submitted that it had informed the authors that they may proceed, under the Aliens Act 1937, to assume as a family name the surname of the wife in accordance with procedures laid down by the aforementioned Act. Further, the Government has published the Committee's Views on the website of the Human Rights and Documentation Centre of the University of Namibia, a body devoted to human rights education and information. As far as the State party is concerned it is not within the Government's power to dictate to the courts of law of Namibia, including the Supreme Court, what should be their discretion with respect to the award of costs in matters before them. Due to the principle of separation of powers, the Government cannot interfere with the order of costs awarded to the successful party in the matter in question.

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