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ON CIVIL AND POLITICAL RIGHTS

SELECTED DECISIONS OF THE
HUMAN RIGHTS COMMITTEE
under
THE OPTIONAL PROTOCOL

Volume 3

*Thirty-third to thirty-ninth sessions
(July 1988 - July 1990)*

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NOTE

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^a Pursuant to rule 92, paragraph 3, of the Committee's rules of procedure, the text(s) of an individual opinion is/are appended to the decision. All individual opinions are included, even in those cases where selections were deemed appropriate.

^b Disclose no violation.

^c Pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, the text(s) of an individual opinion is/are appended to the views (after amendment of the rules of procedure).

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 written communications to the Human Rights Committee for consideration. Of the 92 States that have acceded to or ratified the Covenant, 50 have accepted the competence of the Committee to receive and consider individual complaints by ratifying or acceding to the Optional Protocol.* No communication can be received by the Committee if it concerns a State party to the Covenant which is not also a party 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 90 in the Committee's provisional rules of procedure, 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 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 on behalf of an alleged victim when it appears that the victim 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 of settlement;

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

* As of 31 July 1990.

5. Under rule 86 of its provisional rules of procedure, the Committee may, prior to the forwarding of its final views on a communication, inform the State party on whether "interim measures" of protection are desirable to avoid irreparable damage to the victim of the alleged violation. A request for interim measures, however, does not imply a determination of the merits of the communication. The Committee has requested such interim measures in a number of cases, e.g. where the carrying out of a death sentence or the expulsion or extradition of a person appeared to be imminent. Under rule 88 (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 if one considers that the author and the State party do not always have equal access to the evidence, and that frequently the State party alone is in possession of the relevant information. It is implicit in article 4 (2) of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its authorities.

7. It is useful to note that the Committee is neither a court nor a body with a quasi-judicial mandate, like the organ created under a regional human rights instrument, the European Court of Human Rights. Still, the Committee applies the provisions of the Covenant and of the Optional Protocol in a judicial spirit and performs functions similar to those of the European human rights bodies, insofar as the consideration of applications from individuals is concerned. Its decisions on the merits (of a communication) are, in principle, comparable to the reports of the European Commission, non-binding recommendations. The two systems differ, however, in that the Optional Protocol does not provide explicitly for friendly settlement between the parties, and, more important, in that the Committee has no power to hand down binding decisions as does the European Court of Human Rights. States parties to the Optional Protocol endeavour to observe the Committee's views, but in case of non-compliance the Optional Protocol does not provide for an enforcement mechanism or for sanctions.

8. The Secretariat regularly receives enquiries from individuals who intend to submit a communication to the Committee. Such enquiries are not immediately registered as cases. In fact, the number of authors who eventually submit their cases for consideration by the Committee under the Optional Protocol is relatively low, 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. The observations notwithstanding, the number of communications placed before the Committee each year is increasing steadily, and the Committee's work is becoming better known to lawyers, research workers and the general public. If the series of *Selected Decisions* contribute to making the work of the Committee more generally known, it will have served a useful purpose.

9. The first step towards a wider dissemination of the Committee's work was the decision taken during the seventh session to publish its views: that publication was desirable in the interest 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. Starting with the Annual Report of the Human Rights Committee, in 1979 and up to the 1990 report incorporating the thirty-ninth session, all of the Committee's views (103), a selection of 44 of its decisions declaring communications inadmissible, three decisions in reversal of admissibility and decisions to discontinue the consideration have been published in full.¹

10. At its fifteenth session, the Committee decided to proceed with the periodical publication of a selection of its decisions under the Optional Protocol, including certain important decisions declaring communications admissible and other decisions of an interlocutory nature. Volume 1 of this series, covering decisions taken from the second to the sixteenth session inclusive, was published in 1985 in English.² Volume 2 covers decisions

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).

² Human Rights Committee, Selected Decisions under the Optional Protocol (2 - 16 Sessions, New York, 1985, United Nations Publications, Sales No. E.84.XIV.2), hereinafter referred to as Selected Decisions...Vol. 1. French and Spanish versions were published in June 1988. For an introduction to the Committee's Jurisprudence from the second to the twenty-eighth Sessions, see A. de Zayas, J. Moller, T. Opsahl, "Application of the International Covenant on Civil and Political Rights under the Optional Protocol by the Human Rights Committee", German Year Book of International Law, Volume 28, 1985, pp.9-64. Reproduced by the United Nations Centre for Human Rights as re-print No. 1, 1989.

taken from the seventeenth to the thirty-second session under Article 5 (4) of the Optional Protocol, 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 provisional rules of procedure, requesting interim measures of protection.³

11. With regard to the publication of decisions relating to communications declared inadmissible or on which action has been discontinued, the names of the author(s) and of the alleged victim(s) are replaced by letters or initials. With respect to decisions of an interlocutory kind, including decisions declaring a communication admissible, the names of the author(s), the alleged victim(s) and the State party concerned may also be deleted.

12. Communications under the Optional Protocol are numbered consecutively, indicating the year of registration (e.g. No. 1/1976, No. 288/1988).

13. Since the publication of Volume 2, the case load of the Committee under the Optional Protocol has increased. As an indication, it may be noted that at the opening of its thirty-ninth session, 140 cases were pending. In view of this development, the Committee decided at its thirty-fifth session in 1989 to designate, under rule 91 of its rules of procedure, one of its members as Special Rapporteur on New Communications in order to process them between sessions of the Committee.

14. The Committee, in addition, decided to adopt a new format of decisions on admissibility and final views in order to enhance clarity and prevent overlapping. At its thirty-seventh session, the Committee adopted the new format although this structure is still evolving and adapting itself to new cases.

15. The most revealing evidence of an evolution in the jurisprudence of the Committee is the increasing number of individual opinions appended by members of the Committee to decisions on admissibility (rule 92 (3)) or final views (rule 94 (3)) of the rules of procedure, whether concurring or dissenting. This trend emulates the procedures of other international and regional human rights bodies and is a welcome development for the progressive development of human rights law and public international law in general. Whereas only three individual opinions were reflected in Volume 2 covering 16 sessions, 16 individual opinions were recorded during the 7 sessions covered by this Volume, including 13 opinions (seven in the "views" and six in the admissibility stage) relative to the thirty-seventh to thirty-ninth sessions.

³ International Covenant on Civil and Political Rights, Selected Decisions under the Optional Protocol (33rd - 39th sessions), New York, 1990. French and Spanish versions were published in 1991.

16. The aforementioned trend is an illustration of a number of formal and substantial changes in the approach of the Human Rights Committee to its jurisprudence:

(a) a growing erosion of consensus as a decision-making process;

(b) it reflects the increasing complexity of communications both in respect of the factual and the legal situation;

(c) attempts to speed up the decision-making process through improving the quality and the quasi-judicial nature of the procedure.

17. The working group on communications was given with effect from the thirty-fifth session the power to declare cases admissible provided that all members of the working group and all other members so agree (unanimity requirement).

INTERLOCUTORY DECISIONS

A. Decisions transmitting a communication to the State party (rule 91) and requesting interim measures of protection (rule 86)

Communication No. 227/1987

Submitted by: O.W. (name deleted) on 2 March 1987

Alleged victim: The author

State party: Jamaica

Declared inadmissible: 26 July 1988 (thirty-third session)*

Subject matter: Petition for leave to appeal to the Judicial Committee of the Privy Council by individual under sentence of death

Procedural issues: Interim measures of protection—Non exhaustion of domestic remedies

Substantive issues: Right to life—Fair trial—Right to appeal conviction and sentence

Articles of the Covenant: 6 (4) and 14 (5)

Article of the Optional Protocol: 5 (2) (b)

1. The author of the communication (initial letter dated 2 March 1987; subsequent letter dated 1 May 1987) is O. W., a Jamaican citizen, awaiting execution at St. Catherine District Prison in Jamaica. He claims to be innocent of the crimes imputed to him and alleges irregularities in the various judicial proceedings leading to his death sentence.

2.1 O.W. states that in June 1974 he was questioned by the police in connection with a robbery, in the course of which two suspects had allegedly killed a female employee of an unnamed institution. Although the author explained to the police officers that he did not know the men in question or anything about the incident under investigation, he was taken to the scene of the crime, where two witnesses allegedly stated that he was not one of the men they had seen. Nevertheless O. W. was detained and taken to the police station for further investigation. When he was told to stand in line for purposes of identification, he requested the presence of a lawyer or of a member of his family, as allegedly

* The Committee has dealt with several similar communications involving the same State party : Communications Nos. 231/1987, 251/1987, 252/1987, 257/1987, 258/1987, 259/1987, 260/1987, 278/1988, 281/1988, 285/1988, and 286/1988.

provided in Jamaican law, but his request was not granted. On 14 August 1974 he was allegedly tried, found guilty and sentenced to "indefinite detention" for possession of a firearm. The author claims that no firearm was found in his possession and none was produced in court.

2.2 On 25 November 1975 a second trial took place, before the Home Circuit court. O. W. does not specify the charges against him in the second trial, but, from the overall context of his letter, they appear to have been murder charges stemming from the robbery in June 1974 at which a woman was killed. As the jury could not arrive at a unanimous verdict, the judge ordered a new trial which took place on 13 July 1976. After being convicted and sentenced to death, the author appealed to the Court of Appeal, which, on 17 April 1977, ordered a new trial on the grounds of "unfair identification". The new trial took place in July 1978 and O. W. was again convicted and sentenced to death. His second appeal to the Court of Appeal was dismissed in December 1980. He maintains his innocence and claims that the sole witness against him was instructed by the police to identify him as one of the suspects and that defence exhibits from previous proceedings, which were to be used to impeach the witness and

which were supposed to be in the possession of the Court, could not be found for his trial in 1978. O. W. did not mention in his initial letter whether he had filed a petition for leave to appeal to the Judicial Committee of the Privy Council.

3. By decision of 8 April 1987, the Human Rights Committee requested O. W., under rule 91 of the Committee's provisional rules of procedure, to furnish clarifications on a number of issues relating to his communication and transmitted the communication for information to the State party, requesting it, under rule 86 of the provisional rules of procedure, not to carry out the death sentence against the author before the Committee had had the opportunity to consider further the question of the admissibility of the communication. By letter dated 1 May 1987, the author provided a number of clarifications and stated that the Jamaica Council for Human Rights had filed a petition on his behalf for leave to appeal to the Judicial Committee of the Privy Council, indicating that this appeal, to the best of his knowledge, was still pending.

4. By telegram dated 23 July 1987 addressed to the Deputy Prime Minister and Minister for Foreign Affairs, the Chairman of the Human Rights Committee informed the State party that the consideration of the question of admissibility of the communication would be further delayed and reiterated the Committee's request that the death sentence against O. W. should not be carried out before the Committee had had an opportunity to consider further the question of the admissibility of the communication. By letter dated 11 October 1987, author's counsel informed the Committee that the Judicial Committee of the Privy Council had granted the author's petition for special leave to appeal on 8 October 1987 and would conduct a hearing on the merits of the case at a date to be determined. He requested the Committee to postpone consideration of the case pending the outcome of the author's appeal to the Judicial Committee of the Privy Council.

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

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

5.3 With respect to the requirement of exhaustion of domestic remedies under article 5 (2) (b) of the Optional Protocol, the Committee has noted the letter from the author's counsel, dated 11 October 1987, indicating that the Judicial Committee of the Privy Council granted the author's petition for special leave to appeal and would conduct a hearing on the merits of the case at a date to be determined. It thus concludes that one available remedy has not been exhausted by the author. Article 5 (2) (b), however, precludes the Committee from considering a communication prior to the exhaustion of all available domestic remedies.

6. The Human Rights Committee therefore decides:

1. That the communication is inadmissible under article 5 (2) (b) of the Optional Protocol;

2. That, since this decision may be reviewed under rule 92 (2) of the Committee's provisional rules of procedure upon receipt of a written request by or on behalf of the author containing information to the effect that the reasons for inadmissibility no longer apply, the State party shall be requested, taking into account the spirit and purpose of rule 85 of the Committee's provisional rules of procedure, not to carry out the death sentence against the author, before he has had a reasonable time, after completing the effective domestic remedies available to him, to request the Committee to review the present decision;

3. That this decision be transmitted to the State party and to the author .

Communication No. 246/1987

Submitted by: N.A.J. (name deleted) on 6 August 1987

Alleged victim: The author

State party : Jamaica

Declared inadmissible: 26 July 1990 (thirty-ninth session)

Subject matter: *Petition for leave to appeal to the Judicial Committee of the Privy Council by individual under sentence of death*

Procedural issues: *Interim measures of protection—Unreasonably prolonged procedures—Non exhaustion of domestic remedies—Withdrawal of communication from IACHR*

Substantive issues: *Right to life—Fair trial—Right of appeal*

Articles of the Covenant: 6 (4) and 14 (5)

Article of the Optional Protocol: 5 (2) (b)

1. The author of the communication¹ (initial submission dated 6 August 1987, model communication dated 3 November 1987 and subsequent correspondence) is N. A. J., a Jamaican citizen currently awaiting execution at St. Catherine District Prison, Jamaica. He claims to be the victim of a violation by the Government of Jamaica of articles 6, 7 and 14 of the International Covenant on Civil and Political Rights. He is represented by counsel.

¹ The author does not provide a detailed account of the facts. The following account is based on the judgement of the Court of Appeal.

2.1 On 5 October 1977, the author was convicted and sentenced to death in the Home Circuit Court, Kingston, for the murder, on 15 January 1976, of one P. N. The Court of Appeal of Jamaica dismissed his appeal on 23 February 1978. In January 1988, the death sentence was commuted to life imprisonment by the Governor-General of Jamaica

2.2 As to the facts of the case, the author states that on 15 January 1976 at about 8 p. m., he went to the deceased's house to visit his girlfriend. Together with his girlfriend and her baby were Mr. M., the prosecution's main witness, P. N. and another individual. The author submits that an argument developed between the deceased and himself in the course of which the deceased produced a knife and tried to stab him. The ensuing fight was interrupted by a friend of the deceased. The author then left the premises. On the following day, he claims, he was informed about N's death.

2.3 The author argues that he was poorly assisted by his court-appointed lawyer; this lawyer, in his statement of defence before the Home Circuit court, allegedly failed to request that the charges against the author be reduced to manslaughter. Furthermore, it is submitted that the summing-up of the trial judge was unfair and unbalanced, in that the judge unduly stressed the weaknesses and discrepancies of the defence evidence in his summing-up, whereas he failed to put to the jury that the medical and expert evidence presented by the prosecution put the credibility of the testimony of the prosecution's sole eye-witness in question.

2.4 Referring to the conditions of his detention, the author indicates that he suffers from handicaps and ailments, without, however, specifying the nature of his disability and whether it developed during his detention. He explains that in the spring of 1987, welfare officers conducted interviews among inmates with permanent handicaps pursuant to a prison directive that a list with the names of disabled inmates be submitted to the prison authorities. The author states that his name was not included in that list and that, as a result, he has been discriminated against.

3. By decision of 5 November 1987, the Human Rights Committee transmitted the communication, for information, to the State party and requested it, under rule 86 of the rules of procedure, not to carry out the death sentence against the author before it had had an opportunity to consider further the question of the admissibility of the communication. The author was requested, under rule 91 of the rules of procedure, to furnish clarifications about the facts of his case and the circumstances of his trial and his appeal and to provide the Committee with the transcripts of the written judgements in the case.

4. Under cover letter dated 14 January 1988, and upon request by the author, the Secretariat of the Inter-American Commission on Human Rights forwarded to the Committee the documents submitted by the author to the IACHR. The Secretariat of the IACHR indicated that the author had requested that his case be withdrawn from consideration by that body. No clarifications were received from the author in reply to the Committee's request.

5. By further decision of 22 March 1988, the Committee's Working Group transmitted the communication to the State party, requesting it, under rule 91 of the rules of procedure, to provide information and observations relevant to the question of the admissibility of the communication. More particularly, it requested the State party to clarify whether the author retained the right to petition the Judicial Committee of the Privy Council for leave to appeal and whether legal aid would be available to him in that respect. The State party was further asked to provide the Committee with the texts of the written judgements in the case. The Working Group further requested the State party, under rule 86 of the rules of procedure, not to carry out the death sentence against the author while his communication was under consideration by the Committee.

6. In its submission under rule 91, dated 25 October 1988, the State party argues that the author's communication is inadmissible on the ground that he has not exhausted domestic remedies, as required by article 5, paragraph 2 (b), of the Optional Protocol, since his case has not been adjudicated upon by the Judicial Committee of the Privy Council, Jamaica's highest appellate court.

7. In his comments, dated 29 March 1989, counsel contends that although Section 3 of the Poor Prisoners' Defence Act provides legal aid for purposes of a petition for special leave to appeal to the Judicial Committee of the Privy Council, an appeal to that body constitutes a remedy of limited scope. He adds that the State party has failed to show how this remedy could have been or could be effective in the circumstances of the case and concludes that the requirements of article 5, paragraph 2 (b) have been met.

8. In a further submission, dated 20 June 1989, the State party submits that a petition for special leave to appeal to the Privy Council is a genuine remedy: thus, in the author's case, such a petition would be considered in a judicial hearing and adjudicated on grounds that are both judicial and reasonable. If the Privy Council were to refuse the petition as without merit, the author could not claim that he had no remedy; he would merely have been unsuccessful in the pursuit. The State party therefore maintains that the communication is inadmissible on the ground of failure to exhaust domestic remedies.

9. In further comments dated 16 February 1990, counsel affirms that while Section 3 of the Poor Prisoners' Defence Act may provide legal aid for purposes of a petition for special leave to appeal, such a petition would inevitably fail in the author's case. He points out that although the long delays in the judicial proceedings in the case should be deemed to constitute a denial of justice, the Judicial Committee has held, in the case of *Riley and others v. The Queen* (1981) that whatever the reasons for delays in the execution of a sentence lawfully imposed, the delay could afford no ground for holding the execution to be in contravention of Section 17 of the Jamaican Constitution. Counsel concludes that a petition for special leave to appeal to the Judicial Committee of the Privy Council would not be a remedy "available" to the author within the meaning of article 5, paragraph 2 (b).

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

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

10.3 With respect to the requirement of exhaustion of domestic remedies, the Committee notes the State party's contention that the author may still petition the Judicial Committee of the Privy Council for special leave to appeal. It notes that the author was sentenced to death on 5 October 1977. Although the application of domestic remedies over a period of thirteen years could be construed as being "unreasonably prolonged" within the meaning of article 5, paragraph 2 (b), it is a well established principle that any appellant must display reasonable diligence in the pursuit of available remedies. In the instant case, it was incumbent upon the author or his representative to pursue the avenue of a petition for special leave to appeal to the Judicial Committee after the Jamaican Court of Appeal had, in April 1978, produced its written judgement in the case. The author and his counsel have not shown, although they were invited to do so, the existence of circumstances which would have absolved them from petitioning the Judicial Committee of the Privy Council in due course. In the circumstances, the Committee concludes that the delays in the judicial proceedings can be attributed mainly to the author, and that the requirements of article 5, paragraph 2 (b), of the Optional Protocol have not been met.

11. The Human Rights Committee therefore decides:

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

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

B. Decisions to deal jointly with communications (rule 88)

Communications Nos. 324 and 325/1988

Submitted by: J.B. and H.K. (names deleted) on 28 July 1988

Alleged victim: The authors

State party : France

Declared inadmissible: 25 October 1988 (thirty-fourth session)

Subject matter: Alleged discriminatory denial of the use of the Breton language

Procedural issues: Standing of authors—Effective remedy—Non-exhaustion of local remedies

Substantive issues: Equality before the law—Freedom of expression

Articles of the Covenant: 2, 19, 26, and 27

Article of the Optional Protocol: 5 (2) (b)

A. DECISION TO DEAL JOINTLY WITH TWO COMMUNICATIONS

The Human Rights Committee,

Considering that communications Nos. 324 and 325/1988 concerning J. B. and H. K. refer to closely related events affecting the authors, said to have taken place in Morlaix, France, in March 1985,

Considering further that the two communications can appropriately be dealt with together,

1. *Decides*, pursuant to rule 88, paragraph 2 of its provisional rules of procedure, to deal jointly with these communications;

2. *Further decides* that this decision shall be communicated to the State party and the authors of the communications.

B. DECISION ON ADMISSIBILITY

1. The authors of the communications (two identical letters dated 28 July 1988) are J. B. and H. K., two French citizens resident in Ploufragan, Bretagne, France. They claim to be victims of a violation of articles 2, 19, 26 and 27 of the International Covenant on Civil and Political Rights by France.

2.1 The authors, two teachers, state that they had to appear, on 15 March 1985, before the Tribunal Correctionnel of Morlaix (Bretagne), on charges of having sprayed and rendered illegible a road sign, in the context of a campaign to obtain the installation of bilingual road signs in Brittany. The tribunal refused to make available to them the services of an interpreter, allegedly on the grounds that two teachers should be deemed to understand French.

2.2 With respect to the requirement of exhaustion of domestic remedies, the authors state that the pursuit of such remedies as are available is absolutely futile ("*totalelement inefficace*") and even risky, because the competent Court of Appeal at Rennes systematically refuses to hear cases in Breton and allegedly tends to aggravate, in cases such as are under examination, the penal sanctions.

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

3.2 The Committee has ascertained, as it is required to do 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.

3.3 With respect to the requirement of exhaustion of domestic remedies under article 5, paragraph 2 (b), of the Optional Protocol, the Committee notes that the authors do not intend to appeal the judgement of the Tribunal Correctionnel of Morlaix, because they believe that an appeal would be futile and fear that the Court of Appeal might increase the penal sanctions. The Committee finds, however, that, in the particular circumstances disclosed by the communication, the authors' contentions do not absolve them from the obligation to pursue remedies available to them. The Committee is of the view that the further pursuit of the available remedies cannot be deemed a priori futile and that mere doubts about the success of such remedies do not render them ineffective and cannot be admitted as a justification for non-compliance. Unable to find that the application of domestic remedies in this case has been unreasonably prolonged, the Committee concludes that the requirement of article 5, paragraph 2 (b), of the Optional Protocol has not been met.

4. The Human Rights Committee therefore decides :

(a) That the communications are inadmissible;

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

Communications Nos. 343, 344 and 345/1988

Submitted by: R.A.V.N. *et al.* (names deleted) on 22 November 1988

Alleged victim: Relatives of the authors

State party : Argentina

Declared inadmissible: 26 March 1990 (thirty-eighth session)*

Subject matter: Application of "Due Obedience Law" to legal proceedings in disappearance cases

Procedural issues: Inadmissibility *ratione temporis*

Substantive issues:

Articles of the Covenant: 2, 3, 4, 6, 9, 14 and 24

Article of the Optional Protocol: 2

A. DECISION TO DEAL JOINTLY WITH TWO COMMUNICATIONS

The Human Rights Committee,

Considering that communications Nos. 343, 344 and 345/1988 refer to closely related events said to have taken place in Argentina in 1976 and to the enactment of certain legislation in June 1987,

Considering further that the three communications can appropriately be dealt with together,

1. *Decides*, pursuant to rule 88, paragraph 2 of its rules of procedure, to deal jointly with these communications;

2. *Further decides* that this decision shall be communicated to the State party and the authors of the communications.

B. DECISION ON ADMISSIBILITY

1. The authors of the communications are Argentine citizens residing in Argentina, writing on behalf of their deceased and/or disappeared relatives, Argentine citizens formerly resident in the Province of Córdoba who died or disappeared in 1976, before the entry into force of the Covenant on Civil and Political Rights and the Optional Protocol for Argentina on 8 November 1986.

2.1 The authors claim that the enactment of Law No. 23,521 of 8 June 1987 (known as the Due Obedience Law (*Ley de Obediencia Debida*)) and its application to the legal proceedings in the cases of their relatives constitute violations by Argentina of articles 2, 3, 4, 6,

* The text of an individual opinion submitted by Mr. Bertil Wennergren pursuant to rule 92, paragraph 3 of the Committee's rules of procedure is appended.

9, 14 and 24 of the International Covenant on Civil and Political Rights. They are represented by counsel.

2.2 It is claimed that law No. 23,521 is incompatible with Argentina's obligations under the Covenant. The law presumes, without admitting proof to the contrary, that those persons who held lower military ranks at the time the crimes were committed were acting under superior orders; the law therefore exempts them from punishment. This immunity also covers senior military officers who did not act as commander-in-chief, chief-of-zone or chief-of-security police or penitentiary forces, provided that they did not themselves take decisions or that they did not participate in the elaboration of criminal orders.

2.3 With regard to the application of the Covenant to the facts of the cases, the authors acknowledge that their relatives were either killed or disappeared in 1976, under the prior Argentine Government, before the entry into force of the Covenant and of the Optional Protocol for Argentina. They challenge, however, the compatibility of the Due Obedience Law with article 2 of the Covenant, which provides, *inter alia*, that States parties should adopt the necessary legislative measures to give effect to the rights recognized in the Covenant. They claim that by adopting legislation which effectively guarantees the impunity of military officials responsible for disappearances, torture and murder, the Argentine Government has violated its obligations under the Covenant.

2.4 As to the requirement of exhaustion of domestic remedies, the authors point out that, with respect to the disappearance or death of the alleged victims, the matter was brought before the competent Argentine courts. However, by virtue of law No. 23,521, the pending criminal cases were shelved in June 1987 and May 1988, and the accused were accordingly set free. The authors conclude that domestic remedies have been exhausted.

2.5 It is stated that the same matter has not been and is not being examined under another procedure of international investigation or settlement.¹

2.6 Specifically, the authors request the Committee to find that Argentina violated its obligations under the

¹ The Secretariat has ascertained that one case was submitted to the Inter-American Commission on Human Rights, which registered it under No. 10288. However, it is not currently being examined by the Commission.

Covenant, and to urge the Government of Argentina to abrogate law No. 23,521 so as to allow the criminal prosecution and punishment of the persons responsible for the disappearance and/or death of their relatives.

3. By decisions of 4 April 1989, the Working Group of the Human Rights Committee, without transmitting the communications to the State party, requested the authors, under rule 91 of the rules of procedure: (a) to clarify whether and, if so, to what extent the claims contained in their communication go beyond their desire to see those held to be responsible for the disappearance or death of their relatives criminally prosecuted; (b) to specify, bearing in mind that the Covenant and the Optional Protocol entered into force for Argentina on 8 November 1986, which violations they claim took place after that date; and (c) to indicate whether they have instituted legal proceedings before the competent courts with a view to obtaining compensation and, if so, with what result.

4.1 In their reply to the Working Group's questions, the authors state that besides punishing the guilty, the Government of Argentina should reopen the inquiry into the disappearance of one of the alleged victims, although following the investigations of the Comisión Nacional sobre Desaparición de Personas (CONADEP) (National Commission on the Disappearance of Persons), it was presumed, in view of the lapse of time since the disappearances, that the persons in question were dead. The authors stress, moreover, that laws of impunity should be repudiated, lest they be understood as encouraging the commission of similar crimes. In this connection they invoke the principles of the Nuremberg Trials, particularly the rejection of the defence of superior orders.

4.2 As to which violations of the Covenant are said to have taken place after its entry into force for Argentina on 8 November 1986, the authors claim that the enactment of the Due Obedience Law in June 1987 constitutes a violation of the State party's obligation to ensure the thorough investigation of crimes and the punishment of the guilty.

4.3 With regard to legal proceedings aimed at obtaining compensation, the authors indicate that they preferred to demand an investigation of the events, in particular of the whereabouts of disappeared persons, and the identification of the guilty parties. Although it appears that none of the authors ever initiated legal proceedings for compensation, they refer to other persons who have unsuccessfully sought compensation in civil proceedings,

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

5.2 With regard to the application *ratione temporis* of the International Covenant on Civil and Political Rights and of the Optional Protocol for Argentina, the Committee recalls that both instruments entered into force on 8 November 1986. It observes that the Covenant cannot be applied retroactively and that the Committee is precluded *ratione temporis* from examining alleged violations that occurred prior to the entry into force of the Covenant for the

State party.

5.3 It remains for the Committee to determine whether violations of the Covenant have occurred subsequent to its entry into force. The authors have invoked article 2 of the Covenant and claim a violation of their right to a remedy. In this context, the Committee recalls its prior jurisprudence that article 2 of the Covenant constitutes a general undertaking by States and cannot be invoked, in isolation, by individuals under the Optional Protocol (*H. G. B. and S. P. v. Trinidad and Tobago*, communication No. 268/1987, para. 6.2, declared inadmissible on 3 November 1989). To the extent that the authors invoke article 2 in conjunction with other articles of the Covenant, the Committee observes that article 2, paragraph 3 (a) of the Covenant stipulates that each State party undertakes "to ensure that any person whose rights or freedoms *as herein recognized* are violated shall have an effective remedy . . ." (emphasis added). Thus, under article 2, the right to a remedy arises only after a violation of a Covenant right has been established. However, the events of disappearance and death, which could have constituted violations of several articles of the Covenant, and in respect of which remedies could have been invoked, occurred prior to the entry into force of the Covenant and of the Optional Protocol for Argentina. Therefore, the matter cannot be considered by the Committee, as this aspect of the communication is inadmissible *ratione temporis*.

5.4 The Committee finds it necessary to remind the State party that it is under an obligation, in respect of violations occurring or continuing after the entry into force of the Covenant, to investigate alleged violations thoroughly and to provide remedies where applicable, for victims or their dependants.

5.5 To the extent that the authors claim that the enactment of law No. 23,521 frustrated their right to see certain government officials prosecuted, the Committee refers to its prior jurisprudence that the Covenant does not provide a right for an individual to require that the State criminally prosecute another person (*H. C. M. A. v. The Netherlands*, communication No. 213/1986, para. 11.6, declared inadmissible on 30 March 1989). Accordingly, this part of the communication is inadmissible *ratione materiae* as incompatible with the provisions of the Covenant.

5.5 As to the question of compensation, the Committee notes that the authors, in reply to the Working Group's questions, explained that this was not the remedy that they sought.

6. The Human Rights Committee therefore decides :

(a) The communications are inadmissible ;

(b) This decision shall be communicated to the authors through their counsel, and, for information, to the State party.

APPENDIX

*Individual opinion submitted by Mr. Bertil Wennergren
pursuant to rule 92, paragraph 3 of the Committee's rules
of procedure, concerning the Committee's decision
to declare communications Nos. 343, 344 and 345/1988,
R. A. V. N. et al. v. Argentina, inadmissible*

I concur in the views expressed in the Committee's decision. However, in my opinion, the arguments in paragraph 5.4 of the decision need to be clarified and expanded. In this paragraph, the Committee reminds the State party that it is under an obligation, in respect of violations occurring or continuing after the entry into force of the Covenant, to investigate alleged violations thoroughly and to provide remedies, where applicable, for victims or their dependants.

According to article 28 of the 1969 Vienna Convention on the Law of Treaties (cited under paragraph 4.2 in the Committee's decision) a treaty's provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of entry into force of the treaty in respect of that party; the Permanent Court of International Justice (PCIJ Series A/B, No. 74 (1938), p. 10-48 - Phosphates in Morocco case) has held in this context that both the terms concerning the limitation *ratione temporis* and the underlying intention are clear; this clause was inserted in order to deprive the acceptance of the compulsory jurisdiction of any retroactive effects. In this case, the Court had to decide whether or not issues arose from factors subsequent to the acceptance of its jurisdiction (which the Court refers to as the "crucial date"), firstly because certain acts, which, if considered separately, were in themselves unlawful international acts, were actually accomplished after the "crucial date"; secondly, because these acts, if taken in conjunction with earlier acts to which they were closely linked, constituted as a whole a single, continuing and progressive illegal act which was not fully accomplished until after the "crucial date"; and lastly, because certain acts which were carried out prior to the "crucial date" nevertheless gave rise to a permanent situation which was inconsistent with international law and which existed after the said date. The question of whether a given situation or fact occurs prior to or subsequent to a particular date is, the Court explains, one to be decided in respect of each specific case, just as the question of the situations or facts with regard to which the issues arose must be decided in regard to each specific case. I note that the "crucial date" in this case is 8 November 1986.

The Committee has repeatedly indicated in prior decisions that it "can consider only an alleged violation of human rights occurring on or after (the date of entry into force of the Covenant and the Protocol for the State party) unless it is an alleged violation which, although occurring before that date, continues or has effects which themselves constitute a violation after that date". Disappearance cases that cannot be attributed to natural causes (accidents, voluntary escapes, suicides, etc.) but that give rise to reasonable assumptions and suspicions of illegal acts, such as killing, deprivation of liberty and inhuman treatment, may lead to claims not only under the respective material articles in the Covenant (articles 6, 7, 9 and 10) but in connection therewith also under article 2 of the Covenant, concerning a State party's obligation to adopt such measures as may be necessary to give effect to the rights recognized in the Covenant and to ensure that any person whose rights or freedoms are violated shall have an effective remedy. In an early decision involving a disappearance (30/1978 : *Bleier v. Uruguay*), the Committee, after noting that, according to unrefuted allegations, "Eduardo Bleier's name was on a list of prisoners read out once a week at an army unit in Montevideo where his family delivered clothing for him and received his dirty clothing until the summer of 1976" (i.e. after the "crucial date"), urged the Uruguayan Government "to take effective steps ... to establish what has happened to Eduardo Bleier since October 1975 (i.e. before the crucial date but with continuation after that date), to bring to justice any person found to be responsible for his death, disappearance or ill-treatment, and to pay compensation to him or his family for any injury which he has suffered". In another case (107/1981 : *Quinteros v. Uruguay*), the Committee was of the view that the information before it revealed breaches of articles 7, 9 and 10, paragraph 1, of the Covenant and concluded that the responsibility for the disappearance of Elena Quinteros fell on the authorities of Uruguay and that the State party should take immediate and effective steps (i) to establish what has happened to Elena Quinteros since 28 June 1976, and secure her release, (ii) to bring to justice any persons found to be responsible for her disappearance and ill-treatment, (iii) to pay compensation for the wrongs suffered, and (iv) to ensure that similar violations do not occur in the future. In the latter case, the author of the communication was the mother of the disappeared victim who had alleged that she, too, was a victim of a violation of article 7 (psychological torture because she did not know about the whereabouts of her daughter) and who had given ample description of her sufferings. The Committee expressed its understanding of the anguish and stress caused to the mother both by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. She had the right to know what had happened to her daughter. The Committee therefore found that in these respects she was also a victim of a violation of the Covenant.

I draw the following conclusions. A disappearance *per se* does not raise any issue under the Covenant. For it to do so, a link to some of the material articles of the Covenant is required. And it is solely with such a link that article 2 of the Covenant may become applicable and an issue may arise under that article also. Should it become clear that the cause of the disappearance is attributable to a killing for which the State party must be held responsible, but that the killing took place before the "crucial date", then this killing cannot be deemed to constitute a violation of article 6 of the Covenant, notwithstanding that it was a crime against the right to life under domestic penal law. Consequently, a claim regarding the non-fulfilment of a State party's obligations under article 2 of the Covenant also cannot arise. But, on the other hand, if a killing before the "crucial date" is merely one hypothesis among several others, the case law of the Committee clearly

indicates that under article 2 of the Covenant the State party is under a duty to carry out a meaningful investigation. It is only in instances where any act, fact or situation which would constitute a violation of the Covenant, could not, under any circumstances, have continued to exist or have occurred subsequent to the "crucial date" that such an obligation does not arise. It should be added that a declaration under domestic civil law in respect of a disappeared person's death does not set aside a State party's obligation under the Covenant. Domestic civil law provisions cannot be given precedence over international legal obligations. Whatever the length and thoroughness deemed necessary for an investigation to satisfy the requirements under the Covenant on a case by case basis, an investigation must, under all circumstances, be conducted fairly, objectively and impartially. Any negligence, suppression of evidence or other irregularity jeopardizing the outcome must be regarded as a violation of the obligations under article 2 of the Covenant, in conjunction with a relevant material article. And once an investigation has been closed due to lack of adequate results, it must be reopened if new and pertinent information comes to light.

Bertil Wennergren

FINAL DECISIONS

A. Reversal of a decision on admissibility

Communication No. 164/1984

Submitted by: Gilberto François Croes, deceased, and his heirs, on 11 January 1984

Alleged victim: G. F. Croes

State party : The Netherlands

Declared admissible: 25 October 1985 (twenty-sixth session)

Declared inadmissible: 7 November 1988 (thirty-fourth session)

Subject matter: Alleged violation of the right to life of a member of Parliament of Aruba

Procedural issues: Review of admissibility decision—Non exhaustion of local remedies

Substantive issues: Right to life—Effective remedy—Right to hold opinions without interference—Right to peaceful assembly—Right to take part in public affairs

Articles of the Covenant: 1, 6, 19, 21 and 25

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

1. The author of the communication (initial letter dated 11 January 1984 and further letters dated 18 May, 8 June and 27 September 1984) is the late Gilberto François Croes, a native of the island of Aruba. Mr. Croes was the leader of the People's Electoral Movement (Movimiento Electoral di Pueblo, MEP) of Aruba. When Aruba achieved the status of a self-governing country within the Kingdom of the Netherlands, on 1 January 1986, the author was elected a member of the Parliament of Aruba. On 26 November 1986, as a result of an automobile accident, the author passed away. By letter of 29 June 1988, his heirs requested the Committee to continue examination of the case. They are represented by counsel.

2.1 It is stated that the author founded the MEP in 1971 and that the party has been proposing Aruba's independence since 1972. Because of his political activity he was allegedly subjected to harassment, accusations of being radical and revolutionary as well as to physical threats and attacks by various political opponents; he deposited complaints with the prosecuting authorities for slander and other offences, but it is claimed that he was denied reasonable satisfaction and that the authorities have condoned these violations.

2.2 In connection with the preparation for the elections of the Island Parliament in April 1983, the MEP, which reportedly had been the majority party through six elections, (in the November 1985 elections, the MEP lost its majority), was denied permission to hold a parade, apparently on the ground that the relevant request submitted by the MEP had disappeared. The author was allegedly led to believe by police authorities that no obstacle would be placed in the way to the parade, but, on 24 April 1983, an order was given by the police authorities to break up the MEP parade and a policeman shot the author in the chest two inches below the heart. He was operated on and subsequently flown to a hospital in Miami, United States, where he underwent a second operation. It is further alleged that the policeman who did the shooting has not been prosecuted, although the author requested his prosecution on 11 June 1983 and again on 16 November 1983 in a complaint to the Judge of First Instance in Aruba. After the judge rejected prosecution on 22 December 1983, the author directed a request to the Supreme Court of the Netherlands Antilles, which, on 24 February 1984, declared the author's request inadmissible. It is thus claimed that domestic remedies have been exhausted with respect to this allegation, and that "the duration of the investigation itself had taken much too long, unreasonably long in the terminology of the Optional Protocol".

2.3 The author alleged, particularly, that his right to life, his right to being treated equally and his right to see others treated equally under the laws of the Netherlands Antilles were violated by the authorities of the Netherlands Antilles and of the Netherlands. He further alleged that the right to self-determination of the Aruban people was threatened with gross violation by the authorities concerned.

3. In response to a request for further information, the author, in a letter dated 27 September 1984, stated that the alleged attempt on his life "was the result of a conspiracy, inspired to kill me as a leader of the Aruba independence movement", and gave details on another shooting incident and on an alleged raid on his parents' home in August 1977.

4. By its decision of 26 October 1984, the Human Rights Committee transmitted the communication under rule

91 of the Committee's provisional rules of procedure to the State party, requesting information and observations relevant to the question of the admissibility of the communication.

5.1 In its submission dated 28 May 1985, the State party presented the facts as follows:

The complainant, Mr. Gilberto François Croes, is the leader of a political party on the island of Aruba. Aruba is one of the islands which together constitute the Netherlands Antilles. The Netherlands Antilles is a part of the Kingdom of the Netherlands, consisting of two self-governing countries, the Netherlands and the Netherlands Antilles.

The political party of which Mr. Croes is the leader strives for an independent status of Aruba.

On 24 April 1983, during disturbances surrounding a car parade on the island of Aruba, held by Mr. Croes' political party without the required permission from the authorities, Mr. Croes was wounded by a pistol shot. He alleged that the shot was deliberately fired by a policeman.

On 26 May 1983, the Minister of Justice of the Netherlands Antilles appointed a Committee of Inquiry to investigate the actions and conduct of the police during the events that took place on 24 April. This investigation was concluded on 8 July 1983. The Committee of Inquiry concluded that the police forces serving that day had shown sufficient self-restraint and self-discipline.

The Committee of Inquiry purposely did not go into the question whether the shot that wounded Mr. Croes was in fact fired by a policeman, and if so, whether the policeman could be held guilty of this fact, in view of the forthcoming investigations by the prosecuting authorities into these questions. The prosecuting authorities in their investigations came to the conclusion that there was no proof of premeditated or deliberate or intentional firing on the part of [the policeman], and moreover that there was even no proof of guilt on the part of [the policeman] that his gun fired the shot which hit Mr. Croes. For this reason the case against [the policeman] was dropped.

On 16 November 1983, Mr. Croes filed a request with the Court of First Instance, requesting the prosecution of [the policeman]. The Court, in a decision dated 12 December 1983, supported the Public Prosecutor's Decision not to prosecute [the policeman], and rejected the request of Mr. Croes.

Mr. Croes then, on 12 January 1984, filed a complaint with the Court of Justice of the Netherlands Antilles, which was rejected on grounds of form.

5.2 With regard to the rights invoked by the author, the State party addresses itself to alleged violations of the following rights:

- (a) "his right to life",
- (b) "his right to being treated equally",
- (c) "his right to see others treated equally",
- (d) "the right to self-determination of the Aruban people",

(e) furthermore a complaint in a letter of Mr. Croes' lawyer dated 18 May 1984, "that the duration of the investigation itself had taken much too long, unreasonably long". It is unclear whether this complaint refers to the treatment of Mr. Croes himself or the treatment of the [policeman]. In the latter case, this part of the communication would in any case be inadmissible under *rule 90, paragraph 1 (b)* of the Committee's Rules.

5.3 With regard to the question of admissibility, the State party

starts from the assumption that Mr. Croes can be supposed to be invoking articles 6, 14, 26 and article 1 of the International Covenant on Civil and Political Rights. As for his "right to see others treated equally", the Government cannot find an article in the Covenant protecting such a right.

Confronted with the question of whether the Government considers Mr. Croes' communication to be admissible, the Government, to its regret, has to reply in the negative, for the following reasons:

Firstly, the communication indicates an abuse of the right to present a communication, for political and propagandist motives. Mr. Croes is the leader of a political party propagating a "status aparte" for the island of Aruba. His principal accusation is that, *as a political leader*, he was discriminated against by the prosecuting and judicial authorities of the Kingdom of the Netherlands. A complaint based on *article 26* of the Covenant could only be made on the basis of an allegation that either the prosecuting authorities or the courts applied the laws to Mr. Croes in a discriminatory way. Though Mr. Croes does indeed accuse the authorities of a "conspiracy" against him, and apparently fears that this spirit of conspiracy has even reached the Judicial Laboratory at Rijswijk in the Netherlands, he fails to bring any concrete evidence in support of his accusations and insinuations.

Secondly, Mr. Croes failed to exhaust the available domestic remedies with respect to his complaints under the Covenant. What he *did* submit to the national authorities were:

(a) a protest against the decision not to prosecute [the policeman],

(b) a protest against the decision not to prosecute Mr. Croes himself on charges of perjury and holding a car parade without a permit.

However, Mr. Croes failed to invoke before the national authorities any of the Covenant's rights mentioned above. Of these rights, at least the articles 6 and 14 are, in accordance with article 93 of the Constitution, "self-executing" in the sense that they can be invoked by individuals before the national courts. In this way the Constitution provides an important "available domestic remedy" in the sense of article 5, paragraph 2 (b), of the Optional Protocol.

Thirdly, Mr. Croes' allegation that the investigating procedures took too long cannot be brought within the scope of *article 14, paragraph 3 (b)* of the Covenant, because Mr. Croes was not in the position of a person "charged with a criminal offence" within the meaning of that provision.

Fourthly, a complaint based on article 6 of the Covenant appears to be made as a result of allegations that:

(a) the shots which wounded Mr. Croes were deliberately fired by a policeman in a premeditated attempt to kill him, and

(b) that the prosecuting and judicial authorities joined in efforts to cover up this fact and to protect [the policeman] from the normal administration of justice.

Mr. Croes fails to submit any evidence in support of such allegations.

Lastly, Mr. Croes cannot claim a right to invoke article 1 of the Covenant without submitting even a beginning of evidence to the effect that:

(a) the people of Aruba claim to be the victim of a violation of article 1 of the Covenant by the Kingdom of the Netherlands,

(b) this people has authorized Mr. Croes to submit on its behalf a complaint under article 1 of the Covenant,

(c) the Kingdom of the Netherlands has violated article 1. In this respect, it is significant that Mr. Croes' lawyer, in paragraph 28 of his letter of 11 January 1984, does not as yet allege an actual violation of article 1, but "a threat" to the right of self-determination. This raises the question, whether a possible future violation of a right protected by the Covenant could be the object of a complaint under the Optional Protocol. The Government answers this question in the negative.

For the reasons submitted in the foregoing paragraphs the Government of the Kingdom of the Netherlands submits that the communication of Mr. Gilberto François Croes is inadmissible under rule 90, paragraphs 1 (b), 1 (c), 1 (d) and 1 (f) of the Committee's Rules of Procedure.

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

6.2 Article 5, paragraph 2 (a), of the Optional Protocol precludes the Committee from considering a communication if the same matter is being examined under another procedure of international investigation or settlement. There was no indication that the case was under examination elsewhere.

6.3 Article 5, paragraph 2 (b), of the Optional Protocol precludes the Committee from considering a communication unless domestic remedies have been exhausted. In this connection, the Committee recalled that, in its decision under rule 91 of its provisional rules of procedure, it requested the State party, in the event that the latter were to contend that domestic remedies had not been exhausted, "to give details of the effective remedies available in the particular circumstances of this case". The Committee noted that in its submission of 28 May 1985 the State party contended that the author had failed to exhaust domestic remedies. It mentioned the steps taken by Mr. Croes, but did not specify what effective local remedies would have been available in the circumstances of this case, had Mr. Croes specifically invoked articles 6 and 14 of the Covenant in his submission of complaints to the national authorities. The Committee noted that the steps taken by the author to exhaust domestic remedies ended with the rejection of his appeal to the Supreme Court of the Netherlands Antilles on 24 February 1984. In the absence of any clear indication from the State party concerning other effective domestic remedies which the author should have pursued, the Committee concluded that it was not precluded by article 5, paragraph 2 (b), of the Optional Protocol from considering this case, but indicated that this conclusion could be reviewed in the light of any further information submitted by the State party under article 4, paragraph 2 of the Optional Protocol.

6.4 The Committee noted the State party's contention that the communication indicates an abuse of the right of submission. However, the Committee found that the grounds invoked by the State party in this connection did not appear to support such a conclusion.

7. On 25 October 1985, the Human Rights Committee therefore decided that the communication was

admissible in so far as Mr. Croes claimed to be personally affected by the events which he described (as set out in paras. 2.2, 2.3 and 3 above), and in so far as these events could raise issues under articles 6, 9, paragraph 1, first sentence, 19, 21, 25 and 26 of the Covenant.

8.1 In its submission under article 4, paragraph 2 of the Optional Protocol, dated 16 May 1986, the State party, elaborating on its submission of 28 May 1985, reaffirms that the author failed to exhaust the domestic remedies that were available to him. It states that the author, in his initial action brought against the State party failed to invoke the self-executing provisions of the International Covenant on Civil and Political Rights. The State party's obligations under the Covenant were invoked for the first time before the Human Rights Committee. Furthermore, he could have initiated civil proceedings against the State alleging tort. The State party submits that the courts would have dealt with his complaints based on the Covenant except his allegation of a violation of the right 'of self-determination under article 1. Had the author acted as indicated above, he could have exhausted all domestic remedies up to and including the highest judicial authority in the Kingdom, the Supreme Court (Hoge Raad), and thus met the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

8.2 With respect to the merits of the communication, the State party submits that there has not been any violation of the rights invoked by the author. Concerning article 6, it recalls that after due investigation the prosecuting authorities in Aruba concluded that there was no evidence whatsoever of premeditated or intentional firing on the part of the police officer, that there was no proof that the shot which wounded Mr. Croes had been fired from the police officer's gun, and that, for that reason, the case against the police officer was dismissed.

8.3 Concerning the alleged violation of article 9, paragraph 1, the State party affirms that it did not violate the author's right to liberty and security of person. It explains that the police forces that were on duty in Aruba on 24 April 1983 sought to uphold law and order, to prevent disorder and to protect all people, including the author, against any form of bodily harm. In this context, the author was neither deprived of his liberty nor of his security. The police forces on duty on the said day were not only sufficiently trained but also displayed behaviour which enabled them to fulfil their duties in every respect. Disturbances resulted because the MEP held a motorcade without permission and partly because of the behaviour of MEP supporters.

8.4 With respect to articles 19, 21 and 25 of the Covenant, the State party rejects the allegations put forth by the author. It points out that Mr. Croes exercised all his democratic rights to express political views, to found a political party and to be elected to the Parliament of the Netherlands Antilles. No violation of article 19 can thus be said to have taken place. In respect of article 21, the State party points out that under the laws of the Netherlands Antilles and Aruba, anyone who wishes to organize a manifestation on public roads must seek and obtain permission from the competent authorities.¹ In the present case, the request for authorization to hold a motorcade filed by the author's party did not reach the authorities, which is why permission to hold a parade was given to another political party. The author's party was, however, granted permission to hold a demonstration. In the interest of public order, the police broke up the motorcade which was held after the demonstration. The State party submits that the regulations in question are compatible with article 21, since the requirement of prior permission to hold public demonstrations is a restriction made in conformity with the law and necessary in the interest of public order. Concerning article 25, the State party summarizes the electoral system in force in the

¹ Article 32 of the General Police Regulations for Aruba. The State party, in an annex to its submission, provides excerpts of these regulations.

Netherlands Antilles and Aruba concurrent with the submission of the complaint, and emphasizes that the author's rights and the rights of his party under that article were in no way restricted.

8.5 Finally, with respect to the alleged violation of article 26, the State party refers to the decision of the Court of Justice of the Netherlands Antilles of 24 February 1984 and argues that the Court's considerations do not reveal that Mr. Croes was discriminated against.

9.1 Commenting on the State party's submission, the author's heirs, in a submission dated 29 June 1988, maintain that their father's initial allegations are well founded and that he did indeed exhaust all the domestic remedies available to him. They claim in particular that the State party's argument that the author should have initiated civil proceedings against the Netherlands does not address his concerns, since monetary compensation cannot do away with the human rights violations of which the author was a victim, and which, in their opinion, still warrant criminal prosecution. Furthermore, they claim that Mr. Croes did not have to invoke international treaty norms and the obligations of the State party, since the courts should have applied them *ex officio*. They claim, in that context, that the author, in his memorandum to the Supreme Court of the Netherlands dated 10 January 1984, did, in fact, invoke the Covenant.

9.2 With respect to the alleged violation of articles 6 and 9, paragraph 1, the author's heirs reiterate that the shot fired by [name deleted] which wounded the author was part of a premeditated plot against the author's life. They affirm that the "heavily armed police corps" intended to "victimize" the unarmed MEP loyalists, to cause Aruban citizens to turn against Aruban citizens, which in turn would provide a pretext to postpone the elections scheduled by the Government of the Netherlands Antilles. They deny that MEP supporters acted in any way that could be construed as aggressive during the motorcade and affirm that the parade was held following discussions with the highest police officer on duty on 24 April 1983.

9.3 With respect to the alleged violations of articles 19 and 21, the author's heirs claim that the State party's argumentation reflects an exceedingly narrow interpretation of the scope of these articles. They take issue with the State party's submissions concerning article 21 (see para. 8.4 above) and reiterate that the motorcade was broken up only after it had proceeded for several hours and covered approximately 20 miles, and that there was no danger of crossing the motorcade of a rival political party. Thus there was no basis for prohibiting and/or breaking up the parade.

9.4 Concerning an alleged violation of article 25, the author's heirs challenge without further substantiation the State party's claim that the rights of the author and of his party were in no way restricted. In respect of article 26, finally, they maintain that, under the pretext of justice, the author did suffer from discrimination because of the inadequate investigation of the shooting incident and the authorities' efforts to hold back evidence. In other words, the discrimination is said to have consisted in the authorities' attempt to "cover up" the case of the police officer.

10. Pursuant to rule 93, paragraph 4 of its provisional rules of procedure and in accordance with its decision of 25 October 1985, the Human Rights Committee has reviewed its decision on admissibility of 25 October 1985. On the basis of the additional information provided by the State party in its submission of 16 May 1986, the Committee concludes that there would have been effective remedies available to the author both with respect to the shooting incident and the break-up of the motorcade. The Committee has stressed on previous occasions that remedies, the availability of which is not evident, cannot be invoked by the State party to the detriment of the author in proceedings under the Optional Protocol (Communication No. 113/1981, decision of 12 April 1985, para. 10.1). In this case, however, the Committee comes to the conclusion that remedies were evident. It would have been open to Mr. Croes to institute civil proceedings against the State party and to claim compensation for the damages suf-

ferred as a result of the alleged failure of the State party to fulfil its obligations under the International Covenant on Civil and Political Rights. It is true that he claimed that this type of recourse would not address his concerns. In this context, the Committee observes that although States parties are obliged to investigate in good faith allegations of human rights violations, criminal proceedings would not be the only available remedy. Accordingly, the Committee cannot accept the argument of the author and his heirs that proceedings before the Aruban courts, other than those leading to the criminal prosecution of the policeman, do not constitute effective remedies within the meaning of article 5, paragraph 2 (b), of the Optional Protocol. The Committee adds that the authors' complaint could

be directed, in all of its aspects, against the Aruban authorities in general and that he and his heirs have failed to pursue all avenues of judicial recourse open to them.

11. The Human Rights Committee therefore decides that:

(a) The decision of 25 October 1985 is set aside;

(b) The communication is inadmissible;

(c) This decision shall be communicated to the heirs of Gilberto François Croes and to the State party.

B. Decisions declaring a decision inadmissible

Communication No. 213/1986

Submitted by: H. C. M. A. [name deleted] (represented by counsel)

Alleged victim: The author

State party: The Netherlands

Declared inadmissible: 30 March 1989 (thirty-fifth session)

Subject matter: Alleged ill-treatment of author by police during demonstration

Procedural issues: Concurrent civilian and military jurisdiction—Availability of effective remedy—Inadmissibility
ratione materiae

Substantive issues: Degrading treatment—Equality before the courts—State party's "duty to prosecute"

Articles of the Covenant: 2, 3, 7, 9, 10 and 14

Articles of the Optional Protocol: 3, 4 (2) (b) and 5 (2) (b)

1. The author of the communication (initial letter dated 31 October 1986, and subsequent submissions of 6 April 1987, 20 June and 18 July 1988) is H. C. M. A., a citizen of the Netherlands residing in the Netherlands. He alleges he was a victim of violations of articles 2, paragraphs 2 and 3, 7, 9, 10, paragraph 1, and 14, paragraph 1 of the International Covenant on Civil and Political Rights by the Government of the Netherlands. He is represented by counsel.

2.1 The author states that on Friday, 19 March 1982, he participated in a peaceful demonstration in Amsterdam to protest the murder of four Netherlands journalists in El Salvador. After leaving the site of the demonstration, he was assaulted by four unknown persons and sustained injuries. Subsequently, policemen in civilian clothes pushed him into a police car and he was detained in a police cell. After four witnesses testified at the police station that he had not disturbed the public order, he was released on Tuesday, 23 March 1982. He was tried for public disorder before the Amsterdam Criminal District Court and acquitted on 5 September 1984. On 1 April 1985 the Amsterdam District Court, Second Chamber, awarded him 400 Netherlands guilders for unlawful detention.

2.2 The author points out that on 22 April 1982 he complained to the Court of First Instance about maltreatment by a police officer. His complaint was transmitted by the Court of First instance to the military prosecutor, as the rank to which the police officer belonged fell under military jurisdiction. The military prosecutor, however, dismissed the complaint. On appeal, the Military High Court stated that in cases of military procedural law only the Minister of Defence had authority to order prosecution. The Military High Court thus decided that it was not competent to rule on the case. Its president subsequently transmitted the file to the Ministers of Defence and Justice, considering that it would be an anomalous situation if persons falling under military jurisdiction could be immune from prosecution under certain circumstances, whereas persons falling under civilian jurisdiction could be prosecuted.

2.3 The author maintains, however, that the Government of the Netherlands has not taken any initiative to eradicate the alleged inequality before the law. The author claims that, as no adequate recourse procedure exists for civilians against cruel and inhuman treatment by the military and the police when such cases fall under the jurisdiction of the military, the State party has violated articles 2 and 7 of the Covenant. Concerning his detention, the author claims, without giving any details, that he was subjected to ill-treatment in violation of article 10 of the Covenant. He further claims that article 14 of the Covenant has been violated, because he has been unable to prosecute a police officer falling under exclusive military jurisdiction. Moreover, he maintains that the existing complaints procedure against members of the police is unjust, since police officers themselves investigate such complaints and exercise discretionary powers in their own favour. He alleges that an independent system of control does not exist in the Netherlands legal system.

3. By its decision of 9 December 1986, the Working Group of the Human Rights Committee transmitted the communication under rule 91 of the provisional rules of procedure to the State party concerned, requesting information and observations relevant to the question of admissibility of the communication, particularly details of the effective remedies available to the author in case domestic remedies had not been exhausted. It also requested the State party to provide the Committee with copies of any administrative or judicial decisions relevant to the communication.

4. In its submission under rule 91, dated 17 February 1987, the State party provides an outline of the factual situation and argues that the communication should be declared inadmissible on the grounds that the allegations put forward by the author do not disclose a violation of any of the rights enumerated in the Covenant and that, therefore, the author has no claim under article 2 of the Optional Protocol.

4.2 With regard to the factual situation, the State party states that the author was arrested in Amsterdam on 19 March 1982 "on the accusation of having committed violent acts (throwing stones at the consulate of the United

States of America) during an anti-El Salvador demonstration". The author was arrested by a team consisting of an Amsterdam City Police officer and an officer belonging to the Royal Military Police (Koninklijke Marechaussee), which also has the task of providing military assistance to the Amsterdam City Police. The State party affirms that, since the author did not submit himself willingly to the authorities, a brief struggle ensued, in the course of which the author's jaw was injured. He received medical treatment for a bruise to his jaw; the surgeon on duty stated that the author did not sustain any permanent injury, and the latter did not in fact report for a scheduled medical examination two weeks later.

4.3 Insofar as the applicable procedures are concerned, the State party argues that in cases such as the one affecting the author, namely the filing of complaints about the acts of officers of the Royal Military Police, complaints have to be addressed to the prosecutor of the Royal Netherlands Army (the Auditeur-Militair), as civilian judicial authorities are not competent to prosecute military personnel. A decision as to whether or not to prosecute is taken by a military legal officer (*verwijzingsofficier*) who acts on behalf of the Commanding-General, on the advice of the Prosecutor of the Army. This was also the procedure applied to the case of the author. Against the decision not to prosecute the military police officer who allegedly maltreated the author, the author lodged a complaint with the National Ombudsman, an independent body instituted by law that mediates in questions related to governmental acts against which no legal remedy is available. The Ombudsman is supposed to report his findings both to the administrative authority to which the disputed act is imputable and to the plaintiff, evaluating whether the governmental act was proper and, optionally, recommending possible remedies to the Administration. In the present case, the Ombudsman advised the author to appeal to the High Military Court (Hoog Militair Gerechtshof) against the decision communicated by the prosecutor of the Army.

4.4 On 13 June 1983, the High Military Court decided that it was not competent to decide on the case, as only the Minister of Defence can order the military legal officer or Commanding-General to prosecute a case. In this context, the State party points out that a provision analogous to article 12 of the civilian Code of Penal Procedure, under which a complaint with an appeal court can be filed if no prosecution is decided upon, does not exist. In the present case, the Minister of Defence held that, as formal notification of non-prosecution to the Royal Military Police had already been given, he could not oblige the military legal officer or the Commanding-General to prosecute the case. The author, subsequently, did not request further action by the Ombudsman, who therefore did not initiate an inquiry.

4.5 Finally, the State party observes that legislative proposals that would resolve the discrepancy between the Code of Military Penal Procedure and its civilian counterpart have been introduced in the Netherlands Parliament and are awaiting approval. An interim solution has been ruled out, given the extensive legislative changes that it would require and the rare occurrence of the complaints in question.

4.6 With regard to the admissibility of the communication, the State party distinguishes between: (a) the actual treatment of the author upon his arrest; and (b) the alleged lack of an adequate legal procedure to see the arresting officer prosecuted.

4.7 With regard to the first issue, the State party recalls the requirement of article 2 of the Optional Protocol that only individuals who have exhausted all available domestic remedies may submit a communication to the Committee and submits that a tort action against the Government could not *a priori* be called futile. With regard to the alleged violations of articles 7 and 10 of the Covenant, it submits that the allegations of the author do not come within of the scope concepts "torture" or "cruel, inhuman or degrading treatment" or the obligation to treat individuals "with humanity and with respect for the inherent dignity of the human person", nor indeed, within the scope of any other concept in the Covenant, and therefore cannot be regarded as constituting a violation of Covenant rights. Furthermore, in the State party's view, the author has not substantiated his allegations in such a way as to support his claim credibly.

4.8 Concerning the second issue, the State party submits:

that the allegations in the communication cannot be regarded as constituting a violation of any of the rights enumerated in the Covenant. More in particular, the Government is not aware of any right laid down in the Covenant to see someone else prosecuted. Furthermore, the allegations have not been substantiated in such a way as to credibly support a claim regarding such a violation ...

5.1 In a submission dated 6 April 1987, the author comments on the State party's charge that he had been arrested because of throwing stones at the United States consulate during a demonstration. He affirms that he only demonstrated and that he was caught violently by the neck by two men when he tried to leave the building where the demonstration was being held. One of the men, an officer of the Royal Military Police, hit him in the face several times. The policemen were dressed as civilians and did not identify themselves. The author claims that he did not resist, and that immediately after the arrest he was taken off in a police car by the two officers. He was released after being detained for four days, during which he was brought to the hospital every day.

5.2 The author states that, in the civil proceedings against the officer of the Royal Military Police which remain *sub judice*, five witnesses testified on his behalf, all of whom confirmed that he did not resort to violence during the demonstration in question. Although not currently experiencing any physical effects of the maltreatment suffered at the hands of the police officers, he still suffers from psychological trauma. He encloses the report from the psychiatrist who treated him, according to which there are unmistakable links between the way the author was treated during his arrest and detention and his subsequent psychological disturbances, e. g., the continuing fear of being attacked in the street.

5.3 He reiterates that the right to test the decision of whether or not to prosecute somebody by a competent, independent and impartial tribunal established by law is a right enshrined in article 14 of the Covenant, and that there is also a right, in a suit at law, to be safeguarded against military arbitrariness.

6.1 By further decision under rule 91, dated 6 April 1988, the Working Group of the Human Rights Committee requested the State party, *inter alia*, to clarify (a) why the author was subjected to detention for four days; (b) whether the author was brought before a judge or judicial officer during this period; (c) whether he could have invoked the principle of habeas corpus during this period; (d) the extent to which the competent military authorities investigated the author's complaint; and (e) whether any written decision was handed down by the Military Prosecutor, explaining why no criminal proceedings against Mr. O. were initiated: in the affirmative, to provide the Committee with the text; in the negative, to clarify the Military Prosecutor's reasons for not indicting Mr. O.

6.2 The Working Group also requested the author (a) to clarify his allegation that he was subjected to ill-treatment during detention in March 1982; (b) to forward to the Committee an English translation of (i) his complaint of 22 April 1982 to the Court of First Instance; and (ii) his legal brief in the civil proceedings against Mr. O.; and (c) to indicate the current stage of the latter proceedings.

7.1 In its reply dated 17 June 1988, the State submits, with regard to the author's arrest and detention:

The plaintiff arrived at the police station at 21.30 hours on Friday, 19 March 1982, and was immediately brought before an assistant public prosecutor. The plaintiff, who was suspected of assault, a criminal offence under article 141 of the Criminal Code, was questioned on the morning of Saturday, 20 March 1982, and a chief superintendent of the municipal police, acting as assistant public prosecutor, ordered him to be remanded in police custody as from 12.30 hours for a maximum of two days. The interests of the investigation required that the suspect should remain in the hands of the judicial authorities to allow for further questioning and the examination of witnesses.

After telephone consultations between the assistant public prosecutor and the public prosecutor, the public prosecutor extended the remand order for a maximum of two days from 12.30 hours on Monday, 22 March 1982. The advocate on duty was

immediately notified of the arrest and remand of the plaintiff and provided legal assistance to the plaintiff when he was remanded in police custody. On Tuesday, 23 March 1982, the plaintiff was brought before the examining magistrate in connection with the application by the public prosecutor for him to be remanded in custody for a further period. After questioning the plaintiff, the examining magistrate refused the application. The plaintiff was then immediately released.

7.2 With respect to remedies available to the author, the State party submits that during the four days of detention the author could have applied to the civil courts for an injunction to secure his release if he believed he was being unlawfully detained. It explains that "[the author's] complaint was minutely examined by the competent military judicial authorities. A complaint can lead to three situations:

1. If both the Auditeur-Militair and the Commanding-General/*Verwijzingsofficier* find the complaint well-founded, prosecution will be effected (article 11 RLLu).

2. If the Commanding-General and the Auditeur-Militair disagree, the Hoog Militair Gerechtshof (military court of appeal) can order prosecution (article 15 RLLu). Moreover, during the investigation the Minister of Defence can order the Commanding-General to prosecute (article 11 RLLu).

3. If both authorities find the complaint ill-founded, no prosecution will follow. In the instance of [*A. v. O.*], both the Auditeur-Militair and the Commanding-General/*Verwijzings-officier* found the complaint ill-founded after thorough review. It was concluded that prosecution of [Mr. O.] should not be effected in view of the fact that the injuries sustained by [Mr. A.] were a consequence of his resistance to the arrest.

One of the tasks entrusted to the police is the effective maintenance of law and order. This can, under certain circumstances, necessitate the use of force. At the time of the arrest, [Mr. O.] was seconded to the civilian police. Therefore civilian police regulations on the use of force were applicable. The police must act according to their standing instructions on the use of force, whereby the principles of last resort and proportionality must be observed, which is to say that a police officer may only use force if no other means is available to him, and that he must act in a reasonable and restrained manner. The Netherlands Government has no evidence to suggest that these rules were not observed during the applicant's arrest.

In the State party's opinion, the procedure concerning the decision not to prosecute Mr. O. described above did not diverge from the standard procedure in the author's case. It adds that the Auditeur-Militair notified the author's counsel of the decision not to prosecute Mr. O.

8. The State party reiterates that it considers the communication to be inadmissible:

The first complaint, contained in the communication, regarding the actual treatment of [Mr. A.] upon his arrest, is deemed inadmissible since the tort procedure against the Government is still *sub judice* (before the subdistrict court in Haarlem); thus it cannot be maintained that all available domestic remedies have been exhausted. Furthermore the complaint is submitted to be neither compatible with the provisions of the Covenant nor sufficiently substantiated.

The second complaint contained in the communication, regarding the lack of adequate legal procedure to see the arresting officer prosecuted, is in the view of the Government also to be declared inadmissible, as the allegations concerned cannot be regarded to constitute a violation of any of the rights enumerated in the Covenant. Nor have the allegations been sufficiently substantiated.

9.1 In his submission of 20 June 1988, author's counsel states, *inter alia*,

I sent to you previously two medical records of the physical and psychical injuries sustained by my client. Dr. Baart

investigated my client during his detention (report dated 16 June 1982). Dr. van Ewijk, the psychiatrist (report dated 19 December 1986), diagnosed my client's illness as a traumatic neurosis in connection with his arrest in March 1982.

9.2 In his comments of 18 July 1988 on the State party's submission, author's counsel argues:

The Netherlands Code of Criminal Procedure is not in accordance with article 9 of the Covenant. . . . In the Code of Criminal Procedure a suspect can be held in custody for 4 days and 15 hours before he shall be brought before a judge or officer authorized by law to exercise judicial power.

[Mr. A.] has also not been held in custody in accordance with articles 52 to 62 of the Code of Criminal Procedure. Normally the suspect is held in custody for two days . . . after questioning. In plaintiff's case the questioning was held on Monday, 22 March 1982. Before that [Mr. A.] had been questioned very shortly, so it is not true that [Mr. A.] was questioned on the morning of Saturday, 20 March 1982. Nor is it true that [Mr. A.] could apply to the civil court for an injunction to secure his release. [Mr. A.] was detained during the weekend, at which time the Court is not in session.

9.3 Counsel further claims the civil proceedings initiated against Mr. O. have nothing to do with the complaint, since the State party is not a party in it. It serves only the purpose of personal satisfaction and reparation. Counsel reiterates that the author's request for prosecution of the police officer is admissible and reaffirms that the right to demand prosecution of this officer is protected by article 14 of the Covenant.

10. On 13 September 1988, the State party submitted further comments on the author's submission:

In accordance with article 57 of the Code of Criminal Procedure, the applicant was questioned before the decision to remand him in custody was taken. . . . questioning took place at 10 a. m. on Saturday, 20 March. The Government has already pointed out in its memorandum of 17 June 1988 that the procedures required under Netherlands law were followed. These procedures are also in accordance with article 9 of the Covenant on Civil and Political Rights.

The president of the district court can be called upon at all times (i. e., also during the weekend) when an injunction is being sought (see article 289, para. 2, of the Code of Civil-Procedure).

The conclusion contained in the Public Prosecutor's letter . . . that [Mr. A.] resisted arrest is based upon the official reports drawn up under oath of office.

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

11.2 The Committee has ascertained, as it is required to do 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.

11.3 With respect to the requirement of exhaustion of domestic remedies, the Committee notes that in respect of the author's allegations of a violation of article 7 of the Covenant, the author instituted civil proceedings against the officer of the Royal Military Police who allegedly maltreated him, and which remain pending. Furthermore, the State party has indicated the possibility of initiating tort proceedings against the Government. The author has not established that such proceedings would be *a priori* futile. Therefore, this part of the communication

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

11.4 With respect to the alleged violation of article 9, paragraph 4, the Committee has taken note of the State party's clarification that pursuant to article 289, paragraph 2 of the Code of Civil Procedure, the author could have called upon the president of the district court at any time after his arrest on 19 March 1982. Considering that the author has not contested the State party's clarification, and taking into account that he was released by order of a magistrate on 23 March 1982 (i.e., four days after his arrest), the Committee finds that the author has not substantiated his claim for purposes of admissibility.

11.5 With respect to the alleged violation of article 10, paragraph 1, the Committee notes that the author has not provided the relevant clarifications requested in the Working Group's decision of 6 April 1988 and has thus failed to adduce any facts to show that he was subjected to improper treatment during detention.

11.6 With respect to the author's allegation of a violation of article 14, paragraph 1 of the Covenant, the Committee observes that the Covenant does not provide for the right to see another person criminally prosecuted. Accordingly, it finds that this part of the communication is inadmissible by virtue of incompatibility with the provisions of the Covenant pursuant to article 3 of the Optional Protocol.

12. The Human Rights Committee therefore decides:

(a) The communication is inadmissible;

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

Communication No. 220/1987

Submitted by: T.K. [name deleted] on 12 January 1987

Alleged victim: The author

State party: France

Declared inadmissible: 8 November 1989 (thirty-seventh session) ***

Subject matter: Refusal to recognize Breton text of license of an association operating in the Breton language

Procedural issues: Standing of the author—Non-exhaustion of local Remedies—Inadmissibility ratione materiae—Non-participation of Committee member in decision

Substantive issues: Interpretation of a reservation—Equality before the law—Freedom of expression

Articles of the Covenant: 2, 16, 19, 26 and 27

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

1. The author of the communication (initial letter dated 12 January 1987 and a further letter dated 30 June 1987) is T. K., a French citizen of Breton ethnic origin, writing on his own behalf and in his capacity as president of the Unvaniezh Ar Galennerien Brezhoneg (UAGB, Union des Enseignants de Breton). He was born in 1937 in Brittany and is employed as a professor

* Pursuant to rule 85 of the Committee's rules of procedure, Ms. Christine Chanet did not participate in the examination of the communication nor in the adoption of this decision.

** The texts of the two individual opinions submitted by Mrs. Rosalyn Higgins and Mr. Bertil Wennergren are appended. The Human Rights Committee has declared three similar cases inadmissible, involving the use of the Breton language against the State party (communications No. 222/1987 and No. 228/1987, to which several members of the Committee appended individual opinions, as well as Communication No. 262/1987).

of philosophy and of the Breton language. He alleges violations by France of articles 2, 16, 19, 26 and 27 of the Covenant.

2.1 The author states that the Tribunal Administratif de Rennes has refused to consider a case which he submitted on behalf of the UAGB in the Breton language on 7 November 1984. In this case, the author sought the recognition of the license for the association that he is heading. In reply to an inquiry written in French and Breton, the Tribunal answered that the case had not been registered because it was not written in French. A subsequent letter of complaint to the French Minister of Justice has allegedly remained unanswered. In support of his case, the author encloses copies of two decisions, one from the Tribunal Administratif de Rennes dated 21 November 1984, the other

from the Conseil d'Etat dated 22 November 1985, both stating that a complaint drafted in the Breton language should not be registered. Such decisions, according to the author, constitute discrimination on the ground of language, in contravention of article 2, paragraph 1, of the Covenant. The author further claims that the State party has violated article 2, paragraph 2, with regard to legislative or other measures necessary to give effect to the rights recognized in the Covenant : article 2, paragraph 3, with regard to effective remedies; article 16 with regard to the right to recognition everywhere as a person before the law; article 19, paragraph 2, with regard to freedom of expression; article 26 with regard to equality before the law without discrimination on any ground; and article 27 with regard to the right to use one's own language.

2.2 Concerning the question of the exhaustion of domestic remedies, the author states that the complaint before the Tribunal Administratif de Rennes was not even registered and that the Minister of Justice has not responded to his written complaint. The author further states that he has not submitted the same matter to another procedure of international investigation or settlement.

3. Without transmitting the communication to the State party, the Human Rights Committee requested the author, by decision of 9 April 1987 under rule 91 of the rules of procedure, to clarify (a) whether he claimed, as an individual, to be personally affected by the alleged violations of the Covenant by the State party, or whether he claimed, in his capacity as President of an organization, that the organization was the victim of the alleged violations; and (b) whether he understood, read and wrote French. By letter dated 30 June 1987, the author replied that he had initially intended to submit the communication on behalf of the organization, although he maintained that he was also directly affected by the events described in his initial communication. He further stated that he understood, read and wrote French.

4. By further decision of 20 October 1988, the Working Group of the Human Rights Committee transmitted the communication to the State party, requesting it, under rule 91 of the rules of procedure, to provide information and observations relevant to the question of admissibility. The author was requested, under rule 91, (a) to specify in which way he claimed to have been denied the right to recognition as a person before the law, (b) to which extent and in which context he claimed that his freedom of expression had been curtailed and (c) to substantiate his allegation that French citizens with French as their mother tongue and those with Breton as their mother tongue are not equal before the law.

5. In his reply, dated 13 January 1989, to the Working Group's questions, the author claims that French citizens with French as their mother tongue and those with Breton as their mother tongue are not equal before the law because the former can express themselves in their mother tongue before the tribunals whereas the latter cannot. While there exists a "Secrétariat à la francophonie", a similar institution has not been created in defence of regional languages other than French. Because the Government refuses to recognize the Breton language, those who use it daily are forced to abandon its use or to forgo their right to freely express themselves. The author adds that the violation of his freedom of expression is manifest in that the Administrative Tribunal refused to register a complaint submitted in Breton on the ground that its content was unintelligible, thereby refusing to recognize the validity of a complaint submitted in a local language and denying the citizens the use of their own language in court. Finally, the author affirms that he is barred, as a French citizen with Breton as his mother tongue, from access to courts, as the judicial authorities do not authorize him to submit complaints in his mother tongue.

6.1 In its submission under rule 91, dated 15 January 1989, the State party argues that the communication is inadmissible on the ground of non-exhaustion of domestic remedies and that some of the author's claims are incompatible with the provisions of the Covenant. The State party recalls that the author did not contest, within the delays prescribed by law, the decision of the Administrative Tribunal not to register his complaint. His written complaint to the Minister of Justice that he had suffered a denial of justice cannot, in the State party's opinion, be considered to be a judicial remedy. Nor has he appealed to any other judicial instance. His communication thus fails to meet the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

6.2 As to the alleged violation of article 2 of the Covenant, the State party argues that this article can never be violated directly and in isolation. A violation of article 2 can only be admitted to the extent that other rights recognized by the Covenant have been violated (paragraph 1) or if necessary steps to give effect to Covenant rights have not been taken (paragraph 2). A violation of article 2 can only be the corollary of another violation of a Covenant right. The State party contends that the author did not base his argument on any precise facts, and that he cannot demonstrate that he has been a victim of discrimination in his relations with the judicial authorities. It was up to him to use the remedies which were available to him.

6.3 With respect to the alleged violation of article 16, the State party notes that the author has not put forth any specific complaint and dismisses his interpretation of this provision as abusive. Thus, the standing of the author in the administrative procedure has never been at issue; what was refused was the possibility to submit his case in Breton, as

in the absence of legislative provision to the contrary, the language of procedure in French courts is the French language" (judgement of the Rennes Administrative Tribunal, 21 November 1984, Quillévére case).

6.4 Concerning the alleged violation of article 19, paragraph 2, the State party submits that the author has not substantiated how his freedom of expression has been violated. On the contrary, his letter to the Minister of Justice demonstrates that he had ample opportunity to present his position. Furthermore, "freedom of expression" within the meaning of article 19 cannot be construed as encompassing the right of French citizens to use Breton before French administrative tribunals.

6.5 As to article 26, the State party rejects the author's contention that the refusal by the Administrative Tribunal of Rennes of a complaint submitted in Breton constitutes discrimination on grounds of language. On the contrary, the authorities based themselves on generally applicable rules which

are intended to facilitate the administration of justice by enabling the tribunals to rule on the original submission (without having to resort to translation).

6.6 Finally, the State party recalls that upon ratification of the Covenant, the French Government entered a reservation with respect to article 27: "In the light of article 2 of the Constitution of the French Republic, the French Government declares that article 27 is not applicable so far as the Republic is concerned".

7.1 In his comments, dated 23 May 1989, the author rejects the State party's contention that the communication is inadmissible because of non-exhaustion of domestic remedies. Thus, he submits that his letter to the Minister of Justice was meant to be an appeal against the decision of the Administrative Tribunal not to register his complaint. Moreover, the State party has failed to indicate to the Committee exactly what kind of remedies would be open to him. To the author, this failure is easily explained, as the State party itself must be well aware that remedies are non-existent, once the court of first instance has refused to register a complaint submitted in Breton. Every subsequent complaint submitted in Breton is bound to suffer the same fate, regardless of which judicial instance is the addressee.

7.2 The author reaffirms that violations of his rights under articles 16, 19, 26 and 27 entail *ipso facto* a violation of article 2, paragraphs 1 and 2. He adds that several legislative proposals have deliberately been ignored by successive French governments, although they would have brought France at least partially into compliance with article 2. With respect to article 16, the author qualifies the State party's interpretation as restrictive if not discriminatory. He expresses surprise at its argument that his standing before the court was never at issue despite the fact that his complaint was not even registered, and contends that the refusal of his complaint necessarily meant a denial of standing. Furthermore, he argues that the Covenant does not link the issue of legal personality to the use, in court, of any specific language, and that in the absence of specific legal rules confirming the use of French as the

official language in judicial proceedings, the use of Breton must be considered to be permissible.

7.3 With respect to article 19, paragraph 2, the author contends that freedom of expression cannot be limited to freedom to express oneself in French, and that freedom of expression for citizens of Breton mother tongue can only mean the freedom to express themselves in Breton. Furthermore, the refusal of the Administrative Tribunal to register his complaint is said to have been intended to restrict his freedom of expression, although the limitations laid down in paragraph 3 of article 19 are said to be inapplicable.

7.4 The author dismisses the State party's arguments concerning an alleged violation of article 26 and claims that a proper administration of justice would not rule out the use of Breton in court. He recalls that several States, including Switzerland and Belgium, allow the use of several languages before their courts and do not force their citizens to abandon the use of their mother tongue. The refusal to register his complaint, according to the author, constitutes discrimination on the ground of language, since French citizens of Breton mother tongue do not benefit from the same procedural guarantees before the tribunal as French citizens of French mother tongue.

7.5 Finally, the author indicates that France did not enter a "reservation" with respect to article 27 but contented itself with making a mere "declaration". The author points out that draft legislation supported by many parliamentarians acknowledges the various languages spoken in France as testimony to the singular character of a region or a community. To the author, there can be no doubt that the Breton community constitutes a linguistic minority within the meaning of article 27, entitled to enjoy the right to use its own language, including in the courts.

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

8.2 Article 5, paragraph 2 (b), of the Optional Protocol precludes the Committee from considering any communication by an individual who has failed to exhaust all available domestic remedies. This is a general rule, which applies unless the remedies are unreasonably prolonged, or the author of a communication has convincingly demonstrated that domestic remedies are not effective, i. e. do not have any prospect of success.

8.3 On the basis of the information before the Committee, there are no circumstances which would absolve the author from attempting to pursue all domestic remedies. He has not been criminally prosecuted but seeks to initiate proceedings before an administrative court to establish that he has been denied rights protected by the Covenant. The purpose of article 5, paragraph 2 (b), of the Optional Protocol is, *inter alia*, to direct possible victims of violations of the provisions of the Covenant to seek, in the first place, satisfaction from the competent State party authorities and, at the same time, to enable States parties to examine, on the basis of individual complaints, the implementation, within their territory and by their organs, of the provisions of the Covenant and, if necessary, remedy the violations occurring, before the Committee is seized of the matter.

8.4 It remains to be determined whether recourse to the French courts must be considered an unavailable or ineffective remedy, given that the author must use French to establish his claim that it is a violation of his rights under the Covenant to have to use French, rather than Breton, in legal proceedings. The Committee observes that the matter of the exclusive use of French to institute proceedings in courts is the issue to be examined at first instance by the French judicial organs and that, under the applicable laws, this can be done only by using French. In view of the fact that the author has demonstrated his proficiency in French, the Committee finds that it would not be unreasonable for him to submit his claim in French to the French courts. Further, no irreparable harm would be done to the author's substantive case by using the French language to pursue his remedy.

8.5 The author has also invoked article 27 of the Covenant claiming that he has been a victim of a breach of its

provisions. On accession to the Covenant, the French Government declared that :

in the light of article 2 of the Constitution of the French Republic ... article 27 [of the Covenant] is not applicable so far as the Republic is concerned.¹

This declaration has not been objected to by other States parties, nor has it been withdrawn.

8.6 The Committee is therefore called upon to decide whether this declaration precludes it from examining a communication alleging a violation of article 27. Article 2, paragraph 1 (*d*), of the Vienna Convention on the Law of Treaties stipulates as follows:

"Reservation" means a unilateral statement, however phrased or named, made by a State, when . . . acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.

The Convention does not make a distinction between reservations and declarations. The Covenant itself does not provide any guidance in determining whether a unilateral statement made by a State party on accession to it should have preclusionary effect regardless of whether it is termed a reservation or declaration. The Committee observes in this respect that it is not the formal designation but the effect the statement purports to have that determines its nature. If the statement displays a clear intent on the part of the State party to exclude or modify the legal effect of a specific provision of a treaty, it must be regarded as a binding reservation, even if the statement is phrased as a declaration. In the present case, the statement entered by

¹ The reasons for the declaration are explained by the State party in its second periodic report to the Human Rights Committee under article 40 of the Covenant (document CCPR/C/46/Add.2) as follows: "Since the basic principles of public law prohibit distinctions between citizens on grounds of origin, race or religion, France is a country in which there are no minorities and, as stated in the declaration made by France, article 27 is not applicable as far as the Republic is concerned." The same explanation also appears in the initial report of France (document CCPR/C/22/Add.2).

the French Government upon accession to the Covenant is clear: it seeks to exclude the application of article 27 to France and emphasizes this exclusion semantically with the words "is not applicable". The statement's intent is unequivocal and thus must be given preclusionary effect in spite of the terminology used. Furthermore, the State party's submission of 15 January 1989 also speaks of a French "reservation" in respect of article 27. Accordingly, the Committee considers that it is not competent to consider complaints directed against France concerning alleged violations of article 27 of the Covenant.

9. The Committee therefore decides:

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

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

APPENDIX I

Individual opinion: submitted by Mr. Bertil Wennergren pursuant to rule 92, paragraph 3, of the Committee's rules of procedure concerning the Committee's decision to declare communication No. 220/1987 inadmissible

As stated in paragraph 8.2 of the Committee's decision, article 5, paragraph 2 (b), of the Optional Protocol precludes the Committee from considering any communication by an individual who has failed to exhaust all available domestic remedies. However, in accordance with recognized rules of international law and established jurisprudence of the Committee, domestic remedies need not be exhausted if they objectively have no prospect of success. In my view, a remedy cannot be deemed to be effective if, under substantive national legislation, the claim would inevitably be dismissed by the courts. Pursuant to article 2 of the Constitution of the French Republic, France shall ensure equality of all citizens before the law, without distinction of origin, race and religion. Of relevance in this context is that among the prohibited grounds for distinction, this provision does not include "language", as does article 26 of the Covenant. In an earlier case concerning the right to use the Breton language (*C. L. D. v. France*, 228/1987), it was brought to the attention of the Committee that the Tribunal Administratif de Rennes, by decision of 21 November 1984, had ruled as follows: "Bearing in mind that in the absence of legal provisions determining otherwise, the procedural language before French tribunals is the French language, the document which was not submitted in the French language and signed by M. Q. was wrongly registered as a complaint by the tribunal's registrar." As the document had neither then nor later been translated, the Tribunal found that it could not be considered. Q's appeal to the Conseil d'Etat was rejected on 22 November 1985, because it had not been written in the French language and therefore was found to be inadmissible. A commentary on this case (*Recueil Dalloz Sirey* (1986), p. 71) indicates that the Conseil d'Etat thereby established a general procedural rule, according to which complaints to administrative courts must be submitted in French. Taking that precedent into account in the light of the contents of article 2 of the French Constitution, it follows that the remedies referred to by the State party cannot be deemed to be effective. In my opinion, the communication should have been declared admissible insofar as it may raise issues under article 26 of the Covenant.

APPENDIX II

Individual opinion: submitted by Mrs. Rosalyn Higgins pursuant to rule 92, paragraph 3, of the Committee's rules of procedure concerning the Committee's decision to declare communication No. 220/1987 inadmissible

I agree with the decision of the Committee insofar as it refers to a remaining requirement that local remedies be exhausted in respect of the claim under article 26. The Conseil d'Etat has not actually ruled on the substantive issue; rather it has decided that it will not do so unless the issue is brought before it through an application itself in the French language. The authors, being perfectly able to use French, could seek through a French language application a definitive ruling on the use of the Breton language in administrative tribunal proceedings. While this might be unpalatable to the authors, no legal harm would be done to their cause by adopting this course of action.

However, I am not able to agree with the findings of the Committee that it is precluded by the French declaration of 4 November 1980 from examining the author's claim as it relates to article 27 of the Covenant. The fact that the Covenant does not itself make the distinction between reservations and declarations does not mean that no distinction between these concepts exists, so far as the Covenant is concerned. Nor, in my view, is the matter disposed of by invoking article 2 (1) (a) of the Vienna Convention on the Law of Treaties, which emphasizes that intent, rather than nomenclature, is the key.

An examination of the notification of 4 January 1982 shows that the Government of the Republic of France was engaged in two tasks: listing certain reservations and entering certain interpretative declarations. Thus in relation to article 4 (1), 9, 14 and 19, it uses the phrase "enters a reservation". In other paragraphs, it declares how terms of the Covenant are, in its views, to be understood in relation to the French Constitution, French legislation, or obligations under the European Convention on Human Rights. To note, by reference to article 2 (1) (d) of the Vienna Convention, that it does not matter how a reservation is phrased or named, cannot serve to turn these interpretative declarations into reservations. Their content is clearly that of declarations. Further, the French notification shows that deliberately different language was selected to serve different legal purposes. There is no reason to suppose that the contrasting use, in different paragraphs, of the phrase "reservation" and "declaration" was not entirely deliberate, with its legal consequence well understood by the Government of the Republic.

The relevant paragraph provides:

"In the light of article 2 of the Constitution of the French Republic, the French Government declares that article 27 is not applicable so far as the Republic is concerned."

Article 2 of the French Constitution provides in relevant part:

"France is a Republic, indivisible, secular, democratic and social. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs."

As is noted in the decisions of the Committee, the reports of France to the Committee under article 40 of the Covenant have explained that the prohibition in the Constitution of distinction on grounds of origin, race or religion means that there are no minorities in France; and therefore article 27 does not apply. As I believe, the French notification concerning article 27 is a declaration and not a reservation; it is, in my view, ultimately for the Committee to see if the interpretation of the French Government accords with its own. The Committee has, in relation to several States parties, rejected the notion that the existence of minorities is in some way predicated on an admission of discrimination. Rather, it has insisted that the existence of minorities within the sense of article 27 is a factual matter; and that such minorities may indeed exist in States parties committed, in law and in fact, to the full equality of all persons within its jurisdiction. Any many States parties whose constitutions, like that of the French Republic, prohibit discrimination, readily accept that they have minorities on whom they report under article 27.

I therefore conclude that the declaration of the French Government, while commanding the respectful attention of the Committee, does not accord with its own interpretation of the meaning and scope of article 27; and does not operate as a reservation.

The point of principle seems to me an important one. However, local remedies would require to be exhausted as much in respect of article 27 as of article 26. My views on the French declaration would not lead me to any different conclusion as to admissibility.

Communication No. 224/1987

Submitted by: A. and S. (names deleted) on 9 March 1987

Alleged victim: The authors and their daughter S.

State party: Norway

Declared inadmissible: 11 July 1988 (thirty-third session)

Subject matter: Refusal of parents to let their child be subjected to religious influence in a nursery

Procedural issues: Non-exhaustion of domestic remedies—Unreasonably prolonged proceedings

Substantive issues: Right to freedom of thought, conscience and religion

Articles of the Covenant: 18 (1), (2), (4) and 26

Article of the Optional Protocol: 5 (2) (b)

1. The authors of the communication (initial letter of 9 March 1987 and further letters of 10 September 1987 and 5 April 1988) are A. and S. N., Norwegian citizens residing in Alesund, writing on their own behalf and on behalf of their daughter S., born in 1981. They claim to be victims of a violation by Norway of articles 18 (1), (2) and (4), and 26 of the International Covenant on Civil and Political Rights. They are represented by counsel.

2.1 The authors state that the Norwegian Day Nurseries Act of 1975, as amended in 1983, contains a clause providing that "The day nursery shall help to give the children an upbringing in harmony with basic Christian values". The authors are non-believers and active members of Norway's Humanist and Ethical Union. They object to the fact that their daughter, who attended the Vestbyen Day Nursery in Alesund from the autumn of 1986 to August 1987, has been exposed to Christian influences against their will. The Christian clause does not apply to privately-owned nurseries, but the authors state that of the ten nurseries in Alesund, nine are owned and run by the Municipal Council, and many parents have no alternative but to send their children to these nurseries. The authors quote from the 1984 Regulations issued by virtue of the Day Nurseries Act and from the "Guidelines for implementing the object clause of the Day Nurseries Act", which read in part: "The Christian festivals are widely celebrated in our culture. Therefore it is natural that day nurseries should explain the meaning of these festivals to the children... Christian faith and teachings should play only a minor role in everyday life at the day nursery". The Humanist and

Ethical Union, an organization of non-believers, has raised strong objections against the Day Nurseries Act and its implementing regulations.

2.2 In the instant case, S. 's parents object that when she first attended the day nursery, grace was sung at all meals. On taking the matter up with the day nursery staff, they were told that their daughter did not have to sing with the other children, but the parents argue that it would have been difficult for a six-year old child not to do the same things as all the other children.

2.3 The parents claim that the Day Nurseries Act, in conjunction with its Regulations and Guidelines and the ensuing practice are inconsistent with article 18 (4) of the Covenant, which requires States parties to respect the liberty of parents to give their children a religious and moral upbringing in accordance with their own convictions. Moreover, they refer to article 26 of the Covenant, which provides that legislation shall prohibit all forms of discrimination and shall secure for everyone equal and effective protection against discrimination on grounds of, among other things, religion.

2.4 With respect to the requirement of the exhaustion of domestic remedies under article 5 (2) (b) of the Optional Protocol, the authors rely on their understanding that this requirement "shall not be enforced in cases where employing such remedies would take an unreasonably long time". They state that they have not submitted their complaint to any Norwegian court and claim that there are no effective remedies available, since S. would only attend day nursery until August 1987. Moreover, they doubt whether "the United Nations Covenant would be applied to this national issue by a Norwegian court of law. Therefore it would be a waste of time and money, and also an extra strain on complainants, if the issue were first to be tried before Norwegian courts".

2.5 The Human Rights Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

3. By decision of 8 April 1987, the Human Rights Committee transmitted the communication under rule 91 of the provisional rules of procedure to the State party, requesting information and observations relevant to the question of the admissibility of the communication. On 23 October 1987, the Committee's Working Group adopted a second decision under rule 91, requesting the State party to provide more specific information concerning the remedies available to the authors.

4.1 In its initial submission under rule 91, dated 14 July 1987, the State party objects to the admissibility of the communication on the grounds that the authors have completely bypassed domestic administrative and judicial remedies and that the exception provided for in article 5 (2) (b) of the Optional Protocol does not apply in the present case.

4.2 The State party points out that the requirement of article 5 (2) (b) is predicated both on practicality and on the principle of State sovereignty. The authors of the communication, however, have not submitted their case to any Norwegian court. It is open to them to challenge the application of the Day Nurseries Act and Regulations in the District and City Court in the first instance; the High Court (Appeals Division) in the second instance; and finally the Supreme Court in the third instance. Subject to permission being granted by the Supreme Court's Appeals Selection Committee, the case could be appealed directly from the District and City Court to the Supreme Court. Such permission may be granted if the issue is considered to be of general importance or if particular reasons suggest that a quick decision is desirable.

4.3 As to the authors' specific complaint, the State party notes that such a case would take approximately 4 months from the writ of summons to the main hearing by the Alesund District and City Court. To bring a suit through all court instances would normally take three to four years, although this period would be shortened

considerably if the Supreme Court should grant a direct appeal. Accordingly, the State party submits that the exhaustion of domestic remedies in Norway would not be unreasonably prolonged and that the authors could, at the very least, have brought the matter before the Court of First Instance. Moreover, the State party observes that the authors' objection that their daughter would be out of the day nursery by the time of the final judgement and that, therefore, it would be futile to go to the courts applies equally to an eventual decision by the Human Rights Committee and its possible incorporation into Norwegian law and practice. Thus, the State party concludes that there is no urgency that could justify bypassing domestic remedies and appealing directly to the United Nations Human Rights Committee.

4.4 In its further submission under rule 91, dated 24 February 1988, the State party explains that

everyone having a "legal interest" may bring his/her case before the ordinary courts in order to test the legality of any act, i. e. also the Day Nurseries Act. This opportunity was also open to the complainants when they in the spring of 1987 decided to submit the matter directly to the Human Rights Committee.

4.5 The State party further reiterates that the Norwegian courts have given considerable weight to international treaties and conventions in the interpretation of domestic rules, even if these instruments have not been formally incorporated into domestic law. It points to several Supreme Court decisions concerning the relationship between international human rights instruments and domestic law and concerning possible conflicts between the Covenant on Civil and Political Rights and domestic statutes. Although the Supreme Court has, in these cases, ruled that there was no conflict between the domestic law and the relevant international instrument, it has expressed clearly that international rules are to be taken into consideration in the interpretation of domestic law. In this context, the State party reiterates that "the possibility of setting aside a national statute altogether on the grounds of conflict with the Covenant cannot be disregarded" and emphasizes that in every case in which international human rights instruments have become relevant, the Supreme Court has taken a decision on the issue of conflict between a domestic statute and the international instrument and has not refused to test it. In a recent case, for example,

the question was whether a private school for educating social workers owned by a Christian foundation was allowed to ask job applicants (future teachers) about their religious beliefs. In this case the court expressed a clear opinion on the legal relevance of the international rules when interpreting domestic law. The first voting judge, who was supported by a unanimous court, stated: "I do not find it questionable that the convention (ILO Convention No. 111) must be given weight in the interpretation of section 55 A of the Working Environment Act of 1977". The further vote also shows that the convention is given considerable attention and weight". (Norsk Rettstidende 1986, pp. 1250 ff.)

4.6 In the light of the above observations, the State party argues that the authors would have stood a good chance of testing, before the Norwegian courts, the compatibility of the Day Nurseries Act with the Covenant. Thus, they could have invoked the Covenant and asked the courts that the Act be interpreted in the light of that legal instrument and that the Christian object clause be declared invalid as being incompatible with it. Moreover, they could have argued that the Act is in conflict with article 2 (1) of the Norwegian Constitution, under which "all inhabitants of the Kingdom shall have the right to free exercise of their religion". In the interpretation of this provision, international human rights instruments would be important elements to be considered by the judge.

5.1 On 10 September 1987 and 5 April 1988, the authors forwarded their comments in reply to the State party's observations on the admissibility of the communication.

5.2 The authors contest the State party's argument that the communication is inadmissible on the grounds of non-exhaustion of domestic remedies. They state that while the Norwegian Government contends that they should have submitted their case to the domestic courts, their main argument is that the domestic courts would be an inappropriate forum to decide the issue at stake. They stress that they have not argued that the practice followed by Norwegian day nurseries is in conflict with the Day Nurseries Act and its by-laws, but with international human

rights instruments.

5.3 The authors maintain that it would be possible to have their case dealt with by the Human Rights Committee without first testing it in the Norwegian courts. They claim that the Supreme Court decisions referred to by the State party in its submission of 24 February 1988 are irrelevant.

5.4 The authors conclude that no practical measures have been implemented by the Norwegian authorities so that children from non-Christian families are not exposed to Christian influences since, despite strong efforts on their part, they did not succeed in preventing such influences in their daughter's case.

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

6.2 The Committee observes, in this respect, that the authors have not pursued the domestic remedies which the State party has submitted were available to them. It notes the authors' doubts as to whether the International Covenant on Civil and Political Rights would be taken into account by Norwegian courts, and their belief that the matter could not be satisfactorily settled by a Norwegian court. The State party, however, has submitted that the Covenant would be a source of law of considerable weight in interpreting the scope of the Christian object clause and that the authors would have stood a reasonable chance of challenging the Christian object clause of the Day Nurseries Act and the prevailing practice as to their compatibility with the Covenant had they submitted the case to the Norwegian courts; the Committee notes further that there was a possibility for an expeditious handling of the authors' case before the local courts. The Committee finds, accordingly, that the pursuit of the authors' case before Norwegian courts could not be deemed *a priori* futile and that the authors' doubts about the effectiveness of domestic remedies did not absolve them from exhausting such remedies. Thus, the requirements of article 5 (2) (b) of the Optional Protocol have not been met.

7. The Human Rights Committee therefore decides:

1. The communication is inadmissible;
2. This decision shall be communicated to the authors and to the State party.

Communication No. 236/1987

Submitted by: V. M. R. B. (name deleted)

Alleged victim: The author

State party: Canada

Declared inadmissible: 18 July 1988 (thirty-third session)

Subject matter: Resistance of Salvadorian journalist to deportation order under the Canadian Immigration Act

Procedural issues: Inadmissibility *ratione materiae*

Substantive issues: Right to life, liberty and security of person—Arbitrary arrest or detention—Deportation of alien on national security grounds—Interpretation of notion of "suit at law "

Articles of the Covenant: 2, 6, 9, 13, 14, 18, 19 and 26

Articles of the Optional Protocol: 2 and 3

1. The author of the communication (initial letter dated 25 June 1987, and further letter dated 20 April 1988) is V. M. R. B, a journalist and citizen of El Salvador, born in 1948, at present residing in Montreal, Canada. He claims to be a victim of a violation by the Government of Canada of articles 2, 6, 9, 14, 18, 19 and 26 of the International Covenant on Civil and Political Rights. He is represented by counsel.

2.1 On 5 January 1982, the author entered Canada at Blackpool, on the United States border, without having any visa to enter or stay in that country. He was detained upon entry, but he applied for admission as a refugee under the *Canadian Immigration Act* of 1976. On 7 January 1982, he was heard for the first time before an Immigration Adjudicator pursuant to article 23 (3) (c) of the Act. The latter decided to uphold the author's detention under article 104 (3) (b) of the Act, on the ground that he represented a "danger to the public" and was likely to stay in Canada and not appear for his deportation hearings. This decision was based on a security certificate dated 14 November 1980 and signed by both the Solicitor General and the Minister for Employment and Immigration of Canada, according to which the author is a person "who there are reasonable grounds to believe will engage in or instigate the subversion by force of any government". Under article 19 (1) (f) of the Act, such persons are to be denied entry into Canadian territory.

2.2 The detention order was extended in a succession of weekly hearings before the Adjudicator (from 14 January to 11 February 1982). On 17 February 1982, the Adjudicator ordered the author deported, purportedly on the sole ground that the Minister's certificate of 14 November 1980 was "uncontestable". Testimony on behalf of the author by witnesses produced by his lawyer was deemed unconvincing. After another hearing on 10 March 1982, during which the Government representative stated that the author could no longer be regarded as a danger to the public, the Adjudicator ordered the author's release on 11 March 1982. The deportation order, however, was upheld.

2.3 The author claims that the Government of Canada has violated article 9 (1) of the Covenant by detaining him arbitrarily from 5 January to 11 March 1982, as the detention hearings never established that he represented a danger to the public. He alleges a violation of article 6 because the Canadian Government has refused to assure him formally that he would not be deported to El Salvador, where, the author claims, he would have reasons to fear attempts on his life. It is further claimed that article 19 (1) (f) of the Immigration Act violates the freedoms of political opinion, of thought and of expression guaranteed by the Covenant. Finally, the author states that the reviews of his detention did not proceed in a fair and impartial manner and that therefore he was the victim of a violation of article 14 (1) of the Covenant.

2.4 With regard to the requirement of the exhaustion of domestic remedies, the author states that he has taken his case through all court instances, and that his appeals were dismissed by the Immigration Appeal Board, the Federal Court of Canada (first instance), the Federal Court of Appeal and the Supreme Court of Canada. He claims that domestic remedies have been exhausted with the decision by the Supreme Court of Canada of 29 January 1987 not to grant him leave to appeal.

3. By decision of 19 October 1987, the Working Group of the Human Rights Committee transmitted the communication under rule 91 of the provisional rules of procedure to the State party, requesting information and observations relevant to the question of the admissibility of the communication.

4.1 In its submission under rule 91, dated 12 February 1988, the State party objects to the admissibility of the communication under Article 3 of the Optional Protocol, *ratione materiae*, as incompatible with the provisions of the Covenant, and as an abuse of the right of submission.

4.2 With regard to the facts, the State party points out that the author had already entered Canada in February 1980 and applied for refugee status. Before a decision could be rendered in his case, he left Canada in October 1980. Investigations showed that "while in Canada he was tasked and funded by a foreign political party to carry out certain activities which are prohibited under Canadian law. As a cover for his entry to Canada and for his activities while in Canada, Mr. R. was accredited as a journalist with the . . . news agency . . . which is known to be directed by a foreign intelligence service". As a result of information made available by the Security Service of the Royal Canadian Mounted Police, it was determined that Mr. R. was a person described under Section 19 (1) (f) of the Immigration Act of 1976, which denies admission to Canada to persons for whom there are reasonable grounds to believe that they will engage in or instigate the subversion by force of any government. Therefore, on 14 November 1980, after the author's departure from Canada, a certificate pursuant to Section 39 of the Immigration Act was issued, excluding him from re-entry into Canada, and requiring that he be deported if he entered Canada again. Thus, when on 5 January 1982 he again entered Canada, he was ordered detained pursuant to Section 104 of the Immigration Act. The State party emphasizes that

upon seeking to re-enter Canada . . . the author was entitled to a hearing of his refugee claim; however, he was never legally admitted to Canada, pursuant to the rules for admission set out in the Immigration Act, 1976. From 1982 to date, the author has never been lawfully within the territory of Canada, although he has remained in Canada during this time pending the outcome of immigration proceedings.

4.3 With respect to an alleged violation of article 6 of the Covenant, the State party indicates that what the author is complaining of is that Canada might deport him to El Salvador or to another country that would, in turn, return him to El Salvador, where allegedly his life could be in danger. Thus, what the author is in effect claiming is that unless he is given permission to stay in Canada, article 6 of the Covenant will be contravened. In this connection the State party observes that there is no right of asylum in the Covenant, and that a violation of article 6 of the Covenant cannot result from the denial of asylum. Thus, this aspect of the communication should be declared inadmissible *ratione materiae*. Furthermore, the State party adds that the author's fears are unfounded, since the Government of Canada has publicly stated on several occasions that it would not return him to El Salvador and has given him the option of selecting a safe third country.

4.4 With respect to an alleged violation of article 9 (1) of the Covenant, the State party indicates that Mr. R's detention from 5 January 1982 to 11 March 1982 was based on the certificate jointly issued by the Canadian Solicitor General and by the Minister of Employment and Immigration pursuant to Section 39 of the Immigration Act, stating that "Based on security and criminal intelligence reports received and considered by us, which cannot be revealed in order to protect information sources, [the author] is a person described in paragraph 19 (1) (f) of the Immigration Act, 1976, his presence in Canada being detrimental to the national interest". Thus, the State party submits that the lawful detention of an alien against whom there exists an exclusion order cannot be deemed to constitute arbitrary detention. Furthermore, the State party explains that in the case of a person seeking asylum, a reasonable amount of time must be allotted to the authorities to collect information, investigate, and carefully determine the sensitive question whether an individual poses a danger to national security. In this context the State party refers to article 5 (1) (f) of the European Convention on Human Rights, which specifically provides that

No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: . . .

(f) The lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

While article 9 (1) of the Covenant is not as specific as the parallel provision in the European Convention, the State party submits that the scope of article 9 (1) does not cover detention for the purposes of immigration control and that this aspect of the communication should be declared inadmissible *ratione materiae*.

4.5 Although the author does not invoke article 13 of the Covenant, the State party addresses the issue of the expulsion of aliens as provided for in the Covenant and refers to the Committee's decision in case No. 58/1979 *Anna Maroufidou v. Sweden*, where the Committee held that her deportation from Sweden did not constitute a violation of the Covenant because she had been expelled in accordance with the procedure laid down by the State's domestic law and that there had been no evidence of bad faith or abuse of power. In this context the Government of Canada asserts that the deportation proceedings against Mr. R. are in compliance with the requirements of article 13 of the Covenant.

4.6 With respect to an alleged violation of article 14 (1) of the Covenant, the State party submits that a procedure for the expulsion of an alien which is specifically envisioned under article 13 of the Covenant cannot be said to be in violation of article 14. More particularly, the State party observes that the protections contained in article 14 of the Covenant apply to the determination of any "criminal charge" or of any "rights and obligations in a suit at law". It submits that deportation proceedings do not fall into either of these categories; rather, they fall into the domain of public law. Since asylum or deportation proceedings are not covered by the terms of article 14, this aspect of the communication should be declared inadmissible *ratione materiae*.

4.7 With respect to an alleged violation of articles 18 and 19 of the Covenant, the State party objects that the author has not submitted evidence to substantiate a *prima facie* case of any violation of his rights to freedom of thought, opinion and expression. Finally, with respect to an alleged violation of articles 2 and 26 of the Covenant, the State party submits that the author has submitted insufficient evidence to disclose a *prima facie* violation of these provisions, that his allegations are manifestly ill-founded, and that these aspects of the communication should be declared inadmissible as an abuse of the right of submission pursuant to article 3 of the Optional Protocol.

5.1 Commenting on the State party's submission under rule 91, the author, on 20 April 1988, reiterates that the order for his expulsion represents an objective danger to his life and refers to the jurisprudence of the European Commission of Human Rights in this respect. He further argues that his communication does not invoke a right of asylum, and that a distinction must be made between the request for a right of asylum, and asylum resulting from the establishment of certain mechanisms to remedy violations of the Covenant alleged by individuals. It was not the deportation order which he denounced but the breach of specific rights guaranteed by the Covenant.

5.2 With respect to the alleged violation of article 14 (1), the author advocates a broad interpretation of what constitutes "rights and obligations in a suit at law". He refers to the Committee's general comment on article 14 which states that "the provisions of article 14 apply to all courts and tribunals within the scope of that article, whether ordinary or specialized", and suggests that public law disputes also fall under the scope of application of article 14. Furthermore, he recalls that the English version of the Covenant protects rights and obligations "in a suit at law" rather than rights and obligations "*de caractère civil*", as stated in the French version of the Covenant, which therefore is said to be more restrictive.

5.3 With respect to article 9, the author maintains that this provision should be applied to all situations where an individual has been deprived of his liberty, including reasons of immigration control.

5.4 The author concludes that with respect to his other allegations, concerning violations of articles 18 and 19, he has at least presented *prima facie* evidence to the effect that Canada has violated the Covenant. He surmises that the reason why Canadian authorities want to deport him is because of his political opinions:

National security grounds cannot be invoked unless there is justification for this infringement of a right guaranteed by the Covenant, in this case to be protected against all discrimination. ... The State invokes national security grounds against opinions expressed by an individual as penalizing that individual for having exercised his right to freedom of expression.

The author suggests that the Committee would be ill-advised to have recourse to restrictive interpretations of the Covenant, interpretations which would be contrary to its object and purpose.

5.5 With regard to his allegation that he has been subjected to discrimination in violation of articles 2 and 26 of the Covenant the author contends: "that the Canadian Government's manoeuvres constitute discrimination against foreign citizens. An alien may not express his opinions, thought or convictions, for in exercising these rights he will not receive the same treatment as a Canadian citizen. The mechanism provided by article 19 (1) (f) of the Canadian Immigration Act is discriminatory in that the accuracy of information concerning an alien as regards ideas or opinions allegedly expressed by him is not verified. The alien cannot enjoy the same protection for his opinions as a citizen expressing the same views".

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

6.2 The Committee observes that the State party has not contested the author's claim that domestic remedies have been exhausted. It further notes that the same matter is not being examined under another procedure of international investigation or settlement. On the basis of the information before it, the Committee therefore finds that the communication meets the requirements of article 5 (2) of the Optional Protocol.

6.3 The Committee has also examined whether the conditions of articles 2 and 3 of the Optional Protocol have been met. It observes that a right of asylum is not protected by the Covenant. With regard to the author's allegation that his right to life under article 6 of the Covenant and that his right to liberty under article 9 have been violated, the Committee finds that he has not substantiated either allegation. With regard to Article 6 of the Covenant, the author has merely expressed fear for his life in the hypothetical case that he should be deported to El Salvador. The Committee cannot examine hypothetical violations of Covenant rights which might occur in the future; furthermore, the Government of Canada has publicly stated on several occasions that it would not extradite the author to El Salvador and has given him the opportunity to select a safe third country. With regard to article 9, the Committee notes that this article prohibits unlawful arrest and detention, whereas the author was lawfully arrested in connection with his unauthorized entry into Canada, and the decision to detain him was not made arbitrarily, especially in view

of his insistence not to leave the territory of Canada. The Committee also found it necessary to determine whether a claim could be substantiated under article 13, although the author has not invoked it. It observes that one of the conditions for the application of this article is that the alien be lawfully in the territory of the State party, whereas Mr. R. has not been lawfully in the territory of Canada. Furthermore, the State party has pleaded reasons of national security in connection with the proceedings to deport him. It is not for the Committee to test a sovereign State's evaluation of an alien's security rating; moreover, on the basis of the information before the Committee, the procedures to deport Mr. R. have respected the safeguards provided for in article 13. With respect to article 14, the Committee notes that even if immigration hearings and deportation proceedings were to be deemed as constituting "suits at law" within the meaning of article 14 (1) of the Covenant, as the author contends, a thorough examination of the communication has not revealed any facts in substantiation of the author's claim to be a victim of a violation of this article. In particular, it emerges from the author's own submissions that he was given ample opportunity, in formal proceedings including oral hearings with witness testimony, both before the Adjudicator and before the Canadian Courts, to present his case for sojourn in Canada. With respect to articles 18 and 19 of the Covenant, the Committee notes that the author has not submitted any evidence to substantiate how his exercise of freedom of conscience or expression has been restricted in Canada. His apparent contention that the deportation proceedings resulted from the State party's disapproval of his political opinions is refuted by the State party's uncontested statement that, as early as November 1980, he had been excluded from re-entering Canada on clear national security grounds (para. 4.2 above). Deportation of an alien on security grounds does not constitute an interference with the rights guaranteed by articles 18 and 19 of the Covenant. With respect to articles 2 and 26 of the Covenant, the author has failed to establish how the deportation of an alien on national security grounds constitutes discrimination.

7. The Human Rights Committee therefore decides:

1. The communication is inadmissible under articles 2 and 3 of the Optional Protocol because the author's claims are either unsubstantiated or incompatible with the provisions of the Covenant;
2. This decision shall be communicated to the author and to the State party.

Communication No. 266/1987

Submitted by: A. M. (name deleted) on 5 November 1987

Alleged victim: I. M. (author's brother, deceased)

State party: Italy

Declared inadmissible: 23 March 1989 (thirty-fifth session)*

Subject matter: Victim's death after hungerstrike in protest against arrest on drug-related charges

Procedural issues: Non-exhaustion of domestic remedies

Substantive issues: Protection of the right to life

Article of the Covenant: 6 (1)

Article of the Optional Protocol: 5 (2) (b)

1. The author of the communication (initial submission postmarked 5 November 1987; further letters dated 20 June, 4 August, 5 and 28 September 1988 and 7 February 1989) is A. M., a Spanish citizen residing at Geneva, Switzerland. He submits the communication on behalf of his deceased brother, I. M., born on 18 August 1941 in Spain, who died in an Italian prison on 26 August 1987 following a hunger strike. He alleges that the Italian authorities violated his brother's human rights.

2.1 The author states that his brother was arrested in Milan on 6 April 1987 on suspicion of involvement in the traffic of drugs. He was allegedly not visited by the investigating officer, Judge A. C., until 3 June 1987, that is, almost two months after the beginning of his detention. It appears that this interrogation proved inconclusive and that no formal charges were raised, so that I. M. requested a second interrogation in order to establish his innocence. However, no further interrogation was granted and I. M. protested against his continued detention by going on a hunger strike on 7 July 1987. During this period he was allegedly seen only once by the prison doctors, when he was transferred to the hospital, only to be returned to the prison because his condition was not considered sufficiently serious. The doctors recommended that he be fed intravenously, but this recommendation was not implemented.

2.2 I. M.'s companion, M. E. E., was able to visit him every 15 days at the prison. When she saw him on

20 August, he allegedly complained that his head had been injured and that he could not see well. In spite of her insistence, he was not taken to the hospital until 24 August, when he was already in coma, and he died two days later.

* Pursuant to rule 85 of the provisional rules of procedure, Committee member Fausto Pocar did not take part in the adoption of the decision.

2.3 With regard to the exhaustion of domestic remedies, the author and M. R. R. have addressed a complaint to the Italian Attorney-General. The Italian lawyers responsible for the case have informed the author that a criminal investigation has been opened against the doctors at the prison and at the hospital.

3. By decision of 15 March 1988, the Working Group of the Human Rights Committee transmitted the communication to the State party, requesting it, under rule 91 of the provisional rules of procedure, to provide information and observations relevant to the question of the admissibility of the communication. The State party was further requested to provide a number of clarifications concerning the case of I. M. The author himself was requested to specify the nature of the complaint submitted to the Italian Attorney-General and the current stage of the investigations.

4. In a letter dated 20 June 1988, the author gives fuller information in reply to the questions raised by the Working Group. He states that in the complaint made to the Italian Attorney-General the charge is "involuntary homicide". As to the current stage of the investigation, the author indicates that they are still pending and forwards copies of his correspondence with the Italian authorities and his counsel at Milan.

5.1 In its submission under rule 91 of the provisional rules of procedure, dated 4 August 1988, the State party provides the clarifications requested by the Working Group and objects to the admissibility of the communication. Recapitulating the facts, it explains that the alleged victim:

was arrested on 6 April 1987 by the Anti-Drug Operations Unit of the Fraud Squad for the offences covered in articles 495 and 473 of the Penal Code and taken into custody (*fermo*) by the judicial police on the strong suspicion of having committed the offences referred to in articles 71 and 75 of Act No. 685 of 22 December 1975 (traffic in significant quantities of drugs and unlawful association with persons engaged in drug traffic). The official notices of the arrest and preventive detention were formally drafted in the name of *R. F. J. v. D.*, appearing in the identity papers produced by the accused; the Fraud Squad immediately established that the same individual had been identified on a previous occasion as I. M. and on another occasion as J-L.

5.2 The State party adds that I. M. was duly notified of the criminal activities:

ascribed to him at the first interrogation carried out by the Deputy Prosecutor of the Milan Prosecutor's Office, Dr. I. B., on 11 April 1987 at 9.20 a.m. At the end of the interrogation, I. M. was served with arrest warrant No. 634/87 D, issued on 10 April 1987 by the aforementioned magistrate, which contained the charges and the statement of grounds. I. M. received a further formal notice of the charges against him by arrest warrant No. 508/87 F, issued on 26 May 1987 by the examining magistrate Dr. A. C.

I. M. was interrogated on two subsequent occasions by the examining magistrate. Dr. A. C., on 3 and 8 June 1987.

5.3 I. M.'s request for a further interview with the examining magistrate at the time he began his hunger strike was rejected by the latter on 21 August 1987. She pointed out that the accused had already been heard on three occasions and for many hours about the activities that had led to his arrest, that court proceedings were suspended for the vacation period and that, in any event, the defendant could have addressed to her, under article 35 of the prison regulations, any request or statement which he might have considered useful for his defence. I. M.'s companion, M. R. R., had been authorized to visit the defendant first by the Deputy Prosecutor and subsequently by the examining magistrate, as can be ascertained from a statement sent by her to the Attorney-General on 28 August 1987. This permission, according to the State party, was not withdrawn during the month of August; on 17 August 1987, I. M. had declined to see her because of his state of health.

5.4 The State party considers that the events described above "point to the fact that the responsibility for I. M.'s tragic end cannot be attributed to the examining magistrate, who showed herself to be responsive, in the context of her competence and in conformity with the requirements of the investigation, to the requests made by members of the prisoner's family".

5.5 The State party further adds that immediately after I. M.'s death the examining magistrate prepared and submitted a report detailing the facts of the case to the Attorney-General's office, which instituted criminal proceedings against the persons alleged to be responsible for the death of the victim. Pre-trial proceedings are currently under way, and it is submitted that they are progressing normally.

5.6 The State party recalls that the author's principal complaint relates to the fact that the victim's request for a further interview with the examining magistrate had been rejected, and emphasizes that there is no obligation on the part of the magistrate to grant such requests, and that the Code of Penal Procedure, which exhaustively regulates the circumstances and modalities of such requests (art. 190), does not provide for the possibility of an appeal. With the exception of the initial interrogation of the prisoner (articles 245 and 365 of the Penal Code) for the purpose of enabling him to respond to the charge and authorize his defence, the magistrate has no obligation to hear the accused on several occasions. On the contrary, under article 299 of the Code of Penal Procedure, the examining magistrate "has the obligation to execute promptly all - and solely - those acts which appear necessary in order to establish the truth in the light of the evidence collected and having regard to the progress of the investigation". The authorities thus enjoy discretionary power in ascertaining whether a further interrogation of the defendant is necessary.

5.7 Finally, the State party points out that the author retains the right, under article 91 of the Code of Penal Procedure, to introduce a civil action against the individuals held to be responsible for his brother's death.

6.1 Commenting on the State party's submission, the author, in a letter dated 28 September 1988, does not contest that his brother's companion, M. R. R., had been authorized by the magistrate to visit the deceased in prison, but contends that the difficulties M. E. E. encountered before she could see him either in the prison or in the hospital were solely attributable to the prison authorities. Thus, he explains that between 17 and 20 August 1987, M. E. R. was turned away under spurious pretexts at the prison gates on several occasions until, at noon on 20 August 1987, she could finally see I. M. The victim, at that time, already was confined to a wheelchair and had visible coordination problems.

6.2 In spite of her repeated requests, M. E. R. was unable to speak with the prison director or assistant director. An intervention on the part of the Spanish Consul in Milan did not produce tangible results either. On 24 August 1987, M. R. R. again asked to see her companion. In the prison's visitors' room, she was told by an inmate that I. M. was still in the prison, although in a life-threatening condition. Subsequently, a guard told her that I. M. had just been transferred to a hospital. At the hospital she was told that the magistrate's authorization to visit him was invalid and that she needed an authorization by the prison director. The director's assistant cursorily showed her a paper alleging that I. M. no longer wanted to see her, but after emphatic requests she was able to see him on 25 August 1987. I. M. did not recognize her because he was in a coma, and the doctor on duty told her that he had been transferred to the hospital much too late. The author claims that if the Assistant Director of the prison alleged that I. M. was in "good physical health", this was not only negligence but incompetence. Similarly, he contends that the doctors, both in the

prison and in the hospital, acted negligently in that they were, or seemed to be, incapable of giving I. M. the appropriate treatment.

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

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

7.3 Inasmuch as the exhaustion of domestic remedies is concerned, the Committee observes that it would be open to the author, pursuant to article 91 of the Italian Code of Criminal Procedure, to introduce a civil action against those alleged to be responsible for his brother's death. The Committee has further noted the State party's uncontested claim that it did institute criminal proceedings against the individuals held to be responsible for the death of I. M., on 26 August 1987, and that the investigations are proceeding normally. The Committee concludes that available domestic remedies have not been exhausted and that the requirements of article 5, paragraph 2 (b), of the Optional Protocol have not been met.

7.4 With respect to the author's complaint that the alleged victim was denied the opportunity of a further interview with the examining magistrate, the Committee finds that this raises no issue under the Covenant.

8. The Human Rights Committee therefore decides:

(a) The communication is inadmissible;

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

Communication No. 268/1987

Submitted by: M. G. B. and S. P. (names deleted) on 4 December 1987

Alleged victim: The authors

State party: Trinidad and Tobago

Declared inadmissible: 3 November 1989 (thirty-seventh session)

Subject matter: Refusal to register a company labelled "T&T 'Human Rights and Legal Aid Company Limited"

Procedural issues: Inadmissibility *ratione materiae*

Substantive issues: Right to judicial remedy—"Effective remedy"

Articles of the Covenant: 2 (3), (a) and (b); 5

Articles of the Optional Protocol: 1 and 3

1. The authors of the communication (initial letter dated 4 December 1987 and subsequent letters dated 30 December 1988 and 24 January 1989) are M. G. B. and S. P., two Trinidadian citizens born on 27 November 1927 and 1 January 1960, respectively, residing in Trinidad. They claim to be the victims of a violation by the Government of Trinidad and Tobago of articles 2 (3) (a) and (b) and 5 of the International Covenant on Civil and Political Rights. They are represented by counsel.

2.1 The authors state that they applied to the Registrar General of Trinidad to register a company known as the TNT Human Rights and Legal Aid-Company Limited. This company was to promote the rule of law, human rights facilities and to assist in providing legal assistance and legal aid to the needy. The Registrar of Companies refused to recognize this company on the grounds that the establishment of a company with such objectives by non-professionals was against public policy. The authors filed an application for judicial review in the High Court of Trinidad and Tobago but the Judge dismissed the application without issuing a written judgement. They then appealed to the Court of Appeal and asked that the appeal be deemed urgent. The Court of Appeal, on 5 November 1987, refused to consider the appeal urgent on the grounds that the authors' application did not show sufficient ground for urgency, because "the incorporation of the Appellants under the name sought is not a *sine qua non* to the lawful provision of financial assistance to indigent persons directly or otherwise with a view to their obtaining legal aid and/or legal advice."

2.2 The authors indicate that there is no right of appeal against that decision to the Judicial Committee of the Privy Council. They claim that the statistics for hearings and the determination of matters in the Court of Appeal show that there is an "inordinate" delay in the hearings and the determination of appeals, usually three to four years. This, they argue, constitutes a judicial block for the determination of appeals and a denial of the right of access to the court.

3. By decision of 15 March 1988, the Working Group of the Human Rights Committee transmitted the communication to the State party under rule 91 of the Committee's rules of procedure, requesting information and

observations relevant to the question of the admissibility of the communication. The Working Group further requested the authors to clarify (a) whether the company they sought to register would have operated on a non-profit basis; (b) whether the persons who would have constituted this company have been in any way prevented from providing legal aid to the needy; and (c) whether there were other associations of lawyers in Trinidad and Tobago which provided similar services.

4.1 By letter dated 30 December 1988, counsel notes that the appeal was discontinued by the authors on 15 December 1988, because they considered it impossible to obtain a positive result in the case since the High Court of Trinidad and Tobago had, in October 1988, indicated to them that no written judgement was available. Without such a judgement however, the case could not be considered by the Court of Appeal of Trinidad.

4.2 By further letter dated 24 January 1989 counsel clarifies that the company as a whole would have operated on a profit basis to achieve its aims but that it would have provided free legal advice and free legal representation in appropriate cases. He further states that the authors have not been prevented from providing legal aid to the needy and that there are other associations in Trinidad and Tobago, such as the Anglican Church and the Caribbean Human Rights Committee, whose aims and objectives are similar to those of the company the author sought to have registered. Counsel provides a copy of the Memorandum and Articles of Association of the company.

5. The State party's deadline for its submission concerning information and observations relevant to the question of the admissibility of the communication expired on 27 June 1988. No comments were received from the State party.

6.1 Before considering any claims in a communication, the Working Group 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 considered the authors' allegations of a violation of articles 2 (3) (a) and (b) and 5 of the Covenant and notes that these are general undertakings by States and cannot be invoked, in isolation, by individuals under the Optional Protocol. The Committee has *ex officio* examined whether the facts submitted raise potential issues under other articles of the Covenant. It has concluded that they do not. The Committee therefore finds that the communication is incompatible with the provisions of the Covenant within the meaning of article 3 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible;

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

Communication No. 273/1988

Submitted by: B. d. B. *et al.* on 14 January 1988

Alleged victim: The authors

State party: The Netherlands

Declared inadmissible: 30 March 1989 (thirty-fifth session)

Subject matter: Complaint by co-owners of physiotherapy cabinet about discriminatory assessment of compulsory social security contributions

Procedural issues: Inadmissibility *ratione materiae*

Substantive issues: Equality before the law

Articles of the Covenant: 14 (1) and 26

Article of the Optional Protocol: 3.

1. The authors of the communication (initial letter dated 14 January 1988; further submission dated 29 December 1988) are B. d. B., G.B., C. J. K. and L. P. M. W., four Dutch citizens. They claim to be the victims of a violation by the Government of the Netherlands of articles 14, paragraph 1, and 26 of the International Covenant on Civil and Political Rights. They are represented by counsel.

2.1 The authors are joint owners of the Teldersweg physiotherapy practice in Rotterdam. They allege that they have been discriminated against by the Industrial Insurance Board for Health and for Mental and Social Interests (hereafter BVG) and the Central Appeals Board (Centrale Raad van Beroep) because of the way in which social security contributions payable by them are regulated under Netherlands social security legislation.

2.2 The authors state that BVG, as the executive organ of the social security insurance legislation, has the task of assessing social insurance claims and of fixing the contributions payable by employers to finance these employees' insurance schemes. Until 1984, BVG held the view that part-time physiotherapists working on the basis

of a collaboration contract with a practitioner were not in employment; there was thus no question of compulsory insurance for these more or less independent collaborators within the framework of the said employees' insurance scheme.

2.3 This situation changed on 14 April 1983, when the Central Appeals Board ruled, contrary to what BVG had previously accepted, that part-time physiotherapists working on an invoicing basis were in fact working in such a dependent socio-economic position vis-à-vis the owner of owners of the practice that their work status was socially comparable to employment and had, therefore, to be regarded as such in the framework of social security insurance legislation. On the basis of this judgement, BVG informed the national professional organizations of physiotherapists that part-time physiotherapists working on an invoicing basis henceforth would have to be insured and that contributions due would have to be paid by the owner of a physiotherapy practice as if he were an employer. In its circular, the BVG announced that contributions due would be collected from 1 January 1984, on the understanding that those required to pay the contributions would send their names to BVG before 1 January 1985. The collection of contributions for the years prior to 1984 would then be waived.

2.4 Despite the BVG view that, from 1984 onwards, there was no longer any question of such a special situation in respect of the obligation for owners of physiotherapy practices to pay contributions, the authors maintain that physiotherapists are still treated differently with regard to the date of commencement of the obligation to contribute. Thus, it has become apparent that those physiotherapy practices which, at an earlier stage, were unambiguously informed in writing by the association that there was no obligation to contribute, were regarded as liable to pay the first contribution in 1986, whereas practices that had not received a letter sent directly by BVG, in which they were informed that there was no such obligation, were required to pay contributions retroactively to January 1984.

2.5 As soon as the complainants learned that, in the former case, the requirement to pay their contributions could have begun in 1986 and thus did not have retroactive effect to 1 January 1984, they invoked the principle of equality before the law, by means of the appeals procedure then prevailing in the Central Appeals Board. They argued that the situation in their practice had not been essentially different from that in other practices which had learned directly from BVG that no insurance obligation was required with regard to their part-time physiotherapists. The part-time physiotherapist who collaborated the authors was also working on an invoicing basis, as others who collaborated with practices that, before 1983, had learned directly from BVG that there would be no question of an insurance obligation.

2.6 Despite the invocation of the principle of equality before the law, the Central Appeals Board held, in its final judgement in the case on 19 August 1987, that the decision by BVG to demand contributions from the complainants with retroactive effect to 1984 was based on legal rules of a compulsory nature which could not or must not be tested against general principles of law.

2.7 To the authors, the Central Appeals Board thereby implicitly concluded that the acknowledged difference in treatment in the manner of demands for contributions between various physiotherapy practices is in accordance with law. The authors point to what they consider an inconsistency in the Central Appeals Board's judgement. On the one hand, the Board appears to take the view that the application of compulsory legal rules cannot or must not be tested against general principles of law; on the other hand, it appears from established case-law that such rules must not be applied if they are in conflict with the principle of confidence in the law, i.e. the principle of the certainty of the law. The authors question why owners of physiotherapy practices who were not directly informed by BVG in the past that part-time physiotherapists co-operating with them were not subject to social security contributions should be subjected to different and less favourable treatment with respect to contributions due after 1984 than those practitioners who had received such direct information.

2.8 The authors claim that since the principle of confidence in the law can, under certain circumstances, prevent the application of compulsory legal rules, it is all the more surprising that this does not apply to the principle of equality before the law, enshrined in article 1 of the Netherlands Constitution and article 26 of the Covenant. They

refer to the decision adopted by the Human Rights Committee on 9 April 1987 in communication No. 172/1984, which states, *inter alia*, that article 26 of the Covenant is not limited to the civil and political rights provided for in the Covenant but also applies to social insurance law. Concerning the differences noted above in the treatment of owners of physiotherapy practices, the authors allege that it is possible to speak of a violation of article 26 in conjunction with article 14, paragraph 1, of the Covenant. They contend that the distinction made by BVG in practice is an arbitrary one.

3. By decision dated 15 March 1988, the Working Group of the Human Rights Committee transmitted the communication to the State party under rule 91 of the Committee's provisional rules of procedure, requesting information and observations relevant to the question of the admissibility of the communication. By note dated 6 July 1988, the State party requested an extension of three months for the submission of its observations.

4.1 In its submission under rule 91, dated 28 October 1988, the State party objects to the admissibility of the communication on a number of grounds. Recapitulating the facts, it points out that the alleged victims are joint owners of a physiotherapy practice where a part-time physiotherapist worked on the basis of a co-operation contract as from 1982; she was paid by invoice, worked more or less independently and was not insured as an employee under social security legislation. The State party further indicated that there are three social security insurance schemes: schemes paid out of public funds, national insurance schemes and employee insurance schemes. Unlike the first two, employee insurance schemes are only applicable where there is an employer/employee relationship. Both employer and employee pay part of the employment insurance contribution, determined in accordance with a standard formula. This contribution is calculated as a certain percentage of the employees income and is payable to the competent industrial insurance board.

4.2 The State party explains that for the purpose of determining who, as an employee, should pay employment insurance contributions, a broad definition of the term "employment" is used. It is not confined to situations in which there is an employment contract governed by civil law but also extends to co-operative relationships that meet certain criteria defined by the relevant act of parliament or the executive rules and regulations based on it; in accordance with these criteria, employment relationships not governed by employment contracts can be equated with those that entail, with all the relevant consequences concerning entitlement to benefits, an obligation to pay contributions.

4.3 In the past it had been generally assumed that a physiotherapist working for a physiotherapy practice who was paid by invoice should not normally be regarded as being employed by the practice. However, the Central Appeals Board took a different view in its judgement of 19 April 1983. BVG is entrusted with the implementation of social security legislation with regard to employees in the health sector and must determine the social insurance contributions of employers and employees for employee insurance schemes such as medical insurance, disability insurance and unemployment insurance contributions. As from 1 January 1984, BVG claimed these contributions from the applicants for the aforementioned physiotherapist. The applicants did not agree that this date was correct and contested the decision on the grounds, *inter alia*, that the principle of equality had been violated because other physiotherapists had only been required to pay contributions as from 1986. The Court of First Instance, the Board of Appeals and the Court of Second and Last Instance, the Central Appeals Board dismissed the case. The main reason for the dismissal of the case was that peremptory statutory provisions had been properly applied, that such provisions must always be applied unless there are special circumstances, and that these were lacking in the author's case.

4.4 With respect to the requirement of exhaustion of domestic remedies, the State party acknowledges that the authors pursued legal proceedings up to the Court of Last Instance. It points out, however, that the authors did not invoke either article 26 or article 14, paragraph 1, before the Board of Appeal and, on appeal, before the Central Appeals Board. It was merely in a supplementary petition to the Central Appeals Board, dated 29 April 1987, that the principle of equality was also mentioned, if only in general terms and without specific reference to provisions of domestic or international law. Nor were the articles of the Covenant invoked by the authors in either of the judgements given in the case. In these circumstances, the State party does not "consider it to be altogether clear that the applicants have exhausted domestic remedies, as they did not explicitly invoke any provisions of the Covenant during domestic proceedings". The State party requests the Committee to decide on whether and to what extent

authors of a communication must invoke the provisions of the Covenant purported to have been violated in the course of domestic legal proceedings.

4.5 With respect to the alleged violations of article 14, paragraph 1, and article 26, the State party contests that the actions complained of by the authors can be brought within the scope of application of these provisions and thus considers the communication to be inadmissible pursuant to articles 2 and 3 of the Optional Protocol. With respect to article 14, paragraph 1, first sentence, it points out that article 14 is concerned with procedural guarantees for trials and not with the substance of judgements handed down by the courts. Individuals who believe that the law has been wrongly applied to them in the Netherlands may seek redress through the courts. The rules governing appeals against decisions under social security legislation are laid down in the Appeals Act of 1955. The State party emphasizes that it has not been alleged that the Board of Appeal or the Central Appeals Board failed to observe these rules, which are compatible with article 14, and that there is no evidence that the boards failed to observe him.

4.6 With respect to the alleged violation of article 26, the State party questions the authors' apparent assumption that article 26 also applies to the contributions that employers and employees are required to make, and invites the Committee to give its opinion on this question. It further indicates that the authors do not appear to have complained about the substance of the statutory provisions concerning mandatory social insurance but only about the fact that the BVG set 1 January 1984 as the date from which contributions were payable. The issue thus is whether the application of a law which is not in itself discriminatory and which the Central Appeals Boards considers to have been correct can run counter to article 26. Earlier communications concerning Netherlands social security legislation submitted to the Committee¹ related to provisions laid down by an act of parliament which the authors deemed to be discriminatory. The present communication, however, does not relate to the provision's substance, which is neutral, but to the application of social security legislation by an industrial insurance board. The State party invites the Committee to formulate its opinion on his point and refers to the Committee's decision in communication No. 212/1986, where it was stated, *inter alia*, that the scope of article 26 of the Covenant does not extend to differences of results in the application of common rules in the allocation of benefits.² This statement, according to the State party, should apply all the more to situations in which social insurance contributions are determined by an industrial insurance board.

4.7 The State party expresses doubts as to whether an action by an industrial insurance board can be attributed to its State organs, in the sense that the State party could be held liable for it under the Covenant or the Optional Protocol thereto. In this context, it emphasizes that an industrial insurance board such as BVG is not a State organ: such boards are merely associations of employers and employees established for the specific purpose of implementing social security legislation, and the management of such a board consists exclusively of representatives of the employer's and employees' organizations. Industrial insurance boards operate independently and there is no way in which the State party's authorities could influence concrete decisions such as that complained of by the authors.

5.1 Commenting on the State party's observations, the authors, in a submission dated 29 December 1988, affirm that it was not necessary for them to invoke either the principle of equality or article 26 of the Covenant in domestic proceedings. In Netherlands administrative law, the principle of equality has traditionally been a legal standard against which the courts test the administrative practices of governmental authorities. They consider it to be unnecessary to invoke, in administrative procedures, sources of law that embody the principle of equality, since the judge is bound to accept this principle and should *ex officio* test the case against it. The fact that the contested judgements do not refer to the provisions of the Covenant is, therefore, irrelevant.

5.2 With respect to the alleged violation of article 14, first sentence of the Covenant, the authors

¹ Communications Nos. 172/1984 (Broeks), 180/1984 (Danning) and 182/1984 (Zwaan-de Vries), final views adopted on 9 April 1987 (twenty-ninth session).

² *P. P. C. v. the Netherlands*, inadmissibility decision adopted on 24 March 1988 (thirty-second session), para. 6.2.

acknowledge that the provisions of article 14 contain further guarantees intended to secure the conduct of a fair trial and add that they have no reason to complain about the conduct of the judicial proceedings as such. They reiterate, however, that the judicial review of general principles of justice in their case by the Central Appeals Board was contradictory, and that the Board treated them differently from others and, therefore, unequally.

5.3 The authors further reject the State party's contention that the communication should be declared inadmissible because it was directed against discriminatory application of legislation which in itself is neutral. They refer to the Committee's decision in communication No. 171/1984³ which stipulated, *inter alia*, that "article 26 is concerned with the obligations imposed on States in regard to their legislation and the application thereof". With respect to the State party's argument that because it left the implementation of some aspects of social security legislation to industrial insurance boards and is therefore unable to exercise influence on concrete decisions adopted by such boards, they argue that the mere inability to supervise the implementation of social security legislation by industrial insurance boards cannot detract from the fact that the State party is responsible for seeing to it that these bodies charged with the implementation of the law perform their statutory assignments in conformity with legal standards. Where loopholes become apparent, it is for the legislator to eliminate them. Therefore, according to the authors, the State party should not be allowed to claim that it cannot influence the decisions of bodies such as BVG. Were this to be allowed, it would be easy for States parties to undermine the "basic rights" of their citizens. The authors conclude that in their case, the State party seeks to deny its responsibility for the concrete application of social security legislation by invoking a situation which it had created itself.

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

6.2 The Committee has ascertained, as it is required to do 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 With respect to the requirement of exhaustion of domestic remedies, the Committee has taken note of the State party's argument that it is doubtful whether the authors have complied with article 5, paragraph 2 (b), of the Optional Protocol, given that they did not invoke

³ See note 1; Committee's final views (twenty-ninth session), para. 12.3.

any provisions of the Covenant in the course of domestic proceedings. The Committee observes that whereas authors must invoke the substantive rights contained in the Covenant, they are not required, for purposes of the Optional Protocol, necessarily to do so by reference to specific articles of the Covenant.

6.4 With regard to an alleged violation of article 14, paragraph 1, of the Covenant, the Committee notes that while the authors have complained about the outcome of the judicial proceedings, they acknowledge that procedural guarantees were observed in their conduct. The Committee observes that article 14 of the Covenant guarantees procedural equality but cannot be interpreted as guaranteeing equality of results or absence of error on the part of the competent tribunal. Thus, this aspect of the authors' communication falls outside the scope of application of article 14 and is, therefore, inadmissible under article 3 of the Option Protocol.

6.5 With regard to an alleged violation of article 26, the Committee recalls that its first sentence stipulates that "all persons are entitled without discrimination to the equal protection of the law". In this connection, it observes that this provision should be interpreted to cover not only entitlements which individuals entertain vis-à-vis the State but also obligations assumed by them pursuant to law. Concerning the State party's argument that BVG is not a State organ and that the Government cannot influence concrete decisions of industrial insurance boards, the Committee observes that a State party is not relieved of its obligations under the Covenant when some of its functions are delegated to other autonomous organs.

6.6 The authors complain about the application to them of legal rules of a compulsory nature, which for unexplained reasons were allegedly not applied uniformly to some other physiotherapy practices; regardless of whether the apparent non-application of the compulsory rules on insurance contributions in other cases may have been right or wrong, it has not been alleged that these rules were incorrectly applied to the authors following the Central Appeals Board's ruling of 19 April 1983 that part-time physiotherapists were to be deemed employees and that their employers were liable for social security contributions; furthermore, the Committee is not competent to examine errors allegedly committed in the application of laws concerning persons other than the authors of a communication.

6.7 The Committee also recalls that article 26, second sentence, provides that the law of States parties should "guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". The Committee notes that the authors have not claimed that their different treatment was attributable to their belonging to any identifiably distinct category which could have exposed them to discrimination on account of any of the grounds enumerated or "other status" referred to in article 26 of the Covenant. The Committee, therefore, finds this aspect of the author's communication to be inadmissible under article 3 of the Optional Protocol.

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.

Communication No. 275/1988

Submitted by: S. E. (name deleted) on 10 February 1988

Alleged victim: The author and her disappeared children

State party: Argentina

Declared inadmissible: 26 March 1990 (thirty-eighth session)*

Subject matter: Abduction of author's children by State party security forces

Procedural issues: Inadmissibility *ratione temporis*–*Individual opinion*

Substantive issues: *Effective judicial remedy*

Articles of the Covenant: 2 (3), (a) and (b)

Articles of the Optional Protocol: 2 and 3

* The text of an individual opinion submitted by Mr. Bertil Wennergren pursuant to rule 92, paragraph 3, of the Committee's rules of procedure is appended.

1. The author of the communication is an Argentinian citizen residing in Argentina. She writes on her own behalf and on behalf of her three disappeared children, born in 1951, 1953 and 1956, respectively, alleging violations of the Covenant by the Government of Argentina. She is represented by counsel.

The background

2.1 The author states that her eldest son, L. M. E., was abducted in Argentina on 10 August 1976 by persons belonging to or associated with the police, security forces or armed forces, apparently on account of his political opinions. Another son, C. E., and her daughter, L. E., were detained on 4 November 1976 in Uruguay and were allegedly seen in November/December 1976 at a detention camp in Argentina known as "The Bank" and at a police station, Brigada Guenes, in Buenos Aires. Their whereabouts have been unknown ever since, in spite of all the steps undertaken by the author to discover what happened to them.

2.2 On 24 December 1986, the Argentine legislature proclaimed Law No. 23,492, the so-called "Finality Act" (Ley de Punto Final), which established a deadline of 60 days for commencing new criminal investigations with regard to the events of the so-called "dirty war" (*guerra sucia*). This deadline expired on 22 February 1987. On 8 June 1987, Law No. 23,521, the Due Obedience Act (Ley de Obediencia Debida) was promulgated, introducing an irrebuttable presumption that members of the security, police and prison services cannot be punished for such crimes if committed in due obedience to orders. The Act further extends protection to senior officers who did not have a decision-making role with regard to the violations. The Argentine Supreme Court has upheld the constitutionality of

this Act.

2.3 On the basis of an application filed on 19 June 1984, the National Commission on the Disappearance of Persons (CONADEP) opened investigation files on the disappearances of L. M. E. (CONADEP file No. 5448), L. E. (No. 5449) and C. E. (No. 5450). The whereabouts of the disappeared persons, however, could not be established.

2.4 Article 6 of the Finality Act specifically provides that "The extinction of penal action pursuant to article 1 does not affect civil proceedings".

2.5 The author has not instituted civil proceedings to obtain compensation.

2.6 Under article 4037 of the Argentinian Civil Code, the statutory time-limit for instituting civil proceedings is two years. This period runs from the date of the alleged violation.

The complaint

3.1 The author claims that the enactment of the Finality Act and the Due Obedience Act constitute violations by Argentina of its obligations under article 2 of the Covenant, in particular "to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant" (art. 2, para. 2), "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy ..." (art. 2, para. 3 (a)) and "to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities ... and to develop the possibilities of judicial remedy" (art. 2, para. 3 (b)).

3.2 The author claims in particular that the disappearance of her children was never fully investigated. She requests that the inquiries be reopened.

The State party's observations

4.1 The State party points out that the disappearances took place in 1976 during the period of military government, 10 years prior to the entry into force of the Covenant and of the Optional Protocol for Argentina.

4.2 With respect to the temporal application of the Covenant and of the Optional Protocol, the State party submits that the general rule for all juridical norms is non-retroactivity. In the specific area of treaty law, a firmly established international practice leads to the same conclusion. Both the Permanent Court of International Justice (Series A/B, No. 4, 24) and the International Court of Justice (*I.C.J. Reports 1952. 40*) have maintained that a treaty has to be considered as having a retroactive effect only when this intention is explicitly stated in the treaty or may be clearly inferred from its provisions. The validity of the principle of non-retroactivity of treaties was enshrined in the 1969 Vienna Convention on the Law of Treaties (which entered into force on 27 January 1980), article 28 of which codifies this rule of customary international law:

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with

respect to that party.

The communication should therefore be declared inadmissible *ratione temporis*.

4.3 As to the inquiries into the disappearance of the author's three children, the State party refers to the CONADEP investigations, which, unfortunately did not yield positive results. In this connection, the State party cites the CONADEP final report, which concerns over 8,900 disappearances.

4.4 The case of the author's children was also submitted to the United Nations Working Group on Enforced or Involuntary Disappearances on 13 August 1980. The State party's investigations in this respect failed to establish the whereabouts of the author's children, or when and where they were deprived of their lives.

4.5 With regard to the possibility of instituting civil proceedings for compensation, the State party points out that although the author could have presented a claim, she did not do so. The delay, under the statutory time-limit, for lodging civil actions for compensation has now elapsed.

Issues and proceedings before the Committee

5.1 Before considering any claims presented 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.

5.2 With regard to the application *ratione temporis* of the International Covenant on Civil and Political Rights and of the Optional Protocol for Argentina, the Committee recalls that both instruments entered into force on 8 November 1986. It observes that the Covenant cannot be applied retroactively and that the Committee is precluded *ratione temporis* from examining alleged violations that occurred prior to the entry into force of the Covenant for the State party concerned.

5.3 It remains for the Committee to determine whether there have been any violations of the Covenant subsequent to its entry into force. The author has invoked article 2 of the Covenant and claimed a violation of the right to a remedy. In this context the Committee recalls its prior jurisprudence that article 2 of the Covenant constitutes a general undertaking by States and cannot be invoked, in isolation, by individuals under the Optional Protocol (*M. G. B. and S. P. v. Trinidad and Tobago*, communication No. 268/1987, para. 6.2, declared inadmissible on 3 November 1989). Bearing in mind that article 2 can only be invoked by individuals in conjunction with other articles of the Covenant, the Committee observes that article 2, paragraph 3 (a), of the Covenant stipulates that each State party undertakes "to ensure that any person whose rights or freedoms *as herein recognized* are violated shall have an effective remedy ..." (emphasis added). Thus, under article 2 the right to a remedy arises only after a violation of a Covenant right has been established. However, the events which could have constituted violations of several articles of the Covenant and in respect of which remedies could have been invoked, occurred prior to the entry into force of the Covenant and of the Optional Protocol for Argentina. Therefore, the matter cannot be considered by the Committee, as this aspect of the communication is inadmissible *ratione temporis*.

5.4 The Committee finds it necessary to remind the State party that it is under an obligation, in respect of violations occurring or continuing after the entry into force of the Covenant, to investigate alleged violations thoroughly and to provide remedies where applicable for victims or their dependants.

5.5 To the extent that the author claims that the enactment of Law No. 23,521 frustrated a right to see certain government officials prosecuted, the Committee refers to its prior jurisprudence that the Covenant does not provide a right for an individual to require that the State party criminally prosecute another person (*H.C. M.A. v. The Netherlands*, communication No. 213/1986, para. 11.6, declared inadmissible on 30 March 1989). Accordingly, this part of the communication is inadmissible *ratione materiae* by virtue of incompatibility with the provisions of the Covenant.

6. The Human Rights Committee therefore decides:

(a) The communication is inadmissible;

(b) This decision shall be communicated to the State party and to the author through her counsel.

APPENDIX

*Individual opinion submitted by Mr. Bertil Wennergren
pursuant to rule 92, paragraph 3 of the Committee's rules of procedure, concerning the Committee's decision
to declare communications No. 275/1988,
S.E. v. Argentina, inadmissible*

I concur with the views expressed in the Committee's decision. However, in my opinion, the arguments in paragraph 5.4 of the decision need to be clarified and expanded. In this paragraph, the Committee reminds the State party that it is under an obligation, in respect of violations occurring or continuing after the entry into force of the Covenant, to investigate alleged violations thoroughly and to provide remedies, where applicable, for victims or their dependants.

According to article 28 of the 1969 Vienna Convention on the Law of Treaties (cited under paragraph 4.2 in the Committee's decision), a treaty's provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of entry into force of the treaty in respect of that party; the Permanent Court of International Justice (PCIJ Series A/B, No. 74 (1938), p. 10-48 - Phosphates in Morocco case) has held, in this context, that both the terms concerning the limitation *ratione temporis* and the underlying intention are clear: this clause was inserted in order to deprive the acceptance of the compulsory jurisdiction of any retroactive effects. In this case, the Court had to decide whether or not issues arose from factors subsequent to the acceptance of its jurisdiction (which the Court refers to as the "crucial date"), firstly because certain acts, which, if considered separately, were in themselves unlawful international acts, were actually accomplished after the "crucial date"; secondly, because these acts, if taken in conjunction with earlier acts to which they were closely linked, constituted as a whole a single, continuing and progressive illegal act which was not fully accomplished until after the "crucial date"; and lastly, because certain acts which were carried out prior to the "crucial date" nevertheless gave rise to a permanent situation which was inconsistent with international law and which existed after the said date. The question of whether a given situation or fact occurs prior to or subsequent to a particular date is, the Court explains, one to be decided in respect of each specific case, just as the question of the situations or facts with regard to which the issues arose must be decided in regard of each specific case. I note that the "crucial date" in this case is 8 November 1986.

The Committee has repeatedly indicated in prior decisions that it "can consider only an alleged violation of human rights occurring on or after (the date of entry into force of the Covenant and the Protocol for the State party) unless it is an alleged violation which, although occurring before that date, continues or has effects which themselves constitute a violation after that date". Disappearance cases that cannot be attributed to natural causes (accidents, voluntary escapes, suicides, etc.) but that give rise to reasonable assumptions and suspicions of illegal acts, such as killing, deprivation of liberty and inhuman treatment, may lead to claims not only under the respective material articles in the Covenant (articles 6, 7, 9 and 10) but in connection therewith also under article 2 of the Covenant, concerning a State party's obligation to adopt such measures as may be necessary to give effect to the rights recognized in the Covenant and to ensure that any person whose rights or freedoms are violated shall have an effective remedy. In an early decision involving a disappearance (30/1978 *Bleier v. Uruguay*) the Committee, after noting that according to unrefuted allegations "Eduardo Bleier's name was on a list of prisoners read out once a

week at an army unit in Montevideo where his family delivered clothing for him and received his dirty clothing until the summer of 1976" (i.e. after the "crucial date"), urged the Uruguayan Government "to take effective steps ... to establish what has happened to Eduardo Bleier since October 1975 (i.e. before the crucial date but with continuation after that date), to bring to justice any person found to be responsible for his death, disappearance or ill-treatment, and to pay compensation to him or his family for any injury which he has suffered". In another case (107/1981 *Quinteros v. Uruguay*), the Committee was of the view that the information before it revealed breaches of articles 7, 9 and 10, paragraph 1 of the Covenant and concluded that the responsibility for the disappearance of Elena Quinteros fell on the authorities of Uruguay and that the State party should take immediate and effective steps (i) to establish what has happened to Elena Quinteros since 28 June 1976, and secure her release, (ii) to bring to justice any persons found to be responsible for her disappearance and ill-treatment, (iii) to pay compensation for the wrongs suffered, and (iv) to ensure that similar violations do not occur in the future. In the latter case, the author of the communication was the mother of the disappeared victim who had alleged that she, too, was a victim of a violation of article 7 (psychological torture because she did not know about the whereabouts of her daughter) and who had given ample description of her sufferings. The Committee expressed its understanding with the anguish and stress caused to the mother both by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. She had the right to know what had happened to her daughter. The Committee therefore found that in these respects she was also a victim of a violation of the Covenant.

I draw the following conclusions. A disappearance *per se* does not raise any issue under the Covenant. For it to do so, a link to some of the material articles of the Covenant is required. And it is solely with such a link that article 2 of the Covenant may become applicable and an issue may arise under that article too. Should it become clear that the cause of the disappearance is attributable to a killing for which the State party must be held responsible, but that the killing took place before the "crucial date", then this killing cannot be deemed to constitute a violation of article 6 of the Covenant, notwithstanding that it was a crime against the right to life under domestic penal law. Consequently, a claim regarding the non-fulfilment of a State party's obligations under article 2 of the Covenant also cannot arise. But, on the other hand, if a killing before the "crucial date" is merely one hypothesis among several others, the case law of the Committee clearly indicates that under article 2 of the Covenant the State party is under a duty to carry out a meaningful investigation. It is only in instances where any act, fact or situation which would constitute a violation of the Covenant could not, under any circumstances, have continued to exist or have occurred subsequent to the "crucial date" that such an obligation does not arise. It should be added that a declaration under domestic civil law in respect of a disappeared person's death does not set aside a State party's obligation under the Covenant. Domestic civil law provisions cannot be given precedence over international legal obligations. Whatever the length and thoroughness deemed necessary for an investigation to satisfy the requirements under the Covenant on a case by case basis, an investigation must, under all circumstances, be conducted fairly, objectively and impartially. Any negligence, suppression of evidence or other irregularity jeopardizing the outcome must be regarded as a violation of the obligations under article 2 of the Covenant, in conjunction with a relevant material article. And once an investigation has been closed due to lack of adequate results, it must be reopened if new and pertinent information comes to light.

Bertil Wennergren

Communication No. 296/1988

Submitted by: J. R. C. (name deleted) on 25 March 1988

Alleged victim: The author

State party: Costa Rica

Declared inadmissible: 30 March 1989 (thirty-fifth session)

Subject matter: Expulsion from Costa Rica of stateless person

Procedural issues: Inadmissibility *ratione materiae*—Non-exhaustion of local remedies—Abuse of the right of submission

Substantive issues: Right to fair trial—Right to "habeas corpus"

Articles of the Covenant: 9 (1) and (4), 14

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

1. The author of the communication (initial letter dated 25 March 1988, and further letter dated 27 December 1988) is J. R. C., of undetermined nationality, at present detained at the Centro de Detenciones de San Sebastián in San José, Costa Rica, awaiting expulsion from that country. He states that, according to his adoptive parents, he was born in Mexico, but that there is no evidence of this fact and that he has no document to establish his identity. He

claims to be a victim of violation of articles 9 and 14 of the International Covenant on Civil and Political Rights by Costa Rica. He is represented by counsel.

2.1 He states that on 4 July 1982 he clandestinely entered Costa Rica from Nicaragua, where he had participated in the Sandinista movement. The Costa Rican immigration police, however, arrested him and a tribunal sentenced him to two years' imprisonment on charges of "ideological falsehood" and use of a false document. In 1985, on completion of his term of imprisonment, he was expelled to Honduras, where police authorities immediately detained him under charges of having participated in a kidnapping said to have occurred in 1981. After escaping from prison in 1987, he re-entered Costa Rica in order to marry a Costa Rican woman by whom he had a son out of wedlock. On 24 November 1987, however, he was again detained by Costa Rican police.

2.2 With regard to the exhaustion of domestic remedies, the author states that on 11 December 1987 he invoked article 48 of the Costa Rican Constitution before the Costa Rican Supreme Court, requesting to be released from detention or, alternatively, to be brought before a judge if there were any charges against him. The Supreme Court, however, denied the author's requests on the grounds that, on 25 November 1987, the Ministry of Immigration had adopted a resolution to deport him as a danger to national security. The author claims that he has exhausted all domestic remedies available.

3. By decision of 8 July 1988, the Working Group of the Human Rights Committee transmitted the communication under rule 91 of the provisional rules of procedure to the State party, requesting information and observations relevant to the question of the admissibility of the communication.

4.1 In its submission under rule 91, dated 31 October 1988, the State party objects to the admissibility of the communication under article 3 of the Optional Protocol by virtue of incompatibility with the provisions of the Covenant and as an abuse of the right of submission and, under article 5, paragraph 2 (b), of the Optional Protocol, because the author has not exhausted all available domestic remedies.

4.2 With regard to the facts, the State party points out that the authors

possesses no documents accrediting him as a citizen of any country, and therefore considers himself to be stateless. There are indications that he may have been born in Mexico, but there is no evidence to confirm this. He took an active part in the revolutionary struggle in Nicaragua, which culminated in the overthrow of the regime by the Sandinistas and the establishment of the Government of the Sandinista National Liberation Front. He was also involved in guerrilla activities, alternately in El Salvador and Honduras, and also in Nicaragua, between 1978 and 1981. He has been linked with the Sandinista National Liberation Front and is known among Central American guerrillas by the alias of "Commander Sarak".

4.3 In July 1982, he entered Costa Rican territory clandestinely and without documents. He never took any steps to obtain migrant status in Costa Rica. However, he did try to obtain papers identifying him as a refugee through the Regional Office of the United Nations High Commissioner for Refugees (UNHCR) in Costa Rica, by using false documents. He was arrested in Costa Rican territory together with other aliens in 1982, in the city of Liberia, armed with an M-23 sub-machine-gun and ammunition, and his papers confiscated, including documents implicating him in a terrorist plan to attack the Guatemalan Embassy at San José, in order to take diplomats hostage and subsequently to demand a cash ransom as well as the release and granting of amnesty to Guatemalan political prisoners and their transfer to Mexico.

4.4 He was tried and sentenced by the Costa Rican court in 1982 on two charges of "ideological falsehood" and one charge of the use of false documents, and sentenced to two years' imprisonment. On completion of his sentence, the Costa Rican authorities ordered his deportation, and this subsequently took place after considerable efforts to find a country that would agree to take him. It was finally possible to deport him to Honduras on 1 October 1985, and he was then banned from entering the national territory.

4.5 Subsequently, although it is not known exactly when, he re-entered Costa Rican territory clandestinely and illegally. He was again arrested by the Costa Rican authorities on 24 November 1987 and immediately, in a decision taken on 25 November 1987, the Directorate-General for Migration and Aliens' Affairs again ordered his deportation, since he was illegally in the country, had previously been deported and had a criminal record that marked him out as a dangerous person and a threat to national security and public order. He was detained until a country could be found that would agree to take him. The State party points out that it has approached the consulates and embassies of numerous friendly countries, thus far without success, and that it is continuing its endeavours to find a receiving country.

5.1 The State party further observes that the author committed the serious offence of unlawful association prejudicial to the public peace. For this offence, the Second Higher Criminal Court, First Section, of San José, in a judgement handed down on 7 December 1982, sentenced him to two years' imprisonment.

5.2 From the above judgement it emerges that the following was proved in the proceedings:

(a) The author received political and military instruction in the Republic of Cuba and, at the time when the offence was committed, was part of a guerrilla commando known as the "Ernesto Che Guevara Commando", in which he was known as "Commander Sarak".

(b) At the time when he was arrested, an M-23 sub-machine-gun was confiscated from him with four magazines and 170 9 mm-calibre projectiles for that weapon, and four triangular black-cloth masks, one of which carried a badge reading "Che Guevara Commando". A number of documents were also confiscated, including one confirming his membership of the guerrilla movement and the draft of a "war report" of the so-called "Che Guevara Commando".

(c) The Commando was proposing to carry out in Costa Rican territory a terrorist operational known as "Death to the Fascist Government of Guatemala". The details of this terrorist attack against the Guatemalan Embassy at San José and its aims are specified in the judgement of the Court.

(d) The author of this communication, the accused in the trial in question, admitted to the courts that he was part of the "Che Guevara" guerrilla commando and gave details of plans which were going to be put into effect in Costa Rica, coinciding with the details of the "war report" confiscated from him when he was arrested. Mr. J. R. C. added that the commando of which he was chief was made up of two other men who were not arrested, and that one of them was also carrying a sub-machine-gun.

(e) Documentary evidence was adduced at the trial proving that the author was in the vanguard of the army of the Sandinista National Liberation Front, as a member of the "Filemón Rivera" and "Facundo Picado" columns.

6.1 With regard to an alleged violation of article 9, paragraph 1, of the Covenant, the State party submits that this provision does not apply to the author because he entered the national territory illegally and is breaking the country's laws (since he was prohibited from entering Costa Rica by a final decision of 1 October 1985 of the Directorate-General for Migration and Aliens' Affairs). The State party further submits that there are other provisions of the Covenant relating to liberty of person and freedom of movement which show that persons who are unlawfully within the territory of a State do not have the right to reside in the country or to move freely within it. These restrictions are set out in article 12, paragraph 1, of the Covenant. Pursuing the analysis of the provisions of article 9, paragraph 1, of the Covenant, the State party argues:

... that the author is not subject to arbitrary detention or imprisonment, since he has been detained under a decision by the competent authority and if he is deprived of his freedom this is because in accordance with the Migrants and Aliens Act and its regulations anyone who has unlawfully entered the country and who is under an order of expulsion shall be kept in detention during the deportation procedure, particularly if allowing him to remain at liberty would endanger national security and public order. The author's background shows him to be a highly dangerous person owing to his past guerrilla and terrorist activities, as well as his criminal record in Costa Rica, where he was sentenced for a number of offences. The security measures adopted by the State in keeping him in detention until he can be deported are therefore fully justified.

The length of the author's detention pending deportation is attributable to the fact that, in spite of concerted efforts by the State party, no other country has hitherto agreed to accept Mr. J. R. C. on its territory.

6.2 With regard to an alleged violation of article 9, paragraph 4, of the Covenant, the State party submits that the evidence presented by the author himself demonstrates that his claim is unfounded, since on 11 December 1987 he applied for *habeas corpus* before the Supreme Court of Justice which, on 5 January 1988, declared the application unfounded, thus confirming the lawfulness of his detention. In its decision, the Court stated that "in the case of aliens unlawfully present in the territory of the Republic, detention constitutes the physical means of ensuring their expulsion, a measure already decreed by the Directorate-General for Migration and Aliens' Affairs".

6.3 With regard to an alleged violation of article 14 of the Covenant, the State party submits that at the time when the author submitted his communication, no criminal charge had been brought against him for his second illegal entry into Costa Rican territory. The State, acting through the Directorate-General for Migration and Aliens' Affairs, merely ordered the deportation of Mr. J. R. C. for entering the country illegally once the Costa Rican authorities had decided to deport the author, and their sole responsibility was to expedite the process, and to find a country which would agree to accept him.

6.4 With regard to the exhaustion of domestic remedies, the State party submits that:

If, on entering the national territory, the author had intended to seek a means of remaining in the country with some kind of status as a migrant, the correct procedure would have been to apply to the courts to invalidate the expulsion order, proving that this decision on the part of the Directorate-General for Migration and Aliens' Affairs was not legally correct. For this purpose the author had normal remedies available, and could have filed an administrative petition in accordance with article 49 of the Political Constitution and article 20 of the Act Regulating Administrative Jurisdiction, No. 3667 of 12 March 1966 .

This was not the procedure chosen by the author... With his communication to the Human Rights Committee, Mr. [R. C.] is endeavouring to cancel his detention, which is a precautionary measure and the consequence and result of the deportation order issued by the competent authorities, instead of endeavouring to have the order reversed by means of the remedies provided by law, which he has not used.

7.1 On 27 December 1988, the author commented on the State party's submission, pointing out that the exhaustion of domestic remedies in his case would be "highly technical, slow and expensive", whereas international human rights law only requires the exhaustion of remedies that are adequate and effective. According to him, the only effective remedy in his case would have been a successful action of *habeas corpus* which the Supreme Court of Costa Rica had denied. The author therefore contends that effective remedies have been exhausted.

7.2 With respect to the State party's argument that the only reason for the author's detention is to assure his deportation, the author complains that such detention has proved disproportionate and indefinite.

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

8.2 Article 5, paragraph 2 (a), of the Optional Protocol precludes the Committee from considering a communication if the same matter is being examined under another procedure of international investigation or settlement. In this connection the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

8.3 Article 5, paragraph 2 (b), of the Optional Protocol precludes the Committee from considering a communication unless domestic remedies have been exhausted. In this connection the Committee notes that the State party has indicated that administrative and judicial remedies are still available to the author that he could still file an administrative petition to invalidate the expulsion order, and, unsuccessful, could apply to the courts for review. The author's belief that these remedies would be highly technical, slow and expensive does not absolve him from the requirement of at least engaging the relevant procedures.

8.4 The Committee has also examined whether the conditions of articles 2 and 3 of the Optional Protocol have been met. With regard to a possible breach of article 9 of the Covenant, the Committee notes that this article prohibits arbitrary arrest and detention. The author was lawfully arrested and detained in connection with his unauthorized entry into Costa Rica. The Committee observes that the author is being detained pending deportation and that the State party is endeavouring to find a host country willing to accept him. In this connection, the Committee notes that the State party has pleaded reasons of national security in connection with the proceedings to deport him. It is not for the Committee to test a sovereign State's evaluation of an alien's security rating. With respect to a possible violation of article 14 of the Covenant, a thorough examination of the communication has not revealed any facts in substantiation of the author's claim to be a victim of a violation of this article.

9. The Human Rights Committee therefore decides:

(a) The communication is inadmissible under articles 2, 3 and 5, paragraph 2 (b), of the Optional Protocol for the reason that the author's claims are either unsubstantiated or incompatible with the provisions of the Covenant, and because domestic remedies have not been exhausted.

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

Communication No. 297/1988

Submitted by: H.A.E.d.J. (name deleted) on 29 March 1988 (represented by counsel)

Alleged victim: the author

State party: The Netherlands

Declared inadmissible: 30 October 1989 (thirty-seventh session)

Subject matter : Alleged discrimination in the allocation of remuneration for performing alternative service to military service as a conscientious objector

Procedural issues: Incompatibility with the provisions of the Covenant—Inadmissibility *ratione materiae*

Substantive issues: Discrimination on the grounds of “other status”; conscientious objection

Articles of the Covenant: 8 (3) (c), 18, 26

1. The author of the communication (initial letter dated 29 March 1989) is H. A. E. d. J., a Dutch citizen born on 10 April 1957, residing in Utrecht, the Netherlands. He claims to be a victim of a violation by the Government of the Netherlands of article 26 of the International Covenant on Civil and Political Rights. He is represented by counsel.

2.1 On 20 August 1984, the author filed an application for a supplementary allowance under the Dutch General Assistance Act of 13 June 1963. At that time, he was performing civilian service as a recognized conscientious objector to military service and received pocket-money and a number of unspecified benefits. This income was allegedly ten percent below the minimum subsistence level applicable nationwide to persons aged 27 who maintain their own household. The executive body established under the General Assistance Act and the appeals board refused to grant the author supplementary benefits under the Act, arguing that the regulations applicable to conscientious objectors provided adequate means of subsistence to individuals in the author's situation.

2.2 In the course of the proceedings, the author challenged the different treatment provided for by Dutch laws and regulations which fix different minimum figures for necessary subsistence costs. Many conscientious objectors are said to live in poor conditions, at about 10% below the minimum subsistence level (in 1984), as formulated in the National Assistance Standardization Act of 3 July 1974. Those conscientious objectors aged 23 and above who, while carrying out their civilian service, seek to maintain their own household, are said to be most seriously affected. Thus, the amount of assistance for an individual aged 23 or over, at the time of the author's request for assistance, was Dutch Guilders 1012.85 per month. The sum the author was entitled to as a conscientious objector was Dutch Guilders 901.76 per month.

2.3 The author submits that he should have received supplementary assistance so as to obtain an income equal to the minimum level referred to in the General Assistance Act, read in conjunction with the National Assistance Standardization Act. With reference to article 26 of the Covenant the author argues that the mere fact that a person performs alternative national service can be no reason for discriminating against him. If the authorities set standard minimum figures, they may not, without well-founded reasons, apply lower minima to certain groups.

3. By its decision of 8 July 1988 the Working Group requested the author, under rule 91 of the rules of procedure, to forward to the Committee a COPY Of the relevant documents and to clarify whether he claimed that persons performing civilian service enjoy less benefits than those performing military service.

4. On 15 September 1988, author's counsel submitted the desired documents, and argued "that a conscientious objector fulfilling alternative military service who is aged 23 or over and maintains an independent household, is discriminated against in comparison to other civilians who maintain an independent household. In this case, there is no issue of discrimination between conscientious objectors on the one hand and conscripts on the other hand. Usually conscripts do not keep an independent household, although under certain circumstances a conscript aged 23 or over might be in the same position as a conscientious objector."

5. By its decision of 10 November 1988, the Working Group transmitted the communication under rule 91 of the rules of procedure to the State party, requesting information and observations relevant to the question of the admissibility of the communication.

6.1 In its submission dated 6 February 1988 the State party notes preliminarily that "the issue of non-discrimination provisions in international law and the Dutch social security system will be discussed in Parliament shortly. In these circumstances, the Government will not address this aspect to the scope of article 26 in the present memorandum, and it reserves the right to turn to this issue, if necessary, in the event that the merits of the complaint in question come under review. In view of the above, there is no impediment to the Dutch Government's responding to the other aspects of the applicant's complaint as it does below with respect to the issue of admissibility."

6.2 The State party further submits that "the legal basis for compulsory military service is provided by article 98 of the Constitution and the National Service Act of 4 February 1922 (published in the Bulletin of Acts, Orders and Decrees, 1922, 24). Military service is compulsory. Article 99 of the Constitution lays down that the conditions subject to which those who have serious conscientious objections may be exempted from military service shall be laid down in the Military Service (Conscientious Objection) Act of 27 September 1962 (Bulletin of Acts, Orders and Decrees 1962, 370). Broadly speaking, the provisions of the Military Service Act are as follows. Any person who has been found fit for military service, and any member of the armed forces, whether or not on active duty may ask the Minister of Defence to recognise his objections as serious conscientious objections. If, after an investigation has been carried out, those objections are recognised, the person concerned is exempted from military service. The

Minister of Social, Affairs and Employment is responsible for finding work conscientious for objectors. Alternative service is performed either with government bodies or with suitable organizations, as designated by the Minister of Social Affairs and Employment, which serve the public interest. Conscientious objectors receive the same pay as conscripts, namely pocket money; certain allowances and fringe benefits are available. As far as possible, the legal position of conscientious objectors is the same as that of conscripts. As regards the possible payment of general assistance, the Government would make the following observations. The General Assistance Act, in conjunction with which the National Assistance Standardisation Decree sets levels of benefits, is based on the premise that assistance will be granted to those who are unable to support themselves. The purpose of this benefit is to cover the costs of subsistence if normal sources of income fail to meet these minimum costs. The General Assistance Act thus provides a safety net

for cases in which all other sources of income have failed. Conscripts and those performing alternative service are deemed to be adequately provided for already, as their position is fully regulated by the National Service Act, the Military Service Act and associated regulations. Under the established case law of the Crown, the statutory arrangements for payments to conscientious objectors are regarded as adequate and they do not require benefit payments. The Royal Decree of 21 January 1988 which was submitted by the applicant is entirely in accordance with this case law. In reply to the Committee's question, it may be observed that neither the General Assistance Act nor the National Standardisation Decree was applicable to the applicant when he was performing his alternative service as a conscientious objector."

6.3 With regard to the Committee's prior jurisprudence, the State party refers to its decisions on admissibility of 5 November 1987 (Communication No. 45/1987, *R.T.Z. v. the Netherlands*) and 24 March 1988 (Communication No. 6711987, *H.J.G. v. the Netherlands*) and argues that the applicant's case should likewise be ruled inadmissible.. "The applications in question related to conscripts. In paragraph 3.2 of the decisions cited, the Committee observed that the Covenant does not preclude the institution of compulsory military service by State parties, even though this means that some rights of individuals may be restricted during military service, within the exigences of such service." The State party also takes the view that the institution of a compulsory alternative service for conscientious objectors is equally endorsed by the Covenant and refers to article 8, paragraph 3 c (ii).

6.4 It is submitted that in cases where conscientious objections have been recognised, alternative service functions as a substitute for military service. "It appears from the applicant's communication that he considers that, as a conscientious objector, he has suffered discrimination in comparison with members of the public. The Government, in this phase of the procedure, will not deal with the factual question whether the non-applicability of the General Assistance Act does result in differences of income as claimed by the applicant. However, referring to the two above-mentioned decisions of the Committee it can be contended that in the Present case a comparison of the position of the author with the position of members of the public vis-à-vis the General Assistance Act is not called for. Furthermore the applicant has not claimed that the rules applicable to him Were applied to him differently than to other conscientious objectors. The Government concludes that the author has no claim under article 2 of the Optional Protocol."

7. In letter dated 29 June 1989, counsel comments on the State party's submission under rule 91,

underlining that the decisive question is whether the difference of treatment between a recognized conscientious objector, above 23 years of age, fulfilling alternative military service and a civilian of the same age constitutes discrimination within the meaning of article 26 of the International Covenant on Civil and Political Rights. Counsel asserts that B difference of treatment can only be justified insofar as the exclusion of his client's eligibility for a supplementary payment under the General Assistance Act is necessary in order to maintain the character of the alternative military service. The author contests, however, that such a necessity has been proven by the State party and, furthermore, he states that there is no provision under Dutch law to support the discrimination against his client.

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

8.2 The Committee notes that the author claims that he is a victim of discrimination on the ground of "other status" (article 26 of the Covenant *in fine*), because, as a conscientious objector to military service and during the period that he performed alternative service, he was not treated as a civilian but rather as a conscript and was thus ineligible for supplementary allowances under the General Assistance Act. The Committee observes, as it did with respect to communications Nos. 245/1987 (*R.T.Z. v. the Netherlands*) and 267/1987 (*H.J.G. v. the Netherlands*), that the Covenant does not preclude the institution by States parties of compulsory national service, which entails certain modest pecuniary payments. But whether that compulsory national service is performed by way of military service or by permitter alternative service, there is no entitlement to be paid as if one were still in private civilian life. The Committee observes in this connection, as it did with respect to communication No. 218/1986 (*Vos v. the Netherlands*) that the scope of article 26 does not extend to differences in result of the uniform application of laws in the allocation of social security benefits. In the present case, there is no indication that the General Assistance Act is not applied equally to all citizens performing alternative service. Thus the Committee concludes that the communication is incompatible with the provision of the Covenant and inadmissible 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 State party and to the author.

Communication No. 300/1988

Submitted by: J. H. (name deleted) on 31 May 1988

Alleged victim: The authors

State party: Finland

Declared inadmissible: 23 March 1989 (thirty-fifth session)*

Subject matter: Conviction of author for drug-related offence—Allegation of testimony under duress

Procedural issues: Requirement to substantiate allegations—Inadmissibility ratione materiae

Substantive issues: Effective remedy—Equality before the court

Articles of the Covenant: 7, 14 (1) and 3 (g)

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

1. The author of the communication (letter dated 3 May 1980; subsequent submission dated 13 December 1988) is J. H., a Finnish citizen born in 1954, currently serving a prison sentence in Finland. The author claims to be the victim of a violation by the Government of Finland of articles 7 and 14, paragraphs 1 and 3 (g), of the International Covenant on Civil and Political Rights.

2.1 The author states that on 5 May 1986 the Municipal Court of Helsinki found him guilty of having smuggled and sold in Finland 15 kilos of drugs (hashish) and sentenced him to seven years' imprisonment and to pay a fine of 399,000 Finnish marks. On 17 September 1987, the Court of Appeal modified the sentence to six and a half years and reduced the fine to 378,000 Finnish marks. On 21 January 1988, the Supreme Court refused the author's application for leave to appeal. The author thus claims to have exhausted domestic remedies available to him.

2.2 The author also claims that he did not smuggle any drugs and that he merely sold 4.6 kilos of hashish. He further alleges that the Municipal Court admitted into evidence against him the testimony of a mentally disturbed co-defendant who, during the trial, had retracted his testimony. This person's testimony was allegedly obtained under duress, in the course of an interrogation said to have lasted from 3 p. m. until midnight. Moreover, he contends that the court based its judgement on the hearsay evidence produced by some of the co-defendants in the case. Lastly, he claims that the court used his earlier confession against him, so as to be able to convict him on additional charges.

3. By its decision of 8 July 1988, the Working Group of the Human Rights Committee transmitted the communication to the State party, requesting it, under

* The Committee has dealt with a similar communication involving the same State party: communication No. 301/1988.

rule 91 of the rules of procedure, to provide information and observations relevant to the question of the admissibility of the communication. It further requested the State party to provide the Committee with the English translations of the judgements of the Municipal Court of Helsinki and of the Court of Appeal.

4.1 In its submission under rule 91 dated 8 November 1988, the State party confirms that the author has

exhausted all the domestic remedies available to him. It does, however, contest the admissibility of the communication on the ground that the facts of the case do not reveal any breach of the author's rights. The State party submits that the author's allegation that article 7 has been violated is completely unfounded, since his submission contains no evidence to support his claim. Nor has he adduced any facts which could substantiate a violation of article 14, paragraph 3 (g), of the Covenant.

4.2 With regard to the alleged violation of article 14, the State party observes that the Human Rights Committee is not a further instance of appeal and, therefore, is not competent to pronounce on the proper weighing of evidence or the measurement of sentences. In this connection, the State party objects that the author is submitting his communication to the Committee as an appeal to a fourth instance for a further review of his case.

5. Commenting on the State party's submission, the author, in a letter dated 13 December 1988, reiterates his initial allegations with respect to the lack of incriminating evidence against him. He further argues that, although the Human Rights Committee is not a further instance of appeal with respect to the measurement of sentences, nevertheless it should be deemed competent to pronounce on the proper weighing of the evidentiary material by domestic courts.

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

6.2 The author of the communication claims that there have been breaches of articles 7 and 14, paragraphs 1 and 3 (g), of the Covenant.

6.3 A thorough examination by the Committee of all the material submitted by the author has not revealed any facts in substantiation of the claim that he is a victim of a violation by the State party of his rights as set forth in article 7.

6.4 The Committee observes that the assessment of evidentiary material is essentially a matter for the courts and authorities of the State party concerned. The Committee further notes that it is not an appellate court and that allegations that a domestic court has committed errors of fact or law do not in themselves raise questions under the Covenant unless it also appears that some of the requirements of article 14 may not have been complied with. J. H.'s complaints relating to the alleged violations of article 14 do not appear to raise such issues.

6.5 The Human Rights Committee considers that the author has failed to provide evidence to substantiate his claims.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible;

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

Communication No. 306/1988

Submitted by: J. G., represented by counsel. June 1988

Alleged victim: The author

State party: The Netherlands

Declared inadmissible: 25 July 1990 (thirty-ninth session)

Subject matter: Alleged discriminatory allocation of special financial assistance to handicapped persons

Procedural issues: Non-exhaustion of local remedies

Substantive issues: Equality before the law

Article of the Covenant: 26

Article of the Optional Protocol: 5 (2) (b)

1. The author of the communication is J. G., a Dutch citizen residing in Rotterdam, the Netherlands. He claims to be a victim of a violation by the Government of the Netherlands of article 26 of the International Covenant on Civil and Political Rights. He is represented by counsel.

The background

2.1 The author, who was born on 1 January 1918, suffers from a physical handicap. On 6 January 1983, following his 65th birthday, he requested admission into subsidized, purpose-built housing, referred to as "Fokushouses" (cluster dwellings), which are designed to enable their occupants to live, to the extent possible, as non-handicapped persons. The Financial Aid Scheme for the Accommodation of the Disabled lays down the specifications for State-subsidized dwellings. Eligibility for admission into such housing is governed by Section 57 of the General Disablement Benefits Act (AAW) of 11 December 1975, which provides that applicants must be

handicapped persons between the ages of 18 and 65. Dwellers of "Fokushouses" receive special assistance called ADL (activities of daily life), intended to contribute to the maintenance, recovery or promotion of the beneficiary's fitness for work, to provide for medical or surgical facilities as well as other measures destined to improve the beneficiary's living conditions.

2.2 By letter of 7 February 1983, the Joint Medical Service (Gemeenschappelijke Medische Diensten, GMD) informed the Ministry of Housing that it would render a negative advice on ADL assistance with respect to a number of persons including the author, who had just become 65 years of age. This position was confirmed by letter dated 24 February 1983 from the Ministry of Welfare and Health to the GMD. Thus, although he was permitted to move into a "Fokushouse", he was denied the ADL assistance granted to other persons who moved into the Fokushouse prior to their 65th birthday.

2.3 As to the requirement of exhaustion of domestic remedies, the author affirms that available means of redress have either been or would be ineffective. He acknowledges that since ADL assistance is provided pursuant to Section 57 of the AAW, remedies must in principle be pursued in compliance with the regulations of the AAW, that is by appeal to the Board of Appeal (Raad van Beroep) and the Central Board of Appeals (Centrale Raad van Beroep). He adds, however, that this procedure was not followed in his case because the GMD had informed the Ministry of Housing that it would render a negative advice on ADL. This position was confirmed by letter from the Ministry of Welfare and Health to the GMD, reaffirming that persons aged 65 and above cannot be granted ADL assistance if they move into purpose-built housing. This means, the author contends, that because the regulations under the AAW provide for an age limit of 65 years, persons aged 65 and above who request assistance pursuant to the AAW would be faced with a negative decision. The State party's practice on eligibility for accommodation in purpose-built housing has not changed since the amendments to the Financial Aid Scheme for the Accommodation of the Disabled, according to the author, as shown, by a letter dated 19 February 1990 from the Secretary of State for Social Affairs to the municipality of Veendam, reaffirming the position that individuals older than 65 were not eligible for ADL assistance. Moreover, during parliamentary debates in the Second Chamber of the Dutch Parliament towards the end of 1989, the Secretary of State is said to have promised that a decision on whether ADL assistance could be made available for handicapped persons older than 65 years would be made before 1 January 1992. Thus, at present this possibility does not exist.

2.4 On the basis of these considerations, the author also applied for assistance pursuant to another scheme, the General Assistance Act (ABW), because the ABW does not stipulate an age limit for applicants and because the procedure under the ABW operates as a form of "last resort" wherever other regulations do not provide for assistance. When the municipality of Rotterdam, on 15 February 1983, rejected his ABW application, the author, on 22 February 1983, requested the local (city) government to intercede with the municipal authorities. His request was rejected on 13 September 1983. On 11 October 1983, he filed an appeal with the Executive Council of the Province of South-Holland (College van Gedeputeerde Staten van de Provincie Zuid-Holland), which was dismissed on 20 March 1985. His subsequent appeal to the Council of State (Raad van State), filed on 12 April 1985, was dismissed on 28 April 1985.

The complaint

3. The author claims that the refusal to grant him ADL assistance constitutes discrimination on account of his age. He points out that for those individuals who move into "cluster dwellings" before they have reached the age of 65 and whose expenses are reimbursed on the basis of the AAW, ADL assistance continues after the age of 65. If an individual moves into purpose-built housing after the age of 65, as he did, or if he reaches the top of the waiting list after the age of 65, that person is excluded, because of his age, from reimbursement on the basis of the AAW. The author is of the opinion that this differentiation between handicapped persons because of their age is unreasonable and not based on objective criteria and thus constitutes discrimination, prohibited under article 26 of the Covenant.

The State party's observations

4.1 The State party contends that the communication should be declared inadmissible because the author failed to bring his case before any court competent to hear complaints concerning the application of the AAW. It reiterates that any person who considers to have been unjustly denied assistance under the AAW may request a ruling by the competent industrial insurance board. From there, appeals to the courts competent in social security matters would be possible and, in the proceedings before these courts, applicants could directly invoke article 26 of the Covenant. The Court of First Instance would be the Board of Appeal, with the possibility of an appeal to the Central Board of Appeal. The fact that the author did appeal under the terms of the ABW to the municipal authorities and the Council of State does not, in the State party's opinion, change the situation, as his complaint to the Committee does not relate to the ABW.

4.2 The State party further explains the procedure which would have to be followed by the competent organs under the AAW and contends that these would indeed constitute effective remedies within the meaning of the Optional Protocol. Thus, the Board of Appeal would not be bound by the negative advice from the Ministry of Welfare, Health and Cultural Affairs (as set out in the letter of 24 February 1983) or from the GMD (as set out in the letter of 7 February 1983). Any judgement of the Board of Appeal would be determined by the relevant statutory provisions and the relevant provisions of public international law; it would not be required to take into account any recommendation which it considered to be incompatible with these provisions. In this context, the State party recalls that the letter of 24 February 1983 is devoid of legal significance, as it does not emanate from a body with any competence to act in the framework of the AAW or the Financial Aid Scheme for the Accommodation of the Disabled.

Issues and proceedings before the Committee

5.1 Before considering any claims presented 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.

5.2 The Committee has ascertained, as it is required to do 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.

5.3 Article 5, paragraph 2 (b) of the Optional Protocol precludes the Committee from considering any communication from an individual who has failed to exhaust all available domestic remedies. This is a general rule which applies unless the remedies are unreasonably prolonged, or the author of a communication has convincingly demonstrated that domestic remedies are not effective, i.e. do not have any prospect of success.

5.4 On the basis of the information before the Committee, there are no circumstances which would absolve the author from attempting to pursue all domestic remedies, including those available pursuant to the AAW, namely an appeal to the competent authorities and courts. While the applicable rules and regulations resort to objective criteria in the determination of the beneficiaries of ADL assistance, the State party has shown that the competent courts would not only *not* be bound by negative recommendations from the administrative authorities in respect of ADL assistance to the author, but that they could set aside the terms of the applicable regulations if they considered them to be in conflict with relevant provisions of international law. The purpose of article 5, paragraph 2 (b) is, *inter alia*, to direct possible victims of violations of the provisions of the Covenant to seek, in the first place, satisfaction from the competent State party authorities and, at the same time, to enable States parties to examine, on the basis of individual complaints, the implementation, within their territory and by their organs, of the provisions of the Covenant and, if necessary, remedy the violations occurring, before the Committee is seized of the matter. In the light of the above considerations, and having regard to article 5, paragraph 2 (b) of the Optional Protocol, the

Committee considers that the author has not exhausted available domestic remedies.

6. The Human Rights Committee therefore decides:

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

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

Communication No. 318/1988

Submitted by: E. P. *et. al.*, June 1988

Alleged victim: The authors

State party: Colombia

Declared inadmissible: 25 July 1990 (thirty-ninth session)

Subject matter: Alleged denial of self-determination of the residents of archipelago under Colombian sovereignty

Procedural issues: Non-exhaustion of local remedies

Substantive issues: "Effective remedy"—Equality before the law—Right of self-determination

Articles of the Covenant: 1, 2, 25, 26 and 27

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

1. The authors of the communication (initial submission dated 10 June 1988 and subsequent correspondence) are E. P., F. W., D. B., L.G., O. B. and A. H., all citizens of Colombia, residing in the islands of San Andrés, Providence and Catalina, which form an archipelago 300 miles north of mainland Colombia. They invoke articles 1, 2, 25, 26 and 27 of the International Covenant on Civil and Political Rights and claim that, as members of an overwhelmingly English-speaking Protestant population, they are subjected to violations of their rights by Colombia, which has sovereignty over the islands.

2.1 The authors state that, in 1819, Colombia asserted sovereignty over the archipelago under the doctrine of *uti possidetis* and consolidated its administration by military force against the will of the islanders. The authors claim that Colombia has been violating their rights ever since.

2.2 According to the authors, recent Colombian legislation has led to the dispossession of many islanders of their land. As part of a project to "Colombianize" the islands, the Government provides subsidies and incentives to mainland Colombians, particularly to families of four or more, to settle in the archipelago. The process of registering land ownership (*Juicio de pertenencia*) favors mainlanders by permitting them to post their claims in Spanish at the court house or even in Spanish language newspapers in far-away towns, such as Bogotá or Barranquilla. Indigenous landowners who cannot afford a lawyer, or cannot understand Spanish, or are simply unaware of claims against their land, are in effect victims of expropriation by mainland Colombians. Already 40,000 mainland Colombians and other foreigners have settled on the 44 square kilometre island of San Andrés.

2.3 The authors assert that the overpopulation resulting from the Government's policies has caused severe environmental damage. New developments, including more than 30 hotels, 10 banks and 700 imported-goods stores, have put such demands on the water table that an artificial drought has been created, making farming impossible, thus destroying one of the islanders' traditional livelihoods. The Government has permitted the destruction of the mangrove swamps, formerly rich sources of lobster, fish, crabs and crayfish, by allowing electric power plants unlimited access for dumping hot, polluted water there. Environmental protection laws are allegedly selectively applied to islanders.

2.4 The authors assert that the Government has granted fishing rights and other concessions to Honduras and other countries without regard to native interests. This has deprived the islanders of another traditional means of survival.

2.5 Spanish has been made the official language. Education is provided only in Spanish and native children are rejected by the schools if they fail to learn Spanish. Public libraries offer books only in Spanish. Natives are presumed to know Spanish in Court. Islanders allegedly are often harassed or even arrested by the police for speaking English in public. Disciplinary actions for these abuses are rare and never result in more than the transfer of the responsible officers; the abuses continue with their replacements. All the mass media are in Spanish. These facts are alleged to constitute violations of article 27 of the Covenant.

2.6 The authors claim that native islanders suffer pervasive employment discrimination. Only 15% of the workers in the private sector are indigenous. Most businesses, and at least one Government agency, La Registraduría de Instrumentos Públicos, hire no natives at all. Natives earn less than 5% of the islands' total income. Natives are also denied equal access to public utilities such as water, electricity and telecommunications. The foregoing, in the authors' opinion, constitutes violations of article 26 of the Covenant.

2.7 With regard to article 25 of the Covenant, the authors note that the archipelago's Governor is not elected by the islanders but is appointed in Bogotá by the President of Colombia. Only 11 of the 90 Governors appointed by the central government have been islanders. Elections to the local council are not by secret ballot. This has led to rampant favoritism and alleged blackmail with regard to jobs, housing, scholarships and other government benefits. In any event, by virtue of law One of 1972, the local council was stripped of much of its power, which was transferred to the Governor. This law also stripped San Andrés of its status of a municipality.

2.8 The authors object to the increasing militarization of their islands, more particularly, to the expansion of the Cove-Seaside naval base and other recent land acquisitions by the Colombian Armed Forces. They fear that this may involve them militarily in Central American conflicts of which they wish no part.

2.9 The authors claim to have exhausted domestic remedies, to the extent that they can be deemed available and effective for purposes of article 5, paragraph 2 (b), of the Optional Protocol. A series of letters, telegrams and petitions sent in 1985-1987 to former President Betancur, the Governor and other ministers, went unanswered. President Virgilio Barco sent a telegram in reply to one of their letters but nothing that was promised was accomplished. On 4 January 1987, they unsuccessfully submitted a Proyecto de Acuerdo to the Governor seeking restraints on the alienation of land. Several meetings with the Governor produced verbal promises that were not fulfilled. Moreover, the Constitution and the National Bill of Laws of Colombia contain no provisions for the protection or recognition of minorities or their rights, in violation of article 2 of the Covenant.

3. By decision of 21 October 1988, the Working Group of the Human Rights Committee requested the authors to clarify whether they had been individually affected by the alleged activities of the Colombian authorities and to elaborate on their claim that they had complied with the requirements of article 5, paragraph 2 (b), of the Optional Protocol concerning exhaustion of domestic remedies.

4. In their reply, dated 21 December 1988, to the Working Group's request for clarification and elaboration, the authors itemize the effects that the Government's policies are said to have had on them personally:

– O. B. allegedly was denied a teaching position for which she was otherwise qualified because she did not speak Spanish. F. W., D. B., E. P. and L. G., were allegedly unable to qualify for teaching positions in English.

– Three of the authors have children who are allegedly unable to receive education in their native language.

– E. P. was allegedly denied the possibility of applying for a scholarship because he is not Catholic.

– None of the authors claims to have felt able to vote freely because the ballots are not secret.

– All of the authors allege that they are required to speak Spanish in court, before the police and before other officials.

5. By decision of 4 April 1989, the Working Group of the Human Rights Committee transmitted the communication to the State party and requested it, under rule 91 of the rules of procedure, to provide information and observations relevant to the question of the admissibility of the communication.

6.1 In its submission under rule 91, dated 9 August 1989, the State party contends that the authors failed to exhaust domestic remedies, as required by article 5, paragraph 2 (b), of the Optional Protocol.

6.2 The State party outlines in general terms the jurisdiction of the Colombian Supreme Court over constitutional claims emanating from individuals or groups of individuals, and the jurisdiction of the Administrative Courts over collective claims. The State party further notes that administrative remedies are available through the Consejo de Estado (Council of State) or Administrative Tribunals with full jurisdiction and authority to nullify administrative acts deemed to be arbitrary, illegal or an abuse of power. It is only in instances where these remedies have been exhausted that leave to appeal to the Supreme Court may be considered and granted.

6.3 The State party finally claims that the authors have failed to identify clearly in their complaint the alleged victims, the rights considered to have been violated or the administrative agents responsible for their situation.

7.1 In their comments, dated 30 August and 2 September 1989 and 17 April 1990, the authors indicate that the domestic remedies suggested by the State party are ineffective. They cite in their support the 1968 decision of the Consejo de Estado, which struck down resolution 206 of INCORA providing land for settlers. Ostensibly a legal victory, the ruling was allegedly circumvented by the State party through other procedural means, and the dispossession of the natives has continued unabated. Legislation that would have restored San Andrés' status as a municipality was vetoed by President Barco on 30 January 1990 for reasons of "national security and sovereignty".

7.2 Furthermore, the authors contend that resort to domestic judicial remedies would be too prolonged and prohibitively expensive due to the large number of acts and legislation to be contested. They cite the example of a petition to the Attorney-General in 1987 in which they asked for collective action on many of their grievances. There was no reply for over two years, and then the authors were merely requested to report in person for confirmation. Meanwhile, the settlement of more Colombians on the islands proceeds at a rate of some 8,000 individuals per year. In view of the urgency of the situation, therefore, the pursuit of protracted domestic remedies is considered ineffective, with no prospect of adequate redress.

7.3 Finally, the authors state that many of the laws and actions in question are constitutional. There is no right of self-determination in the Constitution and article 27 thereof actually guarantees the "free alienation" of land, one of the authors' principal complaints. Contrary to the Government's assertion, the International Covenant on Civil and Political Rights is not incorporated into Colombian law.

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

8.2 With regard to the issue of the authors' standing, the Committee reaffirms that the Covenant recognizes and protects in most resolute terms a people's right to

self-determination as an essential condition for the effective guarantee of observance of individual human rights and for the promotion and strengthening of those rights. However, the Committee reiterates that the authors cannot claim under the Optional Protocol to be victims of a violation of the right of self-determination enshrined in article 1 of the Covenant.¹ 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. The Committee further notes that no individual, or group of individuals, can in the abstract, by way of *actio popularis*, challenge a law or practice deemed to be contrary to the Covenant. An individual, or a group of individuals, can only claim to be a victim in the sense of article 1 of the Optional Protocol if he or she, or they, are actually affected.

8.3 With regard to the requirement of exhaustion of domestic remedies, the Committee reiterates that pursuit of such remedies can only be required to the extent that they are both available and effective. It notes that the authors have not pursued the remedies which the State party has submitted were available to them, for the reason that they consider them ineffective and their pursuit would be "too prolonged and prohibitively expensive". The Committee further observes that the authors did not comply with the Working Group's request for clarifications about the steps they had taken to pursue remedies available to them in respect of their individual grievances (see paragraph 4 above). The Committee concludes that the authors have not shown the existence of circumstances which would have absolved them from exhausting the remedies which the State party indicates are available to them; it reaffirms² that mere doubts about the effectiveness of remedies, as well as the prospect of protracted and costly legal proceedings, did not absolve the authors from exhausting them. Accordingly, the requirements of article 5, paragraph 2 (b), have not been met.

9. The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible under article 5, paragraph 2 (b), the Optional Protocol;
- (b) That this decision be transmitted to the State party and the authors.

¹ See Committee's views in communication No. 167/1984 (*B. Ominayak and the Lubicon Lake Band v. Canada*), decision of 26 March 1990, paragraph 32.1.

² See Communication No. 224/1987 (*A. and S.N. v. Borway*), inadmissibility decision of 11 July 1988, paragraph 6.2.

Submitted by: D. E. (name deleted) on 6 May 1988

Alleged victim: The author

State party: Jamaica

Declared inadmissible: 26 March 1990 (thirty-eighth session)

Subject matter: Claim of unfair trial by individual sentenced to hard labour

Procedural issues: Inadmissibility *ratione materiae*

Substantive issues: Right to a fair trial

Article of the Covenant: 14 (2)

Article of the Optional Protocol: 2

1. The author of the communication (initial letter dated 6 May 1988 and subsequent correspondence) is D. F., a Jamaican citizen born in 1954, currently serving a 12-year prison term at St. Catherine District Prison, Jamaica. He claims to be the victim of a violation of his human rights by Jamaica.

2.1 The author indicates that he was convicted of felonious wounding by the Circuit Court in Spanish Town on 24 January 1986 and sentenced to 12 years of hard labour. He claims to be innocent of the crime.

2.2 The author, a shopkeeper, states that on 10 March 1985 he was involved in a fight with a younger brother of the victim, E. S., who had allegedly insulted him and tried to steal several bottles of liquor from his shop. On 19 March 1985, stones and a bottle were thrown at his shop, destroying several windows. The author claims that at the time of the crime he was at his shop repairing the damage perpetrated earlier that day, and that he was not the person who, in a fight, had cut four fingers off the victim's hand.

2.3 The author alleges that the testimony of the prosecution's main witness, one R. B., an acquaintance of the victim and of the author, was entirely fabricated. He further claims that the judge misdirected the jury, both about the evaluation of Mrs. B.'s testimony, by stating that she was testifying on his behalf, and about the conflicting evidence presented by the public prosecutor and by the author.

2.4 On 16 December 1986, the author's appeal was dismissed by the Court of Appeal of Jamaica. The author states that he cannot afford to file a petition for special leave to appeal to the Judicial Committee of the Privy Council because he lacks the financial means to do so. A request for legal aid to the Jamaica Council for Human Rights apparently remains unanswered. It appears, however, that the author has not formally applied for legal aid under section 3, paragraph 1, of the Poor Prisoners' Defence Act.

3. By decision of 24 October 1988, the Working Group of the Human Rights Committee transmitted the communication to the State party and requested it, under rule 91 of the rules of procedure, to provide information and observations relevant to the question of the admissibility of the communication. It further requested the author to provide several clarifications about his efforts to apply for special leave to appeal to the Judicial Committee of the Privy Council. In several subsequent submissions the author claims, in essence, that the judge misdirected the jury, in the light of the contradictory evidence that was put before the jury and which it was for the jury to accept or reject.

4. In its submission under rule 91, dated 20 January 1989, the State party argues that the communication is inadmissible under article 5, paragraph 2, of the Optional Protocol, on the ground of non-exhaustion of domestic remedies, for the reason that the author did not apply, pursuant to section 110 of the Jamaican Constitution, for special leave to appeal to the Judicial Committee of the Privy Council.

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

5.2 The Committee has considered the material submitted by the author. From this information it appears that the author claims that the judge misdirected the jury, in the light of the contradictory evidence that was put before the jury and which it was for the jury to accept or reject. While article 14 of the Covenant guarantees the right to a fair trial, it is for the appellate courts of States parties to the Covenant to evaluate facts and evidence in a particular case.¹ It is not in principle for the Committee to review specific instructions to the jury by the judge in a trial by jury, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice. The Committee has no evidence that the trial judge's instructions suffered from such defects. Accordingly, the author has no claim under article 2 of the Optional Protocol.

6. The Human Rights Committee therefore decides:

(a) The communication is inadmissible;

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

¹ See communication No. 369/1989 (*G.S. v. Jamaica*), inadmissibility decision adopted on 8 November 1989, para. 3.2.

Communication No. 342/1988

Submitted by: R. L. (name deleted) on 1 June 1998

Alleged victim: The author

State party: Canada

Declared inadmissible: 7 April 1989 (thirty-fifth session)

Subject matter: Alleged favouritism of defendant civil party in bankruptcy proceedings before the Canadian court

Procedural issues: Standing of author– Non-exhaustion of domestic remedies

Substantive issues: Equality before the law–Right to a fair trial

Articles of the Covenant: 14 (1)

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

1. The author of the communication, dated 1 June 1988, is, R. L., a Canadian citizen currently residing in the province of Quebec. He claims to be a victim of violations of his human rights by the Canadian courts, alleging that during bankruptcy proceedings his rights to equality before the law and to a fair trial were denied. In particular, he alleges that the judges in both the trial and the appellate courts relied on false evidence and clearly favoured the other party, a lawyer of a prestigious law firm, in both procedure and substance. He further claims that all decisions rendered were the product of bad faith and bias on the part of the judges.

2. With regard to the issue of exhaustion of domestic remedies; the author claims that it would be futile to file further appeals on the ground of the unfair attitude allegedly exhibited by the judges. He encloses, however, a copy of a petition for a declaratory judgement, dated 31 May 1988, in which he asks the Superior Court of the District of Montreal to declare that the rights to equality before the law and to a fair trial, as enshrined in the Canadian and Quebec Charters of Rights and Liberties, apply to him.

3. Before considering any claims contained in a communication, the Committee must ascertain whether it fulfils the basic conditions of admissibility under the Optional Protocol.

4. A thorough examination of the material submitted by the author does not reveal any substantiation of the claim, for purposes of admissibility, that he is a victim of violations by the State party of any of the rights set forth in the International Covenant on Civil and Political Rights. Furthermore, the author has acknowledged that he has not exhausted all domestic remedies, which he is required to do under article 5, paragraph 2 (b), of the Optional Protocol. The communication does not disclose the existence of any special circumstances which might have absolved the author from exhausting the domestic remedies at his disposal. The Committee concludes that the requirements for declaring the communication admissible under the Optional Protocol have not been met.

5. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible;

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

Communication No. 360/1989

Submitted by: A newspaper publishing company, on 2 March 1989 (represented by counsel)

Alleged victim: The company

State party: Trinidad and Tobago

Declared inadmissible: 14 July 1989 (thirty-sixth session)*

Subject matter: Discrimination in allocation of foreign currency resources based on political opinions expressed in newspapers published by a publishing company

Procedural issues: Lack of locus standi under the Optional Protocol

* The Committee has dealt with a similar communication (361/1989) involving the same State party.

Substantive issues: Freedom of expression

Articles of the Covenant: 2 (1), 14 (1) and 19 (2)

Articles of the Optional Protocol: 1 and 2

1. The communication, dated 2 March 1989, is submitted by a newspaper company registered in Trinidad. The company claims to be the victim of a violation by the Government of Trinidad and Tobago of articles 2, 14 and 19 of

the International Covenant on Civil and Political Rights. It is represented by counsel.

2.1 The managing director of the company, Mr. D. C., states that the company publishes a biweekly and a weekly newspaper, with wide circulation in Trinidad and throughout the Caribbean. As the material necessary for the publication of the paper has to be imported, the company requires the permission of the Central Bank of Trinidad and Tobago to purchase the foreign currency needed for payment. Every year the Central Bank determines the allocation of foreign exchange for newspapers published in the country, usually at a level which would allow the companies to purchase sufficient raw material for publication purposes. It is stated that, in 1988, the Central Bank allocated to the company an amount of foreign exchange wholly insufficient for the purpose of maintaining its annual production and guaranteeing the publication of the newspapers; allocations for other publishers are said to have been sufficient. The company unsuccessfully sought approval of the same amount of foreign exchange allocated to other publishers.

2.2 On 27 April 1988, the company requested the grant of a supplementary allocation from the Central Bank, which was refused. On 13 July 1988, it commenced a Constitutional Motion in the High Court of Trinidad and Tobago under section 14 of the Constitution, alleging that "the Central Bank acted as arm of the State and directly affected the supply of newsprint and accessories of the company, thus violating an integral part of the freedom of the press, freedom of expression and the right to express political views". It is submitted that the newspapers published by the company have been critical of the policies pursued by the present Government of Trinidad, which has been in power since December 1986 and that, as a consequence, the company has been discriminated against. While the High Court deemed the case to be urgent, it heard it on several separate days during the period from September to December 1988, when it reserved its judgement. Since that day, the High Court has failed to produce a judgement. On December 1988, the company reiterated its request to the Central Bank for a supplementary allocation of foreign exchange. This was again denied. According to the company's director, the allocation obtained only enables the company to sustain the production and the publication of its newspapers through the first quarter of 1989.

2.3 With respect to the requirement of exhaustion of domestic remedies, it is submitted that there are no effective remedies within the meaning of article 2 of the Covenant, since the High Court has failed to act expeditiously. It is stated that the matter has not been submitted for examination under another procedure of international investigation or settlement.¹

3.1 Before considering any claims presented in a communication, the Human Rights Committee must, pursuant to rule 87 of its provisional rules of procedure, ascertain whether or not it is admissible under the Optional Protocol to the Covenant.

3.2 The present communication is submitted on behalf of a company incorporated under the laws of Trinidad and Tobago. While counsel has indicated that Mr. D. C., the company's managing director, has been duly "authorized to make the complaint on behalf of the company", it is not indicated whether, and to what extent, his individual rights under the Covenant have been violated by the events referred to in the communication. Under article 1 of the Optional Protocol, only individuals may submit a communication to the Human Rights Committee. A company incorporated under the laws of a State party to the Optional Protocol, as such, has no standing under article 1, regardless of whether its allegations appear to raise issues under the Covenant.

4. The Human Rights Committee therefore decides:

(a) The communication is inadmissible;

(b) This decision shall be communicated to the representative of the alleged victim, and, for information, to the State party.

¹ The Secretariat has ascertained that the matter has not been submitted to the Inter-American Commission on Human Rights.

C. Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights

Communication No. 162/1983

Submitted by: Vicenta Acosta (alleged victim's mother) – later joined by Omar Berterretche Acosta as co-author

Alleged victim: Omar Berterretche Acosta

State party: Uruguay

Date of adoption of views: 25 October 1988 (thirty-fourth session)

Subject matter: Psychological, physical and mental torture of victim imprisoned for alleged assistance to subversion

Procedural issues: Consideration of events occurring prior to entry into force of Covenant—Inadmissibility *ratione temporis*

Substantive issues: Arbitrary arrest and detention—Inhuman treatment and torture—"Effective remedy"

Articles of the Covenant: 7 and 10 (1)

1. The original author of the communication (letter dated 20 December 1983) is Vicenta Acosta, a Uruguayan national residing in Uruguay. She submitted the communication on behalf of her son, Omar Berterretche Acosta, a Uruguayan national born on 23 February 1927, who was detained in Uruguay from September 1977 to 1 March 1985. He joined as co-author of the communication by letter received on 3 July 1985.

2.1 It is stated that Omar Berterretche is an architect and meteorologist and that prior to his detention he was employed as sub-director of weather forecasting in Uruguay's Department of Meteorology and as professor of dynamics, aerodynamics, mathematics and physics at various institutions. He was detained for the first time in January 1976 and allegedly subjected to torture; he was released on 25 February 1976 without being charged. He was arrested for the second time on 7 September 1977 at police headquarters in Montevideo, where he had gone to pick up his passport to go abroad. One day later his family learned of his detention, but he was kept incommunicado for 40 more days. He was taken to the Central Prison in Montevideo, where he stayed until February of 1978, when he was transferred to the Punta Carreta Prison in Montevideo. From July 1979 to 1 March of 1985, he was detained at Libertad Prison.

2.2 The military judge of first instance imposed on him a term of imprisonment of 24 months, on charges of assisting subversion. The Government prosecutor charged him further with providing military intelligence to the Communist Party and asked for a six-year sentence. The Supreme Military Tribunal sentenced him to 14 years' imprisonment.

3. By its decision of 22 March 1984, the Working Group of the Human Rights Committee, having decided that Vicenta Acosta was justified in acting on behalf of the alleged victim, transmitted the communication under rule 91 of the provisional rules of procedure to the State Party concerned, requesting information and observations relevant to the question of admissibility of the communication. The Working Group also requested the State party to provide the Committee with copies of any court orders or decisions relevant to the case and to inform the Committee of the state of health of Omar Berterretche.

4.1 In a submission dated 28 August 1984, the State party informed the Committee that on 5 June 1980, Mr. Omar W. Berterretche was sentenced in second instance to 14 years' imprisonment for committing the offences of "subversive associations", "assault on the material strength of the army, navy and air force by espionage", "espionage" and "attack against the Constitution in the degree of conspiracy, followed by preparatory acts" all covered by the Military Penal Code. Concerning his state of health, the State party declared the following: "patient suffering from gastro-enteritis which is treated and controlled. At present, stabilized."

4.2 The present Uruguayan Government came to power on 1 March 1985. Pursuant to an amnesty law enacted by that Government on 8 March 1985, all political prisoners were released and all forms of political banishment were lifted.

5. In an undated letter received on 3 July 1985, Mr. Berterretche joined his mother as co-author of the communication, indicating that he had been released from imprisonment in March 1985 and requesting the Committee to continue consideration of the communication. He confirmed that the facts as described by his mother were correct and made the following comments on the State party's submission of 24 August 1984:

It is stated that I am suffering from gastro-enteritis but that this is now stabilized. This is only a half truth since I was only half-treated medically, i. e. in an inadequate manner. The fact is obviously concealed that I am suffering from nervous hypertension, which is of a serious nature because of its extreme variability and which is also inadequately controlled. Also concealed is the cardiac problem which has developed since I was tortured. No reference is made to the fact that, from the time I was first captured and during the interrogations leading to my indictment I was subjected to physical abuse such as beatings, strapping up, asphyxiation, electric shocks and long periods of forced standing in the cold without anything to drink or eat. None of this is mentioned. No reference is made either to the fact that, in the absence of firm evidence to convict me I was declared a "spy". On this ground, the procedure was drawn out indefinitely, as I was progressively sentenced to 12 months, then eight and a half years and finally 14 years of imprisonment, without any aggravating factor having intervened in the interim.

The military court did not find any active participation in politics on my part and, acting solely on the basis of my ideology, it imposed on me the heaviest sentence possible, on grounds which were false . . .

Libertad prison, in which I was held, was a place of genuinely repugnant and constant repression , carried out by specialized personnel who were rotated in order that they should not suffer the fatigue which this type of duty inevitably produces.

The following provides evidence of the pleasure that was taken in carrying out torture at Libertad prison. It was a case of torture of the nerves, practised on me and my family, as on many others. On 7 September 1981, the day on which I had served exactly four years of detention, I was informed that I was to report to the warden's office. Also ordered to report were some of my companions who were informed of several decisions, some of them being told that they were to be released. As for me, I was informed that I had been granted freedom. I was informed of this by a military court established there and I was asked to give my address. This is a normal procedure when release is approved. I informed my family, which, when they sought confirmation of my release, were informed that there had been a mistake.

In view of the foregoing, I have to make the following statement:

(a) I wish my case to remain open because, in view of the treatment to which I was subjected, it is necessary to measure not only the moral damage caused to me and my family and the damage inflicted on the State by the *de facto* Government, but also the damage constituted by the fact that despite all the efforts I have made, I am still without work. In other words, I have so far not been reinstated in the School of Meteorology or in the Department of Meteorology and, at the age of 58, it is very difficult for me to obtain a position.

(b) I wish my case to remain open in case it is possible to conduct further inquiries and because I shall continue to fight for the genuine welfare of mankind, for its rights and for the possibility for it to live in peace and freedom, as I believe this to be one of the aims man has always pursued.

6. Before considering any claims presented in a communication, the Human Rights Committee must, in accordance with rule 87 of its provisional rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant. The Committee did not find that any of the procedural obstacles laid down in articles 2, 3 or 5 of the Optional Protocol existed in the present case.

7. On 11 July 1985, the Committee therefore decided: that the communication was admissible insofar as the facts submitted relate to events which allegedly took place after 23 March 1976, the date on which the Covenant and the Optional Protocol entered into force for Uruguay. The State party was requested, in accordance with article 4, paragraph 2, of the Optional Protocol, to submit written explanations or statements clarifying the matter and the measures, if any, that might have been taken by it and, again, to furnish the Committee with copies of all court orders and decisions relevant to the case. The Committee's decision was transmitted to the parties on 1 August 1985, together with an indication that the authors would be afforded an opportunity to comment on any submission received from the State party, as provided in rule 93, paragraph 3, of the Committee's provisional rules of procedure.

8. By note of 3 January 1986, the State party confirmed its intention to co-operate with the Committee and stated that it would forward copies of the relevant court orders and decisions. On 12 December 1986 the State party transmitted copies of the judgement of the Supreme Military Tribunal, dated 5 June 1980, as well as transcripts of the hearings and decisions of the lower courts.

9. The text of the State party's submissions of 3 January and 12 December 1986 was dispatched to the authors on 18 December 1986 by registered mail. The dispatch was returned by the postal authorities on 1 April 1987 with an indication that the authors had moved, without leaving a forwarding address. Delivery was therefore unsuccessful. By letter of 16 November 1987, Mr. Berterretche Acosta re-established contact with the Committee and indicated that it was his intention to furnish further information in respect of his case. The submissions of the State party of 3 January and 12 December 1986 were thereupon retransmitted to him. Again, he was afforded an opportunity to comment on the State party's submissions. No further information or comments have been received from him to date.

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. The Committee observes in this connection that the information provided by the authors in substantiation of the allegations is somewhat limited. In the circumstances, and in the absence of any comments from the authors on the extensive court records submitted by the State party, the Committee will limit itself to pronouncing on the allegations of ill-treatment and torture, which have not been contradicted by the State party.

10.2 The authors' allegations concerning ill-treatment and torture, and the consequences thereof, are basically the following:

(a) Mr. Berterretche Acosta's mother alleges in the initial letter that her son was subjected to torture at the time he was detained for the first time, from January to February 1976. She also states that her son was held incommunicado for 40 days from the time he was arrested for the second time, on 7 September 1977 (para. 2.1 above);

(b) In his comments on the State party's submission of 28 August 1984, Mr. Berterretche Acosta observes that no reference is made in the State party's submission "to the fact that from the time I was first captured and during the interrogations leading to my indictment, I was subjected to physical abuse such as beatings, stringing up, asphyxiation, electric shocks and long periods of forced standing in the cold without anything to drink or eat";

(c) As to alleged psychological torture carried out at Libertad prison, Mr. Berterretche Acosta refers to the events on 7 September 1981, at which time he was told that he had been granted freedom, and the subsequent explanation given to his family "that there had been a mistake" (para. 5 above);

(d) As to the consequences of his treatment while in detention, Mr. Berterretche further observes in his comments on the State party's submission of 28 August 1984: "The fact is obviously concealed that I am suffering from nervous hypertension, which is of a serious nature because of its extreme variability and which is also inadequately controlled. Also concealed is the cardiac problem which has developed since I was tortured" (para. 5 above);

(e) Omar Berterretche further states that, as a result of his detention, he has lost his employment and has not been reinstated, is without work and that it has been difficult for him to find new employment.

10.3 The Committee observes in this connection, firstly, that the allegations concerning the treatment of Mr. Berterretche Acosta in January and February 1976 fall outside its competence, as they relate to a period of time prior to the entry into force of the Covenant on 23 March 1976. Secondly, the Committee observes that Mr. Berterretche Acosta's allegations of physical abuse, contained in the comments received from him in July 1985, are

to some extent unclear. As to when the alleged torture took place he employs the language "from the time I was first captured and during the interrogations leading to my indictment". Read in context, however, and noting that Mr. Berterretche Acosta was not charged at the time he was held in captivity in January and February 1976, it can be assumed that the allegations refer to the period of time from his second arrest, on 7 September 1977, until he was indicted. Mr. Berterretche Acosta does not explain when he was indicted, but from the court records subsequently provided by the State party (see para. 8 above) it transpires that he was indicted on 17 October 1977. This corresponds to the period of 40 days, during which Mr. Berterretche Acosta was allegedly held incommunicado (see para. 2.1 above).

10.4 In formulating its views, the Human Rights Committee notes that the State party has not offered any explanations or statements concerning the treatment of Mr. Berterretche Acosta from 9 September to 17 October 1977 and the circumstances of his detention during that time. Although his description of what allegedly happened is very brief, it is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has a duty to investigate such allegations in good faith and to inform the Committee of the results. The Committee further notes that the State party has offered no comments in respect of the alleged conditions of detention at Libertad prison and the consequences thereof (paragraph 10 (2)). In the circumstances, due weight must be given to the authors' allegations.

10.5 The Committee has taken account of the change of Government in Uruguay on 1 March 1985 and the enactment of special legislation aimed at the restoration of rights of victims of the previous military regime. The Committee is also fully aware of the other relevant aspects of the legal situation prevailing now in Uruguay, but it remains convinced that there is no basis for exonerating the State party from its obligation under article 2 of the Covenant to ensure that any person whose rights or freedoms have been violated shall have an effective remedy, and to ensure that the competent authorities shall enforce such remedies.

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 events of this case, insofar as they occurred after 23 March 1976 (the date on which the Covenant and the Optional Protocol entered into force for Uruguay), disclose violations of the International Covenant on Civil and Political Rights, particularly of:

Article 7, because Omar Berterretche Acosta was subjected to torture and to cruel, inhuman and degrading treatment and punishment, and

Article 10, paragraph 1, because he was not treated with humanity and with respect for the inherent dignity of the human person during his detention at Libertad prison until he was released on 1 March 1985.

12. The Committee, accordingly, is of the view that the State party is under an obligation to take effective measures to remedy the violations which Omar Berterretche has suffered, and to provide him with adequate compensation.

Communication No. 167/1984

Submitted by: Chief Bernard Ominayak and members of the Lubicon Lake Band (represented by counsel)

Alleged victim: Lubicon Lake Band

State party: Canada

Date of adoption of views: 26 March 1990 (thirty-eighth session)*

Subject matter: Claim of right of self-determination by indigenous community in Alberta, based on claim of aboriginal title to land

Procedural issues: Interlocutory proceedings—Interim measures of protection—Denial of due process—Unreasonably prolonged proceedings—Abuse of right of submission—Interim injunction—Interpretation of domestic remedies—Standing of the author—Request for interpretation of rule 93 (4)

Substantive issues: Right of self-determination—ICCPR relationship to ICESCR—Collective rights—Conflicting claims to sovereignty—Equal protection before the law—Rights of indigenous groups under ancestral titles—Effective remedy—Right to compensation

Articles of the Covenant: 2, 14 (1), 17, 18 (1), 23 (1), 26 and 27

Articles of the Optional Protocol: 1, 2, 3, 4 (2) and 5 (2) (b)

1. The author of the communication (initial letter dated 14 February 1984 and subsequent correspondence) is Chief Bernard Ominayak (hereinafter referred to as the author) of the Lubicon Lake Band, Canada. He is represented by counsel.

2.1 The author alleges violations by the Government of Canada of the Lubicon Lake Band's right of self-determination and by virtue of that right to determine freely its political status and pursue its economic, social and cultural development, as well as the right to dispose freely of its natural wealth and resources and not to be deprived of its own means of subsistence. These violations allegedly contravene Canada's obligations under article 1, paragraphs 1 to 3, of the International Covenant on Civil and Political Rights.

2.2 Chief Ominayak is the leader and representative of the Lubicon Lake Band, a Cree Indian band living within the borders of Canada in the Province of Alberta. They are subject to the jurisdiction of the Federal Government of Canada, allegedly in accordance with a fiduciary relationship assumed by the Canadian Government with respect to Indian peoples and their lands located within Canada's national borders. The Lubicon Lake Band is a self-identified, relatively autonomous, socio-cultural and economic group. Its members have continuously inhabited, hunted, trapped and fished in a large area encompassing approximately 10,000 square kilometres in northern Alberta since time immemorial. Since their territory is relatively inaccessible, they have, until recently, had little contact with non-Indian society. Band members speak Cree as their primary language. Many do not speak, read or write English. The Band continues to maintain its traditional culture, religion, political structure and subsistence economy.

2.3 It is claimed that the Canadian Government, through the Indian Act of 1970 and Treaty 8 of 21 June 1899 (concerning aboriginal land rights in northern Alberta), recognized the right of the original inhabitants of that area to continue their traditional way of life. Despite these laws and agreements, the Canadian Government has allowed the Provincial Government of Alberta to expropriate the territory of the Lubicon Lake Band for the benefit of private corporate interests (e.g., leases for oil and gas exploration). In so doing, Canada is accused of violating the Band's right to determine freely its political status and to pursue its economic, social and cultural development, as guaranteed by article 1, paragraph 1, of the Covenant. Furthermore, energy exploration in the Band's territory allegedly entails a violation of article 1, paragraph 2, which grants all peoples the right to dispose of their natural wealth and resources. In destroying the environment and undermining the Band's economic base, the Band is allegedly being deprived of its means to subsist and of the enjoyment of the right of self-determination guaranteed under article 1.

3.1 The author states that the same matter has not been submitted for examination under another procedure of international investigation or settlement.

3.2 With respect to the exhaustion of domestic remedies, it is stated that the Lubicon Lake Band has been pursuing its claims through domestic political and legal avenues. It is alleged that the domestic political and legal process in Canada is being used by government officials and energy corporation representatives to thwart and delay the Band's actions until, ultimately, the Band becomes incapable of pursuing them, because industrial development at the current rate in the area, accompanied by the destruction of the environmental and economic base of the Band, would make it impossible for the Band to survive as a people for many more years.

3.3 On 27 October 1975, the Band's representatives filed with the Registrar of the Alberta (Provincial) Land Registration District a request for a caveat, which would give notice to all parties dealing with the caveated land of their assertion of aboriginal title, a procedure foreseen in the Provincial Land Title Act. The Supreme Court of Alberta received arguments on behalf of the Provincial Government, contesting the caveat, and on behalf of the Lubicon Lake Band. On 7 September 1976, the Provincial Attorney-General filed an application for a postponement, pending resolution of a similar case; the application was granted. On 25 March 1977, however, the Attorney-General introduced in the provincial legislature an amendment to the Land Title Act precluding the filing of caveats; the amendment was passed and made retroactive to 13 January 1975, thus predating the filing of the caveat involving the Lubicon Lake Band. Consequently, the Supreme Court hearings were closed.

3.4 On 25 April 1980, the members of the Band filed an action in the Federal Court of Canada, requesting a declaratory judgement concerning their rights to their land, its use, and the benefits of its natural resources. The claim was dismissed on jurisdictional grounds against the Provincial Government and all energy corporations except one (Petro-Canada). The claim with the Federal Government and Petro-Canada as defendants was allowed to stand.

3.5 On 16 February 1982, an action was filed in the Court of Queen's Bench of Alberta requesting an interim injunction to halt development in the area until issues raised by the Band's land and natural resource claims were settled. The main purpose of the interim injunction, the author states, was to prevent the Alberta Government and the oil companies (the "defendants") from further destroying the traditional hunting and trapping territory of the Lubicon Lake people. This would have permitted the Band members to continue to hunt and trap for their livelihood and subsistence as a part of their aboriginal way of life. The Provincial Court did not render its decision for almost two years, during which time oil and gas development continued, along with rapid destruction of the Band's economic base. On 17 November 1983, the request for an interim injunction was denied and the Band, although financially destitute, was subsequently held liable for all court costs and attorneys' fees associated with the action.

3.6 The decision of the Court of Queen's Bench was appealed to the Court of Appeal of Alberta; it was dismissed on 11 January 1985. In reaching its decision, the Court of Appeal agreed with the lower court's finding that the Band's claim of aboriginal title to the land presented a serious question of law to be decided at trial. Nonetheless, the Court of Appeal found that the Lubicon Lake Band would suffer no irreparable harm if resource

development continued fully and that the balance of convenience therefore favoured denial of the injunction.

3.7 The author states that the defendants attempted to convince the Court that the Lubicon Lake Band has no right to any possession of any sort in any part of the subject lands, which, logically, included even their homes. In response, the Court pointed out that any attempt to force the members of the Lubicon Lake Band from their dwellings might indeed prompt interim relief, as would attempts to deny them access to traditional burial grounds or other special places, or to hunting and trapping areas. In its complaint, the Band alleged denial of access to all of these areas, supporting its allegations with photographs of damage and with several uncontested affidavits. Yet, the Court overlooked the Band's evidence and concluded that the Band had failed to demonstrate that such action had been taken or indeed threatened by the defendants.

3.8 The author further states that the legal basis for the Court of Appeal's decision was its own definition of irreparable injury. This test was: injury that is of such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the injunction would be a denial of justice. The author submits that the Lubicon Lake Band clearly met this test by demonstrating, with uncontested evidence, injury to their livelihood, to their subsistence economy, to their culture and to their way of life as a social and political entity. Yet, the Court found that the Band had not demonstrated irreparable harm.

3.9 On 18 February 1985, the Band presented arguments to a panel of three judges of the Supreme Court of Canada, requesting leave to appeal from the judgement of the Alberta Court of Appeal. On 14 March 1985, the Supreme Court of Canada refused leave to appeal. Generally, the author states, the criteria for granting leave to appeal are: whether the questions presented are of public importance, whether the case contains important issues of law or whether the proceedings are for any reason of such a nature or significance as to warrant a decision by the Supreme Court of Canada. He states that the issues presented by the Lubicon Lake Band involved such questions as the interpretation of the constitutional rights of aboriginal peoples, the existence of which was recently confirmed by the Constitution Act, 1982; the remedies available to aboriginal peoples; the rights of aboriginal peoples to carry out traditional subsistence activities in traditional hunting and trapping grounds; the legal regime applicable to a large area of land in northern Alberta; conflicts between Canada's traditional, land-based societies and its industrial society; public interests and minority interests; the competing rights of public authorities and individuals; considerations of fundamental and equitable justice; equality before the law; and the right to equal protection and benefit of the law. The author submits that at least the first four questions have not yet been adjudicated by the Supreme Court of Canada and that they undeniably fall within the criteria for granting leave to appeal.

4. By decision of 16 October 1984, the Working Group of the Human Rights Committee transmitted the communication under rule 91 of the rules of procedure to the State party, requesting information and observations relevant to the question of the admissibility of the communication. The main points reflected in the information and observations received from the State party are set out in paragraphs 5.1 to 5.7 and 6.1 to 6.4 below.

Exhaustion of domestic remedies

5.1 In its submission dated 31 May 1985, the State party contends that the Lubicon Lake Band has not pursued to completion domestic remedies commenced by it and that responsibility for any delays in the application of such remedies does not lie with the Government of Canada. The State party recalls that the Lubicon Lake Band, suing in its own legal right, and Chief Bernard Ominayak, suing in his personal capacity, and with other Band councilors in a representative capacity, have initiated three different legal procedures and points out that only the litigation concerning the caveat filed by the Band has been finally determined. Two other legal actions, one in the Federal Court of Canada and one in the Alberta Court of Queen's Bench, were said to be still pending.

5.2 With regard to the Federal Court action referred to in the communication, the State party recalls that the Band and its legal advisers, in April 1980, sought to sue the Province of Alberta and private corporations in proceedings in the Federal Court of Canada. It is submitted that in the circumstances of this case, neither the Province nor private entities could have been sued as defendants in the Federal Court of Canada. Rather than reconstitute the proceedings in the proper forum, the State party submits, the Band contested interlocutory proceedings brought by the defendants concerning the issue of jurisdiction. These interlocutory proceedings resulted in a determination against the Band in November 1980. An appeal by the Band, arising from the decision of the Federal Court of Canada, was dismissed by the Federal Court of Appeal in May 1981.

5.3 Following the interlocutory proceedings relating to the jurisdiction of the Federal Court, a new action was instituted on 21 February 1982 against the Province and certain corporate defendants in the Court of Queen's Bench of Alberta. As indicated in the communication, the Band sought an interim injunction. In November 1983, after extensive proceedings, the Band's interim application was dismissed by the Court of Queen's Bench, based on the case of *Erickson v. Wiggins Adjustments Ltd.* (1980) 6 W.R.R. 188, which sets out the criteria that must be present for a court to grant an interim injunction. Pursuant to that case, an applicant for an interim injunction must establish:

- (a) That there exists a serious issue to be tried;
- (b) That irreparable harm will be suffered prior to trial if no injunction is granted;
- (c) That the balance of convenience between the parties favours relief to the applicant.

The State party points out that the Alberta Court denied the Band's application on the grounds that the Band had failed to prove irreparable harm and that it could be adequately compensated in damages if it was ultimately successful at trial.

5.4 Rather than proceed with a trial on the merits, the Band appealed against the dismissal of the interim application. Its appeal was dismissed by the Alberta Court of Appeal of 11 January 1985. The Band's application for leave to appeal the dismissal of the interim injunction to the Supreme Court of Canada was refused on 14 March 1985. Almost two months later, on 13 May 1985, the State party adds, the Supreme Court of Canada denied another request by the Band that the Court bend its own rules to rehear the application. Thus, the State party states, the Court upheld its well-established rule prohibiting the rehearing of applications for leave to appeal.

5.5 The State party submits that, after such extensive delays caused by interim proceedings and the contesting of clearly settled procedural matters of law, the author's claim that the application of domestic remedies is being unreasonably prolonged has no merit. It submits that it has been open to the Band as plaintiff to press ahead on the substantive steps in either of its legal actions so as to bring the matters to trial.

Additional remedies

5.6 The State party submits that the term "domestic remedies", in accordance with the prevailing doctrine of international law, should be understood as applying broadly to all established municipal procedures of redress. Article 2, paragraph 3 (b), of the Covenant, it states, recognizes that, in addition to judicial remedies, a State party to the Covenant can also provide administrative and other remedies. Following the filing of its defence in the Federal Court action, the Federal Government proposed late in 1981 that the claim be settled by providing the Band with reserve land pursuant to the treaty concluded in 1899. The conditions proposed by the Province (which holds legal title to the lands) were not acceptable to the Band and it accordingly rejected the proposed resolution of the dispute.

5.7 The Band's claim to certain lands in northern Alberta, the State party submits, is part of a complex situation that involves competing claims from several other native communities in the area. In June 1980, approximately two months after the Band commenced its action in the Trial Division of the Federal Court, six other native communities filed a separate land claim with the Department of Indian Affairs asserting aboriginal title to lands that overlap with the property sought by the Lubicon Lake Band's claim. Subsequently, in June 1983, the Big Stone Cree Band filed a claim with the Department of Indian Affairs - this time claiming treaty entitlement - to an area that also overlaps with land claimed by the Lubicon Lake Band. The Big Stone Cree Band allegedly represents five of the native communities that filed the June 1980 claim based on aboriginal title. To deal with this very complex situation, in March 1985 the Minister of Indian and Northern Affairs appointed a former judge of the British Columbia Supreme Court as a special envoy of the Minister to meet with representatives from the Band, other native communities and the Province, to review the entire situation and to formulate recommendations. The State party submits that consideration of the Lubicon Lake Band's claim in isolation from the competing claims of the other native communities would jeopardize the domestic remedy of negotiated settlement selected by the latter.

Right of self-determination

6.1 The Government of Canada submits that the communication, as it pertains to the right of self-determination, is inadmissible for two reasons. Firstly, the right of self-determination applies to a "people" and it is the position of the Government of Canada that the Lubicon Lake Band is not a people within the meaning of article 1 of the Covenant. It therefore submits that the communication is incompatible with the provisions of the Covenant and, as such, should be found inadmissible under article 3 of the Protocol. Secondly, communications under the Optional Protocol can only be made by individuals and must relate to the breach of a right conferred on individuals. The present communication, the State party argues, relates to a collective right and the author therefore lacks standing to bring a communication pursuant to articles 1 and 2 of the Optional Protocol.

6.2 As to the argument that the Lubicon Lake Band does not constitute a people for the purposes of article 1 of the Covenant and it therefore is not entitled to assert the right of self-determination under the Protocol, the Government of Canada points out that the Lubicon Lake Band comprises only one of 582 Indian bands in Canada and a small portion of a larger group of Cree Indians residing in northern Alberta. It is therefore the position of the Government of Canada that the Lubicon Lake Indians are not a "people" within the meaning of article 1 of the Covenant.

6.3 The Government of Canada submits that while self-determination as enunciated in article 1 of the Covenant is not an individual right, it provides the necessary contextual background for the exercise of individual human rights. This view, it contends, is supported by the following phrase from the Committee's general comment on article 1 (CCPR/C/21/Add.3, 5 October 1984), which provides that the realization of self-determination is "an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights". This general comment, the State party adds, recognizes that the rights embodied in article 1 are set apart from, and before, all the other rights in the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights. The rights in article 1, which are set out in part I of the Covenant on Civil and Political Rights are, in the submission of Canada, different in nature and kind from the rights in part III, the former being collective, the latter individual. Thus, the structure of the Covenant, when viewed as a whole, further supports the argument that the right of self-determination is a collective one available to peoples. As such, the State party argues, it cannot be invoked by individuals under the Optional Protocol.

6.4 The Government of Canada contends that the Committee's jurisdiction, as defined by the Optional Protocol, cannot be invoked by an individual when the alleged violation concerns a collective right. It therefore contends that the present communication pertaining to self-determination for the Lubicon Lake Band should be dismissed.

7. In a detailed reply, dated 8 July 1985, to the State party's submission, the author summarized his arguments

as follows. The Government of Canada offers three principal allegations in its response. It alleges, firstly, that the Lubicon Lake Band has not exhausted domestic remedies. However, the Band has, in fact, exhausted these remedies to the extent that they offer any meaningful redress of its claims concerning the destruction of its means of livelihood. Secondly, the Government of Canada alleges that the concept of self-determination is not applicable to the Lubicon Lake Band. The Lubicon Lake Band is an indigenous people who have maintained their traditional economy and way of life and have occupied their traditional territory since time immemorial. At a minimum, the concept of self-determination should be held to be applicable to these people as it concerns the right of a people to their means of subsistence. Finally, the Government of Canada makes allegations concerning the identity and status of the communicant. The "communicant" is identified in the Band's original communication. The "victims" are the members of the Lubicon Lake Band who are represented by their unanimously elected leader, Chief Bernard Ominayak.

8.1 By interim decision of 10 April 1986, the Committee, recalling that the State party had informed it that the Minister of Indian and Northern Affairs had appointed a special envoy and given him the task to review the situation, requested the State party to furnish the Committee with the special envoy's report and with any information as to recommendations as well as measures which the State party had taken or intended to take in that connection.

8.2 In the same decision, the Committee requested the author to inform it of any developments in the legal actions pending in the Canadian courts.

9.1 In his reply, dated 30 June 1986, to the Committee's interim decision, the author claims that there has been no substantive progress in any of the pending court proceedings. He reiterates his argument that:

The Band's request for an interim injunction to halt the oil development, which has destroyed the subsistence livelihood of its people, was denied and the Supreme Court of Canada refused to grant leave to appeal the denial ... The development and the destruction, therefore, continue unabated. The Band's attorney is continuing to pursue the claims through the courts despite the fact that the Band is unable to provide financial support for the effort and that there is no possible hope of resolution for the next several years. Therefore, the Band has no basis for altering its previous conclusion that, for all practical purposes, its domestic judicial remedies have been exhausted.

9.2 The Band also points out that the Federal Government's Special Envoy, Mr. E. Davie Fulton, was relieved of his responsibilities following the submission of his "discussion paper".

In the discussion paper ... Mr. Fulton reached much the same conclusion as the Band itself, that the Canadian Government must bear the blame for the situation at Lubicon Lake and that the resolution of the problem is up to the Federal Government. His report also suggested a land settlement based on the Band's current population and recognized the importance of providing the Band with wildlife management authority throughout its hunting and trapping territory.

The land settlement proposed by Mr. Fulton, which would result in a reserve significantly larger than the 25 square mile reserve the Band was promised in 1940, is consistent with the position of the Band with regard to this issue ... Mr. Fulton also recommended that Alberta compensate the Band for damage caused by the unrestricted oil and gas development for which it has issued leases within the Band's territory. In addition to relieving Mr. Fulton of his responsibility in the matter, the Federal Government, to date, has refused to make his discussion paper public.

10.1 In its reply to the Committee's interim decision, dated 23 June 1986, the State party forwarded the text of Mr. Fulton's report and noted that it had appointed Mr. Roger Tasse to act as negotiator. Furthermore, it informed the Committee that on 8 January 1986 the Canadian Government had made an *ex gratia* payment of \$1.5 million to the Band to cover legal and other related costs.

10.2 In a further submission of 20 January 1987, the State party argues, that following the rejection of the Band's application for an interim injunction:

The Band should then have taken steps with all due speed to seek its permanent injunction before seeking international recourse. The Band alleges in its submission ... that the delay in the litigation will cause it irreparable harm. Its action for a permanent injunction would, if successful, permanently prevent that harm.

11.1 In submissions dated 23 and 25 February 1987, the author discussed, *inter alia*, matters of substance, such as the Fulton discussion paper, and argued that "Canada has abandoned key recommendations contained in the Fulton discussion paper", and that "Canada is attempting retroactively to subject the Band to a law which this Committee has held to be in violation of article 27 of the International Covenant on Civil and Political Rights and which Canada amended in accordance with the findings of this Committee".

11.2 With regard to the pending litigation proceedings, the Band contends that a permanent injunction would not constitute an effective remedy because it would come too late, explaining that:

The recognition of aboriginal rights or even treaty rights by a final determination of the courts will not undo the irreparable damage to the society of the Lubicon Lake Band, will not bring back the animals, will not restore the environment, will not restore the Band's traditional economy, will not replace the destruction of their traditional way of life and will not repair the damages to the spiritual and cultural ties to the land. The consequence is that all domestic remedies have indeed been exhausted with respect to the protection of the Band's economy as well as its unique, valuable and deeply cherished way of life.

12. In a further submission, dated 12 June 1987, the author states that:

The Lubicon Lake Band is not requesting a territorial rights decision. Rather, the Band requests only that the Human Rights Committee assist it in attempting to convince the Government of Canada that:

(a) The Band's existence is seriously threatened by the oil and gas development that has been allowed to proceed unchecked on their traditional hunting grounds and in complete disregard for the human community inhabiting the area;

(b) Canada is responsible for the current state of affairs and for co-operating in their resolution in accordance with article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights.

13.1 Before considering a communication on the merits, the Committee must ascertain whether it fulfills all conditions relating to its admissibility under the Optional Protocol.

13.2 With regard to the requirement, in article 5, paragraph 2 (b), of the Optional Protocol, that authors must exhaust domestic remedies before submitting a communication to the Human Rights Committee, the author of the present communication had invoked the qualification that this requirement should be waived "where the application of the remedies is unreasonably prolonged". The Committee noted that the author had argued that the only effective remedy in the circumstances of the case was to seek an interim injunction, because "without the preservation of the status quo, a final judgement on the merits, even if favourable to the Band, would be rendered ineffectual", insofar as "any final judgement recognizing aboriginal rights, or alternatively treaty rights, [could] never restore the way of life, livelihood and means of subsistence of the Band". Referring to its established jurisprudence that "exhaustion of domestic remedies can be required only to the extent that these remedies are effective and available", the Committee found that, in the circumstances of the case, there were no effective remedies still available to the Lubicon Lake Band.

13.3 With regard to the State party's contention that the author's communication pertaining to self-determination should be declared inadmissible for the reason that "the Committee's jurisdiction, as defined by the Optional Protocol, cannot be invoked by an individual when the alleged violation concerns a collective right", the Committee reaffirmed that the Covenant recognizes and protects in most resolute terms a people's right of self-determination and its right to dispose of its natural resources, as an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. However, the Committee observed that the author, as an individual, could not claim under the Optional Protocol to be a victim of a violation of the right of self-determination enshrined in article 1 of the Covenant which deals with rights conferred upon peoples as such.

13.4 The Committee noted, however, that the facts as submitted might raise issues under other articles of the Covenant, including article 27. Thus, insofar as the author and other members of the Lubicon Lake Band were affected by the events which the author has described, these issues should be examined on the merits, in order to determine whether they reveal violations of article 27 or other articles of the Covenant.

14. On 22 July 1987, therefore, the Human Rights Committee decided that the communication was admissible insofar as it might raise issues under article 27 or other articles of the Covenant. The State party was requested, under rule 86 of the rules of procedure, to take interim measures of protection to avoid irreparable damage to Chief Ominayak and other members of the Lubicon Lake Band.

15. In its submission under article 4, paragraph 2, dated 7 October 1987, the State party invokes rule 93, paragraph 4, of the Committee's provisional rules of procedure and requests the Committee to review its decision on admissibility, submitting that effective domestic remedies have not been exhausted by the Band. It observes that the Committee's decision appears to be based on the assumption that an interim injunction would be the only effective remedy to address the alleged breach of the Lubicon Lake Band's rights. This assumption, in its opinion, does not withstand close scrutiny. The State party submits that, based on the evidence of the Alberta Court of Queen's Bench and the Court of Appeal - the two courts which had had to deal with the Band's request for interim relief - as well as the socio-economic conditions of the Band, its way of life, livelihood and means of subsistence have not been irreparably damaged, nor are they under imminent threat. Accordingly, it is submitted that an interim injunction is not the only effective remedy available to the Band, and that a trial on the merits and the negotiation process proposed by the Federal Government constitute both effective and viable alternatives. The State party reaffirms that it has a right, pursuant to article 5, paragraph 2 (b), of the Optional Protocol to insist that domestic redress be exhausted before the Committee considers the matter. It claims that the terms "domestic remedies", in accordance with relevant principles of international law, must be understood as applying to all established local procedures of redress. As long as there has not been a final judicial determination of the Band's rights under Canadian law, there is no basis in fact or under international law for concluding that domestic redress is ineffective, nor for declaring the communication admissible under the Optional Protocol. In support of its claims, the State party provided a detailed review of the proceedings before the Alberta Court of Queen's Bench and explained its long-standing policy to seek the resolution of valid, outstanding land claims by Indian Bands through negotiation.

16.1 Commenting on the State party's submission, the author, in a letter dated 12 January 1988, maintains that his and the Lubicon Lake Band's allegations are well-founded. According to Chief Ominayak, the State party bases its request for a review of the decision on admissibility on a mere restatement of the facts and is seeking to have the Committee reverse its decision under the guise of substantiation of its previous submissions, without adducing any new grounds. Recalling the Committee's statement that the communication is admissible insofar as it raises issues under article 27 "or other articles of the Covenant", the author spells out which articles of the Covenant he considers to have been violated. First, he claims that Canada has violated article 2, paragraphs 1 to 3, of the Covenant: paragraph 1, for the reason that the State party has treated the Lubicon Lake Band without taking into consideration elements of a social, economic and property nature inherent in the Band's indigenous community structure; paragraph 2, for the reason that it is said to continue to refuse to solve some issues complained of by the Band for which there remain means of redress; and paragraph 3, for the reason that it is said to have failed to provide the Band with an effective remedy with regard to its rights under the Covenant.

16.2 The author further alleges that the State party, through actions affecting the Band's livelihood, has created a situation which "led, indirectly if not directly, to the deaths of 21 persons and [is] threatening the lives of virtually every other member of the Lubicon community. Moreover, the ability of the community to [survive] is in serious doubt as the number of miscarriages and stillbirths has skyrocketed and the number of abnormal births ... has gone from near zero to near 100 per cent". This, it is submitted, constitutes a violation of article 6 of the Covenant. Furthermore, it is claimed that the appropriation of the Band's traditional lands, the destruction of its way of life and livelihood, and the devastation wrought on the community constitute cruel, inhuman and degrading treatment within the meaning of article 7 of the Covenant for which the State party must be held accountable.

16.3 The author raises further questions about the State party's compliance with articles 14, paragraph 1, and 26, of the Covenant. He recalls that the domestic court proceedings instituted by the Lubicon Lake Band, founded on aboriginal rights and title to land, challenge certain of the State's asserted powers and jurisdiction which, he contends, are "inherently susceptible to precisely the types of abuses that articles 14, paragraph 1, and 26 are intended to guard against". In this context, he claims that "the bias of the Canadian courts has presented a major obstacle to the Band's attempt to protect its land, community and livelihood, and that the courts' biases arises from distinctions based on race, political, social and economic status". He further claims that the economic and social biases the Band has been confronted with in the Canadian courts, especially in the provincial court system in Alberta, have been greatly magnified by the "fact that several of the judges rendering the decisions of these courts have had clear economic and personal ties to the parties opposing the Band in the actions".

16.4 In addition to the above, it is submitted that in violation of articles 17 and 23, paragraph 1, of the Covenant, the State party has permitted the members of the Lubicon Lake Band to be subjected to conditions that are leading to the destruction of the families and the homes of its members. The author explains that in an indigenous community, the entire family system is predicated upon the spiritual and cultural ties to the land and the exercise of traditional activities. Once these have been destroyed, as in the case of the Band, the essential family component of the society is irremediably damaged. Similarly, it is alleged that the State party has violated article 18, paragraph 1, of the Covenant since, as a consequence of the destruction of their land, the Band members have been "robbed of the physical realm to which their religion - their spiritual belief system - attaches".

16.5 With respect to the requirement of exhaustion of domestic remedies, the author rejects the State party's assertion that a trial on the merits would offer the Band an effective recourse against the Federal Government and redress for the loss of its economy and its way of life. Firstly, this assertion rests upon the assumption that past human rights violations can be rectified through compensatory payments; secondly, it is obvious that the Band's economy and way of life have suffered irreparable harm. Furthermore, it is submitted that a trial on the merits is no longer available against the Federal Government of Canada since, in October 1986, the Supreme Court of Canada held that aboriginal land rights within provincial boundaries involve provincial land rights and must therefore be adjudicated before the Provincial Courts. It was for that reason that, on 30 March 1987, the Lubicon Lake Band applied to the Alberta Court of Queen's Bench for leave to amend its statement of claim before that court so as to be able to add the Federal Government as a defendant. On 22 October 1987, the Court of Queen's Bench denied the application. Therefore, despite the fact that the Canadian Constitution vests exclusive jurisdiction for all matters concerning Indians and Indian lands in Canada with the Federal Government, it is submitted that the Band cannot avail itself of any recourse against the Federal Government on issues pertaining to these very questions.

17.1 In a submission dated 3 March 1988, the State party submits that genuine and serious efforts continue to be made with a view to finding an acceptable solution to the issues raised by the author and the Band. Particularly, it explains that:

On 3 February 1988, the Minister of Indian Affairs and Northern Development delivered to the Attorney-General of Alberta a formal request for reserve land for the Lubicon Lake Band. In this request, he advised Alberta that a rejection of the request would require Canada to commence a legal action, pursuant to the Constitution Act, 1930, to resolve the dispute as to the quantum of land to which the Lubicon Lake Band is entitled. In any event, the Minister of Indian Affairs and Northern Development asked Alberta to consider, as an interim measure, the immediate transfer to the Band of 25.4 square miles of land ...

without prejudice to any legal action.

By letter dated 10 February 1988, the federal negotiator advised counsel for the Band of the above developments and, as well, sought to negotiate all aspects of the claim not dependent on Alberta's response to the formal request ... The communicant, by letter dated 29 February 1988, rejected this offer, but indicated that he would be prepared to consider an interim transfer of 25.4 square miles without prejudice to negotiations or any court actions. As a consequence of the above developments, negotiators for the federal and provincial Governments met on 1 and 2 March 1988 and concluded an interim agreement for the transfer of 25.4 square miles as reserve land for the Band, including mines and minerals. This agreement is without prejudice to the positions of all parties involved, including the Band ...

17.2 With respect to the effectiveness of available domestic remedies, the State party takes issue with the author's submission detailed in paragraph 16.5 above, which it claims seriously misrepresents the legal situation as it relates to the Band and the Federal and Provincial Governments. It reiterates that the Band has instituted two legal actions, both of which remain pending: one in the Federal Court of Canada against the Federal Government; the other in the Alberta Court of Queen's Bench against the Province and certain private corporations. To the extent that the author's claim for land is based on aboriginal title, as opposed to treaty entitlement, it is established case law that a court action must be brought against the Province and not the Federal Government.

17.3 The State party adds that in the action brought before the Alberta Court of Queen's Bench:

The communicant sought leave to add the Federal Government as a party to the legal proceedings in the Alberta Court of Queen's Bench. The Court there held that, based on existing case law, a provincial court is without jurisdiction to hear a claim for relief against the Federal Government; rather, this is a matter properly brought before the Federal Court of Canada. The plaintiff has in fact done this and the action is, as already indicated, currently pending. Therefore, recourse against the Government of Canada is still available to the Band, as it has always been, in the Federal Court of Canada. Moreover, the communicant has appealed the decision of the Court of Queen's Bench to the Alberta Court of Appeal.

17.4 Finally, the State party categorically rejects most of the author's allegations detailed in paragraphs 16.2 and 16.3 above as unfounded and unsubstantiated; it submits that these allegations constitute an abuse of process that should result in the dismissal of the communication pursuant to article 3 of the Optional Protocol.

18.1 In a further submission dated 28 March 1988, the author comments on the State party's overview of recent developments in the case (see para. 17.1) and adds the following remarks: (a) the Lubicon Lake Band was not a party to the negotiation of the settlement offer; (b) the settlement offer rests on a "highly prejudicial" view of the Band's rights under Canadian law and an equally prejudicial determination of Band membership; (c) the Federal Government would negotiate non-land issues such as housing with fewer than half of the Band's members; (d) Canada has leased all but 25.4 square miles of the Band's traditional lands for development, in conjunction with a pulp mill to be constructed by the Daishowa Canada Company Ltd. near Peace River, Alberta; (e) the Daishowa project frustrates any hopes of the continuation of some traditional activity by Band members; and (f) the Parliamentary Standing Committee on Aboriginal Affairs, the oversight committee of the Canadian Parliament with respect to such matters, does not support the approach to negotiated settlement being taken by the Minister of Indian Affairs and Northern Development.

18.2 The author reaffirms that the essential part of the court actions initiated by the Band relates to aboriginal rights claims and that, with the decision of the Alberta Court of Queen's Bench of 22 October 1987 and in the light of recent Supreme Court decisions referred to by the State party, the Band continues to be denied redress against the Federal Government.

18.3 The author further rejects the State party's contention that the claims made in his submission of 12 January 1988 are unsubstantiated and unfounded and constitute an abuse of the right of submission; he reaffirms his

readiness to furnish detailed information on the "21 unnatural deaths resulting directly or indirectly from the destruction of the traditional Lubicon economy and way of life". Finally, he points out that the State party continues to disregard the Committee's request for interim measures of protection pursuant to rule 86 of its rules of procedure, as evidenced by Canadian backing of the Daishowa paper mill project. This means that far from adopting interim measures to avoid irreparable harm to the Band, Canada has endorsed a project that would contribute to the further degradation of the Band's traditional lands.

19.1 In another submission dated 17 June 1988, the State party points to further developments in the case and re-emphasizes that effective remedies continue to be open to the Lubicon Lake Band. It explains that, since 11 March 1988, the date of the Band's refusal of the Government's interim offer to transfer to it 25.4 square miles of reserve land, discussions:

have taken place between the Federal Government, the Province of Alberta and the communicant. However, virtually no progress was made towards settlement. As a consequence, on 17 May 1988, the Federal Government initiated legal proceedings against the Province of Alberta and the Lubicon Lake Band in order to enable Canada to meet its lawful obligations to the Band under Treaty 8. The Statement of Claim, commencing the legal action, asks the Court of Queen's Bench of Alberta for a declaration that the Lubicon Lake Band is entitled to a reserve and a determination of the size of the reserve. On 9 June 1988 the Lubicon Lake Band filed a Statement of Defence and Counterclaim. On 10 June 1988, all parties to the dispute appeared before Chief Justice Moore of the Alberta Court of Queen's Bench and agreed that best efforts should be made to expedite this case with a preliminary trial date to be set on 10 January 1989.

19.2 The State party accepts its obligation to provide the Lubicon Lake Band with a reserve pursuant to Treaty 8. It argues that the issue forming the basis of the domestic dispute, as well as the communication under consideration, concerns the amount of land to be set aside as a reserve and related issues. As such, the State party asserts that the communication does not properly fall within any of the provisions of the Covenant and cannot therefore form the basis of a violation.

20.1 In a submission dated 5 July 1988, the author furnishes further information and comments on the State party's submission of 17 June 1988. He identifies "many problems" inherent in the court action initiated by the Federal Government against the Provincial Government in the Alberta Court of Queen's Bench. Among these are: (a) the purported fact that it ignores the Band's aboriginal land claim; (b) the fact that it seeks a declaratory judgement with respect to Band membership "apparently based on the unique and highly controversial approach to determination of Band membership that has been discussed in previous submissions"; and (c) the fact that much of the substance of the issues addressed is already before the courts in the Band's pending actions. The author notes that since "the action was filed in the lowest court in Canada, and will entail subpoena of an argument over the extremely lengthy and complex Lubicon genealogical study, as well as appeals from any decision rendered, there is no basis for believing that the action will do anything but delay indefinitely [the] resolution of the Lubicon land issues". The author believes that the Government's action is intended to have precisely this effect.

20.2 By letter dated 28 October 1988, the author informs the Committee that on 6 October 1988, the Lubicon Lake Band asserted jurisdiction over its territory. He explains that this action was the result of the Federal Government's failure to contribute to a favourable solution of the Band's problems. He adds that the State party has continuously delayed action on the issue, accusing it of "practicing deceit in the media and dismissing advisors who recommend any resolution favourable to the Lubicon people. At the same time the Band has watched the Province of Alberta continue to grant leases for oil and gas development and now for timber development on the Lubicons' traditional lands ...".

20.3 The author further observes that the action of the Lubicon Lake Band has resulted in:

a positive response from the Alberta Provincial Government. Alberta Premier Don Getty negotiated an agreement with Chief Ominayak whereby Alberta will offer to sell to the Federal Government 79 square miles of land with surface and

subsurface rights, to be designated as a reserve for the benefit of the Lubicon Lake Band. The province has agreed to sell an additional 16 square miles of land to the Federal Government with surface rights only, and to make subsurface development on such land subject to Band approval. Thus the total area agreed to by the province is 95 square miles, the amount to which the Band is entitled, based on its present membership, under Canadian federal Indian law The Federal Government has stated that it is willing to consider the transfer of 79 square miles of land for the benefit of the Lubicon people. However, it has refused to accept the remaining 16 square miles, recommending that such land be transferred to the Band to be held in free title. The effect of this would be to subject the land in question to taxation and alienation, while reducing the level of federal obligation to the Lubicon people ...

21.1 In a further submission dated 2 February 1989, the State party observes that in November 1988, following an agreement between the Provincial Government of Alberta and the Lubicon Lake Band to set aside 95 square miles of land for a reserve, the Federal Government initiated negotiations with the Band on the modalities of the land transfer and related issues. During two months of negotiations, consensus was reached on the majority of issues, including Band membership, size of the reserve, community construction and delivery of programmes and services. No agreement could, however, be found on the issue of cash compensation and on 24 January 1989 the Band withdrew from the negotiations when the Federal Government presented its formal offer.

21.2 After reviewing the principal features of its formal offer (transfer to the Band of 95 square miles of reserve land; the acceptance of the Band's membership calculation; the setting aside of \$C 34 million for community development projects; the granting of \$C 2.5 million per year of federal support programmes; the proposal of a special development plan to assist the Band in establishing a viable economy on its new reserve; and the establishment of a \$C 500,000 trust fund to assist Band elders wishing to pursue their traditional way of life), the State party observes that the Government's formal overall offer amounts to approximately \$C 45 million in benefits and programmes, in addition to a 95 square mile reserve. The Band has claimed additional compensation of between \$C 114 million and \$C 275 million for alleged lost revenues. The State party has denied the Band's entitlement to such sums but has advised it that it is prepared to proceed with every aspect of its offer without prejudice to the Band's right to sue the Federal Government for additional compensation.

21.3 The State party concludes that its most recent offer meets two tests of fairness, namely: that it is consistent with other recent settlements with native groups, and that it addresses the legitimate social and economic objectives of the Band. It adds that the community negotiation process must be considered as a practical vehicle and opportunity for Indian communities to increase their local autonomy and decision-making responsibilities. The federal policy provides for negotiations on a wide range of issues, such as government institutions, membership, accountability, financial arrangements, education, health services and social development. Based on the above considerations, the State party requests the Committee to declare the communication inadmissible on the grounds of failure to exhaust all available domestic remedies.

22.1 In a further submission dated 22 March 1989, the author takes issue with the State party's submission of 2 February 1989, characterizing it as not only misleading but virtually entirely untrue. He alleges that recent negotiations between the Lubicon Lake Band and the Federal Government did not, on the Government's side, "in any way represent a serious attempt at settlement of the Lubicon issues". Rather, he submits, the Government's "formal offer" was an exercise in public relations, which committed the Federal Government to virtually nothing. It is submitted that the offer, if accepted, would have stripped the community's members of any legal means of redressing their situation.

22.2 In substantiation of these allegations, the author argues that the Government's "formal offer" contains no more than a commitment to provide housing and a school. On the other hand, it lacks "any commitment to provide the facilities and equipment necessary for the Lubicon people to manage their own affairs, such as facilities for essential vocational training, support for commercial and economic development, or any basis from which the Band might achieve financial independence". It is further submitted that, contrary to the State party's statement that an agreement had been reached on the majority of issues for which the Band seeks a viable solution, including membership, reserve size and community construction, no agreement or consensus had been reached on any of these issues. Furthermore, the author argues that while the State party has claimed that its offer would amount

to approximately \$C 45 million in benefits and programmes, it has failed to indicate that the majority of these funds remain uncommitted and that without adequate means of legal redress the Lubicon Lake Band would be incapable of seeking to obtain any future commitments from the Government.

23.1 By submission of 30 May 1989, the author recalls that the Band has been pursuing its domestic claims through the Canadian courts for over 14 years, and that the nature of the claims and the judicial process involved is bound to draw out these proceedings for another 10 years. He submits that the State party does not dispute that court actions and negotiations undertaken to ensure the Band's livelihood have produced no results, and that court proceedings addressing the issues of land title and compensation would take years in litigation. It is pointed out that following the Band's refusal to endorse a settlement offer, which would force the Band to relinquish all rights to legal action involving a controversy with the State party in exchange for promises of future discussions between Canada and the Band, Canada terminated the negotiations. The author adds that: "Rather than continuing to seek a course of compromise and settlement, Canada has sent agents into non-native communities of northern Alberta, in the area immediately surrounding the traditional Lubicon territory." Working through a single individual who is said to retain some ties with the Band but who has not lived in the community for 40 years, these agents are said to be trying to induce other native individuals to strike their own private deals with the Federal Government. Most of the individuals identified by the agents do not appear to be affiliated with any recognized aboriginal society.

23.2 In substantiation of earlier allegations, the author explains that the Band's loss of its economic base and the breakdown of its social institutions, including the transition from a way of life marked by trapping and hunting to a sedentary existence, have led to a marked deterioration in the health of the Band members:

... the diet of the people has undergone dramatic changes with the loss of their game, their reliance on less nutritious processed foods, and the spectre of alcoholism, previously unheard of in this community and which is now overwhelming it As a result of these drastic changes in the community's physical existence, the basic health and resistance to infection of community members has deteriorated dramatically. The lack of running water and sanitary facilities in the community, needed to replace the traditional systems of water and sanitary management is leading to the development of diseases associated with poverty and poor sanitary and health conditions. This situation is evidenced by the astonishing increase in the number of abnormal births and by the outbreak of tuberculosis, affecting approximately one third of the community.

24.1 In a submission dated 20 June 1989, the State party concedes "that the Lubicon Lake Band has suffered a historical inequity and that they are entitled to a reserve and related entitlements". It maintains, however, that it has made offers to the Band which, if accepted, would enable the Band to maintain its culture, control its way of life and achieve economic self-sufficiency, and that its offer would provide an effective remedy for the violations of the Covenant alleged by the Band. However, a remedy of this nature cannot be imposed on the Band. The State party recalls that negotiations between the Lubicon Lake Band and senior government officials took place from November 1988 to January 1989; during the autumn of 1988, Chief Ominayak also met with the Prime Minister of Canada. It is submitted that the State party met virtually every demand of the author, either in full or to such an extent that equal treatment with other indigenous groups in Canada was approximated or exceeded. Thus, 95 square miles of land, mineral rights over 79 square miles, community facilities for each family living on the reserve, control over membership and an economic self-sufficiency package were offered in full to the Band. On the basis of a total of 500 Band members and a government package worth \$C 45 million (non-inclusive of mineral and land rights), this offer amounted to \$C 90,000 per person or almost \$C 500,000 for each family of five. A number of the Band's demands, such as a request for an indoor ice arena or a swimming pool, were refused.

24.2 According to the State party, the major remaining point of contention between the Federal Government and the Band is a claim by the Band for \$C 167 million in compensation for economic and other losses allegedly suffered. In an endeavour to permit the resolution of the matters agreed on between the parties, the Federal Government put forth a proposal that would enable the Band to accept the State party's offer in its entirety, while continuing to pursue their general claim for compensation in the Canadian courts. The State party rejects the contention that "virtually all items of any significance" in its offer "were left to future discussions", and contends that most of the Band's claims for land, mineral rights, community facilities, control over membership and an economic

self-sufficiency package have been agreed to by the Government. Finally, the State party rejects the allegation that it negotiated in bad faith.

24.3 On procedural grounds, the State party indicates that, since the Committees's decision on admissibility, no clarifications have been put forward by the Committee to enable the State party to address specific allegations of violations of the Covenant. It therefore maintains that the proceedings have not progressed from the admissibility stage. It further submits that by acting within its jurisdiction and procedure, the Committee should (a) issue a ruling pursuant to rule 93, paragraph 4, indicating the outcome of its reconsideration of admissibility; (b) if the communication is found admissible, stipulate the articles and the evidence on which the finding is based; and (c) provide the Federal Government with a six-month period during which to file its observations on the merits.

25. By interlocutory decision of 14 July 1989, the Human Rights Committee invited the State party to submit to the Committee any further explanations or statements relating to the substance of the author's allegations, in addition to its earlier submissions, by 1 September 1989 at the latest. The State party was again requested, pursuant to rule 86 of the rules of procedure and pending the Committee's final decision, to take measures to avoid damage to the author and the members of the Lubicon Lake Band.

26.1 In its reply to the interlocutory decision, dated 31 August 1989, the State party asserts that it is being denied due process, since the principles of natural justice require that a party be aware of the specific charge and evidence on which the accusations of the author of the communication are based. It claims that since it was never informed of the articles of the Covenant and the evidence in respect of which the communication was declared admissible, the principles of procedural fairness have not been respected, and that the Federal Government remains prejudiced in its ability to respond to the Band's claim.

26.2 In respect of the alleged violations of articles 14, paragraph 1, and 26, the State party rejects as "totally unfounded" the claim that it failed to provide the Band with an independent and impartial tribunal for the resolution of its claims: the long tradition of impartiality and integrity of Canadian courts includes numerous cases won by aboriginal litigants. It is submitted that the Band has failed to adduce any evidence that would indicate that the judiciary acted any differently in proceedings concerning the Lubicon Lake Band. Furthermore, the State party claims that the responsibility for major delays in the resolution of the Band's court actions lies largely with the Band itself. Not only did the Band fail to take the necessary steps to move any of the actions it initiated forward and refuse to co-operate with the Federal Government in the action it had initiated in an effort to resolve the matter, but, in addition, on 30 September 1988, the Band declared that it refused to recognize the jurisdiction of the Canadian courts, thus undermining any attempt to obtain a resolution through the judicial process.

26.3 The State party provides a detailed outline of the chronology of the judicial proceedings in the Band's case. Three court actions in respect of the Band remain outstanding. The first of these was initiated by the Band in the Federal Court of Canada against the Federal Government. This action has not moved forward since 1981 although, according to the State party, it was the Band's responsibility to take the next step in this suit. The second action was initiated by the Band in the Alberta Court of Queen's Bench against the province and some private corporations. After the Band was denied an interim injunction in 1985, it did not take substantive steps in the proceedings and abandoned its appeal against the Court's refusal to add the Federal Government as a party. The third action was initiated by the Federal Government in May 1988 in an attempt to overcome jurisdictional wrangles, to bring both the Provincial and Federal Governments and the Band before the same courts, and to finally resolve matters. The Band chose not to participate in this action, despite the efforts of the Chief Justice of the Court of Queen's Bench of Alberta to expedite matters - this action remains in abeyance. For the State party, each of the above court actions provides a vehicle by which the Band could resolve its claims.

26.4 In addition to judicial proceedings, the State party maintains, the Federal Government has sought to settle matters with the Lubicon Lake Band by way of negotiation. Thus, the offers put forward during these negotiations (outlined in para. 24.1 above) met virtually all of the author's claim in full or to a large extent. The State

party adds that a new round of negotiations has started and that "extensive efforts are being made in this regard". Discussions between the Band and the Alberta Provincial Government resumed on 23 August 1989, and further discussions with the Federal Government were scheduled to start on 7 September 1989. The State party reiterates that its offer to the Band remains valid.

26.5 In respect of the determination of Band membership, the State party rejects as "completely incorrect" the Band's claim that "Canada has attempted to subject Lubicon Lake Band members to a retroactive application of the Canadian Indian Act as it stood prior to its amendment following the decision in *Sandra Lovelace v. Canada*". On the contrary, the State party submits, the Band submitted, in 1985, a membership code pursuant to the Indian Act (as amended following the Committee's decision in the Lovelace case), which was accepted by Canada and gave the Band total control over its membership. As a result, the Federal Government's offer is based on the approximately 500 individuals considered by the Band leadership to be members of the Lubicon Lake community.

26.6 In respect of the alleged violations of articles 17 and 23, paragraph 1, articles 18 and 27, the State party rejects as inaccurate and misleading the Band's claim that "Canada is participating in a project by which virtually all traditional Lubicon lands have been leased for timber development". It points out that the Daishowa pulp mill, which is under construction north of Peace River, Alberta, is neither within the Band's claimed "traditional" lands nor within the area agreed to by the Band and the Provincial Government for a reserve. It is stated that the new pulp mill is located approximately 80 kilometres away from the land set aside for the Band. The State party continues:

As regards the area available to the pulp mill to supply its operations, the forest management agreement between the province of Alberta and the pulp mill specifically excludes the land proposed for the Lubicon Lake Band. Moreover, in the interests of sound forest management practices, the area cut annually outside of the proposed Lubicon reserve will involve less than 1 per cent of the area specified in the forest management agreement."

26.7 Finally, the State party draws attention to recent developments in the Cadotte Lake/Buffalo Lake community, within which the majority of the Lubicon Lake Band members reside. In December 1988, the Federal Government was informed of the existence of a new group within the community, which was seeking to resolve the rights of its members under Treaty 8 independent of the Lubicon Lake Band. This group, composed of about 350 individuals, requested from the Government recognition of its status as the Woodland Cree Band. According to the State party, the group consists of Lubicon Lake Band members who formally expressed their intention of joining the new Band, former Lubicon Lake Band members whose names were removed by the Lubicon Lake Band in January 1989 from the list of Band members, and other native individuals living within the community. The Federal Government agreed to the creation of the Woodland Cree Band. The State party adds that it recognizes the same legal obligations in respect of the Woodland Cree Band as it does in respect of the Lubicon Lake Band members.

26.8 In a further submission dated 28 September 1989, the State party refers to the tripartite negotiations between the Federal Government, the Provincial Government and the Lubicon Lake Band, scheduled to take place at the end of August/early September 1989; it claims that although the Band had undertaken to provide a comprehensive counterproposal to the Federal Government's outstanding offer and to provide a list of the persons it represented in the negotiations, it was informed, on 7 September 1989, that a counterproposal had not been prepared by the Band and that no list of the individuals purported to be represented by the Band would be forthcoming. The Band allegedly stated that it refused to negotiate in the presence of Mr. Ken Colby, a member of Canada's negotiating team, by virtue of his activities as a government media spokesman. Thus, owing to the Band's refusal to continue a meaningful discussion of its claim, negotiations were not resumed.

27.1 In his comments of 2 October 1989 on the State party's reply to the Committee's interim decision, the author contends that the State party's claim of prejudice in conducting the case before the Human Rights Committee is unfounded, as all the factual and legal bases of the Band's claims have been thoroughly argued. As to

whether domestic remedies continue to be available to the Band, it is pointed out that no domestic remedy exists which could restore the Lubicon Lake Band's traditional economy or way of life, which "has been destroyed as a direct result of both the negligence of the Canadian Government and its deliberate actions". The author submits that from the legal point of view, the situation of the Band is consistent with the Committee's decision in the case of *Muñoz v. Peru*,¹ in which it was held that the concept of a fair hearing within the meaning of article 14, paragraph 1, of the Covenant necessarily entails that justice be rendered without undue delay. In that case, the Committee had considered a delay of seven years in the domestic proceedings to be unreasonably prolonged. In the case of the Band, the author states, domestic proceedings were initiated in 1975. Furthermore, although the Band petitioned the Federal Government for a reserve for the first time in 1933, the matter remains unsettled. According to the Band, it was forced to bring 14 years of litigation to an end, primarily because of two decisions that effectively deny the Band an opportunity to maintain the aboriginal rights claim brought against the Federal Government. Thus, in 1986, the Supreme Court of Canada denied federal court jurisdiction in aboriginal rights cases arising within provincial boundaries in the *Joe* case. In the light of that decision, the Band requested the Alberta courts, in 1987, to include the Federal Government as a necessary party in the Band's aboriginal rights claim; this request was opposed by the Federal Government. In May 1988, the Federal Government instituted proceedings, which, in the author's opinion, were intended to persuade the Alberta Court of Queen's Bench that the Band merely had treaty-based rights to 40 square miles of land. It is submitted that a favourable decision would, for the Government, virtually clear the title to the Daishowa timber leases, encompassing nearly all of the traditional Lubicon territory, while not

¹ Communication No. 203/1986, final views adopted on 4 November 1988, para. 11.3.

rendering "moot issues related to [the] destruction of the Band's economic base". The author submits that the Chief Justice of the Court of Queen's Bench recognized that aboriginal rights had to be determined before any decision on the issue of treaty rights, and that if the State party had wanted the courts to truly settle the Lubicon land issue, rather than using them so as to forestall any efforts to resolve the matter, it would have referred the issue directly to the Supreme Court of Canada.

27.2 As to the State party's reference to a negotiated settlement, the author submits that the offer is neither equitable nor does it address the needs of the Lubicon community, since it would leave virtually all items of any significance to future discussions, decisions by Canada, or applications by the Band; and that the Band would be required to abandon all rights to present any future domestic and international claims against the State party, including its communication to the Human Rights Committee. The author further submits that the agreement of October 1988 between the Band and the Province of Alberta does not in the least resolve the Band's aboriginal land claims, and that the State party's characterization of the agreement has been "deceptive". In this context, the author argues that, contrary to its earlier representations, the State party has not offered to implement the October 1988 agreement and that if it were willing to honour its provisions, several issues including the question of just compensation would have to be settled.

27.3 In substantiation of his earlier submissions concerning alleged violations of articles 14 and 26, the author claims that the State party has not only failed to provide the Band equal protection vis-à-vis non-Indian groups, but that it also attempted to deny it equal protection vis-à-vis other Indian bands. Thus, with respect to the issue of Band membership, the author alleges, the effect of the formula proposed by Canada in 1986 for determining Band membership would deny aboriginal rights to more than half of the Lubicon people, thereby treating the Band members in an unequal and discriminatory way in comparison with the treatment of all other native people. It is submitted that as late as December 1988, the State party sought to apply to the Band criteria that were those of the legislation "prior to the Human Rights Committee's views in the case of *Lovelace v. Canada*,² which legislation was found to be contrary to article 27 of the Covenant.

27.4 With respect to the alleged violations of articles 17, 18, 23 and 27, the author reiterates that the State party has sought to distort the presentation of recent events and engaged in a misleading discussion of the

Daishowa timber project, so as to divert the Commit-

² Communication No. 24/1977, final views adopted on 30 July 1981.

tee's attention from "Canada's knowing and wilful destruction of Lubicon society". He recalls that only seven months after the Committee's request for interim protection under rule 86, virtually all of the traditional Lubicon land was leased for commercial purposes in connection with the Daishowa timber project. The relevant forest management agreement to supply the new pulp mill with trees, allegedly completely covers the traditional Lubicon hunting and trapping grounds, which cover 10,000 square kilometres, with the exception of 65 square kilometres set aside but never formally established as a reserve. It is submitted by the author that Canada acted in violation of the Committee's request for interim protection when it sold the timber resources of the 10,000 square kilometres, allegedly traditionally used by the Band and never ceded by it, to a Japanese company. Moreover, Canada is alleged to portray wrongly the Impact of the Daishowa project as minimal; the author points out that current production plans would call for the cutting of 4 million trees annually, and that plans to double the envisaged annual production of 340,000 metric tons of pulp in three years have recently been announced. This economic activity, if it proceeds unabated, would, in the author's opinion, continue to destroy the traditional lifeground of the Lubicon community. He submits that the fact that the 95 square miles, set aside under the October 1988 agreement, are relatively intact would be irrelevant, since the game on which the Band members have traditionally depended for their livelihood has already been driven out of the entire 10,000 square kilometres area.

27.5 Finally, the author submits that the State party's creation of the "Woodland Cree Band", through which it is allegedly attempting to "fabricate" a competing claim to traditional Lubicon lands, places the State party in further violations of articles 1, 26 and 27 of the Covenant. In this context, the author claims that the Woodland Cree Band is:

a group of disparate Individuals drawn together by Canada from a dozen different communities scattered across Alberta and British Columbia, who have no history as an organized aboriginal society and no relation as a group to the traditional territory of the Lubicon Lake Band [and that it] is Canada's most recent effort to undermine the traditional Lubicon society and to subvert Lubicon land rights.

The author adds that the Federal Government has supported the Woodland Cree Band both financially and legally, recognizing it "with unprecedented dispatch", thereby bypassing more than 70 other groups, including six different homogenous Cree communities in northern Alberta that had been awaiting recognition as bands for over 50 years. Some of the alleged members of the "Woodland Cree" band are said to come from these very communities. The author refers to section 17 of the Indian Act, which gives the Canadian Indian Affairs Minister the power to constitute bands and to determine that "such portion of the reserve land and funds of the existing Band as the Minister determines" may be earmarked for the benefit of the new band. It is submitted by the author that the powers conferred under section 17 of the Indian Act are "extraordinary and unconstitutional" and that they have been invoked "in order to create [the] 'Woodland Cree Band' and to dispossess the Lubicon Lake Band of its traditional territory and culture". Furthermore, whereas the State party claims that the Woodland Cree Band represents some 350 individuals, the author alleges that the new Band has steadfastly refused to release the names of its members, so that its claims might be verified. He states that the Federal Government has recognized that the Woodland Cree Band members comprise only 110 individuals.

27.6 The author concludes that the State party has been unable to refute his allegations of violations of articles 2; 6, paragraph 1; 7; 14, paragraph 1; 17; 18, paragraph 1; 23, paragraph 1; 26 and 27, as set out in his submissions of 12 January 1988 and 30 May 1989, and requests the Committee to rule against the State party in respect of these articles. In respect of an alleged violation of article 1, he points out that while he has, as the

representative of the Band, signed all the submissions to the Committee, he merely acts in his capacity as a duly elected representative of the Band and not on his own behalf. In this context, he notes that while article 2 of the Optional Protocol provides for the submission of claims to the Committee by individuals, article 1 of the Covenant guarantees "all peoples ... the right of self-determination". He adds that "if the Committee determines that an individual submitting a claim on behalf of a group, in compliance with the provisions of article 2 of the Optional Protocol, may not state a case on behalf of that group under article 1 of the Covenant, the Committee effectively has determined that the rights enumerated in article 1 of the Covenant are not enforceable". The author further adds that it "clearly could not be the intent of the Committee to reach such a result" and that "therefore, the Band respectfully submits that as a people, represented by their duly elected leader, Chief Bernard Ominayak, the Lubicon Lake Band has been the victim of violations by the Federal Government of Canada of the Band's rights as enumerated in article 1 of the Covenant on Civil and Political Rights".

28.1 In a final submission dated 8 November 1989, the State party recalls that in any assessment of the judicial proceedings in the case of the Lubicon Lake Band, the State party's constitutional division of powers between the federal and Provincial Governments and the respective jurisdiction of the courts has to be borne in mind. Where provincially owned lands are claimed, as in the case of the Lubicons, the Supreme Court of Canada has held that claims must be filed in the provincial courts against Provincial Governments. The Supreme Court's ruling clearly defines, the State party submits, the proper judicial forum for the Band's claim to aboriginal land rights. The State party emphasizes that the failure of the Band's representatives to initiate proceedings in the competent courts does not imply that Canadian courts are either unable or unwilling to guarantee a fair hearing in the case.

28.2 Regarding the distinction between aboriginal rights and treaty rights, the State party explains that under Canadian constitutional law, aboriginal rights may be superseded by treaty rights. Whenever this occurs, Indian bands may claim benefits under the superseding treaties. The State party acknowledges that the Lubicon Lake Band has a valid claim to benefits under Treaty 8, which was entered into with the Cree and other Indians in the Province of Alberta in 1899. Rights under Treaty 8 formed the basis of the offers made by the Canadian and Albertan governments to the Band. The land offered by the Provincial Government under the October 1988 agreement is related to these Treaty provisions. On the other hand, the 10,000 square kilometres area referred to by the Band in its submissions relate to its aboriginal claims, which have not been recognized by the Federal Government. The Band's complaint about oil exploration and exploitation and impending timber development, refers to activities on this wider territory of 10,000 square kilometres - not on lands that were identified in proposed settlements between the Band and the federal and Provincial Government.

28.3 The State party refutes the Band's claim that its trapping and hunting lifestyle has been irretrievably destroyed and points out that in areas covered by timber leases the forest, generally, remains intact and sustains an animal population sufficient to satisfy those members of the Lubicon Lake Band who wish to engage in traditional activities. It adds that disturbances of the forest ecosystems usually result in an increase of the population of larger mammals, as they increase food availability in open areas.

28.4 Lastly, the State party reaffirms the voluntary nature of the establishment of the Woodland Cree Band. It points out that a minority of those wishing to join the Woodland Cree Band were at one point in time full members of the Lubicon Lake Band. Some of them, the State party points out, have since left the Band voluntarily, while about 30 of the members were expelled recently by decision of the Lubicon Lake Band. It is submitted that members of the Woodland Cree Band petitioned the Federal Government, in much the same way as members of the Lubicon Lake Band did prior to the Band's recognition in the 1930s. The new Band was recognized because, in the State party's view, some of its members have land entitlements pursuant to Treaty 8 which they wish to assert. The State party adds that it recognized the Woodland Cree Band, at the express request of those who sought recognition, so that their desire to form a community could be realized, and that the Woodland Cree Band has not sought any land portions also claimed by the Lubicons.

Summary of the submissions

29.1 At the outset, the author's claim, although set against a complex background, concerned basically the alleged denial of the right of self-determination and the right of the members of the Lubicon Lake Band to dispose freely of their natural wealth and resources. It was claimed that, although the Government of Canada, through the Indian Act of 1970 and Treaty 8 of 1899, had recognized the right of the Lubicon Lake Band to continue its traditional way of life, its land (approximately 10,000 square kilometres) had been expropriated for commercial interest (oil and gas exploration) and destroyed, thus depriving the Lubicon Lake Band of its means of subsistence and enjoyment of the right of self-determination. It was claimed that the rapid destruction of the Band's economic base and aboriginal way of life had already caused irreparable injury. It was further claimed that the Government of Canada had deliberately used the domestic political and legal processes to thwart and delay all the Band's efforts to seek redress, so that the industrial development in the area, accompanied by the destruction of the environmental and economic base of the Band, would make it impossible for the Band to survive as a people. The author has stated that the Lubicon Lake Band is not seeking from the Committee a territorial rights decision, but only that the Committee assist it in attempting to convince the Government of Canada: (a) that the Band's existence is seriously threatened; and (b) that Canada is responsible for the current state of affairs.

29.2 From the outset, the State party has denied the allegations that the existence of the Lubicon Lake Band has been threatened and has maintained that continued resource development would not cause irreparable injury to the traditional way of life of the Band. It submitted that the Band's claim to certain lands in northern Alberta was part of a complex situation that involved a number of competing claims from several other native communities in the area, that effective redress in respect of the Band's claims was still available, both through the courts and through negotiations, that the Government had made an *ex gratia* payment to the Band of \$C 1.5 million to cover legal costs and that, at any rate, article 1 of the Covenant, concerning the rights of people, could not be invoked under the Optional Protocol which provides for the consideration of alleged violations of individual rights, but not collective rights conferred upon peoples.

29.3 This was the state of affairs when the Committee decided in July 1987 that the communication was admissible "insofar as it may raise issues under article 27 or other articles of the Covenant". In view of the seriousness of the author's allegations that the Lubicon Lake Band was on the verge of extinction, the Committee requested the State party, under rule 86 of the rules of procedure "to take interim measures of protection to avoid irreparable damage to [the author of the communication] and other members of the Lubicon Lake Band".

29.4 Insisting that no irreparable damage to the traditional way of life of the Lubicon Lake Band had occurred and that there was no imminent threat of such harm, and further that both a trial on the merits of the Band's claims and the negotiation process constitute effective and viable alternatives to the interim relief which the Band had unsuccessfully sought in the courts, the State party, in October 1987, requested the Committee, under rule 93, paragraph 4, of the rules of procedure, to review its decision on admissibility, insofar as it concerns the requirement of exhaustion of domestic remedies. The State party stressed in this connection that delays in the judicial proceedings initiated by the Band were largely attributable to the Band's own inaction. The State party further explained its long-standing policy to seek a negotiated resolution of the valid, outstanding land claims by Indian bands.

29.5 Since October 1987, the parties have made a number of submissions, refuting each other's statements as factually misleading or wrong. The author has accused the State party of creating a situation that has directly or indirectly led to the death of many Band members and is threatening the lives of all other members of the Lubicon community; that miscarriages and stillbirths have skyrocketed and abnormal births have risen from zero to near 100 per cent, all in violation of article 6 of the Covenant; that the devastation wrought on the community constitutes cruel, inhuman and degrading treatment in violation of article 7; that the bias of the Canadian courts has frustrated the Band's efforts to protect its land, community and livelihood, and that several of the judges have had clear economic and personal ties to the parties opposing the Band in the court actions, all in violation of articles 14, paragraph 1; and 26; that the State party has permitted the destruction of the families and homes of the Band members in violation of articles 17; and 23, paragraph 1; that the Band members have been "robbed of the physical realm to which their religion attaches" in violation of article 18, paragraph 1; and that all of the above also constitute violations of article 2, paragraphs 1 to 3, of the Covenant.

29.6 The State party has categorically rejected the above allegations as unfounded and unsubstantiated and as constituting an abuse of the right of submission. It submits that serious and genuine efforts continued in early 1988 to engage representatives of the Lubicon Lake Band in negotiations in respect of the Band's claims. These efforts, which included an interim offer to set aside 25.4 square miles as reserve land for the Band, without prejudice to negotiations or any court actions, failed. According to the author, all but the 25.4 square miles of the Band's traditional lands had been leased out, in defiance of the Committee's request for interim measures of protection, in conjunction with a pulp mill to be constructed by the Daishowa Canada Company Ltd. near Peace River, Alberta, and that the Daishowa project frustrated any hopes of the continuation of some traditional activity by Band members.

29.7 Accepting its obligation to provide the Lubicon Lake Band with reserve land under Treaty 8, and after further unsuccessful discussions, the Federal Government, in May 1988, initiated legal proceedings against the Province of Alberta and the Lubicon Lake Band, in an effort to provide a common jurisdiction and thus to enable it to meet its lawful obligations to the Band under Treaty 8. In the author's opinion, however, this initiative was designated for the sole purpose of delaying indefinitely the resolution of the Lubicon land issues and, on 6 October 1988 (30 September, according to the State party), the Lubicon Lake Band asserted jurisdiction over its territory and declared that it had ceased to recognize the jurisdiction of the Canadian courts. The author further accused the State party of "practicing deceit in the media and dismissing advisors who recommend any resolution favourable to the Lubicon people".

29.8 Following an agreement between the Provincial Government of Alberta and the Lubicon Lake Band in November 1988 to set aside 95 square miles of land for a reserve, negotiations started between the Federal Government and the Band on the modalities of the land transfer and related issues. According to the State party, consensus had been reached on the majority of issues, including Band membership, size of the reserve, community construction and delivery of programmes and services, but not on cash compensation, when the Band withdrew from the negotiations on 24 January 1989. The formal offer presented at that time by the Federal Government amounted to approximately \$C 45 million in benefits and programmes, in addition to the 95 square mile reserve.

29.9 The author, on the other hand, states that the above information from the State party is not only misleading but virtually entirely untrue and that there had been no serious attempt by the Government to reach a settlement. He describes the Government's offer as an exercise in public relations, "which committed the Federal Government to virtually nothing", and states that no agreement or consensus had been reached on any issue. The author further accused the State party of sending agents into communities surrounding the traditional Lubicon territory to induce other natives to make competing claims for traditional Lubicon land.

29.10 The State party rejects the allegation that it negotiated in bad faith or engaged in improper behaviour to the detriment of the interests of the Lubicon Lake Band. It concedes that the Lubicon Lake Band has suffered a historical inequity, but maintains that its formal offer would, if accepted, enable the Band to maintain its culture, control its way of life and achieve economic self-sufficiency and, thus, constitute an effective remedy. On the basis of a total of 500 Band members, the package worth \$C 45 million would amount to almost \$C 500,000 for each family of five. It states that a number of the Band's demands, including an indoor ice arena or a swimming pool, had been refused. The major remaining point of contention, the State party submits, is a request for \$C 167 million in compensation for economic and other losses allegedly suffered. That claim, it submits, could be pursued in the courts, irrespective of the acceptance of the formal offer. It reiterates that its offer to the Band stands.

29.11 Further submissions from both parties have, *inter alia*, dealt with the impact of the Daishowa pulp mill on the traditional way of life of the Lubicon Lake Band. While the author states that the impact would be devastating, the State party maintains that it would have no serious adverse consequences, pointing out that the pulp mill, located about 80 kilometres away from the land set aside for the reserve, is not within the Band's claimed traditional territory and that the area to be cut annually, outside the proposed reserve, involves less than 1 per cent of the area specified in the forest management agreement.

30. The Human Rights Committee has considered the present communication in the light of the information made available by the parties, as provided for in articles 5, paragraph 1, of the Optional Protocol. In so doing, the Committee observes that the persistent disagreement between the parties as to what constitutes the factual setting for the dispute at issue has made consideration of the claims on the merits most difficult.

Request for a review of the decision on admissibility

31.1 The Committee has seriously considered the State party's request that it review its decision declaring the communication admissible under the Optional Protocol "insofar as it may raise issues under article 27 or other articles of the Covenant". In the light of the information now before it, the Committee notes that the State party has argued convincingly that, by actively pursuing matters before the appropriate courts, delays, which appeared to be unreasonably prolonged, could have been reduced by the Lubicon Lake Band. At issue, however, is the question of whether the road of litigation would have represented an effective method of saving or restoring the traditional or cultural livelihood of the Lubicon Lake Band, which, at the material time, was allegedly on the brink of collapse. The Committee is not persuaded that that would have constituted an effective remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol. In the circumstances, the Committee upholds its earlier decision on admissibility.

31.2 At this stage, the Committee must also state that it does not agree with the State party's contention that it was remiss in not spelling out, at the time of declaring the communication admissible, which of the author's allegations deserved consideration on the merits. Although somewhat confusing at times, the author's claims have been set out sufficiently clearly as to permit both the State party and the Committee, in turn, to address the issues on the merits.

Articles of the Covenant alleged to have been violated

32.1 The question has arisen of whether any claim under article 1 of the Covenant remains, the Committee's decision on admissibility notwithstanding. 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 of whether the Lubicon Lake Band constitutes 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. There is, however, no objection to a group of individuals, who claim to be similarly affected, collectively submitting a communication about alleged breaches of their rights.

32.2 Although initially couched in terms of alleged breaches of the provisions of article 1 of the Covenant, there is no doubt that many of the claims presented raise issues under article 27. The Committee recognizes that the rights protected by article 27 include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong; far-reaching allegations concerning extremely serious breaches of other articles of the Covenant (6, 7, 14, para. 1; and 26), made after the communication was declared admissible, have not been substantiated to the extent that they would deserve serious consideration. The allegations concerning breaches of articles 17 and 23, paragraph 1, are similarly far-reaching and will not be taken into account except insofar as they may be considered subsumed under the allegations which, generally, raise issues under article 27.

32.3 The most recent allegations that the State party has conspired to create an artificial band, the

Woodland Cree Band, said to have competing claims to traditional Lubicon land, are dismissed as an abuse of the right of submission within the meaning of article 3 of the Optional Protocol.

Violations and the remedy offered

33. Historical inequities, to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue. The State party proposes to rectify the situation by a remedy that the Committee deems appropriate within the meaning of article 2 of the Covenant.

APPENDIX I

Individual opinion: submitted by Mr. Nisuke Ando pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the Committee's views on communication No. 167/1984, B. Ominayak and the Lubicon Lake Band v. Canada

I do not oppose the adoption of the Human Rights Committee's views, as they may serve as a warning against the exploitation of natural resources which might cause irreparable damage to the environment of the earth that must be preserved for future generations. However, I am not certain if the situation at issue in the present communication should be viewed as constituting a violation of the provisions of article 27 of the Covenant.

Article 27 stipulates: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language". Obviously, persons belonging to the Lubicon Lake Band are not denied the right to profess and practice their own religion or to use their own language. At issue in the present communication is, therefore, whether the recent expropriation by the Government of the Province of Alberta of the Band's land for commercial interest (e.g. leases for oil and gas exploration) constitutes a violation of those persons' right "to enjoy their own culture".

It is not impossible that a certain culture is closely linked to a particular way of life and that industrial exploration of natural resources may affect the Band's traditional way of life, including hunting and fishing. In my opinion, however, the right to enjoy one's own culture should not be understood to imply that the Band's traditional way of life must be preserved intact *at all costs*. The history of mankind bears out that technical development has brought about various changes to existing ways of life and thus affected a culture sustained thereon. Indeed, outright refusal by a group in a given society to change its traditional way of life may hamper the economic development of the society as a whole. For this reason, I would like to express my reservation to the categorical statement that recent developments have threatened the life of the Lubicon Lake Band and constitute a violation of article 27.

Nisuke Ando

APPENDIX II

Individual opinion: submitted by Mr. Bertil Wennergren pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the Committee's views on Communication No. 167/1984, Ominayak and the Lubicon Lake Band v. Canada

The communication in its present form essentially concerns the authors' rights to freely dispose of their natural wealth and resources, and to retain their own means of subsistence, such as hunting and fishing. In its decision of 22 July 1987, the Human Rights Committee decided that the communication was admissible insofar as it could have raised issues under article 27 or other articles of the Covenant. With respect to provisions other than article 27 the authors' allegations have remained, however, of such a sweeping nature that the Committee has not been able to take them into account except insofar as they may be subsumed under the claims which, generally, raise issues under article 27. That is the basis of my individual opinion.

Since the Committee adopted its decision on admissibility, discussions seeking a resolution of the matter have taken place between the Federal Government, the Province of Alberta and the authors. As no progress was made towards a settlement, the Federal Government initiated legal proceedings against the Province of Alberta and the Lubicon Lake Band on 17 May 1988, in order to enable Canada to meet its legal obligations vis-à-vis the authors under Treaty 8. The Statement of Claim, initiating the legal action, seeks from the Court of the Queen's Bench of Alberta (a) a declaration that the Lubicon Lake Band is entitled to a reserve and (b) a determination of the size of that reserve.

On 9 June 1988, the Lubicon Lake Band filed a Statement of Defence and Counterclaim. In this connection, the State party has submitted that the issue forming the basis of the domestic dispute as well as the basis of the communication before the Human Rights Committee concerns the extent of the territory to be set aside as a reserve, and related issues. It is not altogether clear that all issues which may be raised under article 27 of the Covenant are issues to be considered by the Court of Queen's Bench of Alberta in the case still pending before it. At the same time, it does appear that issues under article 27 of the Covenant are inextricably linked to the extent of the territory to be set aside as a reserve, and questions related to those issues.

The rationale behind the general rule of international law that domestic remedies should be exhausted before a claim is submitted to an instance of international investigation or settlement is primarily to give a respondent State an opportunity to redress, by its own means within the framework of its domestic legal system, the wrongs alleged to have been suffered by the individual. In my opinion, this rationale implies that, in a case such as the present one, an international instance shall not examine a matter pending before a court of the respondent State. In my opinion, it is not compatible with international law that an international instance consider issues which, concurrently, are pending before a national court. An instance of international investigation or settlement must, in my opinion, refrain from considering any issue pending before a national court until such time as the matter has been adjudicated upon by the national courts. As that is not the case here, I find the communication inadmissible at this point in time.

Bertil Wennergren

Communication No. 181/1984

Submitted by: Elcida Arévalo Pérez on behalf of her disappeared sons, Alfredo Ráfael and Samuel Humberto Sanjuan Arévalo

Alleged victim: Alfredo Ráfael and Samuel Humberto Sanjuan Arévalo

State party: Colombia

Date of adoption of views: 3 November 1989 (thirty-seventh session)*

Subject matter: State party's failure to investigate the disappearance of the victim's sons

Procedural issues: State party's duty to investigate—Adoption of views without submission on merits by State party—Article 4 (2)

Substantive issues: Effective remedy—Right to life—General comment on Article 6 (16)

Articles of the Covenant: 2, 6, 7, 9 and 10

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

* The text of an individual opinion submitted by Mr. Nisuke Ando is reproduced in the appendix.

1. The author of the communication (initial letter dated 17 September 1984 and subsequent correspondence) is Elcida Arévalo Pérez, a Colombian national residing in Colombia, writing on behalf of her sons, Alfredo Ráfael and Samuel Humberto Sanjuán Arévalo, who disappeared in Colombia on 8 March 1982.

2.1 The author states that Alfredo Ráfael (born on 7 October 19471, a student of engineering at the District University of Bogotá, left the family home in Bogotá, on 8 March 1982 at 8 a. m., with the intention of going to the university and that Samuel Humberto (born on 25 March 1959), a student of anthropology at the National University of Colombia, left their home on the same day at 3 p. m. for the purpose of attending to a job offer. They did not return and their whereabouts have been unknown ever since. The author further states that on the same day she was told by neighbours that their home had been watched by armed individuals carrying walkie-talkies, that these men

had inquired about the activities of the Sanjuán family and that they had identified themselves as agents of the "F2" (a section of the Colombian police forces).

2.2 On 10 March 1982, the author reported the disappearance of her sons to the local police and to the Section of Disappeared Persons of the "F2". She also regularly visited the morgues. Between June and September 1982, the case of her sons was reported to the assistant prosecutor of the Police, to the Armed Forces, to the Attorney-General's office and to the Administrative Department of Security "DAS". Investigations were carried out by most of these authorities for some weeks, but without results. The author also mentions several letters written to the President of the Republic and states that, at the behest of his office, a judge of a criminal court was appointed in February 1983 to initiate the appropriate investigation. At the time of writing, she stated that these proceedings were still pending, due to frequent changes of judges.

2.3 The author claims that she could never obtain from the authorities any official information about her sons' whereabouts. However, in a letter dated 17 August 1982 from the alleged victims' father addressed to State Minister Rodrigo Escobar Navia (with copies sent to the President of Colombia, Minister of Justice and Attorney-General), submitted to the Human Rights Committee as part of communication No. 181/1984, it is stated that the parents of Alfredo Rafael and Samuel Humberto Sanjuán Arévalo received indications in August 1982, from the Chief of the Administrative Department of Security, "DAS", that their sons had been arrested by agents of the "F2" and that on 13 August 1982 in the course of an interview with the National Director of the "F2", it was intimated that they would soon reappear ("confien en Dios que pronto aparecerán y estén tranquilos").

2.4 The author claims that articles 2, 6, 7, 9 and 10 of the International Covenant on Civil and Political Rights have been violated.

2.5 She indicates that the case of her sons is not being examined under another procedure of international investigation or settlement.

3. Having concluded that the author of the communication was justified in acting on behalf of the alleged victims, the Working Group of the Human Rights Committee decided, on 17 October 1984, to transmit the communication under rule 91 of the rules of procedure to the State party concerned, requesting information and observations relevant to the question of the admissibility of the communication. The Working Group also requested the State party to forward copies of any official inquiries made in connection with the reported disappearance of Alfredo Rafael and Samuel Humberto Sanjuán Arévalo.

4. The deadline for the State party's submission under rule 91 of the Committee's rules of procedure expired on 20 January 1985. No rule 91 submission was received from the State party.

5.1 With regard to article 5, paragraph 2, of the Optional Protocol, the Committee noted that the author's statement, that the case of her sons was not being examined under another procedure of international investigation or settlement, remained uncontested.

5.2 With regard to article 5, paragraph 2 (b), of the Optional Protocol, the Committee was unable to conclude, on the basis of the information before it, that there were available remedies in the circumstances of the present case which could or should have been pursued.

6. On 11 July 1985, the Human Rights Committee therefore decided that the communication was admissible. The State party was further requested to forward copies of any official inquiries made in connection with the reported disappearance of Alfredo Rafael and Samuel Humberto Sanjuán Arévalo.

7.1 In its submissions under article 4, paragraph 2, of the Optional Protocol, dated 11 August 1986, 21 January and 8 July 1987, 20 October 1986 and 27 January 1989, the State party forwarded the Committee copies of the relevant police reports on the ongoing investigations into the disappearance of the Sanjuán brothers.

7.2 A report from the Office of the Attorney-General of Colombia (Procuraduría General), dated 19 June 1986, indicates that, pursuant to an order of the Attorney-General of Colombia, dated 21 May 1986, the Colombian lawyer Martha Julieta Tovar Cardona was entrusted with a general review of the records of the Colombian Police Department aimed at determining whether the cases of 10 disappeared persons and 2 deceased persons had been properly investigated.

7.3 The report reflects that, on 19 June 1986, Mrs. Tovar Cardona studied the records of the investigations started by the Colombian Police on 8 March 1983 concerning the suspected crime of kidnapping of 12 persons, including the Sanjuán brothers. In her report, Mrs. Tovar Cardona notes that there were indictments against 18 police officials. She also notes the appointment of a judge in charge of the investigations into the suspected crime of kidnapping and that in the course of the police investigations the records of prior discoveries of corpses, on 7 and 27 June 1982, 11 and 19 July 1982, 28 September 1982, 21 November 1982, and 15 February 1983, had been examined. None of the bodies had been identified.

7.4 The next 16 pages of the 18-page report consist mainly of listings of the names of some 193 persons interrogated (including the names of police officials suspected of involvement in the disappearances), with an indication of the date and place of deposition. There is no indication, however, as to the contents of any of the depositions or as to their relevance to the disappearance of the Sanjuán brothers. Except for declarations made by Elcida Mariá Arévalo Pérez and Yolanda Sanjuán Arévalo on 11 March 1983, it cannot be seen which, if any, of the other declarations and depositions listed relate to their cases. There is reference, however, to inquiries which had been made at prisons and police stations to ascertain that the Sanjuán brothers were not being detained there. Other references concern the appointment of court officials to evaluate the evidence and the assignment of persons for on-site inspections. There is no indication of the outcome.

7.5 Mrs. Tovar Cardona observes that the Colombian Police has carried out exhaustive investigations into the alleged disappearances and killings. The investigations are said to have continued until the end of May 1986. It cannot be seen whether the indictments against the various police officers have led to any further actions against them.

7.6 Mrs. Tovar Cardona concludes her report by making the following observations:

The original records, numbered 1 to 7 inclusive were examined and, in conformity with the instruction given verbally by the attorney assigned to the police, particular importance was attached to determining by means of dates of reception and transmittal, the various activities undertaken in the preliminary proceedings both in ordinary jurisdiction and in the military criminal justice system as well as the various formalities carried out by the departments responsible for acting on the files. In addition to this, because of their quantity and since they were not absolutely germane to the fulfilment of the mandate of legal vigilance of the representative of the Office of the Attorney-General assigned to the police, the items of judicial evidence were not considered as a whole. Nevertheless, a scrutiny of the material evidence available with which the preliminary proceedings were conducted, complicated as they were on many occasions by the passage of time, distances, the lack of resources, the lack of co-operation on the part of relatives, friends, neighbours or in general those who had knowledge of the facts in coming forward with their testimony or in participating in confrontation formalities, identification parades and the adducing of items of judicial evidence as a whole. An examination of the proceedings does not reveal any irregularity or delay constituting a breach of discipline which would justify bringing charges, pursuant to the opening of a formal disciplinary investigation, and accordingly since the task set out in the order of 21 May 1986 issued by the office of the attorney assigned to the police has been completed, the files are returned herewith.

8.1 In response to the Committee's request for more precise information about the progress of investigations concerning the disappearance of the Sanjuán brothers, the State party indicated by note of 22 January 1987 that the case of the Sanjuán brothers (file No. 45317) was under review and that a statement of charges against members of the police force could follow. By letter of 27 January 1989, the Colombian Ministry of Foreign Affairs informed the Committee that a criminal investigation was being conducted by Court 34 of the Criminal Bench of Bogotá:

In these criminal proceedings, the Ninth Criminal Investigation Judge of Bogotá, who initially heard the case, on 2 May 1983, admitted an application for related civil proceedings brought by the relatives of the victims. Such proceedings are established in Colombian criminal legislation for compensation, in the event that the acts reported are confirmed for the damages incurred, both materially and morally. Further, they offer the injured parties or their representatives an opportunity on requesting evidence in order to ascertain the truth about the offence, its perpetrators and accessories, their criminal liability and the nature and extent of the damages incurred as well as many other activities granted to them by the law, such as the filing of remedies. In the case of the Sanjuán Arévalo brothers, the records show that their representatives have not made effective use of that right and have confined themselves to requesting copies of the proceedings, without really moving matters forward.

Because of the alleged involvement of members of the national police force, the military criminal proceedings were expedited by the Inspector-General of Police, the judge of the Court of First Instance, who, on 12 March 1987, qualified the pre-trial proceedings by dismissing the case against the officers, non-commissioned officers and members of the police alleged to be implicated. The decision was taken on the ground that the requirements of article 539 of the Code of Military Criminal Justice are not satisfied, i. e. full proof of *corpus delicti* or the existence of a convincing statement offering solid grounds for credibility or serious evidence identifying the accused as the principals or accomplices of the act under investigation . . .

This decision by the judge of the court of first instance was transmitted to the Military Superior Court which confirmed it *in toto*.

8.2 With regard to the disciplinary investigations, the State party adds that the Attorney-General

has reactivated the proceedings and accordingly appointed a special commission by an order dated 8 November 1988, comprising two co-ordinating lawyers of the Judicial Police and two technical investigators to continue to investigate the events that led to the disappearance of the Sanjuán Arévalo brothers. Having completed their mission, the appointed officials submitted on 27 November 1988 the relevant evaluation report suggesting the opening of a disciplinary investigation against the chief of the DIPEC (the former Intelligence Corps of the National Police), the chief of the Intelligence and Counter-Intelligence Section of the DIPEC, the chief of the Judicial Police of the DIPEC, and the non-commissioned officers and members of the National Police Force who acted on the orders of the aforementioned officers. The Office of the Attorney-General, on the basis of the evaluation report, ordered by decree of 19 December 1988 the proceedings to be referred to the Office of the Attorney-General assigned to the National Police so that a formal disciplinary investigation may be opened against the aforementioned officers and non-commissioned officers.

8.3 The State party further observes that since the investigations are still continuing and the applicable judicial procedures are pending, domestic remedies have not been exhausted.

9. No further submissions have been received from the State party or from the author of the communication.

10. The Human Rights Committee has considered the present communication in the light of all written information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol. In adopting its views, the Committee stresses that it is not making any finding on the guilt or innocence of the Colombian officials who are currently under investigation for possible involvement in the disappearance of the Sanjuán brothers. The Committee limits itself to expressing its views on the question of whether any of the Covenant rights of the Sanjuán brothers have been violated by the State party, in particular articles 6 and 9. In this connection, the Committee refers to its general comment 6 (16) concerning article 6 of the Covenant, which provides, *inter alia*,

that States parties should take specific and effective measures to prevent the disappearance of individuals and establish facilities and procedures to investigate thoroughly, by an appropriate impartial body, cases of missing and disappeared persons in circumstances which may involve a violation of the right to life. The Committee has duly noted the State party's submissions concerning the investigations carried out hitherto in this case.

11. The Human Rights Committee notes that the parents of the Sanjuán brothers received indications that their sons had been arrested by agents of the "F2". The Committee further notes that in none of the investigations ordered by the Government has it been suggested that the disappearance of the Sanjuán brothers was caused by persons other than Government officials. In all these circumstances, therefore, the Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, finds that the right to life enshrined in article 6 of the Covenant and the right to liberty and security of the person laid down in article 9 of the Covenant have not been effectively protected by the State of Colombia.

12. The Committee takes this opportunity to indicate that it would welcome information on any relevant measures taken by the State party in respect of the Committee's views and, in particular, invites the State party to inform the Committee of further developments in the investigation of the disappearance of the Sanjuán brothers.

APPENDIX

Individual opinion submitted by Mr. Nisuke Ando pursuant to rule 94, paragraph 3 of the Committee's rules of procedure concerning the views of the Committee on communication No. 181/1984, Sanjuan Arevalo v. Colombia

I have no objection to the Committee's invitation that the State party continue to inform it of further developments in the investigation into the disappearance of the Sanjuán brothers (para. 12 of the views).

However, in inviting the State party to continue to inform it, the Committee notes that "the Sanjuan brothers were arrested in the first place by the agents of the 'F2'". It further notes that "in none of the investigations ordered by the Government has it been suggested that the disappearance of the Sanjuán brothers was caused by private persons". Thus, "[In] all these circumstances ... the Committee finds that the right to life enshrined in article 6 of the Covenant and the right to liberty and security of the person laid down in article 9 of the Covenant have not been effectively protected by the State of Colombia" (*ibid.*).

I have three *reservations* concerning these findings:

Firstly, the finding that "the Sanjuán brothers were arrested ... by agents of the 'F2'" is based on a statement contained in a letter of the victims' father (para. 2.3). According to this letter, the parents of the brothers "received indications in August 1982 from the Chief of the Administrative Department of Security ... that their sons had been arrested by agents of the 'F2'". In my opinion, the Committee should have made it clear that its finding is based on that particular letter. Moreover, the letter's evidentiary value must be treated with caution.

Secondly, the finding that "in none of the investigations ordered by the Government has it been suggested that the

disappearance ... was caused by private persons" is not, in my opinion, well-founded. It is true that the information contained in paragraphs 2.7 and 8 refers merely to the possible involvement of officers and members of the National Police in the brothers' disappearance. Nevertheless, since the investigations of the case are still continuing and the applicable judicial procedures are pending (para. 8.3), it is not proper for the Committee to make such a finding at this stage, notwithstanding the possibility that it might be established that private persons were involved in the disappearances.

Thirdly, the finding that "[In] all these circumstances ... the right to life .. and the right to liberty and security of the person ... have not been effectively protected by the State of Colombia" is, in my opinion, too far-reaching. It is true that many cases of disappearances, including this one, are reported to have occurred in Colombia, and that the investigations of these cases seem to have encountered a number of difficulties. This situation is indeed deplorable. Nevertheless, considering the efforts made by the Colombian Government, which can be ascertained from its replies to the Committee's requests for clarifications, I am unable to persuade myself that the Committee's far-reaching finding is justified.

Nisuke Ando

Communication No. 193/1985

Submitted by: Pierre Giry (represented by counsel)

Alleged victim: The author

State party: Dominican Republic

Date of adoption of views: 20 July 1990 (thirty-ninth session)*

Subject matter: In-transit deportation of victim to third country by State party authorities

Procedural issues: Lack of due process—State party's failure to make submission on the merits

Substantive issues: Unlawful and arbitrary arrest—Detention—Expulsion—Right to a fair trial—National security considerations—Bilateral extradition treaty—General comment

Articles of the Covenant: 2, 3, 9 (1) and (2), 12 and 13

Article of the Optional Protocol: 4 (2)

1. The author of the communication is Pierre Giry, a French citizen, formerly a resident of Saint-Barthélemy (Antilles), at present detained at a Federal penitentiary in the United States He is represented by counsel.

The complaint

2. The author claims to be the victim of violations by the Government of the Dominican Republic of article 9, paragraphs 1 and 2, articles 12 and 13 in conjunction with articles 2 and 3 of the International Covenant on Civil and Political Rights. He contends in particular that his detention of nearly three hours by the Dominican authorities violated article 9, because he was prevented from taking his intended flight to Saint-Barthélemy, thereby depriving him of his right to liberty of movement under article 12, and that he was subjected to an illegal expulsion contrary to article 13 of the Covenant, since he was deported by force without the benefit of any administrative or judicial procedures.

Background

3.1 According to the author, he arrived in the Dominican Republic on 2 February 1985, stayed there for two days and, on 4 February, went to the airport to buy a ticket in order to leave the country on a flight to Saint-Barthélemy. Two agents in uniform, either belonging to the Dominican police or to the customs service, took him to the police office at the airport,

* The text of a joint individual opinion submitted by Ms. Christine Chanet and Mssrs. Francisco Aguilar Urbina, Nisuke Ando and Bertil Wennergren is appended.

where he was subjected to a thorough search. After two hours and forty minutes, he was taken out by a back door leading directly to the runway and made to board an Eastern Airlines plane bound for Puerto Rico. On his arrival in Puerto Rico he was arrested and charged with conspiracy and attempt to smuggle drugs into the United States.

3.2 The author was tried before the United States District Court in San Juan, Puerto Rico, and convicted of the offences of conspiracy to import cocaine into the United States, and of the use of a communication facility, the telephone, to commit the crime of conspiracy.

3.3 On 30 April 1986 he was sentenced to 28 years of imprisonment and fined \$250,000. He is serving his term of imprisonment at the Federal Correctional Institution at Ray Brook, New York.

3.4 With respect to the requirement of exhaustion of domestic remedies in the Dominican Republic, the author states that remedies could not be effectively used since he was expelled within three hours of his arrest.

The State party's observations

4.1 By note of 24 June 1988, the State party informed the Committee

that Mr. Pierre Giry was deported from the Dominican Republic to the United States of America on the basis of the extradition treaty existing between the two nations and by virtue of the internal law on extradition No. 489 of 22 October 1969". The State party further observed that "in response to this procedure Mr. Giry should have exhausted the remedies provided for under Dominican legislation before seizing the Committee with the case.

4.2 In a further submission dated 8 June 1990, the State Party contends that in respect of the alleged violation of article 9 of the Covenant, the provision is inapplicable to the particular circumstances of the case, since the Dominican authorities had no intention to arrest Mr. Giry and to detain him on Dominican territory; their intention was merely to expel him from Dominican territory. The brief period that he spent at the airport prior to the departure of the flight for Puerto Rico could not be deemed to be a "detention" within the meaning of article 9. If it were to be considered as such, then the State party argues that it was neither arbitrary nor illegal, since Mr. Giry was internationally sought on charges of drug trafficking. His name had appeared on a list of the United States Drug Enforcement Agency, with which Dominican authorities cooperate in the spirit of international cooperation in the struggle against drug trafficking.

4.3 With respect to the alleged violation of article 13 of the Covenant, the State party contends that there is no violation and invokes that part of the provision that permits summary expulsions where compelling reasons of national security require. It is stated that Mr. Giry constituted a national security danger for the Dominican Republic, which, as any sovereign State, is entitled to take the necessary steps to protect national security, public order, and public health and morals.

4.4 The State party further argues that its actions must be understood in the context of the international efforts to apprehend persons involved in the illegal traffic of drugs, which must be seen as an international crime subject to universal jurisdiction.

Issues and proceedings before the Committee

5.1 When considering the communication at its thirty-third session, the Committee concluded, on the basis of the information before it, that the conditions for declaring the communication admissible had been met and that it raised issues under the Covenant that should be examined on the merits. The author had not submitted the matter for examination elsewhere and there were no effective remedies available in the Dominican Republic which the author could or should have pursued.

5.2 On 11 July 1988, the Committee declared the communication admissible and invited the State party to make its written submission on the merits of the case, in accordance with article 4, paragraph 2, of the Optional Protocol, not later than 26 February 1989. The State party was further requested to forward to the Committee the text of Law No. 489 on extradition, a copy of the decision to extradite Mr. Giry as well as the text of the relevant laws and regulations governing the expulsion of aliens. Under cover of a note dated 5 October 1989, the State party forwarded a copy of law No. 489. By telefax dated 10 July 1990, the State party asked for additional time in order to furnish other documentation. The Committee understands this request as pertaining to the State party's stated intention of furnishing the records of the United States District Court in Puerto Rico in the court case against the author. It deems it unnecessary, however, to have access to such court records for the consideration of the issues before it.

5.3 The Committee has considered the present communication in the light of all the information provided by the parties. It observes that, although the communication concerns an individual suspected of involvement in serious crimes, and later convicted of having perpetrated the very same offences, his rights under the Covenant must be respected.

5.4 The Committee has noted that the author has invoked a number of provisions of the Covenant, which he alleges to have been violated in his case. The Committee observes, however, that the facts as placed before it, basically raise issues under article 13 of the Covenant. It will limit itself to those issues.

5.5 The State party initially submitted that the author was deported from Dominican territory on the basis of an extradition treaty between the Dominican Republic and the United States of America. The State party has also referred to the action as expulsion. Regardless of whether the action against the author is termed extradition or expulsion, the Committee confirms, as it has done in its general comments on the provision in question,¹ that "expulsion" in the context of article 13 must be understood broadly and observes that extradition comes within the scope of the article, which provides:

An alien lawfully in the territory of a State party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

The Committee notes that, while the State party has specifically invoked the exception based on reasons of national security for the decision to force him to board a plane destined for the jurisdiction of the United States of America, it was the author's very intention to leave the Dominican Republic of his own volition for another destination. In spite of several invitations to do so, the State party has not furnished the text of the decision to remove the author from Dominican territory or shown that the decision to do so was reached "in accordance with law" as required under article 13 of the Covenant. Furthermore, it is evident that the author was not afforded an opportunity, in the circumstances of the extradition, to submit the reasons against his expulsion or to have his case reviewed by the competent authority. While finding a violation of the provisions of article 13 in the specific circumstances of Mr. Giry's case, the Committee stresses that States are fully entitled to protect their territory vigorously against the menace of drug dealing by entering into extradition treaties with other States. But practice under such treaties must

¹ "[Article 13] is applicable to all procedures aimed at the obligatory departure of an alien, whether described in national law as expulsion or otherwise". (*Official Records of the General Assembly, Forty-first Session, Supplement No. 40 (A/41/40), Annex VI, paragraph 9*).

comply with article 13 of the Covenant, as indeed would have been the case, had the relevant Dominican law been applied in the present case.

6. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as presented disclose violations of article 13 of the International Covenant on Civil and Political Rights and that the State party has an obligation to ensure that similar violations do not occur in the future.

APPENDIX

*Individual opinion submitted by Ms. Christine Chanet and Messrs. Francisco Aguilar Urbina, Nisuke Ando and Bertil Wennergren pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the views of the Committee on communication No. 193/1985,
Giry v. Dominican Republic*

[Original: French]

In the view of the four signatories of this separate opinion, the communication should be considered in relation to articles 9 and 12 of the Covenant and not to article 13.

It appears from the information available to the Committee at the time when it took its decision that the arrest of Mr. Giry after he had been on the territory of the Dominican Republic for two days, his detention at the airport and his forcible transfer to the aeroplane of a foreign State to which he was handed over forthwith and against his will, should be regarded as an act of violence.

This concept of administrative law is defined as a decision not capable of being related to an act falling within the competence of the administration.

In the present case, the Dominican Republic was not able to produce or refer to any administrative act ordering the expulsion or extradition of Mr. Giry before or after his arrest at the airport.

Had there been an administrative act, even an irregular one, this might have been a case of expulsion falling within the scope of article 13.

In the absence of such an act, identifiable, *inter alia*, by its date, by the authority taking the decision and by its nature, it appears to the signatories that the arrest of Mr. Giry and his enforced boarding of an Eastern Airlines flight when he wished to travel to Saint-Barthélemy constitute unlawful and arbitrary arrest within the meaning of article 9, paragraph 1, of the Covenant.

Furthermore, since the arbitrary arrest involved not only depriving the author of his liberty but also, and more particularly, preventing him from travelling to another country of his choice and since he was obliged, against his will, to take a flight other than the one which he would have taken, the arrest in question also constitutes, in our opinion, a violation of article 12 of the Covenant.

Christine Chanet

Francisco Aguilar Urbina

Nisuke Ando

Communication No. 195/1985

Submitted by: William Eduardo Delgado Páez

Alleged victim: The author

State party: Colombia

Date of adoption of views: 12 July 1990 (thirty-ninth session)

Subject matter: State party's alleged failure to protect security of and discrimination against teacher of liberation theology

Procedural issues: Effective remedy—Unreasonably prolonged domestic remedies—Failure of State party to investigate allegations—Travaux préparatoires

Substantive issues: Equality before the law—Obligation to provide reasonable and appropriate measures of protection—Right to liberty and security of person—Freedom of expression—Freedom of religion—Right to compensation—Equal right of access to public service

Articles of the Covenant: 2, 9, 14 (6), 18, 19, 25 (c), 26

Article of the Optional Protocol: 5 (2) (b)

1. The author of the communication is William Eduardo Delgado Páez, a Colombian national who resided in Bogotá, Colombia, at the time of submission. In May 1986 he left the country and sought political asylum in France, where he was granted refugee status.

Background

2.1 In March 1983, the author was appointed by the Ministry of Education as a teacher of religion and ethics at

a secondary school in Leticia, Colombia. He was elected vice-president of the teachers' union. As an advocate of "liberation theology", his social views differed from those of the then Apostolic Prefect of Leticia.

2.2 In October 1983, the Apostolic Prefect sent a letter to the Education Commission withdrawing the support that the Church had given to Mr. Delgado. On 10 December 1983, the Apostolic Prefect wrote to the Police Inspector accusing Mr. Delgado of having stolen money from a student.

2.3 On 25 August 1984, the Circuit Court dismissed all charges against the author, having established that the accusation of theft was unfounded.

2.4 On 5 February 1984, Mr. Delgado was informed that he would no longer teach religion. Instead, a course in manual labour and handicrafts (*manualidades y artesanias*), for which he had no training or experience, was assigned to him. In order not to lose employment altogether, he endeavoured to teach these subjects.

2.5 On 29 May 1984, the author requested from the Ministry of Education two weeks' leave for the period inclusive 26 June to 10 July 1984, to attend an advanced course at Bogotá to further his teaching qualifications. He and other teachers were admitted to the course on 5 July 1984, but Mr. Delgado was subsequently denied leave. He considered this to be unjustified discrimination and decided to attend the course, also taking into account that, as a result of a national strike (*paro nacional*), the teachers were, by decree of the Ministry of Education, on enforced vacation (*vacaciones forzosas*).

2.6 By administrative decisions of the Ministry of Education, dated 12 July, and 11 and 25 September 1984, he was suspended from his post for 60 days, and a six-months' salary freeze was imposed on him on grounds of having abandoned his post without permission from the Principal. On 27 November 1984, the author requested the annulment of these administrative decisions (*recurso de reposición*), arguing that he had not abandoned his post, but that the law allowed teachers to take such special courses and that he had been duly admitted to the course with the approval of the Ministry of Education. The action was dismissed. He then submitted an appeal, and on 3 December 1985, by decision of the Ministry of Education, the prior decisions of suspension and salary freeze were annulled.

2.7 Convinced that he was a victim of discrimination by the ecclesiastical and educational authorities of Leticia, the author took the following steps:

(a) On 17 May 1985, he submitted a complaint to the Office of the Regional Attorney on grounds of alleged irregularities committed by the Fondo Educativo Regional (Regional Education Fund) in his case;

(b) On 18 May 1985, he submitted a complaint to the penal court of Leticia, accusing the Apostolic Prefect of slander and abuse (*injuria y calumnia*);

(c) On 28 May, 4 June and 3 October 1985, he wrote to the Office of the Attorney-General of the Republic, expressing concern about the denial of justice at the regional level, attributable to the alleged influence of the Apostolic Prefect;

(d) On 13 May 1986, he again wrote to the Attorney-General describing the pressures he had been and was being subjected to in order to force him to resign. He indicated, *inter alia*, that on 23 November 1983 the Apostolic Prefect had written to the Secretary of Education asking the latter in specific and clear terms:

to bring pressure on me to resign from my post, and this in fact happened, for, on 2 December 1983, I was summoned to the office of the Secretary of Education and orally informed that the Monsignor was putting pressure on him and that I therefore had to resign from my post as a teacher, failing which criminal proceedings would be instituted against me. I promptly informed the president of the teachers' union and the teachers' representative on the Promotion Board of such an outrage and they immediately went to the office of the Secretary of Education, who repeated that it had nothing to do with him, but that he had been acting at the Monsignor's insistence. I of course refused to resign, but the threat was carried out and criminal proceedings were instituted against me.

2.8 While at his residence in Bogotá, the author received anonymous phone calls threatening him with death if he returned to Leticia and did not withdraw his complaint against the Apostolic Prefect and the education authorities. He also received death threats at the teachers' residence at Leticia, which he reported to the military authorities at Leticia, the teachers' union, the Ministry of Education and the President of Colombia.

2.9 On 2 May 1986, a colleague, Mrs. Rubiela Valencia, was shot to death outside the teachers' residence in Leticia by unknown killers. On 7 May 1986, the author was himself attacked in the city of Bogotá, and, fearing for his own life, left the country and obtained political asylum in France in June 1986.

2.10 By letter dated 10 June 1986, he tendered to the Ministry of Education at Leticia his resignation from his post, justifying his decision on account of the pressures and threats he had received. His resignation was rejected "in those terms". He resubmitted his resignation on 27 June 1986, without adducing any reasons, and this time it was accepted, effective 14 July 1986.

The Complaint

3. The author claims to be a victim of violations by Colombia of articles 14, 18, 19, 25 and 26 in conjunction with article 2 of the International Covenant on Civil and Political Rights.

3.2 He maintains that he was subjected to persecution (ideologically, politically and in his work) by the Colombian authorities, because of his "progressive ideas in theological and social matters", that his honour and reputation were attacked by the authorities who falsely accused him of theft, whereas the reason behind the charge was to intimidate him because of his religious and social opinions. Moreover, his professional qualifications were unjustly called into question, although he had studied and taken a degree at the University of Santo Tomás and had taught several years at a high school in Bogotá.

3.3 Furthermore, he claims to have been denied the freedom to teach, having been suspended from his teaching post in breach of the decree concerning appointments and of the teachers' statute (decrees No. 2277 of 1979 and No. 2372 of 1981). When he applied for a transfer, his request was ignored by the administration.

3.4 More importantly, he charges that manifold threats were used to force him to resign: first, being threatened with prosecution; then, when he refused to resign, preliminary proceedings on the theft charges were initiated without prior notice, thereby violating the right of defence; he was not heard by the examining magistrate during the preliminary investigation and was not assisted by a court-appointed lawyer; furthermore, the authorities sent copies of the unfounded allegations, even before they were investigated, to all offices in the Ministry of Education and to all the schools; as a result, he was subjected to public scorn and, essentially, convicted before the charges had been investigated. Furthermore, copies of the allegations were included in his personal file. This caused him harm in economic, moral and social terms. Nevertheless, he was acquitted of all charges.

3.5 Additionally, he was suspended from practicing his profession for 60 days, for alleged dereliction of duty, and from the National Teachers' Register for six months; every possible kind of offence was invoked so that the outcome of the administrative inquiries would not only be contrary to the truth, but would also cause prejudice by leading to criminal proceedings and, in this manner, implicate his colleagues in the teachers' union who supported him. The case was again dismissed on all points. He then addressed complaints, without success, to the authorities concerning alleged offences, perpetrated by others, of falsifying public documents, forging his signature, making a false accusation to the authorities and breaching administrative confidentiality.

3.6 He claims that he "found it absolutely essential to leave the country, as there are no guarantees for the protection of the most basic human rights, such as equality, justice and life, which the Colombian Government has a constitutional and moral obligation to protect". Allegedly, the threats on his life and on the lives of other teachers have not been duly investigated by the State party.

The State party's observations

4.1 The State party argues, although only after the communication had been declared admissible, that domestic remedies have not been exhausted, since various actions are still pending.

4.2 It further denies that Mr. Delgado's rights under the Covenant have been violated. More particularly, it indicates that Mr. Delgado was cleared of all charges against him and contends that his complaints against various Colombian authorities were duly investigated:

William, Eduardo Delgado Páez has not been subjected to restrictions on his freedom of thought, conscience, religion, speech or expression, as is demonstrated by the steps he was able to take under the criminal law and in the administrative sphere throughout this investigation.

4.3 In the disciplinary action initiated by Mr. Delgado against various officials, the Court of First Instance of Leticia acquitted three persons and sanctioned two others with a suspension of 15 days without remuneration. Appeals are pending.

4.4 The criminal action against the Apostolic Prefect on grounds of slander and abuse was referred to the Apostolic Nuncio pursuant to the Concordat between the Republic of Colombia and the Vatican. The investigation was terminated on the death of the Apostolic Prefect in 1990.

4.5 With respect to Mr. Delgado's qualifications as a teacher, the State party forwards a copy of a statement from the Ministry of Education setting forth the general requirements for teachers, without, however, specifically addressing the application of these requirements in the author's case.

4.6 As to the legal basis for the appointment of teachers of religion in Colombia, the State party states that:

Applicants for the post of teacher of religion in Colombia must present a certificate of suitability in the area of religious and moral education, along the lines laid down in article 12 of Act 20 of 1974, which reads: In pursuance of the right of Catholic

families to arrange for their children to receive religious education in keeping with their faith, educational plans at the primary and secondary level shall include religious education and training in official establishments in accordance with the teaching of the church. In order to put this right into practice, it falls to the competent church authority to supply curricula, approve religious education texts and verify how such education is provided. The civil authorities shall take into consideration certificates of suitability for teaching religion issued by the competent church authority.

The State party submits the text of the agreement of 31 July 1986 between the Ministry of Education and the Colombian Episcopal Conference, without, however, showing the relevance of this Concordat to the case of Mr. Delgado, whose resignation had already been accepted on 9 July 1986.

4.7 The State party does not address the author's allegations concerning death threats against himself and other teachers, the alleged assault on his person on 7 May 1986, nor the general situation of persecution against named journalists and intellectuals, amounting to a violation of the right of security of the person.

The issues and proceedings before the Committee

5.1 When considering the communication at its thirty-second session, the Committee concluded, on the basis of the information before it, that the conditions for declaring the communication admissible had been met. The Committee noted in particular that while the State party had claimed that there was no violation of the Covenant, it had not argued that the communication was inadmissible.

5.2 On 4 April 1988, the Committee declared the communication generally admissible, without specifying articles of the Covenant. The Committee, however, requested the State party to address the issues raised in one of the author's submissions which focused on the right of security of the person.

5.3 The Committee has considered the present communication in the light of all the information provided by the parties. It has taken note of the State party's contention that domestic remedies have not been exhausted and that actions are still pending. The Committee finds, however, that, in the particular circumstances of the author's case, the application of domestic remedies has been unreasonably prolonged and, for purposes of article 5, paragraph 2 (b), of the Optional Protocol, they need therefore not be further pursued.

5.4 Although the author has not specifically invoked article 9 of the Covenant, the Committee notes that his submission of 14 September 1987, which was transmitted to the State party prior to the adoption of the Committee's decision on admissibility, raised important questions under this article. The Committee recalls that on declaring the communication admissible, it requested the State party to address these issues. The State party has not done so.

5.5 The first sentence of article 9 does not stand as a separate paragraph. Its location as a part of paragraph one could lead to the view that the right to security arises only in the context of arrest and detention. The *travaux préparatoires* indicate that the discussions of the first sentence did indeed focus on matters dealt with in the other provisions of article 9. The Universal Declaration of Human Rights, in article 3, refers to the right to life, the right to liberty and the right to security of the person. These elements have been dealt with in separate clauses in the Covenant. Although in the Covenant the only reference to the right of security of person is to be found in article 9, there is no evidence that it was intended to narrow the concept of the right to security only to situations of formal deprivation of liberty. At the same time, States parties have undertaken to guarantee the rights enshrined in the Covenant. It cannot be the case that, as a matter of law, States can ignore known threats to the lives of persons under their jurisdiction, on the grounds that they are neither arrested nor otherwise detained. States parties are under an obligation to take reasonable and appropriate measures to protect them. An interpretation of article 9 which would allow a State party to ignore threats to the personal security of non-detained persons within its jurisdiction would render totally ineffective the guarantees of the Covenant.

5.6 There remains the question of the application of this finding to the facts of the case under consideration. There appears to have been an objective need for Mr. Delgado to be provided by the State with protective measures to guarantee his security, given the threats made against him, including the attack on his person, and the murder of a close colleague. It is arguable that, in seeking to secure this protection, Mr. Delgado failed to address the competent authorities, making his complaints to the military authorities in Leticia, the teachers' union, the Ministry of Education and the President of Colombia, rather than, to the general prosecutor or the judiciary. It is unclear to the Committee whether these matters were reported to the police. It does not know either with certainty whether any measures were taken by the Government. However, the Committee cannot but note that the author claims that there was no response to his request to have these threats investigated and to receive protection, and that the State party has not informed the Committee otherwise. Indeed, the State party has failed to comply with the request by the Committee to provide it with information on any of the issues relevant to article 9 of the Covenant. Whereas the Committee is reluctant to make a finding of a violation in the absence of compelling evidence as to the facts, it is for the State party to inform the Committee if the alleged facts are incorrect or indicate a violation of the Covenant. The Committee has, in its past jurisprudence, made clear that circumstances may cause it to assume facts in the author's favour if the State party fails to reply or to address them. The pertinent factors in this case are that Mr. Delgado had been engaged in a protracted confrontation with the authorities over his teaching and his employment. Criminal charges, later determined unfounded, had been brought against him and he had been suspended, with salary frozen, in the circumstances indicated in paragraphs 2.2 to 2.6 above. Further, he was known to have instituted a variety of complaints against the ecclesiastical and scholastic authorities in Leticia (see paragraph 2.7 above). In conjunction with these factors, there were threats to his life. If the State party neither denies the threats nor co-operates with the Committee to explain whether the relevant authorities were aware of these threats, and, if so, to ascertain what was done about them, the Committee must necessarily treat as correct allegations that the threats were known and that nothing was done. Accordingly, while fully understanding the situation in Colombia, the Committee finds that the State party has not taken, or has been unable to take, appropriate measures to ensure Mr. Delgado's right to security of his person under article 9, paragraph 1.

5.7 With respect to article 18, the Committee is of the view that the author's right to profess or to manifest his religion has not been violated. The Committee finds, moreover, that Colombia may, without violating this provision of the Covenant, allow the Church authorities to decide who may teach religion and in what manner it should be taught.

5.8 Article 19 protects, *inter alia*, the right of freedom of expression and of opinion. This will usually cover the freedom of teachers to teach their subjects in accordance with their own views, without interference. However, in the particular circumstances of the case, the special relationship between Church and State in Colombia, exemplified by the applicable Concordat, the Committee finds that the requirement, by the Church, that religion be taught in a certain way does not violate article 19.

5.9 Although the requirement, by the Church authorities, that Mr. Delgado teach the Catholic religion in its traditional form does not violate article 19, the author claims that he continued to be harassed while teaching the non-religious subjects to which he had been

assigned. The Committee must, for the reasons elaborated in paragraph 5.6 above, accept the facts as presented by the author. This constant harassment and the threats against his person (in respect of which the State party failed to provide protection) made the author's continuation in public service teaching impossible. Accordingly, the Committee finds a violation of article 25, paragraph (c), of the Covenant.

5.10 Article 26 requires that all persons be entitled, without discrimination, to be equal before the law and to equality before the law. The Committee finds that neither the terms of Colombian law nor the application of the law by the courts or other authorities discriminated against Mr. Delgado, and finds that there was no violation of article 26.

6. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the

International Covenant on Civil and Political Rights, is of the view that the facts of the communication disclose violations of articles 9, paragraph 1, and 25, paragraph (c), of the Covenant.

7.1 In accordance with the provisions of article 2 of the Covenant, the State party is under an obligation to take effective measures to remedy the violations suffered by the author, including the granting of appropriate compensation, and to ensure that similar violations do not occur in the future.

7.2 The Committee would wish to receive information on any relevant measures taken by the State party in respect of the Committee's views.

Communication No. 196/1985

Submitted by: Ibrahima Gueye *et al.* (represented by counsel)

Alleged victim: The authors

State party: France

Date of adoption of views: Date of adoption of views: 3 April 1989 (thirty-fifth session)*

Subject matter: Discrimination in pension entitlements of former Senegalese soldiers of the French army

Procedural issues: Non-participation by Human Rights Committee members pursuant to rules of procedure 84 and 85—Inadmissibility *ratione materiae-ratione temporis*

Substantive issues: Equality before the law—Equal protection of the law—Unlawful discrimination based on race and nationality

Articles of the Covenant: 2 (3) and 26

Articles of the Optional Protocol: 1, 3 and 4 (2)

* Pursuant to rule 84, paragraph 1 (b), of the Committee's provisional rules of procedure, Ms. Christine Chanet did not participate in the adoption of the views of the

1.1 The authors of the communication (initial letter of 12 October 1985 and subsequent letters of 22 December 1986, 6 June 1987 and 21 July 1988) are Ibrahima Gueye and 742 other retired Senegalese members of the French Army, residing in Senegal. They are represented by counsel.

1.2 The authors claim to be victims of a violation of article 26 of the Covenant by France because of alleged racial discrimination in French legislation which provides for different treatment in the determination of pensions of retired soldiers of Senegalese nationality who served in the French Army prior to the indepen-

Committee. Mr. Birame Ndiaye did not participate in the adoption of the views pursuant to rule 85.

dence of Senegal in 1960 and who receive pensions that are inferior to those enjoyed by retired French soldiers of French nationality.

1.3 It is stated that pursuant to Law No. 51-561 of 18 May 1951 and Decree No. 51-590 of 23 May 1951, retired members of the French Army, whether French or Senegalese, were treated equally. The acquired rights of Senegalese retired soldiers were respected after independence in 1960 until the Finance Act No. 74.1129 of December 1974 provided for different treatment of the Senegalese. Article 63 of this Law stipulates that the pensions of Senegalese soldiers would no longer be subject to the general provisions of The Code of Military Pensions of 1951. Subsequent French legislation froze the level of pensions for the Senegalese as of 1 January 1975.

1.4 The authors state that the laws in question have been challenged before the Administrative Tribunal of Poitiers, France, which rendered a decision on 22 December 1980 in favour of Dia Abdourahmane, a retired Senegalese soldier, ordering the case to be sent to the French Minister of Finance for purposes of full indemnification since 2 January 1975. The authors enclose a similar decision of the Conseil d'Etat of 22 June 1982 in the case of another Senegalese soldier. However, these decisions, it is alleged, were not implemented, in view of a new French Finance Law No. 81.1179 of 31 December 1981, applied with retroactive effect to 1 January 1975, which is said to frustrate any further recourse before the French judicial or administrative tribunals.

1.5 As to the merits of the case, the authors reject the arguments of the French authorities that allegedly justify the different treatment of retired African (not only Senegalese) soldiers on the grounds of: (a) their loss of French nationality upon independence; (b) the difficulties for French authorities to establish the identity and the family situation of retired soldiers in African countries; and (c) the differences in the economic, financial and social conditions prevailing in France and in its former colonies.

1.6 The authors state that they have not submitted the same matter to any other procedure of international investigation or settlement.

2. By its decision of 26 March 1986, the Human Rights Committee transmitted the communication under rule 91 of the Committee's provisional rules of procedure to the State party requesting information and observations relevant to the question of the admissibility of the communication.

3.1 In its initial submission under rule 91, dated 5 November 1986, the State party describes the factual situation in detail and argues that the communication is "inadmissible as being incompatible with the provisions of the Covenant (art. 3 of the Optional Protocol), additionally, unfounded", because it basically deals with rights that fall outside the scope of the Covenant (i. e. pension rights) and, at any rate, because the contested legislation does not

contain any discriminatory provisions within the meaning of article 26 of the Covenant.

3.2 In a further submission under rule 91, dated 8 April 1987, the State party invokes the declaration made by the French Government upon ratification of the Optional Protocol on 17 February 1984 and contends that the communication is inadmissible *ratione temporis*:

France interprets article 1 [of the Optional Protocol] as giving the Committee the competence to receive communications alleging a violation of a right set forth in the Covenant which results either from acts, omissions, developments or events occurring after the date on which the Protocol entered into force for the Republic, or from a decision relating to acts, omissions, developments or events after that date.

It is clear from this interpretative declaration that communications directed against France are admissible only if they are based on alleged violations which derive from acts or events occurring after 17 May 1984, the date on which the Protocol entered into force with respect to France under article 9, paragraph 2, of the said Protocol.

However, the statement of the facts contained both in the communication itself and in the initial observations by the French Government indicates that the violation alleged by the authors of the communication derives from Law No. 79.1102 of 21 December 1979, which extended to the nationals of four States formerly belonging to the French Union, including Senegal, the régime referred to as "crystallization" of military pensions that had already applied since 1 January 1961 to the nationals of the other States concerned.

Since this act occurred before ratification by France of the Optional Protocol, it cannot therefore provide grounds for a communication based on its alleged incompatibility with the Covenant unless such communication ignores the effect *ratione temporis* which France conferred on its recognition of the right of individual communication.

4.1 In their comments of 22 December 1986, the authors argue that the communication should not be declared inadmissible pursuant to article 3 of the Optional Protocol by virtue of incompatibility with the provisions of the Covenant, since a broad interpretation of article 26 of the Covenant would permit the Committee to review the question of pension rights if there is discrimination, as claimed in this case.

4.2 In their further comments of 6 June 1987, the authors mention that although the relevant French legislation pre-dates the entry into force of the Optional Protocol for France, the authors had continued negotiations subsequent to 17 May 1984 and that the final word was spoken by the Minister for Economics, Finance and Budget in a letter addressed to the authors on 12 November 1984.

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

5.2 With regard to the State party's contention that the communication was inadmissible under article 3 of the Optional Protocol by virtue of incompatibility with the Covenant, the Committee recalled that it had already decided with respect to prior communications (Nos. 172/1984, 180/1984, 182/1984) that the scope of article 26 of the Covenant permitted the examination of allegations of discrimination even with respect to pension rights.

5.3 The Committee took note of the State party's argument that, as the alleged violations derived from a law enacted in 1979, the communication should be declared inadmissible on the grounds that the interpretative declaration made by France upon ratification of the Optional Protocol precluded the Committee from considering

alleged violations that derived from acts or events occurring prior to 17 May 1984, the date on which the Optional Protocol entered into force with respect to France. The Committee observed, in this connection, that in a number of earlier cases (Nos. 6/1977, 24/1977), it had declared that it could not consider an alleged violation of human rights said to have taken place prior to the entry into force of the Covenant for a State party, unless it is a violation that continues after that date or has effects which themselves constitute a violation of the Covenant after that date. The interpretative declaration of France further purported to limit the Committee's competence *ratione temporis* to violations of a right set forth in the Covenant, which result from "acts, omissions, developments or events occurring after the date on which the Protocol entered into force" with respect to France. The Committee took the view that it had no competence to examine the question of whether the authors were victims of discrimination at any time prior to 17 May 1984: however, it remained to be determined whether there had been violations of the Covenant subsequent to the said date, as a consequence of acts or omissions related to the continued application of laws and decisions concerning the rights of the applicants.

6. On 5 November 1987, the Human Rights Committee therefore decided that the communication was admissible.

7.1 In its submission under article 4, paragraph 2, of the Optional Protocol, dated 4 June 1988, the State party recalls its submission under rule 91;¹ it adds that Senegalese nationals who acquired French nationality and kept it following Senegal's independence are entitled to the same pension scheme as all other French

¹ Submission dated 5 November 1986, paragraph 3.1 above.

former members of the armed forces. Articles 97, paragraph 2, to 97, paragraph 6, of the Nationality Code offer any foreigner who, at one point in time, possessed French nationality the possibility of recovering it. The State party argues that this possibility is not merely theoretical, since, in the past, approximately 2,000 individuals have recovered French nationality each year.

7.2 The State party further explains that a Senegalese former member of the armed forces who lost his French nationality following Senegal's independence and then recovered his French nationality would *ipso facto* recover the rights to which French nationals are entitled under the Pension Code, article L 58 of which provides that "the right to obtain and enjoy the pension and life disability annuity is suspended: (...) by circumstances which cause a person to lose the status of French national for as long as that loss of nationality shall last". This implies that once nationality is recovered, the right to a pension is re-established. The State party concludes that nationality remains the sole criterion on which the difference in treatment referred to by the authors is based.

8.1 In their comments on the State party's submission, the authors, in a letter dated 21 July 1988, submit that the State party has exceeded the deadline for presenting its submission under article 4, paragraph 2, of the Optional Protocol by 12 days, and that for this reason it should be ruled inadmissible.² In this connection, they suspect that "(b) by stalling and making full use, even beyond the deadlines set under the Committee's rules of procedure, of procedural tactics so as to delay a final decision, the State party hopes that the authors will die off one by one and that the amounts it will have to pay will drop considerably". Alternatively, the authors argue that the Committee should not further examine the State party's observations as they repeat arguments discussed at length in earlier submissions and thus should be considered to be of a dilatory nature.

8.2 With respect to the merits of their case, the authors maintain that the State party's argument concerning the question of nationality is a fallacious one. They submit that the State party is only using the nationality argument as a pretext, so as to deprive the Senegalese of their acquired rights. They further refer to article 71 of the 1951 Code of

Military Pensions, which stipulates:

Serving or former military personnel of foreign nationality possess the same rights as serving or former military personnel of French nationality, except in the case where they have taken part in a hostile act against France.

² The deadline for the State party's submission under article 4, paragraph 2, expired on 4 June 1988. Although the submission is dated 4 June 1988, it was transmitted under cover of a note dated 16 June 1988.

In their view, they enjoy "inalienable and irreducible pension rights" under this legislation. Since none of them has ever been accused of having participated in a hostile act against France, they submit that the issue of nationality must be "completely and definitely" ruled out.

8.3 The authors argue that they have been the victims of racial discrimination based on the colour of their skin, on the purported grounds that:

(a) In Senegal, registry office records are not well kept and fraud is rife:

(b) As those to whom pensions are owed, i. e. the authors, are blacks who live in an underdeveloped country, they do not need as much money as pensioners who live in a developed country such as France.

The authors express consternation at the fact that the State party is capable of arguing that, since the creditor is not rich and lives in a poor country, the debtor may reduce his debt in proportion to the degree of need and poverty of his creditor, an argument they consider to be contrary not only to fundamental principles of law but also to moral standards and to equity.

9.1 The Human Rights Committee, having 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, bases its views on the following facts which appear uncontested.

9.2 The authors are retired soldiers of Senegalese nationality who served in the French Army prior to the independence of Senegal in 1960. Pursuant to the Code of Military Pensions of 1951, retired members of the French Army, whether French or Senegalese, were treated equally. The pension rights of Senegalese soldiers were the same as those of French soldiers until a new law, enacted in December 1974, provided for different treatment of the Senegalese. Law No. 79/1102 of 21 December 1979 further extended to the nationals of four States formerly belonging to the French Union, including Senegal, the régime referred to as "crystallization" of military pensions that had already applied since 1 January 1961 to the nationals of other States concerned. Other retired Finance Law No. 81.1179 of 31 December 1981, applied with retroactive effect to 1 January 1975, has rendered further recourse before French tribunals futile.

9.3 The main question before the Committee is whether the authors are victims of discrimination within the meaning of article 26 of the Covenant or whether the differences in pension treatment of former members of the French Army, based on whether they are French nationals or not, should be deemed compatible with the Covenant.

In determining this question, the Committee has taken into account the following considerations.

9.4 The Committee has noted the authors claim that they have been discriminated against on racial grounds, one of the grounds specifically enumerated in article 26. It finds that there is no evidence to support the allegation that the State party has engaged in racially discriminatory practices vis-à-vis the authors. It remains, however, to be determined whether the situation encountered by the authors comes within the purview of article 26. The Committee recalls that the authors are not generally subject to French jurisdiction, except that they rely on French legislation in relation to the amount of their pension rights. It notes that nationality as such does not appear as one of the prohibited grounds of discrimination listed at article 26, and that the Covenant does not protect the right to a pension, as such. Under article 26, discrimination in the equal protection of the law is prohibited on grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. There has been a differentiation by reference to nationality acquired following accession to independence. In the Committee's opinion, this falls within the reference to "other status" in the second sentence of article 26. The Committee takes into account, as it did in communication No. 182/1984, that "the right to equality before the law and to 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".

9.5 In determining whether the treatment of the authors is based on reasonable and objective criteria, the Committee notes that it was not the question of nationality which determined the granting of pensions to the authors but the services rendered by them in the past. They had served in the French Armed Forces under the same conditions as French citizens; for 14 years subsequent to the independence of Senegal they were treated in the same way as their French counterparts for the purpose of pension rights, although their nationality was not French but Senegalese. A subsequent change in nationality cannot by itself be considered as sufficient justification for different treatment, since the basis for the grant of the pension was the same service which both they and the soldiers who remained French had provided. Nor can differences in the economic, financial and social conditions as between France and Senegal be invoked as a legitimate justification. If one compared the case of retired soldiers of Senegalese nationality living in Senegal with that of retired soldiers of French nationality in Senegal, it would appear that they enjoy the same economic and social conditions. Yet, their treatment for the purpose of pension entitlements would differ. Finally, the fact that the State party claims that it can no longer carry out checks of identity and family situation, so as to prevent abuses in the administration of pension schemes, cannot justify a difference in treatment. In the Committee's opinion, mere administrative inconvenience or the possibility of some abuse of pension rights cannot be invoked to justify unequal treatment. The Committee concludes that the difference in treatment of the authors is not based on reasonable and objective criteria and constitutes discrimination prohibited by the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is

of the view that the events in this case, insofar as they produced effects after 17 May 1984 (the date of entry into force of the Optional Protocol for France), disclose a violation of article 26 of the Covenant.

11. The Committee, accordingly, is of the view that the State party is under an obligation, in accordance with the provisions of article 2 of the Covenant, to take effective measures to remedy the violations suffered by the victims.

Communication No. 197/1985

Submitted by: Ivan Kitok

Alleged victim: The author

State party: Sweden

Date of adoption of views: 27 July 1988 (thirty-third session)

Subject matter: Entitlement of former member of Sami Community to reintegrate into his community and practice reindeer husbandry

Procedural issues: Standing of author—Sufficiency of State party's reply under article 4 (2)—Inadmissibility *ratione materiae*

Substantive issues: Right of self-determination—Right to enjoy one's "own culture"—Equality before the law—Minorities' rights

Articles of the Covenant: 1 and 27

Articles of the Optional Protocol: 1, 3, 4 (2) and 5 (2) (b)

1. The author of the communication (initial letter dated 2 December 1985 and subsequent letters dated 5 and 12 November 1986) is Ivan Kitok, a Swedish citizen of Sami ethnic origin, born in 1926. He is represented by counsel. He claims to be the victim of violations by the Government of Sweden of articles 1 and 27 of the Covenant.

2.1 It is stated that Ivan Kitok belongs to a Sami family which has been active in reindeer breeding for over 100 years. On this basis, the author claims that he has inherited the "civil right" to reindeer breeding from his forefathers as well as the rights to land and water in Sörkaitum Sami Village. It appears that the author has been denied the exercise of these rights because he is said to have lost his membership in the Sami village ("*sameby*", formerly "*lappby*"), which, under a 1971 Swedish statute, is like a trade union with a "closed shop" rule. A non member cannot exercise Sami rights to land and water.

2.2 In an attempt to reduce the number of reindeer breeders, the Swedish Crown and the Lap bailiff have insisted that, if a Sami engages in any other profession for a period of three years, he loses his status and his name is removed from the rolls of the *lappby*, which he cannot re-enter unless by special permission. Thus it is claimed that the Crown arbitrarily denies the immemorial rights of the Sami minority and that Ivan Kitok is the victim of such a denial of rights.

2.3 With respect to the exhaustion of domestic remedies, the author states that he has sought redress through all instances in Sweden, and that the Regeringsrätten (Highest Administrative Court of Sweden) decided against him on 6 June 1985, although two dissenting judges found for him and would have made him a member of the *sameby*.

2.4 The author states that the same matter has not been submitted for examination under any other procedure of international investigation or settlement.

3. By its decision of 19 March 1986, the Working Group of the Human Rights Committee transmitted the communication, under rule 91 of the provisional rules of procedure, to the State party concerned, requesting information and observations relevant to the question of the admissibility of the communication. The Working Group also requested the State party to provide the Committee with the text of the relevant administrative and judicial decisions pertaining to the case, including (a) the decision of 23 January 1981 of the Länsstyrelsen, Norrbottens *län* (the relevant administrative authority), (b) the judgement of 17 May 1983 of the Kammarrätten (Administrative Court of Appeal) and (c) the judgement of 6 June 1985 of the Regerings ratten (supreme administrative court) with dissenting opinions.

4.1 By its submission dated 12 September 1986, the State party provided all the requested administrative and judicial decisions and observed as follows:

Ivan Kitok has alleged breaches of articles 1 and 27 of the International Covenant on Civil and Political Rights. The Government has understood Ivan Kitok's complaint under article 27 thus: that he – through Swedish legislation and as a result of Swedish court decisions – has been prevented from exercising his "reindeer breeding rights" and consequently denied the right to enjoy the culture of the Sami.

With respect to the author's complaint under article 1 of the Covenant, the State party observes that it is not certain whether Ivan Kitok claims that the Sami as a people should have the right to self-determination as set forth in article 1, paragraph 1, or whether the complaint should be considered to be limited to paragraph 2 of that article, an allegation that the Sami as a people have been denied the right freely to dispose of their natural wealth and resources. However, as can be seen already from the material presented by Ivan Kitok himself, the issue concerning the rights of the Sami to land and water and questions connected hereto, is a matter of immense complexity. The matter has been the object of discussions, consideration and decisions ever since the Swedish Administration started to take interest in the areas in northern Sweden, where the Sami live. As a matter of fact, some of the issues with respect to the Sami population are currently under consideration by the Swedish Commission on Sami issues (Samerättsutredningen) appointed by the Government in 1983. For the time being the Government refrains from further comments on this aspect of the application. Suffice it to say that, in the Government's opinion, the Sami do not constitute a "people" within the meaning given to the word in article 1 of the Covenant ... Thus, the Government maintains that article 1 is not applicable to the case. Ivan Kitok's complaints therefore should be declared inadmissible under article 3 of the Optional

Protocol to the International Covenant on Civil and Political Rights as being incompatible with provisions of the Covenant.

4.2 With respect to an alleged violation -of article 27, the State party

admits that the Sami form an ethnic minority in Sweden and that persons belonging to this minority are entitled to protection under article 27 of the Covenant. Indeed, the Swedish Constitution goes somewhat further. Chapter 1, article 2, fourth paragraph, prescribes: "The possibilities of ethnic, linguistic or religious minorities to preserve and develop a cultural and social life of their own should be promoted." Chapter 2, article 15, prescribes: "No law or other decree may imply the discrimination of any citizen on the ground of his belonging to a minority on account of his race, skin colour, or ethnic origin."

The matter to be considered with regard to article 27 is whether Swedish legislation and Swedish court decisions have resulted in Ivan Kitok being deprived of his right to carry out reindeer husbandry and, if this is the case, whether this implies that article 27 has been violated? The Government would in this context like to stress that Ivan Kitok himself has observed before the legal instances in Sweden that the only question at issue in his case is the existence of such special reasons as enable the authorities to grant him admission as a member of the Sorkaitum Sami community despite the Sami community's refusal ...

The reindeer grazing legislation had the effect of dividing the Sami population of Sweden into reindeer-herding and non-reindeer-herding Sami, a distinction which is still very important. Reindeer herding is reserved for Sami who are members of a Sami village (*sameby*), an entity which is a legal entity under Swedish law. (The expression "Sami community" is also used as an English translation of "*sameby*".) These Sami, today numbering about 2,500, also have certain other rights, e.g. as regards hunting and fishing. Other Sami, however – the great majority, since the Sami population in Sweden today numbers some 15,000 to 20,000 – have no special rights under the present law. These other Sami have found it more difficult to maintain their Sami identity and many of them are today assimilated into Swedish society. Indeed, the majority of this group does not even live within the area where reindeer-herding Sami live.

The rules applicable on reindeer grazing are laid down in the 1971 Reindeer Husbandry Act (hereinafter the "Act"). The *ratio legis* for this legislation is to improve the living conditions for the Sami who have reindeer husbandry as their primary income, and to make the existence of reindeer husbandry safe for the future. There had been problems in achieving an income large enough to support a family living on reindeer husbandry. From the legislative history it appears that it was considered a matter of general importance that reindeer husbandry be made more profitable. Reindeer husbandry was considered necessary to protect and preserve the whole culture of the Sami ...

It should be stressed that a person who is a member of a Sami village also has a right to use land and water belonging to other people for the maintenance of himself and his reindeer. This is valid for State property as well as private land and also encompasses the right to hunt and fish within a large part of the area in question. It thus appears that the Sami in relation to other Swedes have considerable benefits. However, the area available for reindeer grazing limits the total number of reindeer to about 300,000. Not more than 2,500 Sami can support themselves on the basis of these reindeer and additional incomes.

The new legislation led to a reorganization of the old existing Sami villages into larger units. The Sami villages have their origin in the old *siida*, which originally formed the base of the Sami society consisting of a community of families which migrated seasonally from one hunting, fishing and trapping area to another, and which later on came to work with and follow a particular self-contained herd of reindeer from one seasonal grazing area to another.

Prior to the present legislation, the Sami were organized in Sami communities (*lappbyar*). Decision to grant membership of these villages was made by the County Administrative Board (Länstyrelsen). Under the present legislation, membership in a Sami village is granted by the members of the Sami village themselves.

A person who has been denied membership in a Sami village can appeal against such a decision to the County Administrative Board. Appeals against the Board's decision in the matter can be made to the Administrative Court of Appeal (Kamnrätten) and finally to the Supreme Administrative Court (Regeringsrätten) .

An appeal against a decision of a Sami community to refuse membership may, however, be granted only if there are special reasons for allowing such membership (see sect. 12, para. 2, of the 1971 Act). According to the legislative history of the Act, the County Administrative Board's right to grant an appeal against a decision made by the Sami community should be exercised very restrictively. It is thus required that the reindeer husbandry which the applicant intends to run within the community be in an essential way useful to the community and that it be of no inconvenience to its other members. An important factor in this context is that the pasture areas remain constant, while additional members means more reindeers.

There seems to be only one previous judgement from the Supreme Administrative Court concerning section 12 of the Reindeer Husbandry Act. However, the circumstances are not quite the same as in Ivan Kitok's case ...

The case that Ivan Kitok has brought to the courts is based on the contents of section 12, paragraph 2, of the Reindeer Husbandry Act. The County Administrative Board and the Courts have thus had to make decisions only upon the question whether there were any special reasons within the meaning of the Act to allow Kitok membership in the Sami community. The County Administrative Board found that there were no such reasons, nor did the Administrative Court of Appeal or the majority of the Supreme Administrative Court ...

When deciding upon the question whether article 27 of the Covenant has been violated, the following must be considered. It is true that Ivan Kitok has been denied membership in the Sami community of Sörkaitum. Normally, this would have meant that he also had been deprived of any possibility of carrying out reindeer husbandry. However, in this case the Board of the Sami community declared that Ivan Kitok, as an owner of domesticated reindeer, can be present when calves are marked, reindeer slaughtered and herds are rounded up and reassigned to owners, all this in order to safeguard his interests as a reindeer owner in the Sami society, albeit not as a member of the Sami community. He is also allowed to hunt and fish free of charge in the community's pasture area. These facts were also decisive in enabling the Supreme Administrative Court to reach a conclusion when judging the matter.

The Government contends that Ivan Kitok in practice can still continue his reindeer husbandry, although he cannot exercise this right under the same safe conditions as the members of the Sami community. Thus, it cannot be said that he has been prevented from "enjoying his own culture". For that reason, the Government maintains that the complaint should be declared inadmissible as being incompatible with the Covenant.

4.3 Should the Committee arrive at another opinion, the State party submits that:

As is evident from the legislation, the Reindeer Husbandry Act aims at protecting and preserving the Sami culture and reindeer husbandry as such. The conflict that has occurred in this case is not so much a conflict between Ivan Kitok as a Sami and the State, but rather between Kitok and other Sami. As in every society where conflicts occur, a choice has to be made between what is considered to be in the general interest on the one hand and the interests of the individual on the other. A special circumstance here is that reindeer husbandry is so closely connected to the Sami culture that it must be considered part of the Sami culture itself.

In this case the legislation can be said to favour the Sami community in order to make reindeer husbandry economically viable now and in the future. The pasture areas for reindeer husbandry are limited, and it is simply not possible to let all Sami exercise reindeer husbandry without jeopardizing this objective and running the risk of endangering the existence of reindeer husbandry as such.

In this case it should be noted that it is for the Sami community to decide whether a person is to be allowed membership or not. It is only when the community denies membership that the matter can become a case for the courts.

Article 27 guarantees the right of persons belonging to minority groups to enjoy their own culture. However, although not explicitly provided for in the text itself, such restrictions on the exercise of this right ... must be considered justified to the extent that they are necessary in a democratic society in view of public interests of vital importance or for the protection of the rights and freedoms of others. In view of the interests underlying the reindeer husbandry legislation and its very limited impact on Ivan Kitok's possibility of "enjoying his culture", the Government submits that under all the circumstances the present case

does not indicate the existence of a violation of article 27.

For these reasons, the Government contends that, even if the Committee should come to the conclusion that the complaint falls within the scope of article 27, there has been no breach of the Covenant. The complaint should in this case be declared inadmissible as manifestly ill-founded.

5.1 Commenting on the State party's submission under rule 91, the author, in submissions dated 5 and 12 November 1986, contends that his allegations with respect to violations of articles 1 and 27 are well-founded.

5.2 With regard to article 1 of the Covenant, the author states:

The old Lapp villages must be looked upon as small realms, not States, with their own borders and their government and with the right to neutrality in war. This was the Swedish position during the Vasa reign and is well expressed in the royal letters by Gustavus Vasa of 1526, 1543 and 1551. It was also confirmed by Gustavus Adolphus in 1615 and by a royal judgement that year for Suondavare Lapp village ...

In Sweden there is no theory, as there is in some other countries, that the King or the State was the first owner of all land within the State's borders. In addition to that, there was no State border between Sweden and Norway until 1751 in Lapp areas. In Sweden, there is the notion of allodial land rights, meaning land rights existing before the State. These allodial land rights are acknowledged in the *travaux préparatoires* of the 1734 law-book for Sweden, including even Finnish territory.

Sweden has difficulty to understand Kitok's complaint under article 1. Kitok's position under article 1, paragraph 1, is that the Sami people has the right to self-determination ... If the world Sami population is about 65,000, 40,000 live in Norway, 20,000 in Sweden, 4,000 to 5,000 in Finland and the rest in the Soviet Union. The number of Swedish Sami in the kernel areas between the vegetation-line and the Norwegian border is not exactly known, because Sweden has denied the Sami the right to a census. If the number is tentatively put at 5,000, this population in Swedish Sami land should be entitled to the right to self-determination. The existence of Sami in other countries should not be allowed to diminish the right to self-determination of the Swedish Sami. The Swedish Sami cannot have a lesser right because there are Sami in other countries ...

5.3 With respect to article 27 of the Covenant, the author states:

The 1928 law was unconstitutional and not consistent with international law or with Swedish civil law. The 1928 statute said that a non-*sameby*-member like Ivan Kitok had reindeer breeding, hunting and fishing rights but was not entitled to use those rights. This is a most extraordinary statute, forbidding a person to use civil rights in his possession. The idea was to make room for the Sami who had been displaced to the north, by reducing the number of Sami who could use their inherited land and water rights ...

The result is that there are two categories of Sami in the kernel Sami areas in the north of Sweden between the vegetation-line of 1873 and the Norwegian 1751 border. One category is the full Sami, i.e., the village Sami; the other is the half-Sami, i.e., the non-village Sami living in the Sami village area, having land and water rights but by statute prohibited to use those rights. As this prohibition for the half-Sami is contrary to international and domestic law, the 1928-1971 statute is invalid and cannot forbid the half-Sami from exercising his reindeer breeding, hunting and fishing rights. As a matter of fact, the half-Sami have exercised their hunting and fishing rights, especially fishing rights, without the permission required by statute. This has been common in the Swedish Sami kernel lands and was valid until the highest administrative court of Sweden rendered its decision on 6 June 1985 in the Ivan Kitok case... Kitok's position is that he is denied the right to enjoy the culture of the Sami as he is just a half-Sami, whereas the Sami village members are full Sami ... The Swedish Government has admitted that reindeer breeding is an essential element in the Sami culture. When Sweden now contends that the majority of the Swedish Sami have no special rights according to the present law, this is not true. Sweden goes on to say "these other Sami have found it more difficult to maintain their Sami identity 'and many of them are today assimilated in Swedish society. Indeed the majority of this group does not even live within the area where reindeer-herding Sami live". Ivan Kitok comments that he speaks for the estimated

5,000 Sami who live in the kernel Swedish Sami land and of whom only 2,000 are *sameby* members. The mechanism of the *sameby* ... diminishes the number of reindeer-farming Sami from year to year; there are now only 2,000 persons who are active sameby members living in kernel Swedish Sami land. When Sweden says that these other Sami are assimilated, it seems that Sweden confirms its own violation of article 27.

The important thing for the Sami people is solidarity among the people (*folksolidaritet*) and not industrial solidarity (*näringsolidaritet*). This was the great appeal of the Sami leaders, Gustaf Park, Israel Ruong and others. Sweden has tried hard, however, to promote industrial solidarity among the Swedish Sami and to divide them into full Sami and half-Sami ... It is characteristic that the 1964 Royal Committee wanted to call the Lapp village "reindeer village" (*renby*) and wanted to make the *renby* an entirely economic association with increasing voting power for the big reindeer owners. This has also been achieved in the present *sameby*, where members get a new vote for every extra 100 reindeer. It is because of this organization of the voting power that Ivan Kitok was not admitted into his fatherland *Sörkaitum Lappby*.

Among the approximately 3,000 non-*sameby* members who are entitled to carry out reindeer farming and live in kernel Swedish Sami land, there are only a few today who are interested in taking up reindeer farming. In order to maintain the Sami ethnic-linguistic minority, it is, however, very important that such Sami are encouraged to join the *sameby*.

5.4 In conclusion, it is stated that the author, as a half-Sami,

cannot enjoy his own culture because his reindeer-farming, hunting and fishing rights can be removed by an undemocratic graduated vote and as a half-Sami he is forced to pay 4,000 to 5,000 Swedish krona annually as a fee to the *Sörkaitum sameby* association that the full Sami do not pay to that association. This is a stigma on half-Sami.

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

6.2 The Committee noted that the State party did not claim that the communication was inadmissible under article 5, paragraph 2, of the Optional Protocol. With regard to article 5, paragraph 2 (a), the Committee observed that the matters complained of by Ivan Kitok were not being examined and had not been examined under another procedure of international investigation or settlement. With regard to article 5, paragraph 2 (b), the Committee was unable to conclude, on the basis of the information before it, that there were effective remedies in the circumstances of the present case to which the author could still resort.

6.3 With regard to the State party's submission that the communication should be declared inadmissible as incompatible with article 3 of the Optional Protocol, or as "manifestly ill-founded", the Committee observed that the author, as an individual, could not claim to be the victim of a violation of the right of self-determination enshrined in article 1 of the Covenant. Whereas the Optional Protocol provides a recourse procedure for individuals claiming that their rights have been violated, article 1 of the Covenant deals with rights conferred upon peoples, as such. However, with regard to article 27 of the Covenant, the Committee observed that the author had made a reasonable effort to substantiate his allegations that he was the victim of a violation of his right to enjoy the same rights enjoyed by other members of the Sami community. Therefore, it decided that the issues before it, more particularly the scope of article 27, should be examined on the merits of the case.

6.4 The Committee noted that both the author and the State party had already made extensive submissions with regard to the merits of the case. However, the Committee deemed it appropriate at that juncture to limit itself to the procedural requirement of deciding on the admissibility of the communication. It noted that, if the State party should wish to add to its earlier submission within six months of the transmittal to it of the decision on admissibility, the author of the communication would be given an opportunity to comment thereon. If no further submissions were received from the State party under article 4, paragraph 2, of the Optional Protocol, the Committee would proceed to

adopt its final views in the light of the written information already submitted by the parties.

6.5 On 25 March 1987, the Committee therefore decided that the communication was admissible insofar as it raised issues under article 27 of the Covenant, and requested the State party, should it not intend to make a further submission in the case under article 4, paragraph 2, of the Optional Protocol, to so inform the Committee, so as to permit an early decision on the merits.

7. By a note dated 2 September 1987, the State party informed the Committee that it did not intend to make a further submission in the case. No further submission has been received from the author.

8. The Human Rights Committee has considered the merits of the 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. The facts of the case are not in dispute.

9.1 The main question before the Committee is whether the author of the communication is the victim of a violation of article 27 of the Covenant for the reason that, as he alleges, he is arbitrarily denied immemorial rights granted to the Sami community, particularly the right to membership of the Sami community and the right to carry but reindeer husbandry. In deciding whether or not the author of the communication has been denied the right to "enjoy [his] own culture", as provided for in article 27 of the Covenant, and whether section 12, paragraph 2, of the 1971 Reindeer Husbandry Act, under which an appeal against a decision of a Sami community to refuse membership may only be granted if there are special reasons for allowing such membership, violates article 7 of the Covenant, the Committee bases its findings on the following considerations.

9.2 The regulation of an economic activity is normally a matter for the State alone. However, where that activity is an essential element in the culture of an ethnic community, its application to an individual may fall under article 27 of the Covenant, which provides:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

9.3 The Committee observes, in this context, that the right to enjoy one's own culture in community with the other members of the group cannot be determined *in abstracto* but has to be placed in context. The Committee is thus called upon to consider statutory restrictions affecting the right of an ethnic Sami to membership of a Sami village.

9.4 With regard to the State party's argument that the conflict in the present case is not so much a conflict between the author as a Sami and the State party, but rather between the author and the Sami community (see para. 4.3 above), the Committee observes that the State party's responsibility has been engaged, by virtue of the adoption of the Reindeer Husbandry Act of 1971, and that it is therefore State action that has been challenged. As the State party itself points out, an appeal against a decision of the Sami community to refuse membership can only be granted if there are special reasons for allowing such membership; furthermore, the State party acknowledges that the right of the County Administrative Board to grant such an appeal should be exercised very restrictively.

9.5 According to the State party, the purposes of the Reindeer Husbandry Act are to restrict the number of reindeer breeders for economic and ecological reasons and to secure the preservation and well-being of the Sami minority. Both parties agree that effective measures are required to ensure the future of reindeer breeding and the

livelihood of those for whom reindeer farming is the primary source of income. The method selected by the State party to secure these objectives is the limitation of the right to engage in reindeer breeding to members of the Sami villages. The Committee is of the opinion that all these objectives and measures are reasonable and consistent with article 27 of the Covenant.

9.6 The Committee has nonetheless had grave doubts as to whether certain provisions of the Reindeer Husbandry Act, and their application to the author, are compatible with article 27 of the Covenant. Section 11 of the Reindeer Husbandry Act provides that:

A member of a Sami community is:

1. A person entitled to engage in reindeer husbandry who participates in reindeer husbandry within the pasture area of the community.
2. A person entitled to engage in reindeer husbandry who has participated in reindeer husbandry within the pasture area of the village and who has had this as his permanent occupation and has not gone over to any other main economic activity.
3. A person entitled to engage in reindeer husbandry who is the husband or child living at home of a member as qualified in subsection 1 or 2 or who is the surviving husband or minor child of a deceased member.

Section 12 of the Act provides that:

A Sami community may accept as a member a person entitled to engage in reindeer husbandry other than as specified in section 11, if he intends to carry on reindeer husbandry with his own reindeer within the pasture area of the community.

If the applicant should be refused membership, the County Administrative Board may grant him membership, if special reasons should exist.

9.7 It can thus be seen that the Act provides certain criteria for participation in the life of an ethnic minority whereby a person who is ethnically a Sami can be held not to be a Sami for the purposes of the Act. The Committee has been concerned that the ignoring of objective ethnic criteria in determining membership of a minority, and the application to Mr. Kitok of the designated rules, may have been disproportionate to the legitimate ends sought by the legislation. It has further noted that Mr. Kitok has always retained some links with the Sami community, always living on Sami lands and seeking to return to full-time reindeer farming as soon as it became financially possible, in his particular circumstances, for him to do so.

9.8 In resolving this problem, in which there is an apparent conflict between the legislation, which seems to protect the rights of the minority as a whole, and its application to a single member of that minority, the Committee has been guided by the *ratio decidendi* in the Lovelace case (No. 24/1977, *Lovelace v. Canada*),¹ namely, that a restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority as a whole. After a careful review of all the elements involved in this case, the Committee is of the view that there is no violation of article 27 by the State party. In this context, the Committee notes that Mr. Kitok is permitted, albeit not as of right, to graze and farm his reindeer, to hunt and to fish.

¹ *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40 (A/36/40), annex XVIII.*

Communication No. 201/1985

Submitted by: Wim Hendriks, Sr.

Alleged victim: The author and his son

State party: The Netherlands

Date of adoption of views: 27 July 1988 (thirty-third session)*

Subject matter: Denial of divorced father's visiting rights and right of access to his son

Procedural issues: Standing of the author—Examination of "same matter" by European Commission—Sufficiency of State party's reply under article 4 (2)—Travaux préparatoires

Substantive issues: Equality of rights and responsibilities of spouses as to marriage and its dissolution—Protection of children's "best interests"—Right of access of non-custodial parent

Article of the Covenant: 23 (1) and (4)

Articles of the Optional Protocol: 4 (2), 5 (1), (2) (b) and (4)

* The text of an individual opinion submitted by Mssrs. Vojin Dimitrijevic and Omar El Shafei, Mrs. Rosalyn Higgins and Mr. Adam Zielinski is reproduced in appendix I; the text of an individual opinion submitted by Mr. Amos Wako is reproduced in appendix II.

1. The author of the communication (initial letter of 30 December 1985 and subsequent letters of 23 February, 3 September and 15 November 1986 and 23 January 1988) is Wim Hendriks, a Netherlands citizen born in 1936, at present residing in the Federal Republic of Germany, where he works as an engineer. He submits the communication on his own behalf and on behalf of his son, Wim Hendriks, Jr., born in 1971 in the Federal Republic of Germany, at present residing in the Netherlands with his mother. The author invokes article 23, paragraph 4, of the Covenant, which provides that:

States Parties ... shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage ... and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

He claims that this article has been violated by the Courts of the Netherlands which granted exclusive custody over Wim Hendriks, Jr. to the mother without ensuring the father's right of access to the child. The author claims that his son's rights have been and are being violated by subjecting him to one-sided custody; moreover, the author maintains that his rights as a father have been and are being violated and that he has been deprived of his responsibilities vis-à-vis his son without any reason other than the unilateral opposition of the mother.

2.1 The author married in 1959 and moved with his wife to the Federal Republic of Germany in 1962, where their son Wim was born in 1971. The marriage gradually broke up and, in September 1973, the wife disappeared with the child and returned to the Netherlands. She instituted divorce proceedings and, on 26 September 1974, the marriage was dissolved by decision of the Amsterdam District Court, without settling the questions of guardianship and visiting rights. Since the child was already with the mother, the father asked the court, in December 1974 and again in March 1975, to make a provisional visiting arrangement. In May 1975, the Court awarded custody to the mother, without, however, making provision for the father's visiting rights; co-guardianship was awarded to the ex-wife's father on the ground that Mr. Hendriks was living abroad. Early in 1978, the author requested the Child Care and Protection Board to intercede in establishing contact between his son and himself. Because of the mother's refusal to co-operate, the Board failed in its efforts and advised the author to apply to the Juvenile Judge of the Amsterdam District Court. On 16 June 1978, the author requested the Juvenile Judge to establish a first contact between his son and himself and subsequently to make a visiting arrangement. On 20 December 1978, the Juvenile Judge, without finding any fault on the part of the father, dismissed the request on the ground that the mother continued to oppose any such contact. In this connection, the Juvenile Judge noted:

That in general the court is of the opinion that contact between a parent who does not have custody of a child or children and that child/those children must be possible;

That, although the court considers the father's request reasonable, the mother cannot in all conscience agree to an access order or even to a single meeting between the boy and his father on neutral ground, despite the fact that the Child Care and Protection Board would agree and would have offered guarantees;

That, partly in view of the mother's standpoint, it is to be expected that the interests of the boy would be harmed if the court were to impose an order.

2.2 On 9 May 1979, the author appealed to the Court of Appeal in Amsterdam, arguing that the mother's refusal to co-operate was not a valid ground for rejection of his request. On 7 June 1979, the Court of Appeal confirmed the lower Court's judgement:

Considering . . . as its main premise that in principle a child should have regular contact with both parents if it is to have a balanced upbringing and be able also to identify with the parent who does not have custody,

That cases may arise, however, where this principle cannot be adhered to,

That this may particularly be the case where, as in the present instance, a number of years have passed since the parents were divorced, both have remarried, but there is still serious conflict between the parents,

That in such a case it is likely that an access order will lead to tension in the family of the parent who has custody of the child and that the child can easily develop a conflict of loyalties,

That a situation such as that described above is not in the interests of the child, it being irrelevant which of the parents has caused the tension, since the interests of the child – the right to grow up without being subjected to unnecessary tension – must prevail,

That in addition the father has not seen the child since 1974 and the child now has a harmonious family life and has come to regard the mother's present husband as his father.

2.3 On 19 July 1979, the author appealed on points of law to the Supreme Court, arguing that the grounds for a rejection could only lie in exceptional circumstances relating to the person of that parent "as certain to be a danger to the health and moral welfare of the child or to lead to a serious disturbance of his mental balance, whereas in the present case it has not been stated or established that such exceptional circumstances exist or have existed". On 15 February 1980, the Supreme Court upheld the Court of Appeal's decision, noting that "the right of the parent who does not have or will not be awarded custody of the child to have access to that child must never be lost sight of but – as the Court rightly judged in this case – the interests of the child must ultimately be paramount". The author therefore states that he has exhausted domestic remedies.

2.4 The author contends that the Netherlands courts did not correctly apply article 161, section 5, of the Netherlands Civil Code, which stipulates that "on demand or on application of both parents or of one of them, the judge may lay down an arrangement regarding contact between the child and the parent not granted custody of the child. If such arrangement has not been laid down in the divorce judgement ... it may be laid down at a later date by the Juvenile Judge". In view of the "inalienable" right of the child to have contact with both his parents, the author contends that the Netherlands courts must grant visiting rights to the non-custodial parent, unless exceptional circumstances exist. Since the Courts did not make an arrangement for mutual access in his case and no exceptional circumstances exist, it is argued that Netherlands legislation and practice do not effectively guarantee the equality of rights and responsibilities of spouses at the dissolution of marriage nor the protection of children, as required by article 23, paragraphs 1 and 4, of the Covenant. More particularly, the author notes that the law does not give the courts any guidance as to which exceptional circumstances might serve as a justification for the denial of this fundamental right of mutual access. For the psychological balance and harmonious development of a child, contact with the parent who was not granted custody must be maintained, unless the parent in question constitutes a danger to the child. In the case of his son and himself, the author contends that, although the Netherlands courts ostensibly had the best interests of the child in mind, Wim junior has been denied the opportunity of seeing his father for 12 years on the insufficient ground that his mother opposed such contacts and that court-enforced visits could have caused psychological stress detrimental to the child. The author argues that every divorce entails psychological stress for all parties concerned and that the courts erred in determining the interests of the child in a static manner by focusing only on his protection from tension which, moreover, would not be caused by the father's misconduct but by the mother's categorical opposition. The author concludes that the courts should have interpreted the child's best interests in a dynamic manner by giving more weight to Wim junior's need to maintain contact with his father, even if the re-establishment of the father-son relationship might initially have given rise to certain difficulties.

2.5 Having regard to article 5, paragraph 2 (a), of the Optional Protocol, the author states that on 14 September 1978 he submitted an application to the European Commission on Human Rights, and that consideration of the matter by that body was completed with the adoption of the Commission's report on 8 March 1982. On 3 May 1984, the author submitted a separate application to the European Commission on behalf of his son. On 7 October 1985,

the Commission declared the case inadmissible, *ratione personae*.

2.6 The author therefore requested the Human Rights Committee to consider his communication since he had exhausted domestic remedies and the same matter was not pending before another procedure of international investigation or settlement.

3. By its decision of 26 March 1986, the Committee transmitted the communication under rule 91 of its provisional rules of procedure to the State party concerned, requesting information and observations relevant to the question of the admissibility of the communication.

4.1 In its submission under rule 91, dated 9 July 1986, the State party contests the author's standing to submit an application on behalf of his son, adding that:

The family relationship between Hendriks, Sr. and Hendriks, Jr. does not in itself provide sufficient grounds to assume that the son wishes the application to be submitted ... Even if Mr. Hendriks did have the right to submit an application on behalf of his son, it is doubtful whether Hendriks, Jr. could be regarded as a "victim" within the meaning of rule 90, paragraph 1 (b), [of the Committee's provisional rules of procedure]. The Government of the Netherlands wishes to stress that the Netherlands authorities have never prevented Wim Hendriks, Jr. from contacting his father of his own accord if he wished to do so. The Government of the Netherlands would point out in this respect that Mr. Hendriks, Sr. met his son in 1985 and entertained him at his home in the Federal Republic of Germany.

4.2 With respect to the compatibility of the communication with the Covenant, the State party contends that article 23, paragraph 4, of the Covenant

does not seem to include a rule to the effect that a parent who has been divorced must have access to children from the marriage if those children are not normally resident with him/her. If the article does not lay down such a right, there is no need to explore the question of whether this right ... has actually been violated.

4.3 With respect to the exhaustion of domestic remedies, the State party observes that there is nothing to prevent the author from once again requesting the Netherlands courts to issue an access order, basing his request on "changed circumstances", since Wim Hendriks, Jr. is now over 12 years old, and, in accordance with the new article 902 (b) of the Code of Civil Procedure which came into force on 5 July 1982, Wim Hendriks, Jr. would have to be heard by the Court in person before a judgement could be made.

5.1 In his comments dated 3 September 1986, the author states that the decision of the Supreme Court of the Netherlands of 24 February 1980 effectively prevents him from re-entering the domestic recourse system.

5.2 With regard to the question of his standing to represent his son before the Committee, the author submits a letter dated 15 November 1986, countersigned by his son, forwarding a copy of the initial letter of 30 December 1985 and of the comments of 3 September 1986, also countersigned by his son.

6.1 Before considering any claims constituting a communication, the Human Rights Committee must, in accordance with rule 87 of its provisional rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant. The Committee decided on the admissibility of the communication at its twenty-ninth session, as follows.

6.2 Article 5, paragraph 2 (a), of the Optional Protocol precludes the Committee from considering a communication if the same matter is being examined under another procedure of international investigation or settlement. The Committee ascertained that the case was not under examination elsewhere. It also noted that prior consideration of the same matter under another procedure did not preclude the Committee's competence as the State party had made no reservation to that effect.

6.3 Article 5, paragraph 2 (b), of the optional Protocol precludes the Committee from considering a communication unless domestic remedies have been exhausted. In that connection, the Committee noted that, in its submission of 9 July 1986, the State party had informed the Committee that nothing would prevent Mr. Hendriks from once again requesting the Netherlands courts to issue an access order. The Committee observed, however, that Mr. Hendriks' claim, initiated before the Netherlands courts 12 years earlier, had been adjudicated by the Supreme Court in 1980. Taking into account the provision of article 5, paragraph 2 (b), *in fine* of the optional Protocol regarding unreasonably prolonged remedies, the author could not be expected to continue to request the same courts to issue an access order on the basis of "changed circumstances", notwithstanding the procedural change in domestic law (enacted in 1982) which would now require Hendriks, Jr. to be heard. The Committee observed that, although in family law disputes, such as custody cases of this nature, changed circumstances might often justify new proceedings, it was satisfied that the requirement of exhaustion of domestic remedies had been met in the case before it.

6.4 With regard to the State party's reference to the scope of article 23, paragraph 4, of the Covenant (para. 4.2 above), i. e. whether the provision in question lays down a right of access for a divorced parent or not, the Committee decided to examine the issue on the merits of the case.

7. On 25 March 1987, the Committee therefore decided that the communication was admissible. In accordance with article 4, paragraph 2, of the Optional Protocol, the State party was requested to submit to the Committee, within six months of the date of transmittal to it of the decision on admissibility, written explanations or statements clarifying the matter and the measures, if any, that might have been taken by it.

8.1 In its submission under article 4, paragraph 2, of the Optional Protocol, dated 19 October 1987, the State party contends that article 23, paragraph 4, of the Covenant does not provide for a right of access to his/her child for a parent who has been divorced and whose children are not normally resident with him/her. Neither the *travaux préparatoires* nor the wording of the said article would seem to imply this. The State party further affirms that it has met the requirements of article 23, paragraph 4, since the equality of rights and responsibilities of spouses whose marriage has been dissolved through divorce is assured under Netherlands law, which also provides for the necessary protection of any children. After the divorce, custody can be awarded to either the mother or the father. The State party Submits that:

In general, it can be assumed that a divorce occasions such tensions that it is essential to the child's interest that only one of the parents be awarded custody. In cases of this kind, article 161, paragraph one, of book 1 of the Civil Code provides that, after the dissolution of a marriage by divorce, one of the parents shall be appointed guardian. This parent will then have sole custody of the child. The courts decide which parent is to be awarded custody after a divorce. This is done on the basis of the interests of the child. One may therefore conclude that, by these provisions, Netherlands law effectively guarantees the equality of rights and responsibilities of parents after the dissolution of marriage, bearing in mind the necessary protection of the child.

The State party adds that it is customary for parents to agree, at the time of the divorce, on an access arrangement between the child and the parent who was not awarded custody. The latter, in accordance with article 161, paragraph 5, of the Civil Code, can request the Court to decide on an access arrangement.

8.2 The State party further explains that, if the Committee should interpret article 23, paragraph 4, of the Covenant as granting a right of access to his/her child to the parent who was not awarded custody, it would wish to

observe that such a right has, in practice, developed in the Netherlands legal system:

Although not laid down explicitly in (the Netherlands) legislation, it is assumed that the parent not awarded custody has a right of access. This right derives from article 8, paragraph 1, of the European Convention on Human Rights, which lays the right to respect for family life. The Netherlands is a party to this Convention, which thus forms part of the Netherlands legal system. Article 8 ... moreover is directly applicable in the Netherlands, thus allowing individual citizens to institute proceedings before the Netherlands courts if they are deprived of the above right.

8.3 With regard to the possible curtailment of access to the child in cases where this is deemed crucial to the child's interests, the State party refers to a judgement of the Supreme Court of the Netherlands of 2 May 1980, the relevant passage of which reads:

The right to respect for family life, as laid down in article 8 of the European Convention on Human Rights, does not imply that the parent who is not awarded custody of his or her minor children is entitled to contact with them where such contact is clearly not in the children's interest because it would cause considerable disturbance and tension in the family in which they were living. To recognize such an entitlement on the part of the parent not awarded custody would conflict with the children's rights under article 8 of the Convention.

This, it is stated, is a case where the "necessary protection of any children", within the meaning of article 23, paragraph 4, of the Covenant, was the overriding interest at stake. The State party adds that the Lower House of Parliament is debating a bill concerning the arrangement of access in the case of divorce. The bill proposes that the parent who is not awarded custody after divorce be granted a statutory right of access and puts forward four grounds on the basis of which access could be denied in the interests of the child, to wit, if:

(a) Access would have a seriously detrimental effect on the child's mental or physical well-being;

(b) The parent is regarded as clearly unfit or clearly incapable of access ;

(c) Access otherwise conflicts with the overriding interest of the child ;

(d) The child, being 12 years of age or older, has been heard and has indicated that he has serious objections to contact with his parent.

8.4 Inasmuch as the scope of a parent's right of access to his/her child is concerned, the State party indicates that such a right is not *an* absolute one and may always be curtailed if this is in the overriding interests of the child. Curtailment can take the form of denying the right of access to the parent not awarded custody or restricting access arrangements, for example by limiting the amount of contact. The interests of the parent not awarded custody will only be overruled and access denied if that is considered to be in the child's interests. However, if the parent who was awarded custody reacts to access arrangements in such a way as to cause considerable disturbance in the family in which the child is living, the parent who was not awarded custody may be denied access. Applications for access can thus be turned down, or access rights revoked, if this is deemed to be in the overriding interests of the child.

8.5 The State party further recalls that the above considerations were all applied in deciding whether the author should have access to his son. This led to the denial of access by every court involved.

8.6 The State party concludes that article 23, paragraph 4, of the Covenant has not been violated and contends

that the obligation to ensure the equality of rights and responsibilities of spouses at the dissolution of marriage, referred to in that provision, does not include an obligation to ensure the right of access in the form of an access arrangement. Alternatively, if the Committee should interpret the above provision as encompassing that right, it states that the Netherlands legal system already provides for the right in question. In the author's case, the right was assumed to exist, yet its exercise was denied in the interests of the child. The necessary protection of the child upon dissolution of the marriage made it impossible for the complainant to exercise his right of access.

9. In his comments dated 23 January 1988, the author claims that article 161, paragraph 5, of the Netherlands Civil Code should have been interpreted as requiring the judge in all but exceptional cases to ensure continued contact between the child and the non-custodial parent. He concludes that, in the absence of a clear legal norm under Netherlands law affirming that a parent-child relationship and parental responsibility continue, the Netherlands courts, in the exercise of uncontrolled discretion, violated his and his son's rights under the Covenant by denying his applications for visiting rights.

10.1 The Human Rights Committee has considered the present communication in the light of all information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol. The facts of the case are not in dispute.

10.2 The main question before the Committee is whether the author of the communication is the victim of a violation of article 23, paragraphs 1 and 4, of the Covenant because, as a divorced parent, he has been denied access to his son. Article 23, paragraph 1, of the Covenant provides for the protection of the family by society and the State:

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Under paragraph 4 of the same article:

States parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

10.3 In examining the communication, the Committee considers it important to stress that article 23, paragraphs 1 and 4, of the Covenant set out three rules of equal importance, namely that the family should be protected, that steps should be taken to ensure equality of rights of spouses upon the dissolution of the marriage and that provision should be made for the necessary protection of any children. The words "the family" in article 23, paragraph 1, do not refer solely to the family home as it exists during the marriage. The idea of the family must necessarily embrace the relations between parents and child. Although divorce legally ends a marriage, it cannot dissolve the bond uniting father – or mother – and child; this bond does not depend on the continuation of the parents' marriage. It would seem that the priority given to the child's interests is compatible with this rule.

10.4 The courts of the States parties are generally competent to evaluate the circumstances of individual cases. However, the Committee deems it necessary that the law should establish certain criteria so as to enable the courts to apply fully the provisions of article 23 of the Covenant. It seems essential, except in exceptional circumstances, that these criteria should include the maintenance of personal relations and direct and regular contact between the child and both parents. The unilateral opposition of one of the parents cannot, in the opinion of the Committee, be considered an exceptional circumstance.

10.5 In the case under consideration, the Committee notes that the Netherlands courts, as the Supreme Court had previously done, recognized the child's right to permanent contact with each of his parents as well as the right of access of the non-custodial parent, but considered that these rights could not be exercised in this case because of the child's interests. This was the court's appreciation in the light of all the circumstances, even though there was no finding of inappropriate behaviour on the part of the author.

11. As a result, the Committee cannot conclude that the State party has violated article 23, but draws its attention to the need to supplement the legislation, as stated in paragraph 10.4.

APPENDIX I

Individual opinion submitted by Mrs. Vojin Dimitrijevic and Omar El Shafei, Mrs. Rosalyn Higgins and Mr. Adam Zielinski, pursuant to rule 94. paragraph 3, of the Committee's provisional rules of procedure, concerning the views of the Committee on communication No. 201/1985, Hendriks v. the Netherlands

1. The great difficulty that we see in this case is that the undoubted right and duty of a domestic court to decide "in the best interests of the child" can, when applied in a certain way, deprive a non-custodial parent of his rights under article 23.

2. It is sometimes the case in domestic law that the very fact of a family rift will lead a non-custodial parent to lose access to the child, though he/she has not engaged in any conduct that would per se render contact with the child undesirable. However, article 23 of the Covenant speaks not only of the protection of the child, but also of the right to a family life. We agree with the Committee that this right to protection of the child and to a family life continues, in the parent-child relationship, beyond the termination of a marriage.

3. In this case, the Amsterdam District Court rejected the father's petition for access, although it had found the request reasonable and one that should in general be allowed. It would seem, from all the documentation at our disposal, that its denial of Mr. Hendriks' petition was based on the tensions likely to be generated by the mother's refusal to agree to such a contact – "even to a single meeting between the boy and his father on neutral ground, despite the fact that the Child Care and Protection Board would agree and would have offered guarantees" (decision of 20 December 1978). Given that it was not found that Mr. Hendriks' character or behaviour was such as to make the contact with his son undesirable, it seems to us that the only "exceptional circumstance" was the reaction of Wim Hendriks junior's mother to the possibility of parental access and that this determined the perception of what was in the best interests of the child.

4. It is not for us to insist that the courts were wrong, in their assessment of the best interests of the child, in giving priority to the current difficulties and tensions rather than to the long-term importance for the child of contact with both its parents. However, we cannot but point out that this approach does not sustain the family rights to which Mr. Hendriks and his son were entitled under article 23 of the Covenant.

Vojin Dimitrijevic

Rosalyn Higgins

APPENDIX II

Individual opinion submitted by Mr. Amos Wako, pursuant to rule 94, paragraph 3, of the Committee's provisional rules of procedure, concerning the views of the Committee on communication No. 201/1985, Hendriks v. the Netherlands

1. The Committee's decision finding no violation of article 23 of the Covenant in this case is predicated on its reluctance to review the evaluation of facts or the exercise of discretion by a local court of a State party.

2. Although I fully appreciate and understand the Committee's opinion in this matter and, in fact, agreed to go along with the consensus, I wish to put on record my concerns, which are twofold.

3. My first concern is that, though the Committee's practice of not reviewing the decisions of local courts is prudent and appropriate, it is not dictated by the Optional Protocol. In cases where the facts are clear and the texts of all relevant orders and decisions have been made available by the parties, the Committee should be prepared to examine them as to their compatibility with the specific provisions of the Covenant invoked by the author. Thus, the Committee would not be acting as a "fourth instance" in determining whether a decision of a State party's court was correct according to that State's legislation, but would only examine whether the provisions of the Covenant invoked by the alleged victim have been violated.

4. In the present case, the Committee declared the communication of Mr. Hendriks admissible, thus indicating that it was prepared to examine the case on the merits. In its views, however, the Committee has essentially decided that it is unable to examine whether the decisions of the Netherlands courts not to grant the author visiting rights to his son were compatible with the requirements of protection of the family and protection of children laid down in articles 23 and 24 of the Covenant. Paragraph 10.3 of the decision reflects the Committee's understanding of the scope of article 23, paragraphs 1 and 4, and of the concept of "family". In paragraph 10.4, the Committee underlines the importance of maintaining permanent personal contact between the child and both his parents, barring exceptional circumstances; it further states that the unilateral opposition by one of the parents – as apparently happened in this case – cannot be considered such an exceptional circumstance. The Committee should therefore have applied these criteria to the facts of the Hendriks case, so as to determine whether a violation of the articles of the Covenant had occurred. The Committee, however, makes a finding of no violation on the ground that the discretion of the local courts should not be questioned.

5. My second concern is whether the Netherlands legislation, as applied to the Hendriks family, is compatible with the Covenant. Section 161, paragraph 5, of the Netherlands Civil Code does not provide for a statutory right of access to a child by the non-custodial parent, but leaves the question of visiting rights entirely to the discretion of the judge. The Netherlands legislation does not include specific criteria for withholding of access. Thus the question arises as to whether the said general legislation can be deemed sufficient to guarantee the protection of children, more particularly the right of children to have access to both parents, and to ensure equality of rights and responsibilities of spouses at the dissolution of a marriage, as envisaged in articles 23 and 24 of the Covenant. The continued contact between a child and a non-custodial parent is, in my opinion, too important a matter to be left solely to the judge to decide upon without any legislative guidance or clear criteria, hence the emerging international norms, notably international conventions against the abduction of children by parents, bilateral agreements providing for visiting rights and, most importantly, the draft convention on the rights of the child, draft article 6, paragraph 3, of which provides: "A child who is separated from one or both parents has the right to maintain personal relations and direct contacts with both parents on a regular basis, save in exceptional circumstances". Draft article 6 bis, paragraph 2, provides similarly: "A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contacts with both parents ...".

6. The facts of this case, as presented to the Committee, do not reveal the existence of any exceptional circumstances that might have justified the denial of personal contacts between Wim Hendriks junior and Wim Hendriks senior. The Netherlands courts themselves agreed that the father's application for access was reasonable, but denied the application primarily on the

grounds of the mother's opposition. Although the Netherlands courts may have applied Netherlands law to the facts of this case correctly, it remains my concern that that law does not include a statutory right of access nor any identifiable criteria under which the fundamental right of mutual contact between a non-custodial parent and his or her child could be denied. I am pleased that the Netherlands Government is currently contemplating the adoption of new legislation which would provide for a statutory right of access and give the courts some guidance for the denial of access based on exceptional circumstances. This legislation, if enacted, would better reflect the spirit of the Covenant.

Amos Wako

Communication No. 202/1986

Submitted by: Graciela Ato del Avellanal

Alleged victim: The author

State party: Peru

Date of adoption of views: 28 October 1988 (thirty-fourth session)

Subject matter: Sex-based discrimination in representation of matrimonial property in Civilian Court proceedings

Procedural issues: State party's failure to make submission on merits—State party's duty to investigate allegations in good faith—Insufficiency of submission on merits

Substantive issues: Discrimination based on "other" c.q. marital status—Discrimination based on sex—Equality before the law

Articles of the Covenant: 2 (1) and (3), 3, 14 (1), 16, 23 (4) and 26

Articles of the Optional Protocol: 4 (2), 5 (1) and 2 (b)

1. The author of the communication (initial letter dated 13 January 1986 and a subsequent letter dated 11

February 1987) is Graciela Ato de l Avellanal, a Peruvian citizen born in 1934, employed as professor of music and married to Guillermo Burneo, currently residing in Peru. She is represented by counsel. It is claimed that the Government of Peru has violated articles 2, paragraphs 1 and 3; 3; 16; 23, paragraphs 4; and 26 of the Covenant, because the author has been allegedly discriminated against only because she is a woman.

2.1 The author is the owner of two apartment buildings in Lima, acquired in 1974. It appears that a number of tenants took advantage of the change in ownership to cease paying rent for their apartments. After unsuccessful attempts to collect the overdue rent, the author sued the tenants on 13 September 1978. The court of first instance found in her favour and ordered the tenants to pay her the rent due since 1974. The Superior Court reversed the judgement on 21 November 1980 on the procedural ground that the author was not entitled to sue, because, according to article 168 of the Peruvian Civil Code, when a woman is married only the husband is entitled to represent matrimonial property before the Courts (" El marido es representante de la sociedad conyugal"). On 10 December 1980, the author appealed to the Peruvian Supreme Court, submitting *inter alia* that the Peruvian Constitution now in force abolished discrimination against women and that article 2 (2) of the Peruvian Magna Carta provides that "the law grants rights to women which are not less than those granted to men". However, on 15 February 1984, the Supreme Court upheld the decision of the Superior Court. Thereupon, the author interposed the recourse of *amparo* on 6 May 1984, claiming that in her case article 2 (2) of the Constitution had been violated by denying her the right to litigate before the courts only because she is a woman. The Supreme Court rejected the recourse of *amparo* on 10 April 1985.

2.2 Having thus exhausted domestic remedies in Peru, and pursuant to article 39 of the Peruvian Law No. 23506, which specifically provides that a Peruvian citizen who considers that his or her constitutional rights have been violated may appeal to the Human Rights Committee of the United Nations, the author seeks United Nations assistance in vindicating her right to equality before the Peruvian courts.

3. By its decision of 19 March 1986, the Working Group of the Human Rights Committee transmitted the communication under rule 91 of the provisional rules of procedure to the State party concerned, requesting information and observations relevant to the question of the admissibility of the communication insofar as it may raise issues under articles 14, paragraph 1, 16 and 26, in conjunction with articles 2 and 3 of the Covenant. The Working Group also requested the State party to provide the Committee with (a) the text of the decision of the Supreme Court of 10 April 1985, (b) any other relevant court orders or decisions not already provided by the author and (c) the text of the relevant provisions of the domestic law, including those of the Peruvian Civil Code and Constitution.

4.1 By its submission dated 20 November 1986, the State party noted that "in the action brought by Mrs. Graciela Ato Avellanal and one other, the decision of the Supreme Court dated 10 April 1985 was deemed accepted, since no appeal was made against it under article 42 of Act No. 23385".

4.2 The annexed decision of the Supreme Court, dated 10 April 1985

declares valid the ruling set out on 12 sheets, dated 24 July 1984, declaring inadmissible the application for *amparo* submitted on 2 sheets by Mrs. Graciela Ato de l Avellanal de Burneo and one other against the First Civil Section of the Supreme Court; [and]

Orders that the present decision, whether accepted or enforceable, be published in the Diario Oficial, El Peruano, within the time-limit laid down in article 41 of Law No. 23156.

5.1 Commenting on the State party's submission under rule 91, the author, in a submission dated 11 February

1987, contends that:

1. It is untrue that the ruling of 10 April 1985, of which I was notified on 5 August 1985, was accepted. As shown by the attached copy of the original application, my attorneys appealed against the decision in the petition of 6 August 1985, which was stamped as received by the Second Civil Section of the Supreme Court on 7 August 1985.

2. The Supreme Court has never notified my attorneys of the decision which it had handed down on the appeal of 6 August 1985.

5.2 The author also encloses a copy of a further application, stamped as received by the Second Civil Section of the Supreme Court on 3 October 1985 and reiterating the request that the appeal lodged should be upheld. She adds that "once again, the Supreme Court failed to notify my attorneys of the decision which it had handed down on this further petition".

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

6.2 With regard to article 5, paragraph 2 (a), of the Optional Protocol, the Committee observed that the matter complained of by the author was not being examined and had not been examined under another procedure of international investigation or settlement.

6.3 With regard to article 5, paragraph 2 (b), of the Optional Protocol, the Committee noted the State party's contention that the author has failed to appeal the decision of the Peruvian Supreme Court of 10 April 1985. However, in the light of the author's submission of 11 February 1987, the Committee found that the communication satisfied the requirements of article 5, paragraph 2 (b), of the Optional Protocol. The Committee further observed that this issue could be reviewed in the light of any further explanations or statements received from the State party under article 4, paragraph 2, of the Optional Protocol.

7. On 9 July 1987, the Human Rights Committee therefore decided that the communication was admissible, insofar as it raised issues under articles 14, paragraph 1, and 16 in conjunction with articles 2, 3 and 26 of the Covenant.

8. The time-limit for the State party's submission under article 4, paragraph 2, of the Optional Protocol expired on 6 February 1988. No submission has been received from the State party, despite a reminder sent to the State party on 17 May 1988.

9.1 The Human Rights Committee, having considered the present communication in the light of all the information made available to it, as provided in article 5, paragraph 1, of the Optional Protocol, notes that the facts of the case, as submitted by the author, have not been contested by the State Party.

9.2 In formulating its views, the Committee takes into account the failure of the State party to furnish certain information and clarifications, in particular with regard to the allegations of discrimination of which the author has complained. It is not sufficient to forward the text of the relevant laws and decisions, without specifically addressing the issues raised in the communication. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities, and to furnish to the Committee all relevant information. In the circumstances, due weight must be given

to the author's allegations.

10.1 With respect to the requirement set forth in article 14, paragraph 1, of the Covenant that "all persons shall be equal before the courts and tribunals", the Committee notes that the Court of First Instance decided in favour of the author, but the Superior Court reversed that decision on the sole ground that according to article 168 of the Peruvian Civil Code only the husband is entitled to represent matrimonial property, i. e. that the wife was not equal to her husband for purposes of suing in Court.

10.2 With regard to discrimination on the ground of sex the Committee notes further that under article 3 of the Covenant State parties undertake "to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant" and that article 26 provides that all persons are equal before the law and are entitled to the equal protection of the law. The Committee finds that the facts before it reveal that the application of article 168 of the Peruvian Civil Code to the author resulted in denying her equality before the courts and constituted discrimination on the ground of sex.

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 events of this case, insofar as they continued or occurred after 3 January 1981 (the date of entry into force of the Optional Protocol for Peru), disclose violations of articles 3, 14, paragraph 1, and 26 of the Covenant.

12. The Committee, accordingly, is of the view that the State party is under an obligation, in accordance with the provisions of article 2 of the Covenant, to take effective measures to remedy the violations suffered by the victim. In this connection the Committee welcomes the State party's commitment, expressed in articles 39 and 40 of Law No. 23506, to co-operate with the Human Rights Committee, and to implement its recommendations.

Communication No. 203/1986

Submitted by: Rubén Toribio Muñoz Hermoza

Alleged victim: The author

State party: Peru

Date of adoption of views: 4 November 1988 (thirty-fourth session)*

Subject matter: Arbitrary suspension of author from the "Guardia Civil" for alleged insubordination

Procedural issues: State party's duty to investigate—Unreasonably prolonged proceedings—State party's failure to make submission on merits

Substantive issues: Right to be presumed innocent— Amparo, habeas corpus—Principle of audiatur et alteram partem—Fair hearing—Election of remedy—Compensation—Access on equal terms to public service

Articles of the Covenant: 2, 3, 14 (1) and (2), 25 (c) and 26

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

1. The author of the communication (initial letter dated 31 January 1986 and subsequent letters dated 29 November 1986, 10 February 1987, 11 May and 5 October 1988) is Rubén Toribio Muñoz Hermoza, a

* The text of an individual opinion submitted by Msrs. Joseph A. Cooray, Vojin Dimitrijevic and Rajsoomer Lallah is reproduced in appendix I; the text of an individual opinion submitted by Mr. Bertil Wennergren is reproduced in appendix II.

Peruvian citizen and ex-sergeant of the Guardia Civil (police), currently residing in Cuzco, Peru. He claims to be a victim of violations of his human rights, in particular of discrimination and of denial of justice, by Peruvian authorities. He invokes Peruvian Law No. 23,506, article 39 of which provides that a Peruvian Citizen who considers that his or her constitutional rights have been violated may appeal to the United Nations Human Rights Committee. Article 40 of the same law provides that the Peruvian Supreme Court will receive the resolutions of the Committee and order their implementation.

2.1 The author alleges that he was "temporarily suspended" (*cesación temporal o disponibilidad*) from the Guardia Civil on 25 September 1978, by virtue of Directorial Resolution No. 2437-78-GC/DP, on false accusations of having insulted a superior. Nevertheless, when he was brought before a judge on 28 September 1978 on the said charge, he was immediately released for lack of evidence. The author cites a number of relevant Peruvian decrees and laws providing, *inter alia*, that a member of the Guardia Civil "cannot be dismissed except upon a conviction" and that such dismissal can only be imposed by the Supreme Council of Military Justice. By administrative decision No. 0165-84-60, dated 30 January 1984, he was definitively discharged from service under the provisions of article 27 of Decree-Law No. 18081. The author claims that after having served in the Guardia Civil for over 20 years he has been arbitrarily deprived of his livelihood and of his acquired rights, including accrued retirement rights, thus leaving him destitute, particularly considering that he has eight children to feed and clothe.

2.2 The author has spent 10 years going through the various domestic administrative and judicial instances; copies of the relevant decisions are enclosed. His request for reinstatement in the Guardia Civil, dated 5 October 1978 and addressed to the Ministry of the Interior, was at first not processed and finally turned down, nearly six years later, on 29 February 1984. His appeal against this administrative decision was dismissed by the Ministry of

the Interior on 31 December 1985 on the grounds that he was also pursuing a judicial remedy. This ended the administrative review without any decision on the merits, over seven years after his initial petition for reinstatement. The author explains that he had turned to the courts, basing himself on article 28 of the law on *amparo* which provides that "the exhaustion of previous procedures shall not be required if such exhaustion could render the injury irreparable", and in view of the delay and apparent inaction in processing the administrative review. On 18 March 1985, the Court of First Instance in Cuzco held that the author's action of *amparo* was well-founded and declared his dismissal null and void, ordering that he be reinstated. On appeal, however, the Superior Court of Cuzco rejected the author's action of *amparo*, stating that the period for lodging such action had expired in March 1983. The case was then examined by the Supreme Court of Peru, which held, on 29 October 1985, that the author could not start an action of *amparo* before the previous administrative review had been completed. Thus, the author claims that, as evidenced by these inconsistent decisions, he has been a victim of denial of justice. As far as the completion of the administrative review, he points out that it is not his fault that said review was kept pending for seven years, and that, in any case, for as long as the review was pending, the period of limitations for an action of *amparo* could not start running, let alone expire.

3. By its decision of 26 March 1986, the Human Rights Committee transmitted the communication under rule 91 of the provisional rules of procedure, to the State Party, requesting information and observations relevant to the question of the admissibility of the communication insofar as it may raise issues under articles 14 (l), 25 and 26 of the International Covenant on Civil and Political Rights. The Committee also requested the State party to explain the reasons for the dismissal of Mr. Muñoz and the reasons for the delays in the administrative proceedings concerning his request for reinstatement, and further to indicate when the administrative proceedings were expected to be concluded and whether the recourse of *amparo* would still be available to Mr. Muñoz at that time.

4. In a further submission, dated 29 November 1986, the author informed the Committee that the Tribunal of Constitutional Guarantees of Peru, by judgement of 20 May 1986, had held that his action of *amparo* was admissible (*procedente*) and that it had quashed the judgement of the Supreme Court of Peru of 29 October 1985. However, no action has yet been taken to enforce the judgement of the Civil Court of First Instance of Cuzco of 18 March 1985. The author claims that this delay is indicative of abuse of authority and failure to comply with Peruvian law in matters of human rights (article 36 taken together with article 34 of Law No. 23,506).

5. In its submission under rule 91, dated 20 November 1986, the State party transmitted the complete file forwarded by the Supreme Court of Justice of the Republic concerning Mr. Muñoz Hermoza, stating, *inter alia*, that "under the law in force, the internal judicial remedies were exhausted when the Tribunal of Constitutional Guarantees handed down its decision". The State party did not provide the other clarifications requested by the Committee.

6. In his comments, dated 10 February 1987, the author refers to the judgement of the Tribunal of Constitutional Guarantees of Peru in his favour and notes that "despite the time that has elapsed, the enforcement of the judgement has not been ordered by the Civil Chamber of the Supreme Court of the Republic of Peru, in disregard of the terms of article 36 of Law No. 23,506".

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

7.2 With regard to article 5, paragraph 2 (a), of the Optional Protocol, the Committee observed that the matter complained of by the author was not being examined and had not been examined under another procedure of international investigation or settlement. With regard to article 5, paragraph 2 (b), of the Optional Protocol, the State party has confirmed that the author has exhausted domestic remedies.

8. On 10 July 1987, the Human Rights Committee therefore decided that the communication was admissible, insofar as it raised issues under articles 14, paragraph 1, 25 (c), and 26, in conjunction with article 2, paragraph 3, of the Covenant.

9.1 In a submission dated 11 May 1988, the author describes the further development of the case and reiterates that the decision of the Court of First Instance of Cuzco of 18 March 1985, holding that his action of *amparo* was well-founded and declaring his dismissal null and void, had not been enforced, in spite of the fact that on 24 September 1987 the Cuzco Civil Chamber handed down a similar decision on the merits ordering his reinstatement in his post with all benefits. The author complains that the Civil Chamber subsequently extended the statutory time-limit of three days for appeal (provided for in article 33 of Law No. 23,506), and, instead of ordering the enforcement of its decision, granted *ex officio* a special appeal for annulment on 24 November 1987 (i. e. 60 days after the decision, purportedly in contravention of article 10 of Law No. 23,506). "Defence of the State" was allegedly adduced as grounds for the decision to grant a special appeal, with reference being made to article 22 of Decree-Law No. 17,537. This decree-law, the author contends, was abrogated by Law No. 23,506, article 45 of which repeals "all provisions which prevent or hinder proceedings for *habeas corpus* and *amparo*."

9.2 The Second Civil Chamber of the Supreme Court of the Republic again received the case on 22 December 1987. A hearing took place on 15 April 1988, allegedly without prior notification to the author, who claims not to have received the text of any judgement or order. In this connection, he observes that "the only way to avoid restoring my constitutional rights ... is to be bogged down in further proceedings".

9.3 More particularly, the author questions the legality of the Government appeal, since all procedural and substantive issues have already been adjudicated, and the Prosecutor General himself, in a written opinion dated 7 March 1988, declared that the decision of the Cuzco Civil Chamber of 24 September 1987 was valid and the author's action of *amparo* well-founded. The author further comments: "the only correct solution would have been to reject the appeal and refer the case back to the Civil Chamber of the Cuzco Court for it to comply with the order to (reinstate him). . ." . Moreover, a lower court was venturing to decide in a manner which conflicted with the procedure indicated by the Tribunal of Constitutional Guarantees, and Decree-Law No. 17,537 is not applicable because it refers to types of ordinary litigation in which the State is a party and not to actions relating to constitutional guarantees, in which the State is under a duty to guarantee full observance of human rights (articles 80 *et seq.* of the Peruvian Constitution). He further observes:

The case has thus been "virtually"shelved indefinitely by the Second Civil Chamber of the Supreme Court in Lima, without any access allowed for the appellant, and without counsel appointed. I was thus obliged to retain a lawyer, but he was not allowed to see the papers in the case and the outcome of the hearing of 15 April 1988 "because it has not yet been signed by the non-presiding members of the Court".

In these circumstances, an application was submitted requesting a certified copy of the decision of 15 April 1988, but it has not been entertained, on the pretext that a lawyer's signature was missing and that the fees had not been paid. This is a breach of article 13 of Act No. 23,506, on *amparo*, which contains tacit dispensation from these formalities, pursuant to article 295 of the Peruvian Constitution.

9.4 The author also indicates that he has spared no effort to try to arrive at a settlement of his case. On 21 February 1988, he wrote to the President of Peru describing the various stages of his 10-year struggle to be reinstated in his post, and adducing procedural irregularities and instances of alleged abuse of authority. The author's petition was passed on to the Deputy Minister of the Interior, who, in turn, communicated it to the Director of the Guardia Civil. Subsequently, the Guardia Civil's Legal Adviser "rendered a legal opinion advising that I should be reinstated. But the Subaltern Ranks Investigating Council and the Director of Personnel rejected my petition. There is, however, nothing in writing and the decision was purely verbal".

9.5 In view of the foregoing, the author requests the Committee to endorse the judgements of the Court of First

Instance of Cuzco, dated 18 March 1985, and of the Civil Chamber of the Court of Cuzco, dated 24 September 1987, and to recommend his reinstatement in the Guardia Civil, his promotion to the rank he would have attained had he not been unjustly dismissed, and the granting of ancillary benefits. He further asks the Committee to take/into account article 11 of Law No. 23,506 which provides, *inter alia*, for indemnification.

9.6 By letter of 5 October 1988, the author informs the Committee that the Second Civil Chamber of the Supreme Court ruled on 15 April 1988 that his action of *amparo* was inadmissible because the period for lodging the action had lapsed on 18 March 1983, whereas he had lodged the action on 30 October 1984. The author points out that this issue had already been definitively decided by the Tribunal of Constitutional Guarantees on 20 May 1986, which held that his action of *amparo* had been timely lodged (see para. 4 above). On 27 May 1988, the author again turned to the Tribunal of Constitutional Guarantees/requesting that the Supreme Court's Decision of 15 April 1988 be quashed. The author's newest action is still pending.

10.1 The time-limit for the State party's submission under article 4 (2) of the-optional Protocol expired on 6 February 1988. No submission has been received from the State party, despite a reminder sent on 17 May 1988. The author's further submission of 11 May 1988 was transmitted to the State party on 20 May 1988. The author's subsequent letter of 5 October 1988 was transmitted to the State party on 21 October 1988. No comments from the State party have been received.

10.2 The Committee has taken due note that the author's new appeal before the Tribunal of Constitutional Guarantees is still pending. This fact, however, does not affect the Committee's decision on the admissibility of the communication, because judicial proceedings in this case have been unreasonably prolonged. In this context the Committee also refers to the State party's submission of 20 November 1986 in which it stated that domestic remedies had been exhausted.

11.1 The Human Rights Committee, having considered the present communication in the light of all the information made available to it, as provided in article 5, paragraph 1, of the Optional Protocol, notes that the facts of the case, as submitted by the author, have not been contested by the State party.

11.2 In formulating its views, the Committee takes into account the failure of the State party to furnish certain information and clarifications, in particular with regard to the reasons for Mr. Muñoz dismissal and for the delays in the proceedings, as requested by the Committee in its rule 91 decision, and with regard to the allegations of unequal treatment of which the author has complained. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities, and to furnish to the Committee all relevant information. In the circumstances, due weight must be given to the author's allegations.

11.3 With respect to the requirement of a fair hearing as stipulated in article 14, paragraph 1, of the Covenant, the Committee notes that the concept of a fair hearing necessarily entails that justice be rendered without undue delay. In this connection, the Committee observes that the administrative review in the Muñoz case was kept pending for seven years and that it ended with a decision against the author based on the ground that he had started judicial proceedings. A delay of seven years constitutes an unreasonable delay. Furthermore, with respect to the judicial review, the Committee notes that the Tribunal of Constitutional Guarantees decided in favour of the author in 1986 and that the State party has informed the Committee that judicial remedies were exhausted by virtue of that decision (para. 5 above). However, the delays in implementation have continued and two and a half years after the judgement of the Tribunal of Constitutional Guarantees, the author has still not been reinstated in his post. This delay, which the State party has not explained, constitutes a further aggravation of the violation of the principle of a fair hearing. The Committee further notes that on 24 September 1987 the Cuzco Civil Chamber, in pursuance of the decision of the Tribunal of Constitutional Guarantees, ordered that the author be reinstated; subsequently, in a written opinion dated 7 March 1988, the Public Prosecutor declared that the decision of the Cuzco Civil Chamber was valid and that the author's action of *amparo* was well-founded. But even after these clear decisions, the

Government of Peru has failed to reinstate the author. Instead, yet another special appeal, this time granted *ex officio* in "Defence of the State" (para. 9.1), has been allowed, which resulted in a contradictory decision by the Supreme Court of Peru on 15 April 1988, declaring that the author's action of *amparo* had not been lodged within the statutory time-limit and was therefore inadmissible. This procedural issue, however, had already been adjudicated by the Tribunal of Constitutional Guarantees in 1986, before which the author's action is again pending. Such a seemingly endless sequence of instances and the repeated failure to implement decisions are incompatible with the principle of a fair hearing.

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 events of this case, insofar as they continued or occurred after 3 January 1981 (the date of entry into force of the Optional Protocol for Peru) disclose a violation of article 14, paragraph 1, of the International Covenant on Civil and Political Rights.

13.1 The Committee, accordingly, is of the view that the State party is under an obligation, in accordance with the provisions of article 2 of the Covenant, to take effective measures to remedy the violations suffered by Rubén Toribio Muñoz Hermoza, including payment of adequate compensation for the loss suffered.

13.2 In this connection, the Committee welcomes the State party's commitment, expressed in articles 39 and 40 of Law No. 23,506, to co-operate with the Human Rights Committee, and to implement its recommendations.

APPENDIX I

Individual opinion submitted by Mssrs. Joseph A. Cooray, Vojin Dimitrijevic and Rajsoomer Lallah pursuant to rule 94, paragraph 3, of the Committee's provisional rules of procedure, concerning the views of the Committee on communication No. 203/1986, Muñoz v. Peru

1. We agree with the conclusion reached by the Committee but also for other reasons.

2. In the absence of any response from the State party under article 4, paragraph 2, of the Optional Protocol, the allegations of the author remain uncontested; and they are, in substance, that:

(a) He had for 20 years been a member of the Guardia Civil of Peru, a post in the public service of his country, access to which is guaranteed under article 25 (c) of the Covenant;

(b) He was, at an initial stage, temporarily suspended from his post and was investigated on a charge of having insulted a superior officer; the case against him was not sustained;

(c) Nevertheless, some five years later, he was permanently discharged from the service. There is no indication that he was given a hearing before the administrative decision was taken to suspend him, nor is there any indication that disciplinary proceedings were brought against him after the criminal investigation had been closed. What is certain is that the Ministry of the Interior declined to consider an appeal against the 1978 decision to discharge him.

He appears to have all the time been treated as guilty while officially being temporarily suspended. This amounted to a continued violation of his right to be presumed innocent (art. 14, para. 2) and to be treated accordingly until proceedings or, failing that, disciplinary proceedings were concluded against him. These proceedings were apparently not initiated;

(d) Having failed to obtain administrative redress, he continued to seek redress from the courts;

(e) A conflict, which the State party has regrettably not sought to elucidate, appears to have emerged between the decisions of the Tribunal of Constitutional Guarantees, which had ruled in his favour, and of the Civil Chamber of the Supreme Court. Following the decision of the Tribunal of Constitutional Guarantees, the Superior Court of Cuzco decided the merits of the case in the author's favour, ordering his reinstatement, but the Civil Chamber of the Supreme Court reversed this decision on a special appeal, granted ex officio and out of time, and based on a procedural point, which the Tribunal of Constitutional Guarantees had already examined and decided in a different manner;

(f) Quite apart from the baffling conflict between the decisions of the Supreme Court and the Tribunal of Constitutional Guarantees, there remains also the significant failure of the Supreme Court to grant the author a hearing before reviewing the decision of the Superior Court of Cuzco.

3. The principles of a fair hearing, known in some systems as the rules of natural justice, and guaranteed under article 14, paragraph 1 of the Covenant, include the concept of audi alteram partem. Those principles were violated because it would appear that the author was deprived of a hearing both by the administrative authorities, which were responsible for the decisions to suspend him and, later, to discharge him, and by the Supreme Court, when it reversed the earlier decision which had been favourable to him. Furthermore, as observed in paragraph 2 (c) above, the apparent absence of criminal or disciplinary proceedings establishing his guilt ran counter to the presumption of innocence embodied in article 14, paragraph 2, of the Covenant and was equally at variance with the administrative consequences that normally follow from that presumption.

4. It is also clear that, with regard to such a simple matter as that concerning the reinstatement of a public official who had been unjustifiably dismissed, the obligations undertaken by the State party under article 2, paragraph 3 (a) and (c), of the Covenant, were unaccountably violated in that neither the administrative nor the judicial authorities of the State party found it possible, over a period spanning a decade, to provide the author with an appropriate remedy and to enforce that remedy.

Joseph A. Cooray

Vojin Dimitrijevic

Rajsoomer Lallah

APPENDIX II

Individual opinion submitted by Mr. Bertil Wennergren pursuant to rule 94, paragraph 3, of the Committee's provisional rules of procedure, concerning the views of the Committee on communication No. 203/1986,

Muñoz v. Peru

1. I concur in the views expressed by the majority of the Committee with regard to the violation of article 14 of the

Covenant but wish to submit the following considerations with regard to article 25 (c) of the Covenant.

2. From the judgement of 20 May 1986 of the Tribunal of Constitutional Guarantees, it appears that Mr. Muñoz, by administrative decision No. 2437-78-GC/DP of 25 September 1978, was suspended from service on disciplinary grounds (for the alleged offence of insulting a superior) and placed at the disposal of the Fourth Judicial Zone of the Police. By administrative decision No. 3020-78-GC/DP of 25 November 1978, the Administration of the Peruvian Guardia Civil refused to cancel the suspension order. By decision No. 0165-84-GD of 30 January 1984, Mr. Muñoz was definitively discharged from service under the provisions of article 27 of Decree Law No. 18081.

3. The Court of First Instance of Cuzco, in its decision of 18 March 1985, declared all the aforementioned decisions null and void. In its findings, it stated, *inter alia*, that the investigation ordered by the Supreme Council of Military Justice against Mr. Muñoz on the charge of having insulted a superior did not establish that he had committed any punishable offence. The Court considered, in this connection, Supreme Decree No. 1056-68-GP, which stipulates that a member of the Guardia Civil "shall be discharged only following a conviction" and noted that Mr. Muñoz had no previous record, neither criminal nor judicial, and that he had shown irreproachable conduct and had obtained sufficient merits, demonstrating discipline and capacity. By decision of 24 September 1987, the Superior Court of Cuzco confirmed the judgement of the Court of First Instance and ordered that Mr. Muñoz should be reinstated in his post with all benefits. None of these Court decisions have become final, but the Supreme Court has not considered them on the merits, reversing them instead by rejecting Mr. Muñoz's actions of *amparo* on procedural grounds. There is, however, no reason to believe that the Supreme Court could have arrived at a different conclusion on the merits than that arrived at by the lower courts. On the contrary, it is reasonable to assume that it could not have decided otherwise, particularly considering that the State party has not contested the merits of the decisions, and the Prosecutor General, in a written opinion dated 7 March 1988, has stated that the decision of 24 September 1987 is valid.

4. Thus, in my view, it is evident that the suspension and discharge of Mr. Muñoz from the Peruvian Guardia Civil were not founded upon objective and justifiable grounds. Whatever the ground may have been, whether, for instance,

political or merely subjective, it was arbitrary. To suspend and dismiss someone arbitrarily from the public service and to refuse him reinstatement, just as arbitrarily, constitutes, in my opinion, a violation of his right, under article 25 (c) of the Covenant, to have access on general terms of equality to the public service. In this context, reference should be made to the Committee's views in case No. 198/1985, where it observed "that Uruguayan public officials dismissed on ideological, political or trade union grounds were victims of violations of article 25 of the Covenant".

5. I am therefore of the view that the events in this case disclose a violation not only of article 14, but also of article 25 (c) of the Covenant.

Bertil Wennergren

Communication No. 207/1986

Submitted by: Yves Morael (represented by counsel)

Alleged victim: The author

State party: France

Date of adoption of views: 28 July 1989 (thirty-sixth session)

Subject matter: Alleged violation of presumption of innocence in bankruptcy proceedings in French Court

Procedural issues: Article 4 (2), State party's failure to make submission on merits

Substantive issues: Presumption of innocence—Right to a fair trial—Fair hearing—Reformatio in pejus—Criteria for application of Article 14 (1) to civil proceedings—Equality of arms—Adversary proceedings

Articles of the Covenant: 1, 2, 14 (1) and (2), 17 (1) and 26

Articles of the Optional Protocol: 3, 4 (2) and 5 (1)

1.1 The author of the communication (letters dated 5 June 1986 and 13 February 1987) is Yves Morael, a French citizen born in France in 1944, at present residing in Paris. He claims to be a victim of violations by France of article 14 (1) and (2) and articles 26 and 17 (1) of the International Covenant on Civil and Political Rights. He is represented by counsel.

1.2 The author states that he is a businessman, and a former member of the board and, later, managing director of the joint stock company, Société Anonyme des Cartonneries Mécaniques du Nord (SCMN), which manufactured paper and cardboard, employing almost 700 persons in 1974. As a consequence of the oil crisis in 1973 and because of increased competition in the sector, the company suffered serious financial losses and, by decision of 24 May 1974 of the Tribunal of Commerce of Dunkerque, was placed under judicial supervision (*règlement judiciaire*). On 25 June 1975, the same Tribunal ordered the sale of assets (*liquidation des biens sociaux*), an order upheld by the Court of Appeal of Douai on 12 July 1975. On 11 July 1977, the Court of Cassation quashed the order, but on 3 July 1978 the Court of Appeal of Amiens, in its turn, ordered the sale to proceed. In the meantime, the company had resumed its activities.

1.3 The author further states that, with a 3.16 per cent shareholding in the company and as a member of the

board of directors of the company since 1978, he repeatedly criticized the policies of the then Managing Director and informed the other shareholders of his written protests in order to bring the seriousness of the situation to their attention. On 28 February 1979, the author resigned from his position as a member of the board. On 30 June 1979, the then Managing Director resigned and the author was named as his successor by the general meeting of shareholders, effective 1 July 1979. Immediately thereafter, he took a number of measures designed to save the company, including closing the Paris office, reducing his salary as Managing Director by 33 per cent and increasing the sales price of the company's products. These measures enabled the author to obtain a court order for temporary suspension of proceedings (*suspension provisoire de poursuites*) on 30 November 1979. However, when the author sought to reduce the number of employees by approximately 10 per cent (54 posts), the Inspectorate of Employment refused permission in most cases and a series of strikes ensued, further increasing the company's losses. The author ceased to act as Managing Director on 7 December 1979, and a temporary judicial administrator was appointed. On 24 January 1980, the Tribunal of Commerce of Dunkerque appointed another judicial administrator, Mr. Deladrière, who had previously been on the board of SCMN, and who, according to the author, had rendered the company's long-term prospects of survival very precarious by failing to reinvest or modernize during his appointment. More importantly, the author claims that it was during Mr. Deladrière's appointment (1980-1983), that the company's liabilities surpassed its assets, that Mr. Deladrière sold certain company assets at a price significantly below their market value, and that he failed to disengage the company from the obligation of paying FF 16,038,847 to ASSEDIC (employment insurance) following the cessation of production in January 1980. The author states that Mr. Deladrière brought both civil and criminal proceedings against him and claims that the allegations in the criminal proceedings were false and defamatory; he adds that he was duly acquitted by the Tribunal Correctionnel of Dunkerque on 5 March 1982. He also states that similar allegations of misuse of company funds, which were subsequently dismissed in the criminal proceedings, had been improperly introduced in the civil proceedings by the Public Prosecutor (Ministère public) in the hope of rebutting his claim that he had exercised due diligence in the management of the company, and that the Tribunal of Commerce had thus been misled. Moreover, the author claims that the Tribunal of Commerce erred in taking a decision against him without waiting for the judgement of the criminal court on the facts since a civil action must be stayed while a criminal action is being prosecuted (*le criminel tient le civil en l'état*).

1.4 By judgement of 7 July 1981, the Tribunal of Commerce of Dunkerque found that the author had failed to prove due diligence and ordered him to pay 5 per cent of the company's debts, which, according to the accounts presented to the Tribunal by the court-appointed administrator, amounted in 1981 to FF 957,040, since the company's debts, including the ASSEDIC payments, were set at FF 19,140,814.

1.5 The author alleges that the former French bankruptcy law, which was applied to him, unjustly placed a presumption of fault on the defendant (article 99 of Act No. 67-563) and observes that the French Parliament amended it on 25 July 1985 (effective 1 January 1986) eliminating that presumption of fault. However, he did not benefit from the application of the revised law.

1.6 The author appealed the judgement of the Tribunal of Commerce of Dunkerque, claiming that a number of procedural errors had been committed by the lower court and requesting a finding that he had exercised all due diligence during his five months as Managing Director, and that he was not liable for any part of the company's debts. More particularly, he cited the misuse of influence by the Public Prosecutor, who was allowed, in the civil proceedings, to allude to accusations brought against him in the Tribunal Correctionnel and to introduce evidence stemming from the criminal proceedings in violation of article 11 of the French Code of Criminal Procedure. In its order of 13 July 1983, the Court of Appeal of Douai, after finding that the author had taken several measures in an effort to save the company but had not succeeded, held him liable for the company's debts, application of the presumption of fault incorporated in article 99 of the old bankruptcy law. Furthermore, the Court of Appeal did not limit itself to confirming the lower court's judgement that the author should pay 5 per cent of the company's debts in 1981, or FF 957,040, and amended that judgement *ex officio* by ordering him to pay FF 3 million. The author notes that he had appealed in order to extinguish his liability and that the court-appointed administrator had asked the Court of Appeal merely to confirm the lower court's judgement. Notwithstanding, the Court of Appeal amended the judgement in two ways, firstly, by basing itself on a financial statement dated 15 February 1983, showing considerable higher net indebtedness (FF 30 million instead of the FF 19,140,814 in 1983 and, secondly, by increasing his share of liability from 5 per cent (FF 1.5 million) to 10 per cent (FF 3 million). The author then appealed to the Court of Cassation, contending that the Court of Appeal, while acknowledging his efforts, had erred in finding that he had not exercised due diligence. The author argued that an officer of a company can be required

only to take measures but not to guarantee the result. Moreover, the author claimed that he could only be held responsible, if at all, for debts arising during his term as Managing Director, whereas neither the lower court nor the Court of Appeal had ever established the extent of the company's debts on 1 July 1979, when he became Managing Director, and on 7 December 1979, when he resigned. There was thus no proof that the company's debts had increased under his management and hence no legal basis for his condemnation. The author further claimed that the Court of Appeal had infringed article 16 of the new Code of Civil Procedure in basing itself on liabilities significantly higher than those established by the lower court, without subjecting the new elements to adversary proceedings. That article reads:

The court must, in all circumstances, ensure the observance of, and itself observe, the principle of adversary proceedings.

In its decision, it may not admit grounds, explanations and documents relied upon or produced by the parties unless they have been available to the parties for contradictory debate.

It may not base its decision on grounds it has raised ex officio without having invited the parties to present their observations.

The author notes that at no time in the appeal proceedings were the parties given an opportunity to present their observations on the higher indebtedness figures on his own share of liability. On 2 May 1985, the Court of Cassation rejected the author's appeal.

2.1 With respect to article 14 (1) of the Covenant, the author calls into question the French legal system which, as it was applied to him, did not guarantee a fair hearing, particularly for the reason that there was no "equality of arms" in the procedure whereby companies are placed under judicial supervision and because article 99 of Act No. 67-563 placed an unfair presumption of fault on company officers without requiring proof of their actual misconduct. In this connection, the author contends that the Court of Cassation wrongly interpreted the concept of due diligence by concluding that any fault committed by the author necessarily excluded diligence, even if he had not shown negligence in the exercise of his duties. The author claims that this excessively severe interpretation of "due diligence" is discriminatory against company officials, for whom an error of judgement regarding economic developments is punished as if constituting negligence. Placing an obligation on him to achieve a desired result, the author argues, was tantamount to denying him any possibility of establishing that he had, in fact, exercised due diligence. The author claims that it is grossly unfair to hold him responsible for the company's financial condition, already disastrous at the time he was appointed Managing Director and which he sought to remedy by diligent efforts that were finally frustrated by factors beyond his control, such as the refusal by the Inspectorate of Employment of staff retrenchment measures and the ensuing strikes.

2.2 Another alleged violation of article 14 (1), the author claims, consisted in the court's consideration of a new and higher amount for the company's liabilities without giving him an opportunity to challenge it. He further contends that the case was not heard within a reasonable time, considering that the Tribunal of Commerce of Lille appointed its administrator in January 1980 and the final decree of the Court of Cassation was not handed down until May 1985. The author claims that had the procedure been more expeditious, the level of the company's debts would have been lower, especially as employees had been paid FF 16,038,847 even after the company had ceased operations in January 1980.

2.3 With respect to article 14 (2), the author contends that article 99 of Act No. 67-563 had not only a civil but also a penal character, and he refers in this connection to the fact that the Public Prosecutor (Ministère public) was heard during the proceedings before the Tribunal of Commerce of Dunkerque. He further contends that the decision by the Court of Appeal ordering him to pay FF 3 million amounts to a penal sanction. He therefore claims that he should have enjoyed the presumption of innocence.

2.4 The author states that, to the extent that he was a victim of violations of article 14 by not having been given a fair hearing, he was also denied the equal protection of the law, as provided by article 26 of the Covenant. This, he claims, also constitutes a violation of article 17 (1), in that there was an attack on his honour and reputation, more particularly that the proceedings against him tarnished his reputation as a company officer and that he is now prohibited by the bankruptcy law from exercising many managerial functions.

2.5 Lastly, the author emphasizes the fact that he was a victim of violations of the Covenant subsequent to the entry into force of the Optional Protocol for France (17 May 1984).

3. By its decision of 1 July 1986, the Working Group of the Human Rights Committee, acting under rule 91 of its provisional rules of procedure, transmitted the communication of Yves Morael to the State party, requesting any information and observations relevant to the question of the admissibility of the communication.

4.1 In a communication dated 1 December 1986, the State party concedes that the author has "exhausted all domestic remedies within the meaning of article 5, paragraph 2 (b), of the Optional Protocol". With regard to the arguments of the author and the merits of his claims, the State party contends that the author's communication should be rejected as "manifestly ill-founded".

4.2 The State party rejects the author's contention that the French courts did not decide the case within a reasonable time, pointing out that the Tribunal of Commerce delivered its judgement on 7 July 1981 and the Court of Appeal announced its decision on 13 July 1983, upheld by the Court of Cassation on 2 May 1985.

Given the complexity of the case and the fact that Mr. Morael used all the remedies permitted by French law for such proceedings without displaying particular eagerness, the courts, which were called upon to reach a decision on three occasions in this case within a total period of less than four years, have acted with all due dispatch.

4.3 With regard to the author's assertion that he was not given a fair hearing owing to the presumption of fault established by article 99 of the then applicable Act of 13 July 1967, the State party quotes the text of the Act:

When judicial supervision of the affairs of a body corporate or the sale of its property reveals that its assets are insufficient, the court may decide, on the petition of the court-appointed administrator, or even *ex officio*, that the company's debts shall be borne, in whole or in part and jointly or severally, by all or some of the managers of the company, whether *de jure* or *de facto*, visible or undisclosed, remunerated or not. To be absolved of their liability, such persons must show that they devoted all due energy and diligence to the management of the company's affairs.

And the state party adds that "this procedure, commonly known as an action for coverage of liabilities, thus introduces in respect of a company's managers or some of them, a presumption of liability, there being a shortfall in assets resulting from the failure of their management".

4.4 "In the view of the French Government, this presumption of liability attached to a company's managers is not in conflict with the principle of a fair hearing, contrary to the contention of the author. Admittedly, the liability of the persons concerned may be invoked in this type of procedure without presentation of proof of fault on the part of the managers. But that is the case in any system of liability for risk or 'objective' liability. Furthermore, the existence of such a presumption instituted by the Act is not, in itself, in any way contrary to the rule of a fair hearing inasmuch as the proceedings take place in conditions that ensure the full enjoyment of his rights by the person concerned. What is more, in the case in question, this presumption is not irrefutable, for the managers in question can in fact absolve themselves of liability by proving by whatever means that they devoted all due energy and diligence to the

management of the company's affairs. The tribunal, itself supervised by the Court of Appeal, is free to evaluate such proof in the light of all the elements which had an influence on the behaviour of the managers involved."

4.5 "It is for [the tribunal] to decide, on the petition of the receiver (*syndic*) or *ex officio*, to make all or some of the company's managers, jointly or severally assume all or part of the company's liabilities. The tribunal is under no compulsion whatsoever to rule against the persons involved. If it does so it is free to determine the amount of the obligation assessed to the managers at fault, on the sole condition that in its decision it does not exceed the amount of the shortfall in assets. It is also free to decide on the advisability of making the managers jointly liable. In short, an action for coverage of liabilities in no way constitutes an automatic sanction, but must rather be regarded as a vicarious-liability action based on a presumption which can always be contested by evidence to the contrary."

4.6 "In the present instance, the trial judges of the case considered that Yves Morael 'had been instrumental in prolonging the life of the company while at the same time worsening its indebtedness' and found that the various measures taken by this manager 'with the aim of saving at all costs a loss-making enterprise proved inadequate ..., that it follows that Yves Morael cannot be deemed diligent within the meaning of article 99 of the Act of 13 July 1967'. It thus emerges that in the course of the proceedings the elements of proof furnished by Mr. Morael were examined so as to ensure a fair hearing, which enabled the judges to evaluate the justification for the action for coverage of liabilities brought by the official receiver. In addition, the Government sees nothing to support the view that the case of the author was not properly considered, or that the trial judges or the appeal judges did not conduct the proceedings properly and fairly. We would note on this connection that the rights of the defence were respected, the person concerned attended the hearings, and that the procedure took place before courts having all the guarantees of independence and impartiality required by article 14 (1) of the Covenant."

4.7 With regard to the author's claim that the Court of Appeal of Douai violated the principle of adversary proceedings by convicting him on the basis of elements that became known after submission of the court-appointed administrator's findings, the State party notes that the author does not identify the elements in the file that were allegedly not the subject of adversary proceedings. Furthermore, the Court of Cassation, in its decree of 2 May 1985, explicitly dismissed this argument when it stated that

the Court of Appeal, in determining that, at the time it handed down its decision, the liabilities of SCMN exceeded its assets, relied upon the elements contained in the findings submitted by the court-appointed administrator, in which the figures are identical, to within a few francs, with those of the statement of outstanding claims as ascertained on 15 February 1983, which was not the subject of any objection ... the Court of Appeal thus ... did not ignore the principle of adversary proceedings ...

4.8 With respect to the alleged violation of article 14 (2), the State party observes that "the presumption of fault enunciated in article 99 of the Act of 3 July 1967 is in no way contrary to article 14, paragraph 2, of the Covenant". In an action for coverage of liabilities, "the verdict, regardless of the amount involved, remains commensurate with the loss suffered by the creditors and never has the character of a financial penalty". Under no circumstances does an action or coverage of liabilities "have a penal character, and acts constituting serious errors of management do not as such constitute criminal offences. What is more, the Public Prosecutor is not empowered to act in such a matter. Unless the court takes up the question *ex officio* – which was not done in this case – only the receiver may bring a petition for coverage of liabilities. But, the presumption of innocence laid down in article 14, paragraph 2, applies exclusively to criminal offences".

4.9 With respect to the alleged violation of article 14 (1) in conjunction with articles 26 and 17 of the Covenant, the State party observes that the author has failed to substantiate his allegations.

5.1 In a letter dated 13 February 1987 containing – in accordance with rule 91 of the provisional rules of procedure – the author's comments on the observations of the State party, the author notes that the State party "does

not contest the admissibility of the communication" having regard to the exhaustion of domestic remedies.

5.2 With regard to the substantiation of his grievances, the author takes issue with most of the State party's arguments concerning the merits. Above all, he draws the Committee's attention to the fact that "article 99 of the Act of 13 July 1967 was the subject of a parliamentary debate in 1984 which led to the adoption of the amended bankruptcy law of 25 January 1985". This new Act, which was not applied to him, restores ordinary law in respect of the burden of proof, eliminating the presumption of fault on the part of company managers. That has two consequences in his case:

Firstly, the Court of Cassation, in its ruling of 2 May 1985, did not apply the more lenient system emerging from the new law of 25 January 1985. He was thus sentenced to bear part of the company's liabilities on the basis of a statute abandoned by the legislature less than four months earlier;

Secondly, the debates both in the National Assembly and the Senate indicate that article 99 of Act No. 67-563 was deemed to violate the principles of "fair hearing" and "presumption of innocence", and that eminent French professors of law and legal experts called upon to testify at proceedings under that article considered it to be distinctly penal in character.

5.3 The author quotes extensively from the debates in the French National Assembly and requests the Committee to take into account the criticisms voiced on that occasion before determining the scope of the concepts of "fair hearing" and "presumption of innocence" guaranteed by the Covenant. The following are excerpts from the debates in the National Assembly:

Mr. Robert Badinter, Minister of Justice at the time of the parliamentary examination of article 99 and currently President of the Constitutional Council, stated:

"Existing law is still burdened by the highly repressive influence of old bankruptcy law. The present Act still regards [management] with suspicion. It threatens company managers with numerous criminal penalties ... It exposes them to liability for covering a company's indebtedness by subjecting them to a presumption of fault contrary to the fundamental principle of presumption innocence ..." (National Assembly, meeting of 5 April 1984, *Compte rendu*, p. 1180).

The author then quotes article 180 of the new bankruptcy law of 25 January 1985:

When judicial reorganization or liquidation of a body corporate reveals that its assets are deficient, the court may – where a fault of management has contributed to such deficiency in assets – decide that the debts of the body corporate shall be borne, in whole or in part, jointly or severally, by all or some of the managers, whether de jure or de facto and whether or not they are remunerated ...

The author adds that the law was voted without any deputy objecting to the adoption of that text.

5.4 With respect to the penal aspect of article 99 of the former bankruptcy law, the author further observes:

The action for coverage of liabilities is a complex action which is not only intended to repair the loss suffered by creditors. It has a penal aspect because of the seriousness of the financial consequences (in this instance, 3 million francs for having been head of the company for a few months), and its accessory disqualifications.

The author then quotes from a law report by Professor Bouloc of the University of Paris:

... Since a conviction ordering coverage of liabilities exposes the manager to personal bankruptcy, to prohibition of performance of managerial functions, to a procedure of judicial supervision or liquidation of personal property, and even to criminal proceedings (article 132 of the Act of 1967), it cannot be said that coverage of liabilities is purely and simply a civil institution without any connection with the criminal law ...

5.5 The author also cites the debates of the 20th Congress of the National Association of Judicial Auditors (Compagnie nationale des experts judiciaires en comptabilite) in 1981, which dealt with the practical application of article 99 of the then applicable bankruptcy law and which arrived at the following conclusion, *inter alia*:

... article 99 can be seen to institute a penalty having no connection ... with the desire to alleviate the loss suffered by the creditors: you mismanaged the company placed under your direction, since you have filed for bankruptcy. You will be punished, and the punishment will serve as an example.

He thus concludes that the proceedings against him had a dual character, of which the criminal law aspects should be taken into consideration in relation to the terms and principles of the Covenant which have a scope of their own, independent of national laws and other definitions.

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

6.2 The Committee found that the parties agreed that all domestic remedies had been exhausted. It also ascertained that the same matter was not being examined under another procedure of international investigation or settlement. The communication therefore meets the requirements of article 5 (2) of the Optional Protocol.

6.3 With respect to the State party's conclusion that the communication should be rejected as "manifestly ill-founded", the Committee noted that article 3 of the Optional Protocol provides that a communication shall be considered inadmissible if it is (a) anonymous, (b) constitutes an abuse of the right of submission, or (c) is incompatible with the provisions of the Covenant. The Committee found that the author had made a reasonable effort to substantiate his complaints and that he invoked specific provisions of the Covenant. Therefore, the Committee had to examine the issues raised, when deciding on the merits of the case.

6.4 The Committee noted that both the author and the State party had already presented numerous observations on the merits of the case. However, the Committee deemed it appropriate at that juncture to limit itself, as the rules of procedure required, to ruling on the admissibility of the communication. It also noted that if the State party should wish to add to its earlier submission within six months following notification of the decision on admissibility, the author of the communication would be given the opportunity to comment thereon. If no further submissions were received from the State party under article 4 (2) of the Optional Protocol, the Committee would proceed to adopt its final views in the light of the written information already submitted by the parties.

7. Accordingly, on 10 July 1987, the Human Rights Committee decided that the communication was admissible and requested the State party, should it not intend submit further explanations or statements under article 4 (2), paragraph 2, of the Optional Protocol, to so inform the Committee, so as to enable it to arrive at an early decision on the merits.

8. The deadline for the State party's submission of explanations or statements under article 4 (2) of the Optional Protocol expired on 6 February 1988. On 29 April 1988, the secretariat sent a reminder to the State party concerned. No further explanation or statement has been received from the State party. The Committee therefore concludes, on the basis of paragraph 2 of its decision on admissibility, that the State party does not intend to submit any further explanations or statements.

9.1 The Human Rights Committee, having examined the merits of the communication in the light of all the information made available to it by the parties, as provided in article 5 (1) of the Optional Protocol, decides to base its views on the following facts which are uncontested.

9.2 The author of the communication is a businessman and former member of the board, and later Managing Director, of the joint-stock company Société Anonyme des Cartonneries Mécaniques du Nord. In 1973, the company began to experience serious financial difficulties and a judicial administrator was appointed. After a sale of some company assets to satisfy creditors in 1978, the company resumed operations under a different management. Since it continued to lose money, the general meeting of shareholders appointed the author as Managing Director on 1 July 1979. He served in that capacity until 7 December 1979, when another judicial administrator was appointed. During those five months he ordered several economy measures designed to save the company, such as closing the Paris office and reducing the salary of the Managing Director by 33 per cent; he also attempted to reduce personnel, but this was unsuccessful owing to the partial refusal of the Inspectorate of Employment and to strikes. During civil proceedings held on the petition of the court-appointed administrator for an order for coverage of liabilities, the Tribunal of Commerce of Dunkerque heard the Public Prosecutor (who made reference to criminal proceedings then pending against the author, subsequently acquitted of all charges by decision of the Tribunal Correctionnel of Dunkerque on 4 May 1982) and, on 7 July 1981, finding that the author had not prove "that he had been diligent in the sense of article 99 of the Bankruptcy Act, ordered him to bear part of the company's indebtedness, as established by operations of the procedure, in the proportion of 5 per cent, together with other members of management, who were jointly ordered to pay 35 per cent of the indebtedness. The author appealed, petitioning the Court of Appeal to find that he had exercised all due diligence during his five months as Managing Director. In its order of 13 July 1983, the Court of Appeal of Douai, while acknowledging that the author had taken a number of measures, held that those measures, designed to save a loss-making enterprise at any cost, had turned out to be inadequate and that the author had helped, as Managing Director, to prolong the life of the company while worsening its finances. Consequently, the Court, considering that he had not demonstrated that he had exercised due diligence, confirmed the lower court's judgement that the company's indebtedness would partly be borne by its managers, while amending it as concerns its fixing of the amount in percentages. Deciding to take as the appropriate point for evaluating the shortfall in the company's assets the date of 15 February 1983, when it had been definitively verified, without challenge, at about FF 30 million, the Court set the sum to be charged the author at FF 3 million, independently of the other managers. The author then appealed to the Court of Cassation, arguing that the Court of Appeal had erred in finding that he had not proven due diligence and that it had based the determination of the shortfall on elements which had not been part of the proceedings. On 2 May 1985, the Court of Cassation rejected the author's appeal, finding that the Court of Appeal had established the facts correctly and had based its decision on the verification of the statement of liabilities, about which there had been no challenge by the parties, and that consequently it had not disregarded the principle of adversary proceedings. Subsequently, article 180 of the new Bankruptcy Act, dated 25 January 1985 (and effective as from 1 January 1986), abolished the presumption of fault, restoring the principle of proof of fault to determine the responsibilities of company managers in case of losses.

9.3 The first question before the Committee is whether the author is the victim of a violation of article 14 (1) of the Covenant for the reason that, as he alleges, his case did not receive a fair hearing within the meaning of that paragraph. The Committee notes in this connection that the paragraph in question applies not only to criminal matters but also to litigation concerning rights and obligations of a civil nature. Although article 14 does not explain what is meant by a "fair hearing" in a suit at law (unlike paragraph 3 of the same article dealing with the determination of criminal charges), the concept of a fair hearing in the context of article 14 (1) of the Covenant should be interpreted as requiring a number of conditions, such as equality of arms, respect for the principle of adversary proceedings, preclusion of *ex officio reformatio in pejus*,¹ and expeditious procedure. The facts of the case should accordingly be tested against those criteria.

9.4 At issue is the application of the third paragraph of the article of the Bankruptcy Law of 13 July 1967 that established a presumption of fault on the part of managers of companies placed under judicial supervision, by requiring them to prove that they had devoted all due energy and diligence to the management of the company's affairs, failing which they could be held liable for the company's losses. The author claims in this regard that the Court of Cassation had given too severe an interpretation of due diligence, one that amounted to denying him any possibility of demonstrating that he had exercised it. It is not for the Committee, however, to pass judgement on the validity of the evidence of diligence produced by the author or to question the court's discretionary power to decide whether such evidence was sufficient to absolve him of any liability. As regards respect for the principle of adversary proceedings, the Committee notes that to its knowledge there is nothing in the facts concerning the proceedings to show that the author did not have the possibility of presenting evidence at his disposal or that the court based its decision on evidence admitted without being open to challenge by the parties. As to the author's complaint that the principle of adversary proceedings had been ignored in that the Court of Appeal had increased the amount to be paid by the author, although the change had not been requested by the court-appointed administrator and had not been submitted to the parties for argument, the Committee notes that the Court of Appeal fixed the amounts to be paid by the author on the basis of the liabilities resulting from the operations of the procedure, as the Court of First Instance had decided; that such verification of the statement of liabilities had not been contested by the parties; and that the definitive amount, while equal to approximately 10 per cent of the company's indebtedness, had been charged to the author individually, whereas the Court of First Instance had ordered payment jointly with other managers, which might have required the author to pay 40 per cent of the company's indebtedness in case it proved impossible to recover the shares due from his co-debtors. In view of the above, it is to be doubted that there was an increase in the amount charged to the author or that the principle of adversary proceedings and preclusion of *ex officio reformatio in*

¹ *Ex officio* correction worsening an earlier verdict.

pejus were ignored. With respect to the author's assertion that the case was not heard within a reasonable time, the Committee is of the opinion that in the circumstances and given the complexity of a bankruptcy case, the time taken by the domestic courts to deal with it cannot be considered excessive.

9.5 As to the complaint that the action for coverage of liabilities brought against the author violated the principle of presumption of innocence laid down in article 14 (2) of the Covenant, the Committee points out that that provision is applicable only to persons charged with a criminal offence. Article 99 of the former bankruptcy law entailed a presumption of responsibility on the part of company managers in the absence of proof of their diligence. But that presumption did not relate to any charge of a criminal offence. On the contrary, it was a presumption relating to a system of liability for risk resulting from a person's activities – one that is well known in private law, even in the form of absolute objective liability ruling out all evidence to the contrary. In the situation under consideration, liability was established in favour of the creditors and the amounts charged to the managers corresponded to the damages they had suffered and were to be paid in order to cover the company's liabilities. The object of article 99 of the Bankruptcy Act was to compensate creditors but it also entailed other penalties which, however, were civil-law and not criminal-law penalties. The provision concerning the presumption of innocence in article 14 (2) cannot therefore be applied in the case under consideration. That conclusion cannot be affected by the allegation that the provision of article 99 of the Bankruptcy Act was subsequently modified by elimination of the presumption of fault, considered unjust from the point of view of the material settlement of liability, for this circumstance does not of itself imply that the earlier provision contravened the above-mentioned provisions of the Convention.

9.6 With respect to the complaints of violation of articles 26 and 17 (1) of the Covenant, the Committee considers that the author has not demonstrated that he was a victim of a violation of article 26, regarding equality before the law or that the procedure followed by the French courts improperly attacked his honour and reputation, protected by article 17.

9.7 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 which have been put before it do not disclose any violation of paragraphs 1 and 2 of article 14 of the Covenant.

Communication No. 208/1986

Submitted by: Karnel Singh Bhinder

Alleged victim: The author

State party: Canada

Date of adoption of views: 9 November 1989 (thirty-seventh session)

Subject matter: Religiously motivated refusal to wear safety headgear in hazardous work area

Procedural issues: N. A.

Substantive issues: Freedom of religion—"Safe and healthy working conditions"—ICCPR relation-ship to ICESR—
Reasonable limitations on enjoyment of right

Articles of the Covenant: 18 (1) and (3) and 26

Article of the Optional Protocol: 5 (2) (b)

1. The author of the communication, dated 9 June 1986, is Karnel Singh Bhinder, a naturalized Canadian citizen who was born in India in 1942 and emigrated to Canada in 1974. He claims to be a victim of a violation by Canada of article 18 of the International Covenant on Civil and Political Rights. A Sikh by religion, he wears a turban in his daily life and refuses to wear safety headgear during his work. This resulted in the termination of his labour contract.

2.1 In April 1974, the author was employed by the Canadian National Railway Company (CNR) as a maintenance electrician on the night shift at the Toronto coach yard.

2.2 CNR is a Crown Corporation; its shares are owned by the Crown and it is accountable to the Canadian Parliament for the conduct of its affairs.

2.3 With effect from 1 December 1978, the company decreed that the Toronto coach yard would be a "hard hat area" in which all employees were required to wear safety headgear.

2.4 At the time, the relevant Canadian legislation in this matter read as follows:

(a) Canada Labour Code, Chapter L-1, Section 81, subsection (2):

Every person operating or carrying on any federal work, undertaking or business shall adopt and carry out reasonable procedures and techniques designed or intended to prevent or reduce the risk of employment injury (...).

(b) Section 82 :

Every person employed upon or in connection with the operation of any federal work, undertaking or business shall, in the course of his employment,

(a) take all reasonable and necessary precautions to ensure his own safety and the safety of his fellow employees; and

(b) at all appropriate times use such devices and wear such articles of clothing or equipment as are intended for his protection and furnished to him by his employer, or required pursuant to this Part to be used or worn by him.

(c) Section 83, subsection (1):

The fact that an employer or employee has complied with or failed to comply with any of the provisions of this Part or the regulations shall not be construed to affect any right of an employee to compensation under any statute relating to compensation for employment injury, or to affect any liability or obligation of any employer or employee under any such statute.

(d) Chapter 1007 (Canada Protective Clothing and Equipment Regulations),

Section 3 :

Where

(a) it is not reasonably practicable to eliminate an employment danger or to control the danger within safe limits, and

(b) the wearing or use by an employee of personal protective equipment will prevent an injury or significantly lessen the severity of an injury, every employer shall ensure that each employee who is exposed to that danger wears or uses that equipment (...).

(e) Chapter 1007, Section 8, subsection (1):

No employee shall commence a work assignment or enter a work area where any kind of personal protective equipment is required by these Regulations to be worn or used unless

(a) he is wearing or using that kind of personal protective equipment in the manner prescribed in these Regulations (...).

(f) Chapter 998 (Canada Electrical Safety Regulations), Section 17 :

No employer shall permit an employee to work, and no employee shall work, on an electrical facility

(a) that has not more than 250 volts (...), where there is a possibility of a dangerous electric shock, or

(b) that has more than 250 volts, but not more than 5.200 volts (...), or not more than 3.000 volts (...), unless that employee uses such insulated protective clothing and equipment as is necessary, in accordance with good electrical safety practice or as required by a safety officer, to protect him from injury during the performance of the work.

(g) Section 18 :

No employer shall permit an employee to work, and no employee shall work, on an electrical facility that, in accordance with good electrical safety practice, requires protective headwear to be worn unless he is wearing protective headwear (...).

2.5 During the five years prior to the introduction of the hard hat requirement, 20 head injuries were sustained among the Toronto coach yard's workforce of 487, 52 of whom were employed as electricians.

2.6 The author's work consisted of the nightly inspection of the undercarriage of trains from a pit located between the rails, as well as maintenance work inside and outside the train, i. e. on the engine.

2.7 Since it is a fundamental tenet of the Sikh religion that men's headwear should consist exclusively of a turban, the author refused to comply with the new hard hat regulations. He also refused a transfer to any other post. His employment was consequently terminated by the CNR on 6 December 1978.

2.8 On 7 December 1978, the author filed a complaint with the Canadian Human Rights Commission, alleging that the CNR had discriminated against him on the basis of his religion. In its decision of 31 August 1981, a Human Rights Tribunal appointed pursuant to the Canadian Human Rights Act made *inter alia* the following findings:

(a) "there is no evidence that other employees or the public will be affected if Mr. Bhinder were to continue working without a hard hat" (paragraph 5167);

(b) "(...) (the author) will be in greater danger if he does not conform with the hard hat policy. There is no doubt that Mr. Bhinder's turban is inferior to a hard hat in its capacity to protect against impact and electrical shock (. . .) There is a real increase in risk if Mr. Bhinder does not wear his hard hat, even though that increase in risk may be very small (para-graph 5177);

(c) "(...) (CNR) pays compensation directly to its injured employees, and as such, if an employee's risk of injury is increased, the likelihood of receiving compensation correspondingly increases, and as a result the employer's liability to pay compensation consequentially increases" (paragraph 5332 (37)).

2.9 In respect of the application of the hard hat rule to Mr. Bhinder, the Tribunal found a violation of the Canadian Human Rights Act on the grounds that the hard hat regulation "has the effect of denying a practising Sikh... employment with the Respondent because of the Complainant's religion" (paragraph 5332 (31)). This finding was based on the following considerations:

(a) An employment policy may be discriminatory within the terms of the Canadian Human Rights Act, even if the employer has no intention to discriminate (paragraph 5332 (3)).

(b) Implicit in the defence of *bona fide* occupational requirement in the Canadian Human Rights Act is the requirement that employers make such accommodation to the religious beliefs of their employees as will not cause them undue hardship (paragraph 5332 (29-32)).

2.10 The Tribunal acknowledged that the "implications of an exemption made for Mr. Bhinder is that all Sikhs are exempt from hard hat regulations in all industries to which the Human Rights Act applies (...)", and that "the effect may be an increase in the overall accident rate in the affected industries for the purpose of workers' compensation" (paragraph 5332 (36)). It held, however, that such added risk was to be regarded as inherent to the employment and consequently to be borne by the employer (paragraph 5332 (38)).

2.11 The CNR appealed and on 13 April 1983 the Federal Court of Appeal reversed the decision of the Human Rights Tribunal on the grounds that the Canadian Human Rights Charter prohibited only direct and intentional discrimination and that it did not encompass the concept of reasonable accommodation.

2.12 The author's appeal to the Supreme Court of Canada was dismissed on 17 December 1985. Although the Supreme Court held that also unintentional or indirect discrimination was prohibited by the Canadian Human Rights Act, it concluded that the policy of the CNR was reasonable and based on safety considerations, and therefore constituted a *bona fide* occupational requirement. The Court also denied a duty of the employer to

"reasonable accommodation" under the Act.

The complaint

3. The author claims that his right to manifest his religious beliefs under article 18, paragraph 1, of the Covenant has been restricted by virtue of the enforcement of the hard hat regulations, and that this limitation does not meet the requirements of article 18, paragraph 3. More particularly, he argues that the limitation was not necessary to protect public safety, since any safety risk ensuing from his refusal to wear safety headgear was confined to himself.

The State party's comments and observations

4.1 The State party submits that the author was not discharged from his employment because of his religion as such but rather because of his refusal to wear a hard hat, and contends that a neutral legal requirement, imposed for legitimate reasons and applied to all members of the relevant work force without aiming at any religious group, cannot violate the right defined in article 18, paragraph 1, of the Covenant. In this respect, it refers to the Human Rights Committee's decision in communication No. 185/1984 (*L. T. K. v. Finland*), where the Committee observed, that "(...) (the author) was not prosecuted and sentenced because of his beliefs or opinions as such, but because he refused to perform military service."

4.2 The State party also invokes its obligation under article 7, paragraph (b), of the International Covenant on Economic, Social and Cultural Rights, to ensure "safe and healthy working conditions", and claims that the interpretation of article 18 of the Covenant should not interfere with the implementation of the ICESCR through uniformly applied safety requirements.

4.3 The State party argues that it was open to the author to avoid the operation of the hard hat requirement by seeking other employment, and refers to a decision of the European Commission on Human Rights (*Ahmad v. UK*, [1982] 4 E. H. R. R. 126, paragraphs 11, 13) which, in assessing the scope of the freedom of religion as guaranteed by article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, had observed that - in addition to the limitations contained in that article - special contractual obligations could influence the exercise of the right to freedom of religion, and that the applicant remained free to resign from his employment if he considered it to be incompatible with his religious duties. .

4.4 In the State party's opinion, article 18 of the Covenant has not been violated, since the hard hat regulation represented a reasonable and objective criterion, in no way incompatible with article 26 of the Covenant.

4.5 The State party further considers that article 18 does not impose a duty of "reasonable accommodation", that the concept of freedom of religion only comprises freedom from State interference but no positive obligation for States parties to provide special assistance to grant waivers to members of religious groups which would enable them to practice their religion.

4.6 The State party further submits that if a *prima facie* infringement of article 18, paragraph 1, of the Covenant were to be found in the circumstances of Mr. Bhinder's case, such limitation was justified under paragraph 3. The State party argues that the scope of this provision comprises also the protection of those persons subject to the limiting regulations.

5.1 On the basis of the information before it, the Committee concluded that all conditions for declaring the communication admissible were met, including the requirement of exhaustion of domestic remedies under article 5, paragraph 2, of the Optional Protocol.

5.2 On 25 October 1988, the Human Rights Committee declared the communication admissible.

6.1 The Committee notes that in the case under consideration legislation which, on the face of it, is neutral in that it applies to all persons without distinction, is said to operate in fact in a way which discriminates against persons of the Sikh religion. The author has claimed a violation of article 18 of the Covenant. The Committee has also examined the issue in relation to article 26 of the Covenant.

6.2 Whether one approaches the issue from the perspective of article 18 or article 26, in the view of the Committee the same conclusion must be reached. If the requirement that a hard hat be worn is regarded as raising issues under article 18, then it is a limitation that is justified by reference to the grounds laid down in article 18, paragraph 3. If the requirement that a hard hat be worn is seen as a discrimination *de facto* against persons of the Sikh religion under article 26, then, applying criteria now well-established in the jurisprudence of the Committee, the legislation requiring that workers in federal employment be protected from injury and electric shock by the wearing of hard hats is to be regarded as reasonable and directed towards objective purposes that are compatible with 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 which have been placed before it do not disclose a violation of any provision of the International Covenant on Civil and Political Rights.

Communications Nos. 210/1986 and 225/1987

Submitted by: Earl Pratt and Ivan Morgan

Alleged victim: The authors

State party: Jamaica

Date of adoption of views: 6 April 1989 (thirty-fifth session)

Subject matter: *Death row phenomenon—Cruel and inhuman treatment during detention on death row—Unfair trial*

Procedural issues: *Interim decision—Interim measures of protection (rule 86)—Joint examination of communication (rule 88)—Interpretation of the local remedies rule —Local remedies*

Substantive issues: *Right to life—Effective remedy—Right to a fair trial—Late notification of stay of execution and removal from condemned cell as cruel, inhuman and degrading treatment—Undue delay in judicial proceedings—Right to a review of conviction and sentence*

Articles of the Covenant: 6, 7 and 14 (3) (d), (e) and (5)

Article of the Optional Protocol: 5 (2) (b)

1. The authors of the communications dated 28 January 1986 and 12 March 1987 are Earl Pratt and Ivan Morgan, two Jamaican citizens awaiting execution at St. Catherine District Prison, Jamaica. They are represented by counsel. They claim to be victims of violations by the Government of Jamaica of articles 6, 7 and 14 of the International Covenant on Civil and political Rights.

2.1 On 6 October 1977, Junior Anthony Missick was shot to death. Three men were reportedly involved in the shooting, including the authors, both of whom were tried in the Home Circuit Court at Kingston from 10 to 15 January 1979. It is alleged that an important defence witness, Mr. Clarence Smith, who would have provided an alibi for Mr. Pratt, was available to give testimony when the court hearing was convened on Friday, 12 January 1979. He had, however, temporarily left the premises, and when he returned, the Court had adjourned until Monday, 15 January. On that day Mr. Smith was not present and the judge closed the case without hearing his testimony. The jury found the authors guilty of murder and they were sentenced to death.

2.2 The Jamaican Court of Appeal considered the authors' appeal in September, November and December 1980. The defence argued that the trial judge "wrongly exercised his discretion not to discharge the jury upon the disclosure of prejudicial evidence, upon extraneous and irrelevant grounds, and upon a misinterpretation of the evidence". The "prejudicial evidence" challenged in the appeal was the allegedly fortuitous statement by the chief witness for the prosecution that Mr. Pratt and Mr. Morgan had been friends of the deceased for about three years, and that Mr. Pratt and the deceased had previously shot another friend of theirs. This statement did not specify who had been shot or what the consequences of the shooting had been, but left an impression with the jury that the accused were capable of killing their own friends. It is argued that the jury should have been discharged and a new trial ordered, as requested by the defence. In rejecting the appeal, the Court of Appeal found that the directions of the trial judge had not operated to the detriment of the appellants. In the particular case of Mr. Morgan, the trial record shows that the only evidence against him was the statement of one witness that he had been with Mr. Pratt at the time of the shooting and that he too had had a gun. The witness had not seen him actually shoot, nor was there any evidence produced to show that the killing had been in pursuance to a prior agreement. In his defence, Mr. Morgan himself had stated, by way of alibi, that he had been with his wife and children at the time of the killing.

2.3 The Court of Appeal did not state its reasons for rejecting the appeal until nearly four years later, on 24 September 1984. A petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 17 July 1986. The Judicial Committee nevertheless expressed the view that it was disgraceful that some nine years had elapsed since the alleged offence and seven years since conviction before the matter came before it. More particularly, the Judicial Committee thought that the delay by the Court of Appeal of Jamaica in issuing a written judgement, almost four years from the date of the hearing, was inexcusable and must never occur again, especially not in a capital penalty case. The Judicial Committee of the Privy Council expressed grave misgivings about this delay and pointed out that this could be the source of grave injustice and possibly constitute inhuman and degrading treatment. It is claimed on behalf of the authors that such "inexcusable delay" constituted cruel and inhuman treatment in that, between 1980 and 1984, they could not pursue their petition for special leave to appeal to the Privy Council because such a procedure was not possible without the written judgement of the Jamaican Court of Appeal. Moreover, during all this period they were detained in that part of the prison reserved for convicted persons awaiting execution.

2.4 On 13 February 1987, a warrant was issued for the execution of Mr. Pratt and Mr. Morgan to take place on 24 February 1987. A stay of execution was granted for both men on 23 February 1987. They were notified of the stay only 45 minutes before the executions were to take place.

3. In the case of Mr. Pratt, the Human Rights Committee had, by interim decision dated 21 July 1986, *inter alia* requested the State party, under rules 86 and 91 of the Committee's rules of procedure, not to carry out the death sentence against the author before the Committee had had an opportunity to consider further the question of the admissibility of the communication and to provide the Committee with several clarifications concerning the judicial remedies available to the author. By submission dated 18 November 1986, the State party provided the clarifications sought by the Committee.

4. Under cover of a letter dated 20 March 1987, the authors' representative submitted further information. He argues in particular: (a) that the delays in the judicial proceedings against the authors constitute a violation of the right to be heard within a reasonable time; (b) that the authors have been subjected to cruel, inhuman and degrading treatment by reason of such delay and also by reason of having been confined to death row since their conviction and sentence in January 1979; (c) that service of a warrant for their execution would amount to an arbitrary deprivation of life; and (d) that the Court of Appeal's failure to provide a written judgement within a reasonable time constitutes a breach of section 20 of the Constitution of Jamaica and is contrary to the Court of Appeal's duty to give reasons for an important decision and, accordingly, contrary to the principles of natural justice.

5. By decision dated 24 March 1987 concerning the communication of Mr. Morgan, the Human Rights Committee transmitted the communication to the State party, requesting it, under rule 91 of the provisional rules of procedure, to provide information and observations relevant to the question of the admissibility of the

communication and, under rule 86 of the rules of procedure, not to carry out the death sentence against Mr. Morgan before the Committee had had the opportunity to render a final decision in the case. By further decision under rule 91 dated 8 April 1987, concerning the communication of Mr. Pratt, the Committee decided to transmit the additional information to the State party and to request it to clarify: (a) how long it would normally take the Court of Appeal to produce a written judgement in appeals against convictions for a capital offence and (b) why the Court of Appeal did not provide a written judgement until three years and nine months after rejecting the author's appeal. As in the case of Mr. Morgan, it requested the State party, under rule 86 of the provisional rules of procedure, not to carry out the death sentence against the author until it had had an opportunity to render a final decision in the case.

6.1 In two submissions under rule 91 dated 4 and 10 June 1987, jointly relating to communications 210/1986 and 225/1987, the State party replied to the questions posed by the Committee in its decision of 8 April 1987, referred to in paragraph 5 above, and objected to the admissibility of the communications on a number of grounds.

6.2 With regard to the first question posed by the Committee, it explained that:

It is established practice of the Court of Appeal to endeavour to hand down judgements in criminal cases in the term in which the appeal is heard, or at the very latest, during the next term. This means that judgements or reasons for judgements are normally available within three months of the hearing of the appeal.

With regard to the second question, it stated that:

On November 12, 1980, the application for leave to appeal by Earl Pratt and Ivan Morgan came up for hearing before the Court of Appeal. The application was refused and the Court promised to give written reasons at a later date. Regrettably, owing to an oversight, the papers in the case were co-mingled with completed case files. It was not until the summer of 1984 that it was brought to the attention of the judge who was to prepare the written judgement that the reasons for judgement were outstanding, and he then attended to the matter.

6.3 The State party rejects the authors' contention that the delays in the judicial proceedings in their cases constitute a violation of the right to be heard within a reasonable time. It argues that, during the three years and nine months between the Court of Appeal's judgement and the delivery of its written decision, it would have been open to the authors or to their counsel to apply to the Court of Appeal for the written judgement; had they done so, the Court would have been obliged to provide it. According to the State party, the responsibility of the accused for asserting his rights is an important factor in considering an allegation of breach of the right to trial within a reasonable time. Since the authors are said not to have asserted their rights, the State party contends that article 14, paragraph 3 (d), of the Covenant, which it sees as being coterminous with section 20, paragraph 1, of the Jamaican Constitution, has not been violated. The State party further denies that delays in the judicial proceedings concerning the authors constitute cruel, inhuman or degrading punishment in violation of article 7 of the Covenant, or that service of a warrant for the execution of the authors would amount to an arbitrary deprivation of life.

6.4 The State party further contends that the authors' communications are inadmissible because they have failed to exhaust domestic remedies, as required by article 5, paragraph 2 (b), of the Optional Protocol. It points out that in respect of the authors' complaints – breach of the right to trial without undue delay and breach of the right to protection against subjection to

torture or cruel, inhuman or degrading treatment – it would have been open to the authors to apply to the Supreme Court for redress alleging breaches of these fundamental rights protected by sections 17 and 20, paragraph 1, of the Jamaican Constitution.

7.1 In their comments dated 29 October 1987, the authors contend that their allegations are well-founded, and that they have indeed exhausted all available legal remedies. They refer to the decision of the Judicial Committee of the Privy Council in *Noel Riley et al. v. the Attorney-General* (1981), where it was decided by a majority (3/2) that whatever the reasons for, or length of, delay in executing a sentence of death lawfully imposed, the delay can afford no ground for holding the execution to be in contravention of section 17 of the Jamaican Constitution. Accordingly, there are no grounds upon which an application by way of constitutional motion to the Supreme Court of Jamaica could successfully be brought. Any such motion must inevitably fail and be decided against the applicants: in consequence, this is not a domestic remedy available to the applicants. On 17 July 1986, the Judicial Committee of the Privy Council refused the applicants petition for special leave to appeal.

7.2 In a further submission under rule 91 dated 17 February 1988, the authors provide additional information concerning the alleged violation of article 14 of the Covenant to the effect that they were not given a fair trial and were denied the opportunity to establish their innocence. They claim that during the trial the principal prosecution witness was questioned by the judge, to whom he answered that Mr. Pratt had shot a person other than the victim; thereafter the judge not only asked the shorthand writer to repeat this prejudicial evidence but proceeded to hear the submissions of the lawyer on this evidence in the presence of the jury. Thus it was impossible for the jury to ignore the above-mentioned prejudicial evidence against Mr. Pratt and, by association, Mr. Morgan. Furthermore, since the lawyer made his submissions in the presence of the jury immediately after the questioning of the witness by the judge, this highlighted the prejudicial nature of this piece of evidence in the eyes of the jury. It is argued that the extent of the prejudice was such that the judge could not redress the balance in his summing up; in any event, he declined to do so. The authors consider this to be bias on the part of the judge against them. According to the authors, another example of the judge's bias was his refusal to confirm to the jury that they were of previous good character. They submit that this evidence should have been accepted. Finally they argue that they were poorly defended. In particular, they claim that it was wrong for Mr. Pratt's counsel, while waiting for the arrival of a vital alibi witness who would testify that Mr. Pratt was elsewhere at the time of the murder, to decide to close the case at this point and to so inform the Court. This is said to be buttressed by a statement of the Court of Appeal which, in refusing an application to call new alibi evidence, criticized Mr. Pratt's counsel as follows: " ... it is clear that this was not a case of the witness not being available ... Indeed, we formed the view that counsel at the trial had chosen to close his case and to take a calculated chance".

7.3 For the above reasons, the authors claim that they were effectively denied the opportunity to have their innocence established. They refer in this context to resolution 1984/50 on "Safeguards guaranteeing protection of the rights of those facing the death penalty", adopted by the Economic and Social Council on 25 May 1984, and in particular safeguard No. 5:

Capital punishment may only be carried out pursuant to a final judgement rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.

8. On 23 February 1988, a second warrant was issued for the execution of the authors on 8 March 1988. By telegram dated 24 February 1988 addressed to the Jamaican Deputy Prime Minister and Minister for Foreign Affairs, the Chairman of the Human Rights Committee reiterated the Committee's request for a stay of execution in conformity with its decisions of 24 March and 8 April 1987. A second stay of execution was granted for both men on 1 March 1988.

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

9.2 Having considered that communications No. 210/1986 and No. 225/1987 refer to the same events said to have taken place in Jamaica since October 1977 and can thus appropriately be dealt with together, the Committee decided on 24 March 1988 to deal jointly with these communications, pursuant to rule 88, paragraph 2, of its provisional rules of procedure.

9.3 The Committee has ascertained, as it is required to do under article 5, paragraph 2 (a), of the Optional Protocol, that, although the authors' cases were considered by the Inter-American Commission on Human Rights, they are no longer being examined under another procedure of international investigation or settlement.

9.4 With regard to the State party's contention that the authors had failed to exhaust domestic remedies because they would still be able to submit their case to the Supreme Court of Jamaica, the Committee noted that the allegations relating to violations of articles 14 and 7 of the Covenant were inextricably mixed and that, insofar as article 14 was concerned, available remedies had been exhausted. Accordingly, the Committee was unable to find that the authors had failed to comply with the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

10. On 24 March 1988, the Human Rights Committee therefore decided that the communications were admissible.

11.1 In its submission under article 4, paragraph 2, of the Optional Protocol dated 19 August 1988, the State party notes that inasmuch as the authors' allegation concerning a violation of article 6 is concerned, the Committee's decision on admissibility suggests that this claim is no longer under consideration by it. With respect to the alleged violations of articles 7 and 14, it reiterates its arguments outlined in paragraph 6.4 above and comments on the authors' contentions in paragraph 7.1 above. Concerning the argument that any constitutional motion in their case would inevitably fail because of the precedent set by the Privy Council's decision in *Riley v. the Attorney-General*, it points out that the requirement of exhaustion of domestic remedies was adopted by consensus by the States parties to the Optional Protocol, and that in the circumstances of the case, the requirement cannot be deemed to have been met or waived for the reasons advanced by the authors. The only qualification, in article 5, paragraph 2 (b), *in fine*, that the general rule shall not apply "where the application of the remedies is unreasonably prolonged", is said to be inapplicable to the case.

11.2 The State party rejects the argument that "an application to the Supreme Court, in respect of section 17 of the Jamaican Constitution, must inevitably fail by reason of the Privy Council's decision in *Riley's case*". It contends that while it is true that the doctrine of precedent is generally applicable, it is equally true that this doctrine may be set aside on the grounds that a previous decision had been arrived at *per incuriam* (through inadvertence). Thus, it would be open to the authors to argue that the decision in *Riley v. the Attorney-General* was the result of inadvertence, especially in the light of the dissenting opinions given by Lord Scarman and Lord Brightman. For this reason, the State party contends that there are no grounds for disregarding its contention that the communications are inadmissible insofar as they relate to article 7.

11.3 With respect to the alleged violation of article 14, the State party refers to "curious aspects" in the way in which the Committee's decision on admissibility addresses this issue and its earlier submission that the communications are inadmissible because of non-exhaustion of domestic remedies for the reason that the authors did not avail themselves of the remedies provided for in section 25 of the Jamaican Constitution. It submits that since the authors had not complained about the non-availability of remedies in this respect, one should have expected the Committee to declare the communication inadmissible for non-exhaustion of domestic remedies. It describes the Committee's arguments as "unreasoned" and affirms that the Committee's conclusion that domestic remedies had

been exhausted in relation to article 14 rests on the simple assertion that "the allegations relating to violations of articles 14 and 7 of the Covenant are inextricably mixed and that, insofar as article 14 is concerned, available remedies have been exhausted".

11.4 According to the State party, the latter argument is:

unreasonable and unreasoned because, firstly, the [Committee's] decision does not identify the basis for the supposed principle that if the allegations relating to articles 14 and 7 are inextricably mixed local remedies have for that reason been exhausted; secondly, assuming the validity of any such principle (which the State party does not believe to exist), the decision proceeds by way of assertion rather than reason in that it does not offer any reason for, or illustration of, the "inextricable mixture": in short, it does not show how the different allegations relating to these separate articles are "inextricably mixed".

11.5 The State party thus concludes that the Committee's decision on admissibility is "unwarranted and without foundation" and reiterates that it considers the allegations relating to a violation of article 14 to be inadmissible for non-exhaustion of domestic remedies.

12.1 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.

12.2 The Committee has taken note of the State party's contention that with respect to the alleged violations of articles 7 and 14, domestic remedies have not been exhausted by the authors. It takes the opportunity to expand upon its admissibility findings.

12.3 The State party has contended that the Committee has no discretion in the application of the local remedies rule (save where the remedy is unacceptably prolonged), in the sense that where local remedies are not exhausted it must declare a communication inadmissible. This is correct in principle, but the Committee necessarily has to determine whether there are effective local remedies left for an author to exhaust. That the local remedies rule does not require resort to appeals that objectively have no prospect of success, is a well-established principle of international law and of the Committee's jurisprudence.

12.4 The Committee has taken due notice of the State party's argument that a constitutional motion filed on behalf of the authors in the Supreme Court of Jamaica is not bound to merely by virtue of the precedent set by the judgement of the Judicial Committee of the Privy Council in the case of *Riley v. the Attorney-General*, and that the authors could have argued that the said judgement had been arrived at *per incuriam*.

12.5 A thorough consideration of the judgement of the Privy Council in the case of *Riley* does not lend itself to the conclusion that it was arrived at *per incuriam*. This judgement explicitly endorses the conclusion of the Privy Council in another case concerning chapter three of the Jamaican Constitution,¹ where it had been argued that this chapter proceeded on the assumption that "the fundamental rights which it covers are already secured to the people of Jamaica by existing law", and that "the laws in force are not to be subjected to scrutiny in order to set whether or not they conform to the precise terms" of the provisions in chapter three. And while it is true that Lord Scarman and Lord Brightman dissented from the majority opinion, they did acknowledge that the constitutional remedy was only available where there was no other adequate redress. In these circumstances, authors' counsel was objectively entitled to take the view that, on the basis of the doctrine of precedent, a constitutional motion in the cases of Mr. Pratt and Mr. Morgan would be bound to fail and that there thus was no effective local remedy remaining to be exhausted.

12.6 Section 20, paragraph 1, of the Jamaican Constitution guarantees the right to a fair trial, and section 25 provides for the implementation of the provisions guaranteeing the rights of the individual. Section 25, paragraph 2, stipulates that the Supreme Court has jurisdiction to "hear and determine applications" but adds, *in fine*, the following qualifications:

Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.

In the view of the Committee, the authors had means of redress available for the alleged breach of their right to a fair trial by appealing to the Jamaican Court of Appeal and by petitioning the Judicial Committee of the Privy Council for special leave to appeal. Their case thus falls within the scope of application of the qualification in section 25, paragraph 2, further confirming that no further local remedy would have been available by way of constitutional motion.

12.7 For the reasons indicated above, the Committee is not satisfied that a constitutional motion would constitute an effective remedy for the authors within the meaning of article 5, paragraph 2 (*b*), of the Optional Protocol. It therefore concludes that there is no reason to revise its decision on admissibility of 24 March 1988.

13.1 With respect to the alleged violation of article 14, there are two questions before the Committee: first, whether consideration of issues relating to legal repre-

¹ Director of Public Prosecution v. Nasralla (1967) 2 All ER 161. Chapter III of the Jamaican Constitution concerns the right of the individual.

sentation and the availability of witnesses amounted to a violation of the guarantees for a fair trial; and second, whether there was undue delay in the appeal process. The Committee has considered the information before it in connection with the trial in the Home Circuit Court of Kingston and the subsequent appeals.

13.2 As to the first issue under article 14, the Committee notes that legal representation was available to the authors. Although persons availing themselves of legal representation provided by the State may often feel they would have been better represented by a counsel of their own choosing, this is not a matter that constitutes a violation of article 14, paragraph 3 (*d*), by the State party. Nor is the Committee in a position to ascertain whether the failure of Mr. Pratt's lawyer to insist upon calling the alibi witness before the case was closed was a matter of professional judgement or of negligence. That the Court of Appeal did not itself insist upon the calling of this witness is not in the view of the Committee a violation of article 14, paragraph 3 (*e*), of the Covenant.

13.3 As to the second issue under article 14, the Committee has noted that the delays in the judicial proceedings in the authors' cases constitute a violation of their rights to be heard within a reasonable time. The Committee first notes that article 14, paragraph 3 (*c*), and article 14, paragraph 5, are to be read together so that the right to review of conviction and sentence must be made available without undue delay. In this context, the Committee recalls its general comment on article 14, which stipulates, *inter alia*, that "all stages [of judicial proceedings] should take place without undue delay, and that, in order to make this right effective, a procedure must be available to ensure that the trial will proceed without undue delay, both in first instance and on appeal".

13.4 The State party has contended that the time span of three years and nine months between the dismissal of the authors' appeal and the delivery of the Court of Appeal's written judgement was attributable to an oversight and that the authors should have asserted their right to receive the written judgement earlier. The Committee considers that the responsibility for the delay of 45 months lies with the judicial authorities of Jamaica. This responsibility is neither dependent on a request for production by the accused in a trial nor is non-fulfilment of this responsibility excused by the absence of a request from the accused. The Committee further observes that the Privy Council itself described the delay as inexcusable (see para. 2.3 above).

13.5 In the absence of a written judgement of the Court of Appeal, the authors were not able to proceed to appeal before the Privy Council, thus entailing a violation of article 14, paragraph 3 (c), and article 14, paragraph 5. In reaching this conclusion it matters not that, in the event, the Privy Council affirmed the conviction of the authors. The Committee notes that in all cases, and especially in capital cases, accused persons are entitled to trial and appeal without undue delay, whatever the outcome of those judicial proceedings turns out to be.

13.6 There are two issues concerning article 7 before the Committee: the first is whether the excessive delays in judicial proceedings constituted not only a violation of article 14, but "cruel, inhuman and degrading treatment". The possibility that such a delay as occurred in this case could constitute cruel and inhuman treatment was referred to by the Privy Council. In principle, prolonged judicial proceedings do not *per se* constitute cruel, inhuman or degrading treatment even if they can be a source of mental strain for the convicted prisoners. However, the situation could be otherwise in cases involving capital punishment and an assessment of the circumstances of each case would be necessary. In the present cases the Committee does not find that the authors have sufficiently substantiated their claim that delay in judicial proceedings constituted for them cruel, inhuman and degrading treatment under article 7.

13.7 The second issue under article 7 concerns the issue of warrants for execution and the notification of the stay of execution. The issue of a warrant for execution necessarily causes intense anguish to individual the concerned. In the authors' case, death warrants were issued twice by the Governor-General, first on 13 February 1987 and again on 23 February 1988. It is uncontested that the decision to grant a first stay of execution, taken at noon on 23 February 1987, was not notified to the authors until 45 minutes before the scheduled time of the execution on 24 February 1987. The Committee considers that a delay of close to 20 hours from the time the stay of execution was granted to the time the authors were removed from their death cell constitutes cruel and inhuman treatment within the meaning of article 7.

14. 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 disclose violations of the Covenant with respect to:

(a) Article 7, because Mr. Pratt and Mr. Morgan were not notified of a stay of execution granted them on 23 February 1987 until 45 minutes before their scheduled execution on 24 February 1987;

(b) Article 14, paragraph 3 (c) in conjunction with paragraph 5, because the authors were not tried without undue delay.

15. It is the view of the Committee that, in capital punishment cases, States parties have an imperative duty to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant. Although in this case article 6 is not directly at issue, in that capital punishment is not *per se* unlawful under the Covenant, it should not be imposed in circumstances where there have been violations by the State party of any of its obligations under the Covenant. The Committee is of the view that the victims of the violations of articles 14, paragraph 3 (c), and 7 are entitled to a remedy; the necessary prerequisite in the particular circumstances is the commutation of the sentence.

Communication No. 215/1986

Submitted by: G. A. van Meurs

Alleged victim: The author

State party: The Netherlands

Date of adoption of views: 13 July 1990 (thirty-ninth session)

Subject matter: Request for compensation for alleged unlawful dissolution of author's labor contract

Procedural issues: N. A.

Substantive issues: Right to a fair trial—Fair and public hearing—Notion of "Suit at law"—Examination of witness—Court hearing in camera

Article of the Covenant: 14 (1)

Articles of the Optional Protocol: 2 and 3

1. The author of the communication (initial letter dated 8 November 1986, numerous subsequent submissions) is G. A. van Meurs, a citizen of the Netherlands born in 1930 in Jakarta. He claims to be a victim of a violation by the Netherlands of article 14, paragraph 1, of the International Covenant on Civil and Political Rights, as a result of proceedings that led to the dissolution of his labour contract by a decision of the sub-district court of Beetsterzwaag.

The background

2.1 The author had been employed in various positions by firms belonging to the private pharmaceutical corporation CIBA GEIGY since 1969, in both New Zealand and the Netherlands.

2.2 In 1983, differences over the rating of the author's performance by his supervisor and his activities in relation to an election to the firm's labour council arose, resulting in the initiation of judicial proceedings by the employer with a view to dissolving the author's labour contract, pursuant to article 1639w of the Civil Code of the Netherlands.

2.3 At the time of the proceedings, the relevant passages of article 1639w read as follows:

(1) Each of the parties shall at all times be empowered for compelling reasons to apply to the sub-district court judge with a written request that the contract of employment be dissolved. Any provision excluding or limiting this power shall be null and void.

...

(3) The judge shall not grant the request until after the other party has been heard or been properly summoned.

(4) If the judge grants the request, he shall decide on what date the employment is to terminate.

...

(7) There shall be no remedy whatsoever against a decision under this article, without prejudice to the power of the Attorney-General at the Supreme Court to appeal in cassation against the decision, solely in the interests of the law.

2.4 Under these provisions, the respondent may present a written statement in response to the initial application;

subsequently, an oral hearing is conducted before a sub-district judge so as to establish the facts of the case.

2.5 It appears that in practice oral hearings under the then applicable article 1639w were held *in camera* and that the general statutory rules on evidence and the hearing of witnesses were not applicable. Consequently, the judge was under no obligation to hear witnesses at the request of the parties; he could, however, do so on his own initiative. In practice, the hearing of witnesses was, however, a regular feature of proceedings under article 1639w.

2.6 The author submitted a written statement of defence, as well as all other material he considered to be relevant, through his counsel to the judge, contending that the employer's request was based on the false accusations of his former supervisor.

2.7 The oral hearing was held on 13 October 1983 in a small hearing-room (measuring approximately 5 x 7 metres) of the sub-district court at Beetsterzwaag. The room contained nine chairs, of which eight were occupied by the sub-district judge, the registrar, two representatives of the petitioner (CIBA GEIGY B. V.) and their counsel, the author, his counsel and the author's wife.

2.8 No witnesses were summoned; the official records of the hearing do not disclose whether the hearing was held *in camera* or in public.

2.9 There is no indication in the memorandum of defence presented by author's counsel, in the official records of the hearing, or in the author's communication that he or his counsel formally requested the summoning of witnesses or formally requested the oral hearing to be held in public, or that they objected to the eventual non-public character of the hearing.

2.10 By sub-district court decisions of 8 and 17 November 1983, the author's labour contract with CIBA GEIGY was dissolved; the author, who has remained unemployed since, was however awarded damages in the amount of 240,000 guilders, to be paid in even sums in 1984, 1985, 1986, 1987, 1988 and 1989.

2.11 Prior to and subsequent to the hearing, the author contacted a number of lawyers for legal assistance, so as to initiate legal proceedings against his former supervisor for slander and to take recourse against the sub-district court decision. Several lawyers evaluated the merits of the case and advised against further proceedings, or refused to assist in such action. In addition, the author has sent several petitions to government departments, including the Ministry of Social Affairs and Employment and the Secretary of State, who confirmed that no recourse was available against the sub-district court's decision.

2.12 The author has not stated whether he initiated penal proceedings by filing a formal request with the police or the prosecution authorities.

The complaint

3.1 The author claims that the State party violated his rights under article 14, paragraph 1, of the International Covenant on Civil and Political Rights by failing to provide a fair and public hearing in his case.

3.2 More particularly, the author complains that the hearing before the sub-district court at Beetsterzwaag was

not public, in that:

(a) According to the established practice of the courts of the Netherlands, hearings pursuant to article 1639w of the Civil Code of the Netherlands were held *in camera*. The possibility of requesting that the hearing be held in public was not indicated either to the author or to his counsel by the authorities;

(b) The legal opinion of a labour law expert contacted in the case noted that "article 429g of the Civil Code stated quite flatly that the court hearings should take place behind closed doors. It is incorrect to assert that article 838 of the Code of Civil Procedure would have provided for the possibility to request that the hearing be held in public".

(c) Two similar procedures governing the dissolution of labour contracts – that governed by article 1638o of the Civil Code ("unlawful dismissal") and that governed by article 1639w – were treated differently in respect of their public nature. It is stated that there was no justification for distinguishing between the former procedure, which was public, and the latter, which, in practice, was held *in camera*.

3.3 The author claims that no outsiders were admitted to the courtroom, and that the fact that his wife attended the meeting cannot be construed as evidence of the public nature of the hearing, given that his wife was directly involved. Furthermore, it is submitted that the size of the courtroom did not allow interested members of the public to attend.

3.4 He further alleges that the hearing was not fair, since:

(a) His former supervisor at CIBA GEIGY, on whose reports the employer's assessment of his performance relied, was not summoned *ex officio* as a witness;

(b) No member of the CIBA GEIGY labour council was summoned *ex officio* as a witness or expert;

(c) The conduct of the oral hearing was entirely dominated by the employer's counsel, without intervention by the judge, so that the author was unable to respond to the petitioner's pleadings;

(d) He was not granted the opportunity to have his own witnesses or experts examined during the oral hearing;

(e) He was not afforded an opportunity to inspect the "exhibits and pleading notes" presented by employer's counsel at the oral hearing;

(f) The official records did not note the presentation and the contents of these "exhibits and pleading notes";

(g) The facts presented by the author (i. e., documents on his professional performance) were not evaluated correctly by the judge, although all relevant evidence had been made available to him.

3.5 The author also claims that he was "indirectly barred from the courts" in his attempts to "prosecute" his former supervisor for slander, for the reason that:

- (a) The legal system of the Netherlands allegedly does not provide adequate facilities for legal aid;
- (b) He could not find a lawyer willing to take his case or to do so without charging high fees;
- (c) No government department advised him on how to handle his case or on recourse procedures open to him.

3.6 The author further contends that article 1639w of the Civil Code of the Netherlands as amended (in force since 25 April 1984), although now specifically providing for public hearings and for the application of general statutory rules on evidence, still remains incompatible with article 14, paragraph 1, of the Covenant.

3.7 The author requests the Committee to recommend that the State party compensate him for all financial losses resulting from the dissolution of his labour contract, and particularly to:

- (a) Continue full payment of unemployment rates until his age of retirement;
- (b) Grant him and his wife full general old age benefits (AOW) on retirement age;
- (c) Exempt both of them from the application of the Code of Unemployment of the Netherlands.

State party's comments and observations

4.1 The State party objects to the admissibility of the communication under articles 2, 3 and 5 of the Optional Protocol and rule 90 of the rules of procedure, contending, *inter alia*, that the author had not sufficiently substantiated his allegations.

4.2 In its observations on the merits of the communication, the State party argues that the author's complaints are ill-founded, since:

- (a) The non-public character of the oral hearing held on 13 October 1983 could not be assumed, as the information in the official records on this issue was insufficient;
- (b) There was no evidence that anyone interested in the oral hearing was barred from the courtroom;
- (c) The author did not formally request a hearing of witnesses or experts on his behalf;
- (d) Article 14, paragraph 1, of the Covenant does not contain an absolute right to have witnesses and experts summoned and examined, or an overall court duty to order such a hearing *ex officio*;

(e) The communication did not show that the author petitioned the courts to take civil or criminal action against his former supervisor;

(f) No evidence was adduced as to whether, how and by whom the author was allegedly prevented from taking such action.

Issues and proceedings before the Committee

5.1 On the basis of the information before it, the Committee concluded that the requirements of article 5, paragraph 2, of the Optional Protocol, including the requirement of exhaustion of domestic remedies, had been met.

5.2 With regard to the application of article 14, paragraph 1, of the Covenant to the facts, the Committee observed that the proceedings at issue related to the rights and obligations of the parties in a suit at law. The Committee noted the State party's contention that the communication should be declared inadmissible on the grounds of insufficient substantiation of claims, but considered that the author had made reasonable efforts to sustain his claim, for purposes of admissibility, that the procedure under article 1639w followed in his case was incompatible with article 14, paragraph 1, of the Covenant.

5.3 On 11 July 1988, the Human Rights Committee declared the communication admissible.

6.1 With respect to the author's claim related to the publicity of the sub-district court hearing, the Committee considers that if labour disputes are argued in oral hearing before a court, they fall within the requirement, in article 14, paragraph 1, that suits at law be held in public. That is a duty on the State which is not dependent on any request, by the interested party, that the hearing be held in public. Both domestic legislation and judicial practice must provide for the possibility of the public attending, if members of the public so wish. In the instant case, the Committee notes that while the old article 1639w of the Civil Code of the Netherlands was silent on the question of the public or non-public nature of the proceedings, it appears that in practice the public did not attend. It is far from clear in this case whether the hearing was or was not held *in camera*. The author's communication does not state that he or his counsel formally requested that the proceedings be held in public, or that the sub-district court made any determination that they be held *in camera*. On the basis of the information before it, the Committee is unable to find that the proceedings in the author's case were incompatible with the requirement of a "public hearing" within the meaning of article 14, paragraph 1.

6.2 The Committee observes that courts must make information on the time and venue of the oral hearings available to the public and provide for adequate facilities for the attendance of interested members of the

public, within reasonable limits, taking into account, e.g., the potential public interest in the case, the duration of the oral hearing and the time the formal request for publicity was made. Failure of the court to make large courtrooms available does not constitute a violation of the right to a public hearing if, in fact, no interested member of the public is barred from attending an oral hearing.

7.1 With respect to the author's claims that the hearing of his case was not conducted fairly, the Committee refers to its constant jurisprudence that it is not a "fourth instance" competent to reevaluate findings of fact or to review the application of domestic legislation. It is generally for the appellate courts of States parties to the Covenant to evaluate the facts and the evidence in a particular case unless it can be ascertained that the proceedings before the domestic courts were clearly arbitrary or amounted to a denial of justice.

7.2 Concerning the author's claims that no witness was summoned for examination at the oral hearing, the Committee notes that no formal request to this effect was made by the author, although he was represented by counsel throughout the proceedings. The author's claim that article 14, paragraph 1, required the judge to do so *ex officio* is unfounded.

7.3 The author's claim that he was unable to respond to the petitioner's pleading is refuted by the official records, which reveal that author's counsel had the opportunity to plead extensively.

8. Regarding the author's claim of having been indirectly barred from the courts, the Committee observes that the author has repeatedly received legal advice from different lawyers and a measure of financial support to this end.

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 as submitted do not disclose a violation of any article of the International Covenant on Civil and Political Rights. The Committee welcomes the fact that the State party has amended article 1639w of the Civil Code to provide specifically for public hearings.

Communication No. 218/1986

Submitted by: Hendrika S. Vos (represented by M. E. Diepstraten)

Alleged victim: The author

State party: The Netherlands

Date of adoption of views: 29 March 1989 (thirty-fifth session)*

Subject matter: Alleged sex-based discrimination in the allocation of disability allowances under the Dutch social system

Procedural issues: Sufficiency of State party's reply under article 4 (2)

Substantive issues: Discrimination on the basis of sex—Notion of "other status"—ICCPR relationship to ICESCR, CERD and CEDAW—Equal protection of the law—Entitlement to disability pension

Articles of the Covenant: 2 (1) and 26

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

1. The author of the communication (initial letter dated 23 December 1986 and subsequent letters dated 5 and 26 March 1987 and 3 January 1989) is Hendrika S. Vos, a citizen of the Netherlands, residing in that country. She claims to be a victim of a violation of article 26 of the International Covenant on Civil and Political Rights by the Government of the Netherlands. She is represented by counsel.

2.1 The author states that since 1 October 1976 she had received an allowance from the New General Trade Association under the General Disablement Benefits Act (AAW), but that in May 1979, following the death of her ex-husband (from whom she had been divorced in 1957), payment of the disability allowance was discontinued, in accordance with article 32, subsection 1 (b), of AAW, because she then became entitled to a payment under the General Widows and Orphans Act (AWW). Under the latter, she receives some 90 guilders per month less than she had been receiving under AAW.

2.2 The author states that she first challenged the decision of the New General Trade Association before the Arnhem Appeals Court, but her claim of being a victim of discrimination was rejected on 10 March 1980. Thereupon, she lodged an objection with the same Appeals Court, which rejected it as unfounded by decision of 23 June 1981. A further appeal was taken to the Central Appeals Court in which the author invoked the direct application of article 26 of the Covenant. The court decided against her claim on 1 November 1983. Thus, domestic remedies are said to be exhausted.

* Individual opinion submitted by Mrs. Francisco Aguilar Urbina and Bertil Wennergren is appended.

2.3 The author had argued before the Netherlands Courts that, whereas a disabled man whose (former) wife dies retains the right to a disability allowance, article 32 of AAW makes an improper distinction according to sex, in that a disabled woman whose (former) husband dies does not retain the right to a disability allowance. Subsection 1 (b) of this article provides:

1. The employment disability benefit will be withdrawn when:

...

(b) a woman, to whom this benefit has been granted, becomes entitled to a widow's pension or a temporary widow's benefit in compliance with the General Widows and Orphans Law.

In her specific case she claimed that the application of the law was particularly unjust because she had been divorced from her husband for 22 years and had been providing for her own support when she became disabled. She claims in consequence that she should be treated primarily as a disabled person and not as a widow.

2.4 In rejecting the author's claim that she is a victim of discrimination under article 26 of the Covenant, the Central Appeals Court, in its decision of 1 November 1983, stated:

From the wording of these two articles (articles 26 and 2 (1) of the Covenant), taken conjointly, it is apparent that article 26 is not solely applicable to the civil and political rights that are recognized by the Covenant. In answer to the question whether this article is also of significance in connection with a social security right, as in dispute here, the Court expresses the following consideration:

In addition to the Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights was concluded at the same time and place. The Court is of the opinion that the text and the import of the two Covenants under consideration here, and the intentions of the States involved therein, must be taken conjointly, because from the history of the conclusion of these Covenants it is apparent that the initial plan to conclude a single covenant was abandoned on the grounds that economic, social and cultural rights – in contrast to civil and political rights – can generally speaking only gradually be realized by means of legislation and other executive measures. That the States involved in those Covenants proceed from this distinction is also apparent from the fact that the Covenant on Economic, Social and Cultural Rights merely provides for a so-called reporting system with respect to the fulfilment of the rights recognized therein whereas the Covenant on Civil and Political Rights also includes an inter-State complaints system (regulated in article 41 et seq. of the Covenant) and an individual

complaints system (regulated in the Optional Protocol to the Covenant). Distinguishing criteria connected with existing social structures which appear also in social security regulations and which are possibly to be regarded as discriminatory, such as man/woman and married/single, can only gradually be done away with by means of legislation ... On the basis of the foregoing, the significance of article 26 of the International Covenant on Civil and Political Rights in connection with a social security right as in dispute here must be denied.

2.5 The author claims that the Central Appeals Court incorrectly interpreted the scope of article 26 of the International Covenant on Civil and Political Rights and asks the Committee to find that the cessation of the payment to her of an AAW allowance was a form of discrimination based on sex and marital status in contravention of article 26 of the Covenant.

3. By its decision of 18 March 1987, the Working Group of the Human Rights Committee transmitted the communication under rule 91 of the provisional rules of procedure to the State party concerned, requesting information and observations relevant to the question of the admissibility of the communication.

4. In its submission dated 25 June 1987, the State party reserved the right to submit observations on the merits of the communication which might turn out to have an effect on the question of admissibility. For this reason the State party suggested that the Committee might decide to join the question of the admissibility to the examination of the merits of the communication.

5. The author's deadline for comments on the State party's submission expired on 4 September 1987. No comments were received from the author.

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

6.2 Article 5, paragraph 2 (a), of the Optional Protocol precludes the Committee from considering a communication if the same matter is being examined under another procedure of international investigation or settlement. In this connection, the Committee ascertained that the same matter was not being examined under another procedure of international investigation or settlement.

6.3 Article 5, paragraph 2 (b), of the Optional Protocol precludes the Committee from considering a communication unless domestic remedies have been exhausted. In this connection the Committee noted that the author's statement that domestic remedies had been exhausted remained uncontested.

7. On 24 March 1988, the Human Rights Committee therefore decided that the communication was admissible. In accordance with article 4 (2) of the Optional Protocol, the State party was requested to submit to the Committee, within six months of the date of transmittal to it of the decision on admissibility, written explanations or statements clarifying the matter and the measures, if any, that may have been taken by it.

8.1 In its submission under article 4, paragraph 2, of the Optional Protocol, dated 28 October 1988, the State party, before discussing the merits of the case, points out that it has taken note of the views of the Committee in communications CCPR/C/29/D/172/1984, CCPR/C/-29/D/180/1984 and CCPR/C/29/D/182/1984 with respect to the applicability of article 26 of the Covenant in the field of social security rights and that it reserves its position, notwithstanding the fact that this aspect is not addressed in its submission.

8.2 In discussing the merits of the case, the State party elucidates first the relevant Netherlands legislation as follows:

8.3 "Netherlands social security legislation consists of employee insurance schemes and national insurance schemes; as employee insurance schemes are not of relevance to the present case, they will be disregarded. The aim of national insurance schemes is to insure all residents of the Netherlands against the financial consequences of certain contingencies. The national insurance schemes concerning survivors, old age and long-term disability guarantee payment of a benefit related to the statutory minimum wage. The entitlements concerned are gross benefits. They are set at such a level that, after tax and social insurance premiums have been deducted from them, net benefits are sufficient to enable the beneficiary to subsist."

8.4 "The AAW of 11 December 1975 created a national insurance scheme concerning long-term disability; under the terms of the Act, anybody who has been disabled for longer than one year is entitled to a basic benefit. If the beneficiary was employed full-time before becoming unfit for work, full benefit is paid (equivalent to the subsistence minimum). If the beneficiary is only partially disabled, the benefit is reduced proportionately; the amount of benefit payable is also based on the number of hours per week worked before the beneficiary became disabled. If the amount of AAW benefit payable is less than the subsistence minimum, as will often be the case if the claimant is only partially disabled or was working part-time before becoming disabled, supplementary benefit can be paid under the National Assistance Act (ABW) or Supplements Act (TW)."

8.5 "The AWW of 9 April 1956 created a national insurance scheme which entitles widows and orphans to receive benefit related to the statutory minimum wage if their husband or father dies. The rationale underlying the Act is that after a married man dies his widow may well have insufficient means of subsistence. At the time when the Act was passed, it was felt that, if there were good reasons why the widow should not be expected to earn her own living (for example, because she still had children to look after or because she was too old), it was desirable to pay her benefit. In some cases, women are eligible for the AWW benefit even if they have been divorced from the deceased."

8.6 "At the time when the General Widows and Orphans Act was passed, it was customary for husbands to act as bread-winners for their families, and it was therefore desirable to make financial provision for dependants in the event of the bread-winner's premature death. In recent years, more married women have been going out to work and households consisting of unmarried people have increasingly been granted the same status as traditional families. This being so, the Government has been studying since the early 1980s ways of amending the AWW; one of the questions being examined is whether the privileged position enjoyed by women under the Act is still justified nowadays."

8.7 "It is too early to say what provisions the future Surviving Dependants Act will contain. As the Netherlands is a member of the European Community (EC), it will in all events comply with the obligations arising from an EC directive which is currently in preparation concerning sexual equality with regard to provision for survivors; it is expected to be many years before the directive enters into force. However, it is possible that the Netherlands Government may make proposals for new legislation on survivors before the EC directive is finalized."

8.8 "In a social security system, it is necessary to ensure that individuals do not qualify for more than one benefit simultaneously under different social insurance acts, when each such benefit is intended to provide a full income at subsistence level. The various relevant acts therefore contain provisions governing entitlements for the eventuality of overlapping entitlements. The clause of which Mrs. Vos complains – article 32, subsection 1 (b), of the AAW – falls into this category. The legislature had to decide whether claimants who were entitled to benefits under both the AAW and the AWW should receive benefits under the one or the other, and it was decided that in such cases the AWW benefit should be paid. The decision to opt for a rule on concurrence as laid down in article 32, subsection 1 (b), of the AAW is based, *inter alia*, on practical considerations with a view to the implementation of the legislation. It is necessary, for example, to avoid the necessity of entering the person concerned in the records of two different bodies responsible for paying benefits and to avoid having to levy income tax in arrears on income

from two separate sources."

8.9 "From the point of view of widows, it is, generally speaking, more advantageous to receive AWW than AAW; if the legislature had decided that the AAW benefit should have precedence *over* the AWW benefit, many widows would have been worse off, because in most cases the AWW benefit exceeds the AAW benefit payable to married women. This is because most married women have worked part-time and therefore receive *only* a partial AAW benefit in the event of long-term disability. This is not to say that the rule on concurrence which gives precedence to the AWW is always advantageous to all widows: it merely benefits the majority of them. Cases are conceivable in which the award of the AWW benefit instead of the AAW benefit leads to a slight fall in income. This is evidently so in the case of Mrs. Vos."

8.10 "However, the fact that, in a particular case, the application of article 32, subsection 1 (b), of AAW leads to a disadvantageous result for a particular individual is irrelevant for purposes of assessing whether a form of discrimination has occurred which is prohibited by article 26 of the International Covenant on Civil and Political Rights. In this connection, reference may be made to the Committee's decision in case No. 212/1986 (*P. P. C. v. the Netherlands*), in which it was found, *inter alia*, that the scope of article 26 does not extend to differences of results in the application of common rules in the allocation of benefits."¹

8.11 Lastly, the Netherlands Government observes that, in the course of the review of the AWW (paras. 8.6 and 8.7), explicit consideration was given to the problem of overlapping entitlements under AAW and AWW.

9.1 With regard to the author's specific complaint in relation to article 26 of the Covenant, the State party contests the contention of Mrs. Vos "that article 32, subsection 1 (b), of AAW discriminates unjustifiably between the sexes, because a disabled man whose wife (divorced or otherwise) dies retains his right to disablement benefit whereas a disabled woman whose husband (divorced or otherwise) dies forfeits hers. The difference in position between a disabled widow and a disabled widower can be explained as follows. The provision which is made for survivors is not available to men, and the problem of overlapping of benefits therefore does not arise. Precisely on account of the fact that a disabled man cannot be eligible for AWW benefit and that the death of his wife therefore does not affect his AAW benefit, it is impossible to compare the rules of concurrence."

9.2 "By way of illustration of the relative discrimination in favour of women, which is inherent in the AWW rules, the Netherlands Government would observe that the favourable treatment which women receive in the Netherlands under AWW has led some people to suggest that the Act discriminates against

¹ CCPR/C/32/D/212/1986, para. 6.2.

men. This is one of the reasons why a review of AWW is under consideration. Be that as it may, this is not the point of Mrs. Vos's complaint. In any case, it should be concluded that the cases to which the applicant refers are not cases which require equal treatment on the basis of article 26 of the Covenant."

10.1 In her comments, dated 3 January 1989, the author reiterates her view that the application of article 32, subsection 1 (b), of the General Disablement Act (AAW) violates article 26 of the Covenant. She also argues that, provided article 26 is found relevant, then it must be accepted that it has direct effect from the moment the International Covenant on Civil and Political Rights came into force. Although she acknowledges that not every inequality constitutes unlawful discrimination, she contends that since 1979 any existing inequality in the field of social security can be examined on the basis of article 26 of the Covenant.

10.2 Contesting the interpretation of article 26 of the Covenant by the Central Appeals Court, the author argues that it would be incompatible with article 26 to grant the Government additional time to eliminate unlawful discrimination, and that what is at issue in the communication under consideration is whether the distinction is acceptable or unacceptable, it being irrelevant whether the Government after 1979 needed some time to eliminate the alleged distinction.

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

11.2 The Committee notes that the State party in its submission under article 4, paragraph 2, of the Optional Protocol has reserved its position with respect to the applicability of article 26 of the Covenant in the field of social security rights (para. 8.1 above). In this connection, the Committee has already expressed the view in its case law² that the International Covenant on Civil and Political Rights would still apply even if a particular subject-matter is referred to or covered in other international instruments, e. g., the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women or, as in the present case, the International Covenant on Economic, Social and Cultural Rights. Notwithstanding the interrelated drafting history of the two covenants, it remains necessary for the Committee to apply fully the terms of the International Covenant on Civil and Political Rights. The Committee observes in this connection that the provisions of article 2 of the International Covenant on Economic, Social and Cultural Rights do not detract from the full application

² CCPR/C/29/D/172/1984, CCPR/C/29/D/180/1984 and CCPR/C/29/D/182/1984.

of article 26 of the International Covenant on Civil and Political Rights.

11.3 The Committee further observes that what is at issue is not whether the State party is required to enact legislation such as the General Disablement Benefits Act or the General Widows and Orphans Act, but whether this legislation violates the author's rights enunciated in article 26 of the International Covenant on Civil and Political Rights. The right to equality before the law and to 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. Further, the differences which result from the uniform application of laws do not *per se* constitute prohibited discrimination.

12. It remains for the Committee to determine whether the disadvantageous treatment complained of by the author resulted from the application of a discriminatory statute and thus violated her rights under article 26 of the Covenant. In the light of the explanations given by the State party with respect to the legislative history, the purpose and application of the General Disablement Benefits Act and the General Widows and Orphans Act (paras. 8.3-8.10 above), the Committee is of the view that the unfavourable result complained of by Mrs. Vos follows from the application of a uniform rule to avoid overlapping in the allocation of social security benefits. This rule is based on objective and reasonable criteria, especially bearing in mind that both statutes under which Mrs. Vos qualified for benefits aim at ensuring to all persons falling thereunder subsistence level income. Thus the Committee cannot conclude that Mrs. Vos has been a victim of discrimination within the meaning of article 26 of the Covenant.

13. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as submitted do not disclose a violation of any article of the International Covenant on Civil and Political Rights.

APPENDIX

Individual opinion submitted by Mrs. Francisco Aguilar Urbina and Bertil Wennergren pursuant to rule 94, paragraph 3, of the Committee's provisional rules of procedure, concerning the views of the Committee on communication No. 218/1986, Vos v. the Netherlands

1. Article 26 of the Covenant has been interpreted as providing protection against discrimination whenever laws differentiating between groups or categories of individuals do not correspond to objective criteria. It has also been interpreted in the sense that whenever a difference in treatment does not affect a group of people but only individuals, a provision cannot be deemed discriminatory as such; negative effects on one individual cannot then be considered to be discrimination within the scope of article 26.

2. It is self-evident that, as the State party has stressed, in any social security system it is necessary to ensure that individuals do not qualify for more than one benefit simultaneously under different social insurance laws. The State party has admitted that the rule on concurrence which gives precedence to the General Widows and Orphans Act (AWW) is not always advantageous to all widows. It might merely benefit a majority of them. Cases are conceivable in which the award of AWW benefits leads to a decrease in income after cessation of payments under the General Disablement Benefits Act (AAW); this is evidently what happened in the case of Mrs. Vos. The State party has also mentioned that in most cases AWW benefits exceed AAW benefits payable to married women, and that this is attributable to the fact that most married women have worked only part-time and therefore receive only partial AAW benefit in the event of long-term disability. It follows that disabled women with full AAW benefits enjoy higher benefits than women, disabled or not, who receive full AWW benefits because of their status as widows.

3. In cases where women receive full pensions under the AAW (being disabled and having worked full-time previously), if the husband dies, they will be given the AWW pension instead. This may reduce the level of pension which their physical needs as disabled persons require and which the General Disablement Benefits Act had recognized.

4. Article 32 of AAW provides in its subsection 1 (b) that the employment disability benefit will be withdrawn when a woman to whom this benefit has been granted becomes entitled to a widow's pension or a temporary widow's benefit pursuant to the AWW. The State party contends that the legislature had to decide whether claimants who were entitled to benefits under both the AAW and the AWW should receive benefits under the one or the other. This is conceivable, but it is not justifiable that this necessarily should be resolved by the introduction of a clause which does not allow for a modicum of flexibility in its implementation. An exception should, in our opinion, be made with regard to women who enjoy full AAW benefits, if such benefits exceed full AWW benefits. By failing to make such an exception, the legislature has created a situation in which disabled women with full AAW benefits who become widows can no longer be treated on a par with other disabled women who enjoy full AAW benefits. The case cannot be considered as affecting only Mrs. Vos, but rather an indeterminate group of persons in the category of disabled women entitled to full disability pensions. Moreover, the intention of the legislator to grant maximum protection to those in need would be violated every time the law is applied in the strict formal sense as it has been applied in Mrs. Vos's case. The increasing number of similar cases can be inferred from the assertion made by the State party that it has seen the need to change the legislation since the early 1980s.

5. A differentiation with regard to full AAW benefits between disabled women, on the sole ground of marital status as a widow, cannot be said to be based on reasonable and objective criteria. It therefore constitutes prohibited discrimination within the meaning of article 26. We note that a review of AWW is under consideration and hope that the discriminatory elements will be eliminated and compensation given to those who have been the victims of unequal treatment.

Communication No. 219/1986

Submitted by: Dominique Guesdon (represented by counsel)

Alleged victim: The author

State party: France

Date of adoption of views: 25 July 1990 (thirty-ninth session)*

Subject matter: Denial of the use of the Breton language in French Court proceedings

Procedural issues: Burden of proof—Non-participation of member of Committee in decision— Inadmissibility *ratione materiae*

Substantive issues: Right to a fair hearing—Freedom of expression—Equality of arms—Discrimination based on language—Examination of witness—Interpretation of "declaration"—Minority rights

Articles of the Covenant: 14 (1), (3) (e) and (f), 19 (2), 26 and 27

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

* Pursuant to rule 85 of the Committee's rules of procedure, Ms. Christine Chanet did not participate in the examination of the communication nor in the adoption of the Committee's views.

1. The author of the communication (initial letter of 11 December 1986 and subsequent correspondence) is Dominique Guesdon, a French citizen born in 1959, employed as an electrician and residing in Paimpont, France. He claims to be a victim of violations of articles 14, paragraphs 1, 3 (e) and (f); 19, paragraph 2; 26 and 27 of the Covenant by France. He is represented by counsel.

2.1 The author states that he is a Breton and that his mother tongue is Breton, which is the language in which he can express himself best, although he also speaks French. On 11 April 1984, before the Optional Protocol entered into force for France (17 May 1984), he appeared before the Tribunal Correctionnel of Rennes on charges of having damaged public property by defacing road signs in French. He admits that militant Bretons who advocate the use of the Breton language painted over some road signs in order to manifest their desire that road signs be henceforth bilingual. The author never admitted his participation in the offences he was charged with, and claims that he was convicted in the absence of any proof.

2.2 On 11 April 1984, the day of the hearing, he requested that 12 witnesses be heard on his behalf. He indicated that all the witnesses and he himself wished to give testimony in Breton, which was the language used daily by most of them and in which they could most easily express themselves for the purposes of his defence. He

therefore requested that their testimony be heard through the assistance of an interpreter. This request was refused by the court. He appealed the decision not to provide for interpretation to the President of the Court of Appeal who, on 24 April 1984, rejected the appeal on the ground that Mr. Guesdon was capable of defending himself without interpretation before the trial court. The merits of the case were examined by the Tribunal Correctionnel on 20 June 1984 (after the Optional Protocol had entered into force for France) at which time the defendant and the witnesses on his behalf again sought in vain to be allowed to express themselves in Breton. The court refused to hear them, as they were not willing to express themselves in French, and the author was given a four-month suspended sentence and ordered to pay a fine of 2,000 French francs. On appeal, he reiterated his request for the same witnesses on his behalf to be heard. The Court of Appeal refused the request and, on 25 March 1985, sentenced him to a prison term of four months, suspended, and ordered him to pay a fine of 5,000 French francs. The author then appealed to the Court of Cassation on the ground that his defence rights had been violated. The appeal was dismissed by the Court of Cassation on 2 October 1985.

2.3 The author claims that the French courts violated his rights to a fair hearing, his right to have witnesses heard on his behalf, his right to have the assistance of an interpreter, his right to freedom of expression, his right to equal treatment and the enjoyment of minority rights, such as the use of a minority language.

3. Without transmitting the communication to the State party, the Human Rights Committee requested the author, by decision of 9 April 1987, under rule 91 of the rules of procedure, to clarify whether he and each of the witnesses who intended to testify on his behalf before the trial court and the Court of Appeal, understood and spoke French. By letter dated 2 June 1987, counsel for the author replied in the affirmative, adding, however, that some of those called as witnesses might have preferred to express themselves in Breton.

4. By further decision of 20 October 1988, the Working Group of the Human Rights Committee transmitted the communication to the State party, requesting it, under rule 91 of the rules of procedure, to provide information and observations relevant to the question of the admissibility of the communication.

5.1 In its submission under rule 91, dated 15 January 1989, the State party provides a detailed account of the facts of the case and concedes that, on the basis of that account, domestic remedies must be considered to have been exhausted following the dismissal, on 2 October 1985, of the author's appeal by the Court of Cassation.

5.2 Concerning the author's allegation that he was a victim of a violation of article 14, paragraph 1, of the Covenant, the State party contends that it was the author's own fault that he was not heard and assisted by counsel before the judge of first instance, because he refused to express himself in French. It adds that at the hearing on 5 March 1985 before the Court of Appeal, the author expressed himself without difficulty in French, and his counsel delivered his pleadings in French.

5.3 With respect to the alleged violations of article 14, paragraphs 3 (e) and (f), the State party contends that these provisions cannot be construed as encompassing the right of the accused to express himself in the language of his choice. Thus, the author cannot pretend that his right "to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him" was not observed, to the extent that the refusal of the witnesses called on his behalf to express themselves in French made it impossible for the judge to hear them. Concerning article 14, paragraph 3 (f), the State party recalls that this provision merely provides for the assistance of an interpreter if the accused "cannot understand or speak the language used in court". The State party submits that it was evident that the author and the witnesses on his behalf were perfectly capable of expressing themselves in French, and points out that article 407 of the Code of Penal Procedure, which stipulates that French is the official Court language, is not only compatible with article 14, paragraph 3 (f), but actually goes further in its protection of the rights of the accused, since it requires the judge to provide for the assistance of an interpreter if the accused or a witness do not *sufficiently* master the French language.

5.4 Concerning the alleged violation of article 19, paragraph 2, of the Covenant, the State party objects to the "abusive" interpretation by the author of the notion of "freedom of expression". It states that the author was never prevented from expressing himself before the courts: rather, it was, initially, his own decision not to present his case. Subsequently, before the Court of Appeal, on 25 March 1985, the author used his right under article 19, paragraph 2, as he was able to do throughout the judicial proceedings.

5.5 Concerning the alleged violation of article 26, the State party argues that *if* it were possible to speak of discrimination in the case, it is imputable directly and solely to the author's behaviour in court. The State party explains that the prohibition of discrimination laid down in article 26 does not extend to the right of the accused to choose, in the proceedings against him, whatever language he sees fit to use; rather, it implies that all the parties to a case accept and submit to the same constraints, that is, in the instant case, to inherent language constraints, and express themselves in the official court language, pursuant to the relevant provisions of the Code of Penal Procedure.

5.6 Finally, with respect to the alleged violation of article 27, the State party recalls that upon ratification of the Covenant, the French Government entered the following "reservation":

In the light of article 2 of the Constitution of the French Republic, the French Government declares that article 27 is not applicable as far as the Republic is concerned.

Thus, the State party argues that

the idea of membership of an "ethnic, religious or linguistic minority" which the applicant invokes is irrelevant in the case in point, and cannot be held against the French Government which does not recognize the existence of "minorities" in the Republic, defined, in article 2 of the Constitution as "indivisible, secular, democratic and social ...

6.1 In his comments dated 8 May 1989, the author's counsel notes that the State party does not contest the admissibility of the communication. He claims that the defacement of road signs of which the author was accused should be seen as a reaction to the State party's systematic refusal to recognize the Breton language. Counsel recalls that in the Declaration of San José of December 1981, UNESCO termed policies similar to those pursued by the State party as "ethnocide", and affirms that the criminal acts imputed to the author are acts of legitimate defence vis-à-vis a crime under international law.

6.2 Counsel reiterates that the author was denied a fair trial, in violation of article 14, paragraph 1, because he was unable to call witnesses and to present his version of the facts as well as his statement of defence. Similarly, before the Court of Appeal, he claims that he did not have a fair hearing, owing to his inability to have witnesses examined. Concerning article 14, paragraphs 3 (e) and (f), it is submitted that the Tribunal Correctionnel and the Court of Appeal failed to even ask the witnesses whether they agreed to express themselves in French. Furthermore, it is submitted that the courts wrongfully denied the author and his witnesses an interpreter. In that context, counsel claims that the notion of a fair hearing implies that the parties be enabled to express themselves with ease (*avec le maximum d'aisance*) and in the language which they normally speak. Some of the witnesses, according to the author, would have experienced difficulties in expressing themselves in French; the court, however, allegedly did not attempt to verify their proficiency in the French language.

6.3 In so far as the general prohibition of discrimination in article 26 is concerned, counsel notes that numerous international conventions prohibit any form of discrimination before the tribunals. He refers to article 5 (a) of the International Convention on the Elimination of All Forms of Racial Discrimination which recognizes a right to equal treatment before the tribunals and all other organs administering justice. In this context, he recalls that article 1 of the Convention against Discrimination in Education, adopted by the UNESCO on 14 December 1960 (entry into force

22 May 1962; France is a State party), defines "discrimination" as "any distinction, exclusion, limitation of preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the effect of nullifying or impairing equality of treatment ...". He further refers to article 1 (c) of the resolution adopted by the European Parliament with respect to the European Community Charter on Regional Languages and Cultures which invites Governments to guarantee to minorities the possibility to use their own language, particularly before the judicial instances. He finally refers to article 20, paragraph 2, of the Draft International Convention on the Protection of Ethnic Groups and Minorities (draft submitted by the Minorities Rights Group, a non-governmental organization, to the Commission on Human Rights in January 1979, doc. E/CN.4/NGO/231) which stipulates that "linguistic autonomy should particularly be observed with regard to the rights of personal liberty, of fair trial and in all matters of social welfare ...".

6.4 With respect to the alleged violation of article 19, paragraph 2, the author reiterates that he did not enjoy the right to express himself freely, since he was not allowed to express himself in Breton. He claims that the French Government appears to consider that "freedom of expression" does not encompass the right to express oneself in the language of one's ancestors. He cites the names of several politicians alleged to have made remarks to this effect and adds that such statements run counter to the Conventions ratified by the French Government and other statements of French officials, who are accused of displaying a "double standard" in this respect. It is submitted that the notion of "freedom of expression" must necessarily be defined in the light of international conventions and resolutions adhered to by the State party, not in the light of the statements made by a few officials. Counsel refers to several instruments adopted by the Council of Europe, the European Parliament and the UN General Assembly which recognize the right of minorities to express themselves in their own language.

6.5 As to France's "reservation" with regard to article 27 of the Covenant, counsel affirms that France made a "declaration" in respect of this provision. He further

claims that in spite of the State party's contention that there are no minorities within its territory, draft legislation on the promotion of the languages and cultures of France has obtained the support of many parliamentarians, and that the President of the Republic himself has deplored the destruction of the minorities' cultures and affirmed that all forms of bilingualism should be encouraged.

7.1 When deciding on the question of admissibility of the communication, as required under rule 87 of its rules of procedure, the Human Rights Committee noted that the requirements of article 5, paragraph 2 (a) and (b), were met.

7.2 As to the author's claim that he had been denied his freedom of expression, the Committee observed that the fact of not having been able to speak the language of his choice before the French courts raised no issues under article 19, paragraph 2. The Committee therefore found that this aspect of the communication was inadmissible under article 3 of the Optional Protocol by virtue of incompatibility with the provisions of the Covenant. With respect to the alleged violations of articles 14 and 26, the Committee considered that the author had made reasonable efforts sufficiently to substantiate his allegations for purposes of admissibility.

7.3 In respect of the author's claim of a violation of article 27 of the Covenant, the Committee did not find it necessary to address the scope of the French "declaration" concerning article 27 of the Covenant in this case, as the facts of the communications did not raise issues under this provision.¹

7.4 On 25 July 1989, the Human Rights Committee, accordingly, declared the communication admissible insofar as it raised issues under articles 14 and 26 of the Covenant.

8.1 In its submission under article 4, paragraph 2, of the Optional Protocol, dated 17 April 1990, the State party reiterates that the author's allegations in respect of violations of articles 14, paragraphs 1 and 3 (e) and (f), are ill-founded. It argues that the notion of "fair trial" (*procès équitable*) within the meaning of article 14, paragraph 1, cannot be determined abstractly but must be examined in the light of the particular circumstances of any given case. Concerning the judicial proceedings in the author's case, it affirms that it is inexact to pretend that the Tribunal Correctionnel of Rennes did not seek to ascertain whether the witnesses called by the defence spoke and understood French; on the contrary, the

¹ Following the decision on admissibility in this case, the Committee decided at its thirty-seventh session that France's declaration concerning article 27 had to be interpreted as a reservation (T. K. v. France, No. 220/1987, paras. 8-5 and 8.6; H. K. v. France, No. 222/1987, paras. 7.5 and 7.6).

President of the tribunal expressly requested information on whether they mastered French sufficiently. The State party asserts that, in reply, the author's representatives claimed not to know the answer, or indicated that some of the witnesses *preferred* expressing themselves in Breton. This led the court to conclude that it was not shown that the accused or the witnesses called did not master the French language, and that the sole reason for requesting an interpreter lay in the desire of the accused and the witnesses to express themselves in Breton so as to promote the use of that language. The State party reiterates that on various occasions during the judicial proceedings, the author clearly established that he was perfectly capable of expressing himself in French. He did so notably during the enquiry that resulted in his conviction by the Court of Appeal on 23 March 1985.

8.2 The State party submits that criminal proceedings are not an appropriate venue for expressing demands linked to the promotion of the use of regional languages. The sole purpose of criminal proceedings is to establish the

guilt or the innocence of the accused. In this respect, it is important to facilitate a direct dialogue between the accused and the judge; since the intervention of an interpreter always encompasses the risk of the accused's statements being reproduced inexactly, resort to an interpreter must be reserved for strictly necessary cases, i. e. if the accused does not sufficiently understand or speak the court language.

8.3 The State party affirms that in the light of the above considerations, the President of the Tribunal of Rennes was perfectly justified not to apply article 407 of the French Penal Code, as requested by the author. This provision stipulates that whenever the accused or a witness do not *sufficiently* master French, the President of the Court must *ex officio* request the services of an interpreter. In the application of article 407, the President of the Court exercises a considerable margin of discretion, based on a detailed analysis of the individual case and all the relevant documents. This has been confirmed by the Criminal Chamber of the Court of Cassation on several occasions.²

8.4 The State party recalls that the author and all the witnesses called on his behalf were francophone, a fact which was confirmed by author's counsel in his submission of 2 June 1987 to the Committee (see para. 3 above). Accordingly, the State party submits, there can be no question of a violation of article 14, paragraph 3 (f).

8.5 The State party rejects the author's argument that he did not benefit from a fair trial in that the court refused to hear the witnesses called on his behalf, in violation of article 14, paragraph 3 (e), of the Covenant.

² See, e.g., the judgement of the Criminal Chamber of the Cour de Cassation of 30 June 1981 (Fayomi).

Rather, Mr. Guesdon was able to persuade the court to call these witnesses, and it was of their own volition that they did not testify. Using his discretionary powers, the President of the Court found that it was neither alleged nor proven that the witnesses were unable to express themselves in French and that their request for an interpreter was merely intended as a means of promoting the cause of the Breton language. It was therefore due to the behaviour of the witnesses themselves that the court did not hear them.

8.6 In respect of the alleged violation of article 26, the State party recalls that the prohibition of discrimination is enshrined in article 2 of the French Constitution. It affirms that the author's argument that an imperfect knowledge of French legal terminology justified his refusal to express himself in French before the courts is irrelevant for purposes of article 26: the author was merely requested to express himself in "basic" French. Furthermore, article 407 of the Penal Code, far from being discriminatory in nature on the grounds of language within the meaning of article 26, ensures the equality of treatment of the accused and of witnesses before the criminal jurisdictions, because all are required to express themselves in French. Finally, the State party charges that the principle of *venire contra factum proprium* is applicable to the author's behaviour: he refused to express himself in French before the courts under the pretext that he did not master the language sufficiently, whereas his submissions to the Committee are made in impeccable French.

9.1 In his comments, dated 11 May 1990, counsel takes issue with the State party's presentation of the facts. Thus, he indicates that the Tribunal Correctionnel only asked the author's representatives, but not the witnesses, whether the latter spoke French. Counsel notes that the rules of procedure of the Bar of Rennes stipulate that lawyers may not advise or influence witnesses on behalf of their clients (*interdiction de solliciter des témoins*), and that only the accused may call witnesses or provide his representative with the names of witnesses. According to counsel, it should have been obvious that the court could not obtain dispositive answers from the representatives on the question of whether the witnesses spoke French; had it been otherwise, the lawyers would have acknowledged implicitly that they had violated professional ethics. Counsel argues that it was the tribunal's duty to ascertain by other means whether the witnesses were proficient in French.

9.2 Counsel reiterates that the notion of "fair trial" implies that any witness unable to express himself with ease in the official court language must be allowed to address the court in his mother tongue. Furthermore, this right extends to all the stages of the judicial procedure. Counsel recalls that before the Court of Appeal, the accused reiterated his request that the witnesses called on his behalf be heard. The Court of Appeal did not, however, consider this request, and failed to ascertain whether the witnesses would agree, at this stage, to express themselves in French. Counsel concludes that the court denied the author the right to have witnesses heard on his behalf.

10.1 The Human Rights Committee has considered the present communication in the light of the information provided by the parties. It bases its views on the following considerations.

10.2 The Committee has noted the author's claim that the notion of a "fair trial", within the meaning of article 14 of the Covenant, implies that the accused be allowed, in criminal proceedings, to express himself in the language in which he normally expresses himself, and that the denial of an interpreter for himself and his witnesses constitutes a violation of article 14, paragraphs 3 (e) and (f). The Committee observes, as it has done on a previous occasion,³ that article 14 is concerned with procedural equality; it enshrines, *inter alia*, the principle of equality of arms in criminal proceedings. The provision for the use of *one* official court language by States parties to the Covenant does not, in the Committee's opinion, violate article 14. Nor does the requirement of a fair hearing mandate States parties to make available to a citizen whose mother tongue differs from the official court language, the services of an interpreter, if this citizen is capable of expressing himself adequately in the official language. It is in instances where the accused or the defence witnesses have difficulty in understanding, or in expressing themselves in the court language, that the services of an interpreter be made available.

10.3 On the basis of the information before it, the Committee finds that the French courts complied with their obligations under article 14, paragraph 1, in conjunction with paragraphs 3 (e) and (f). The author has not shown that he, or the witnesses called on his behalf, were unable to address the tribunal in simple but adequate French. In this context, the Committee notes that the notion of a fair trial in article 14, paragraph 1, *juncto* paragraph 3 (f), does not imply that the accused be afforded the possibility to express himself in the language which he normally speaks or speaks with a maximum of ease. If the court is certain, as it follows from the decision of the Tribunal Correctionnel and of the Court of Appeal of Rennes, that the accused is sufficiently proficient in the court's language, it is not required to ascertain whether it would be preferable for the accused to express himself in a language other than the court language.

10.4 French law does not, as such, give everyone a right to speak his own language in court. Those unable to speak or understand French are provided with the services of an interpreter. This service would have been

³ See communication No. 273/1988 (*B.d.B. v. Netherlands*, decision on inadmissibility of 30 March 1989, paragraph 6.4).

available to the author had the facts required it; as they did not, he suffered no discrimination under article 26 on the ground of his language.

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 submitted do not sustain the author's claim that he is a victim of a violation of article 14, paragraphs 1 and 3(e) and (f), or of article 26 of the Covenant.

Communication No. 223/1987

Submitted by: Frank Robinson (represented by counsel)

Alleged victim: The author

State party: Jamaica

Date of adoption of views: 30 March 1989 (thirty-fifth session)

Subject matter: Violation of right to fair trial in capital case subsequently commuted to life imprisonment

Procedural issues: Sufficiency of State party's reply under article 4 (2)

Substantive issues: Right to life—Right to a fair trial—Fair hearing—Right to appeal—Examination of witness—Equality of arms—Right to adequate counsel—Delay in proceedings—Duty to provide legal assistance in capital case

Articles of the Covenant: 6, 14 (1) and (3) (d) and (e), and 5

Articles of the Optional Protocol: 4 (2), 5 (1) and (2) (b)

1. The author of the communication (initial letter dated 5 February 1987; further letter dated 15 July 1987) is Frank Robinson, a Jamaican citizen serving a life sentence in Jamaica. He claims to be a victim of a violation of article 14 of the Covenant by the Government of Jamaica. He is represented by counsel.

2.1 On 31 August 1978, Frank Robinson was arrested and charged, jointly with another man, of having committed murder. The trial was initially fixed for 18 April 1979 but had to be postponed on six occasions because the prosecution had not been able to locate its chief witness. After the witness was found, the trial was fixed for 30 March 1981, but on that date counsel for Mr. Robinson were not present, allegedly because they had not been given

full instructions. The trial judge understood this to mean that counsel had not received the funds necessary to finance Mr. Robinson's defence. After Mr. Robinson was arraigned, he was told of his right to challenge jurors, but he did not exercise this right and merely asked to see his counsel. The jury was sworn in and a two-hour adjournment was granted to attempt to contact Mr. Robinson's counsel. At the resumption of the trial, the judge was informed that junior counsel for Mr. Robinson would appear in court the next day. The trial, however, was allowed to proceed. On the following day junior counsel appeared and requested the judge's permission, on behalf of senior counsel and himself, to withdraw from the case. The judge refused this request but invited counsel to appear on legal aid. Counsel refused this offer, left the court and never returned. The judge refused any further adjournment and the trial continued with Mr. Robinson unrepresented. During the trial, Mr. Robinson called his mother as a witness to support his alibi defence. He called no other witnesses, although it is alleged that there were others in court who could have been called. He did not cross-examine any of the witnesses called for the prosecution and only made a final speech lasting three minutes. On 2 April 1981 (after three days of proceedings), he was convicted of murder and sentenced to death.

2.2 With regard to the issue of the exhaustion of domestic remedies, Mr. Robinson appealed to the Court of Appeal of Jamaica which dismissed the appeal on 18 March 1983. The Court did not give any reasons. He further appealed to the Judicial Committee of the Privy Council, contending that the trial judge, by refusing an adjournment to enable him to make arrangements for his defence by other counsel, had infringed on his right under section 20, paragraph 6 (c), of the Constitution of Jamaica to "be permitted to defend himself ... by a legal representative of his own choice" and that therefore his conviction should be quashed. In a decision by a three to two majority, the Privy Council dismissed the appeal on the grounds: (a) that he did not enjoy an absolute right to legal representation, but was merely permitted to exercise the right to be legally represented, provided that he himself arranged for his representation; (b) that the judge was not required to grant repeated adjournments, especially considering the present and future availability of witnesses; (c) that he should have applied in advance for legal aid; and (d) that no miscarriage of justice had occurred as a result of the absence of legal counsel, because the judge had put the case very fully and fairly to the jury and, once the veracity of the chief prosecution witnesses had been established under cross-examination by counsel for the co-accused, and the alibi defence of the mother had been rejected, the case against the author was overwhelming.

2.3 As a result of representations made to the Governor-General of Jamaica, Mr. Robinson's sentence of death was commuted in mid-1985 and changed to life imprisonment. It is claimed that Mr. Robinson is a victim of a violation of article 14, paragraph 3 (d), of the Covenant, because he was tried without the benefit of legal representation, not only as a result of the withdrawal of his counsel, but because of the judge's refusal to grant an adjournment to allow him to make alternative arrangements for his legal representation. It is also claimed that he is a victim of a violation of article 14, paragraph 3 (e), in that, by virtue of not being properly represented, he was unable effectively to cross-examine witnesses against him or to obtain the attendance of witnesses on his own behalf. In this connection, it is claimed that Mr. Robinson was denied a fair hearing, in violation of article 14, paragraph 1, of the Covenant.

3. By its decision of 19 March 1987, the Working Group of the Human Rights Committee transmitted the communication under rule 91 of the provisional rules of procedure to the State party, requesting information and observations relevant to the question of the admissibility of the communication.

4.1 In its submission under rule 91, dated 4 June 1987, the State party argues that none of the rights enumerated in article 14 which have been invoked by the author have been violated in his case.

4.2 The State party observes that the Judicial Committee of the Privy Council, when examining the author's appeal in 1985, found that there had been no breach of section 20, paragraph 6 (c), of the Jamaican Constitution, which stipulates that "every person who is charged with a criminal offence shall be permitted to defend himself in person or by a legal representative of his own choice" and which the State party sees as being coterminous with an individual's right, laid down in article 14, paragraph 3 (d), of the Covenant, "to defend himself in person or through legal assistance of his own choosing". It further recalls that the Privy Council held that the aforementioned constitutional provision did not grant an absolute right to legal representation in the sense that it obliged a judge,

"whatever the circumstances, always to grant an adjournment so as to ensure that no one who wishes legal representation is without such representation". Concerning the author's case, the State party reiterates that while it is true that the case was adjourned 19 times, 6 of which were trial dates, these adjournments were largely due to the difficulties of the prosecution in finding its chief witness, who allegedly had been subjected to threats against his life. The trial judge unsuccessfully tried to persuade the two attorneys who had appeared on behalf of the author on all previous occasions to continue to represent the author. The attorneys, however, stated that they had not been "fully instructed", which, according to the State party, can only be construed as a euphemism to indicate that they had not received their full fees. The one attorney present in court refused an assignment of legal aid from the judge to appear for the author.

4.3 Concerning the author's allegation of a breach of his right, under article 14, paragraph 3 (e), of the Covenant, "to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him", the State party argues that since there was no denial of the right to be represented by counsel, this allegation cannot be upheld. It notes that the author "was given every opportunity to examine and cross-examine witnesses, and was in fact significantly assisted by the judge in the examination of his principal witnesses".

4.4 Finally, the State party rejects the author's contention that he was denied a fair hearing in violation of article 14, paragraph 1:

1. ... In any event it is clear from the facts, as well as the above-mentioned judgement of the Judicial Committee of the Privy Council, that there was no breach of the right to a fair hearing either under the Jamaican Constitution or the Covenant. In particular, it is to be noted that the Privy Council ... found that the judge had put the applicant's defence to the jury very fairly and fully, and that there was no miscarriage of justice.

5.1 Commenting on the State party's submission under rule 91, the author, in a submission dated 15 July 1987, contends that his allegations with respect to a violation of article 14, paragraphs 1 and 3, are well-founded.

5.2 He submits that all the issues raised by the State party were comprehensively dealt with in his initial communication, and that the State party's reference to the numerous adjournments granted in the case merely confirm that the latter were meant to accommodate the prosecution. The facts, therefore, confirm his contention on that he was denied equality of arms guaranteed by article 14, paragraph 3 (e). The author submitted a copy of a recent judgement of the English Court of Appeal which is said to support his contention, and in which the Court of Appeal held that, if it was clear that it would be impossible for a litigant to obtain justice, an adjournment order should be made, even if it was highly inconvenient to do so.

5.3 The author also rejects the State party's contention that the trial judge put the author's defence to the jury "very fairly and fully": while the judge could give some guidance and assistance to the author, he was not in a position, as an impartial and independent arbiter, to represent the author in the same way as a defence counsel could have done. Finally, the author contends that the commutation of his death sentence into one of life imprisonment does not constitute an appropriate remedy in the circumstances of his case, as the State party has asserted.

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

6.2 The Committee noted that the State party did not claim that the communication was inadmissible under article 5, paragraph 2, of the Optional Protocol. With regard to article 5, paragraph 2 (a), the Committee observed that the matter complained of by Mr. Robinson had not been submitted to another procedure of international

investigation or settlement. With regard to article 5, paragraph 2 (b), the State party did not contest the author's claim that there were no effective remedies which he could still pursue.

6.3 With regard to the parties' submissions concerning alleged violations of article 14, paragraphs 1, 3 (d) and (e), the Committee decided to examine these issues with the merits of the case.

7. On 2 November 1987, the Human Rights Committee therefore decided that the communication was admissible.

8. In its submission under article 4, paragraph 2, of the Optional Protocol, dated 17 November 1988, the State party reiterates, as it had done in its submission of 4 June 1987, that it does not consider any of the rights invoked by the author to have been violated by the Jamaican courts. It further draws attention to the fact that the Governor-General exercised his prerogative of mercy in Mr. Robinson's case and commuted the death sentence to one of life imprisonment.

9. The Committee has ascertained that the judgement of the Judicial Committee of the Privy Council made no finding with regard to a breach of the Covenant by the Jamaican Government, confining itself to findings concerning the Jamaican Constitution.

10.1 The Human Rights Committee, having 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, hereby decides to base its views on the following facts which appear uncontested.

10.2 Frank Robinson was arrested on 31 August 1978 and charged with murder. His trial, initially scheduled to start on 18 April 1979, had to be postponed on this and on six subsequent occasions; this was attributable to the fact that the prosecution had not been able to establish the place of residence and to subpoena its chief witness, allegedly because the latter had been subjected to threats against his life. When this witness was finally located and the trial began, neither of the author's two lawyers was present in court. The judge, however, allowed the trial to proceed. On the following day, one of the defence lawyers made a brief appearance only to request the judge's permission, on behalf of senior counsel and himself, to withdraw from the case. The judge refused this request and invited counsel to appear on legal aid. Counsel, however, refused this offer, and the judge ordered the trial to proceed with the author unrepresented. Mr. Robinson was left to defend himself and, on 2 April 1981, was convicted and sentenced to death. On 18 March 1983, the Jamaican Court of Appeal rejected his appeal without a written judgement, and in 1985 the Judicial Committee of the Privy Council dismissed his further appeal by a 3 to 2 majority decision. In June 1985, the Governor-General of Jamaica exercised his prerogative of mercy and commuted the author's death sentence to life imprisonment.

10.3 The main question before the Committee is whether a State party is under an obligation itself to make provision for effective representation by counsel in a case concerning a capital offence, should the counsel selected by the author-for whatever reason decline to appear. The Committee, noting that article 14 (3) (d) stipulates that everyone shall have "legal assistance assigned to him, in any case where the interests of justice so require", believes that it is axiomatic that legal assistance be available in capital cases. This is so even if the unavailability of private counsel is to some degree attributable to the author himself, and even if the provision of legal assistance would entail an adjournment of proceedings. This requirement is not rendered unnecessary by efforts that might otherwise be made by the trial judge to assist the author in handling his defence in the absence of counsel. In the view of the Committee, the absence of counsel constituted unfair trial.

10.4 The refusal of the trial judge to order an adjournment to allow the author to have legal representation, when several adjournments had already been ordered by virtue of the prosecution's witnesses being

unavailable or unready, raises issues of fairness and equality before the courts. The Committee is of the view that there has been a violation of article 14, paragraph 1, due to inequality of arms between the parties.

10.5 The Committee, basing itself on the information provided by the parties concerning the author's entitlement to examine witnesses, finds that there has been no violation of article 14, paragraph 3 (e).

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 submitted reveal a violation of article 14, paragraphs 1 and 3 (d), of the Covenant.

12. The Committee, accordingly, is of the view that the State party is under an obligation to take effective measures to remedy the violations suffered by the author, through his release, and to ensure that similar violations do not occur in the future.

Communication No. 232/1987

Submitted by: Daniel Pinto (represented by counsel)

Alleged victim: The author

State party: Trinidad and Tobago

Date of adoption of views: 20 July 1990 (thirty-ninth session)*

Subject matter: *Unfair trial in capital case*

Procedural issues: *Insufficiency of State party's reply under Article 4 (2)—Travaux préparatoires—Failure to investigate victim's allegations*

Substantive issues: *Right to life—Ill-treatment during detention on death row—Right to a fair trial—Right to counsel—Effective legal representation on appeal*

Articles of the Covenant: 6, 10 (1) and 14 (3) (d)

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

1. The author of the communication (initial undated letter, received in June 1987, and subsequent correspondence) is Daniel Pinto, a citizen of Trinidad and Tobago currently awaiting execution at the State Prison of Port-of-Spain, Trinidad. He claims to be the victim of a violation of his human rights by Trinidad and Tobago. He is represented by counsel.

2.1 The author, who claims to be innocent, was arrested at 1:20 a. m. on 18 February 1982 in Arima, and charged with the murder, on the previous day, of one Mitchell Gonzales. His trial took place in the Port-of-Spain Assizes Court, from 3 to 14 June 1985; he was found guilty and sentenced to death on 14 June 1985. On 18 July 1986, the Court of Appeal dismissed his appeal; it produced a reasoned judgement on 8 December 1986.

2.2 The author states that on the night of 17 February 1982 he was assaulted by five men and severely beaten. In the course of the struggle, one of the attackers attempted to stab him but accidentally hit another attacker, who subsequently died. The prosecution's contention was that on the night of the crime the author had approached five men, including Mr. Gonzalez, who were sitting together on a bench outside a bar in Arima and that Mr. Pinto had told them that he had learned that two of them had made deprecatory remarks about him and sought to ascertain what the two, including the deceased, had said. The deceased sought in turn, to ascertain what these remarks pertained to. He then remarked to the others that Mr. Pinto seemed to be under the influence of alcohol, upon which the author was said to have lashed out at Mr. Gonzalez with a knife, stabbing him twice. Mr. Gonzalez escaped but collapsed about 200 feet from the scene.

2.3 The author alleges that he was denied a fair trial, since the four men who had allegedly attacked him acted as the prosecution's witnesses against him. Furthermore, the legal aid attorney assigned to his case allegedly defended him poorly: according to the author, this lawyer never consulted with him prior to the trial and remained passive during most of it, without taking any notes or making any statements or objections. The author also alleges that the trial transcript was tampered with after conviction. Throughout the proceedings, the author maintained his innocence. Upon his conviction, his counsel appealed the sentence, among others, on the following grounds:

(a) that the trial judge failed to direct the jury adequately on the issue of self-defence;

(b) that the trial judge misdirected the jury by instructing the jurors that the issue of manslaughter did not arise for their consideration although there was in fact evidence which, if accepted, could have supported such a verdict as a result of provocation; this misdirection, according to counsel, constituted a "grave miscarriage of justice";

(c) that the trial judge failed to instruct the jury properly on the circumstantial nature of the evidence on which the prosecution relied, and that he did not properly warn the jury that it was dangerous to accept such evidence because it could have been "fabricated" so as to cast suspicion on the accused.

3. By decision of 22 July 1987, the Human Rights Committee transmitted the communication, for information, to the State party and requested it, under rule 86 of the rules of procedure, not to carry out the death sentence against the author before it had had the opportunity to consider further the question of the admissibility of the communication. The author was requested, under rule 91 of the rules of procedure, to provide a number of clarifications about the circumstances of his trial and his appeal.

4.1 In his reply, dated 18 August 1987, to the Committee's request for clarifications, the author indicated that an English law firm had agreed to represent him for purposes of a petition for special leave to appeal to the Judicial Committee of the Privy Council.

4.2 In a further submission, the author complained about irregularities in the administration of justice in Trinidad. He maintained that he sought special leave to

appeal to the Judicial Committee of the Privy Council in 1986, but two years later, the Registry of the Privy Council had still not received the necessary documents and transcripts from the Court of Appeal in Trinidad. The author quotes from a letter to him by his representatives in London:

We have made enquiries at the Privy Council regarding your appeal and we have not yet had the final order of leave to appeal from the Supreme Court of Trinidad and Tobago. We understand that letters have been written twice to the Supreme Court, requesting the same, as this is holding up progress. We have written to our agent in Trinidad ... and requested him to look into the matter urgently on our behalf...

5. By decision of 22 March 1988, the Working Group of the Human Rights Committee reiterated the Committee's request to the State party, under rule 86 of the rules of procedure, that it do not carry out the death sentence against the author while his communication is under examination by the Committee. It further requested the State party, under rule 91 of the rules of procedure, to provide information and observations relevant to the question of the admissibility of the communication. In this context, the State party was asked to provide the Committee with the texts of the written judgements in the case and to indicate whether the Judicial Committee of the Privy Council had heard the petition for special leave to appeal and, if so, with what result.

6. The deadline for the State party's submission under rule 91 of the rules of procedures expired on 27 June 1988. In spite of two reminders sent to the State party on 16 September and 22 November 1988, no submission has been received.

7. By letter dated 13 June 1988, the author indicated that his application for leave to appeal to the Judicial Committee of the Privy Council was dismissed on 26 May 1988. By further letter dated 14 December 1988, he stated that all his submissions to the judicial authorities of Trinidad, including the Attorney-General's Office, the Ministry of National Security and the Minister of External Affairs, have remained unanswered.

8. After the dismissal of his petition for special leave to appeal by the Judicial Committee of the Privy Council, the author sent a petition to the Mercy Committee, without, however, obtaining a reply.

9.1 Before considering any claims presented 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. The Committee addressed the question of admissibility at its thirty-sixth session in July 1989.

9.2 The Committee ascertained, as it is required to do 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.

9.3 The Committee noted with concern the absence of any co-operation from the State party on the matter under consideration. In respect of the requirement of exhaustion of domestic remedies, the State party had not made any submission relevant to the question of the admissibility of the communication. The Committee observed that the author's indication that his petition for special leave to appeal to the Judicial Committee of the Privy Council had been dismissed on 26 May 1988 had also remained uncontested. On the basis of the information before it, the Committee found that there were no further effective domestic remedies which the author could still pursue. It therefore concluded that the requirements of article 5, paragraph 2 (b), had been met.

9.4 On 18 July 1989, the Human Rights Committee therefore declared the communication admissible.

10. The deadline for the State party's explanations and statements on the merits of the communication expired on 17 February 1990. No submission was received despite two reminders addressed to it on 20 February and 29 March 1990. Under cover of a note of 12 March 1990, the State party did, however, forward copies of the court documents in the case, including the notes of evidence, the summing-up of the trial judge, the application for leave to appeal against conviction and sentence and the judgement of the Court of Appeal, which the Committee had requested two years earlier to facilitate consideration of the question of the admissibility of the communication.

11.1 In numerous submissions received after the Committee's decision on admissibility, the author provides further information about his case. Three main issues may be drawn from these submissions. Firstly, he reiterates his allegations of unfair trial and the alleged inadequacy of the judge's instructions to the jury.

11.2 Secondly, the author reaffirms that his representation before the trial court and the Court of Appeal was inadequate, Mr. I. K., who represented him before the Port-of-Spain Assizes Court, is said to have displayed no interest in the case and to have remained passive throughout the trial failing to challenge pieces of evidence presented by the prosecution. He is also accused of "conflict of interest" and "hidden agendas". Allegedly, the lawyer failed to raise the point that throughout the six days the author spent in police custody before being brought before an examining magistrate, he was not properly informed of his rights. Furthermore, the author claims that counsel did not raise the point that subsequent to his apprehension early in the morning of 18 February 1982, he was escorted to the hospital of Arima, where he was treated for injuries allegedly sustained at the hands of his attackers. According to the author, he never saw or approved the grounds of appeal and never had an opportunity to discuss the preparation of the appeal with I. K. In this context, he notes that prior to the hearing of the appeal, he had informed the Registrar of the Court of Appeal that an eminent lawyer from the United Kingdom would represent him; the Court of Appeal, however, completely ignored his letters and re-appointed I. K. as his representative for the appeal, although all the formalities with the English lawyer had been settled. Finally, the author notes that his former representative is actively involved in Government politics, where he serves, among other duties, on the Crime Commission; during the spring of 1989, he is said to have made several statements calling for the speedy execution of prisoners under the sentence of death.

11.3 Thirdly, the author complains about the conditions of his detention on death row. Thus, he claims that, although he was given glasses after failing an eye test, his eyesight is continuously deteriorating. He further claims that he has been in need of urgent dental care for several years, but that the prison authorities have informed him repeatedly that no funds were available for this purpose. More generally, the author affirms that it is difficult to obtain any medical treatment on death row, and that whoever speaks out about this situation is liable to administrative measures or harassment from the prison authorities.

12.1 The Human Rights Committee has considered the present communication in the light of the information provided by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

12.2 In formulating its views, the Human Rights Committee notes with concern the failure of the State party to cooperate with it. Apart from furnishing copies of court documents (see para. 10 above), no submission has been received from the State party. Article 4, paragraph 2, of the Optional Protocol enjoins a State party to investigate in good faith all the allegations of violations of the Covenant made against it and its judicial authorities, and to forward to the Committee all the information available to it. The Committee notes with concern that in spite of two reminders, no explanations or statements on the substance of the present communication have been received from the State party. In the circumstances, due weight must be given to the author's allegations.

12.3 The Committee notes that part of the author's claims relates to the alleged inadequacy of the judge's evaluation of the evidence in the case, as well as the alleged prejudicial nature of his summing-up of the case to the jury. It reaffirms that while article 14 of the Covenant guarantees the right to a fair trial, it is for the appellate courts of States parties to the Covenant to evaluate facts and evidence in a particular case. It is not, in principle, for the Committee to review specific instructions to the jury by the judge in a trial by jury, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice. In the Committee's opinion, the

judge's instructions to the jury must meet particularly high standards as to their thoroughness and impartiality in cases in which a capital sentence may be pronounced on the accused; this applies, *a fortiori*, to cases in which the accused pleads legitimate self-defence.

12.4 After careful consideration of the material placed before it, the Committee concludes that the judge's instructions to the jury on 14 June 1985 were neither arbitrary nor amounted to a denial of justice. As the judgement of the Court of Appeal states, the trial judge put the respective versions of the prosecution and the defence fully and fairly to the jury. The Committee therefore finds that in respect of the evaluation of evidence by the trial court there has been no violation of article 14.

12.5 Concerning the issue of the author's representation before the Court of Appeal of Trinidad and Tobago, the Committee reiterates that it is axiomatic that legal representation must be made available in capital cases.¹ This does not only apply to an accused person at the trial in the Court of First Instance, but also in appellate proceedings. In the instant case, it is uncontested that counsel was assigned to the author for the appeal. What is at issue is whether the author had a right to object to the choice of his court-appointed attorney, who had also, in his opinion, inadequately represented him at the trial of first instance. It is uncontested that the author never saw or approved the grounds of appeal filed on his behalf, and that he was never provided with an opportunity to consult with his counsel on the preparation of the appeal. From the material before the Committee, it can be clearly inferred that the author did not wish his counsel to represent him beyond the first instance; this is corroborated by the fact, which has remained uncontested, that he had made the necessary arrangements to have another lawyer represent him before the Court of Appeal. In the circumstances, and bearing in mind that this is a case involving the death penalty, the State party should have accepted the author's arrangements for another attorney to represent him for purposes of the appeal, even if this would have entailed an adjournment of the proceedings. The Committee is of the opinion that legal assistance to the accused in a capital case must be provided in ways that adequately and effectively ensure justice. This was not done in the author's case. To the extent that the author was denied effective representation during the appeal proceedings, the requirements of article 14, paragraph 3 (*d*), have not been met.

12.6 The Committee is of the opinion that the imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against

¹ See communication No. 223/1987 (*Robinson v. Jamaica*), views adopted on 30 March 1989, para. 10.3.

the sentence is available, a violation of article 6 of the Covenant. As the Committee noted in its general comment 6 (16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal". In the present case, since the final sentence of death was passed without having met the requirements for a fair trial set forth in article 14, it must be concluded that the right protected by article 6 of the Covenant has been violated.

12.7 As to the author's allegations that he was denied adequate medical care during his detention on death row, in particular in respect of ophthalmic and dental treatment, the Committee notes, firstly, that these allegations were made at a late stage, after the communication was declared admissible, as it stood on 18 July 1989, and, secondly, that these additional allegations have not been sufficiently corroborated, for instance by medical certificates, to justify a finding of a violation of article 10, paragraph 1, of the Covenant. The Committee reaffirms, however, that the obligation to treat individuals deprived of their liberty with respect for the inherent dignity of the human person encompasses the provision of adequate medical care during detention, and that this obligation, obviously, extends to persons under sentence of death.

13.1 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, disclose a violation of articles 6 and 14, paragraph 3 (*d*), of the Covenant.

13.2 The Committee observes that, in capital punishment cases, the duty of States parties to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant is even more imperative. The Committee is of the view that Mr. Daniel Pinto, a victim of a violation of articles 6 and 14, paragraph 3 (*d*), is entitled to a remedy entailing his release.

14. The Committee would wish to receive information on any relevant measures taken by the State party in respect of the Committee's views.

APPENDIX

*Individual opinion submitted by Mr. Bertil Wennergren pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the views of the Committee on communication No. 232/1987,
Daniel Pinto v. Trinidad and Tobago*

The Vienna Convention on the Law of Treaties states, *inter alia*, that a treaty provision shall be interpreted in accordance with the ordinary meaning to be given to its terms, placed in their context and in the light of the treaty's object and purpose. The object and purpose of article 6, paragraph 2, of the Covenant is obvious. It is to circumscribe the imposition of death sentences. The *travaux préparatoires* characterize it as a yardstick to which national law authorizing the imposition of the death sentence must conform. This yardstick consists of a number of prerequisites, some of which reflect guarantees also laid down in other articles of the Covenant. The prerequisites are: (*a*) "only for the most serious crimes"; (*b*) "only in accordance with the law in force at the time of the commission of the crime", cf. article 15, paragraph 1; (*c*) "only pursuant to a final judgement rendered by a competent court", cf. article 14, paragraph 1. The same requirements are to be found in article 4 of the American Convention on Human Rights, which reads: the death penalty "may be imposed only for the most serious crimes and pursuant to a final judgement rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime." Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is less complete. It merely states that "no one shall be deprived of his life intentionally save in the execution of a sentence of a court following conviction of a crime for which this penalty is provided by law". Thus the Convention provision focuses more than similar provisions on the purpose to protect an individual from any intentional deprivation of his life by State organs. Article 6, paragraph 2, of the Covenant adds a prerequisite that is not included in either the European or the American Conventions, namely (*d*) "not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide". The latter Convention includes provisions that prohibit any killing – i.e. also execution pursuant to a death sentence – that can be subsumed under the term genocide. Article 6, paragraph 5, of the Covenant prohibits in addition the imposition of a sentence of death for crimes committed by persons below 18 years of age. Thus the prerequisite at (*d*) evidently, in the first place, aims at those provisions in the Covenant and the Genocide Convention dealing with the imposition and execution of death sentences. It is, however, worded in such general terms that it might be understood as applying to other provisions of the Covenant as well, and not merely to provisions which would apply to the imposition itself of a death sentence, for instance article 26. The Committee has in this case interpreted it that way and found that a violation of the provisions in article 14 about a fair trial has to be looked upon as a violation also of article 6, paragraph 2, when the trial ended with a death sentence. I cannot find grounds for such an interpretation for the following reason: in the context where this prerequisite has been placed – i.e. in paragraph 2 and not in paragraph 1 – and in the light of the object and purpose of that paragraph, it is difficult to assume that it should be given an independent significance apart from its specific purpose (paragraph 5 and article 26 observance) and that it adds to what already is made clear by article 6, paragraph 5. The *travaux préparatoires* do not provide any useful guidance; moreover, any State power to investigate a crime that may lead to a death sentence, indict a person for such a crime and conduct a trial against him is outside the focal point of article 6, paragraph 2, that deals only with the power to sentence an individual to death. The exercise of these related powers will then instead fall under paragraph 1, which provides that no one shall be arbitrarily deprived of his life, a term which, according to the *travaux préparatoires*, was preferred to "without due process of law". In my opinion, violations of the safeguards for a fair trial in article 14 in a capital punishment case cannot be

deemed to also constitute violations of article 6, paragraph 2. However, I agree with the Committee that unfairness in a capital case is of the utmost gravity. When someone's life is at stake, all possible precautions and safeguards must come into full play. A breach of article 14 in such a case therefore constitutes a particularly grave violation. But, it cannot, even for that reason, be deemed to constitute a violation of article 6, paragraph 2. It is only if the trial does not display the characteristics of a real trial but rather those of a mock trial lacking the paramount characteristics of due process of law, that a violation of article 6 of the Covenant in addition to a violation of article 14 of the Covenant may arise, namely a violation of article 6, paragraph 1. The trial in this case undoubtedly was a very unsatisfactory one, but the information available does not, in my view, justify the conclusion that the elements of unfairness were such that the trial may be looked upon as arbitrary. I note in this connection that the Judicial Committee of the Privy Council received a petition from the author for special leave to appeal because of the trial's deficiencies, but that the Judicial Committee did not grant leave. My conclusion therefore is that, just as under the American and European Conventions, violations of the fair trial safeguards cannot as such at the same time be deemed to be violations of provisions concerning the imposition of death sentences.

Bertil Wennergren

Communication No. 238/1987

Submitted by: Floresmilo Bolaños

Alleged victim: The author

State party: Ecuador

*Date of adoption of views: 26 July 1989 (thirty-sixth session)**

Subject matter: Prolonged and arbitrary pre-trial detention of Ecuadorian citizen charged with murder

Procedural issues: Unreasonably prolonged domestic remedies—Failure of State party to make submission on merits—Non-participation of member of Committee in decision—failure to investigate author's allegations

Substantive issues: Right to a fair trial—Arbitrary arrest and detention—Delay in pre-trial proceedings—Right to compensation

Articles of the Covenant: 2, 3, 9 (3) and (5), and 14 (3) (c)

Article of the Optional Protocol: 5 (2) (b)

1. The author of the communication (initial letter dated 13 July 1987 and further letters of 2 February, 14 March and 22 September 1988) is Floresmilo Bolaños, an Ecuadorian citizen who claims to be a victim of violations of articles 3, 9 and 14 of the International Covenant on Civil and Political Rights by Ecuador.

* Pursuant to rule 85 of the Committee's rules of procedure, Mr. Julio Prado Vallejo did not participate in the consideration of this communication nor in the adoption of the views of the Committee under article 5, paragraph 4, of the Optional Protocol.

2.1 He states that he has been detained since November 1982 without bail at the Centro de Detención Provisional in Quito in connection with the investigation of the murder of Mr. Iván Egas, whose body was found on 11 September 1982 in the lions' cage at the zoological garden of the Military Academy where the author has been employed. He claims to be innocent of the crime and that he was arrested without any evidence against him. It is suggested that Iván Egas had been the lover of a colonel's wife, that the colonel had him killed and that the body was subsequently taken by other persons into the lions' cage. He further alleges that his right to be tried within a reasonable time has been violated, more particularly for the reason that whereas Ecuadorian law provides that detention before indictment should not exceed 60 days, he was detained for over five years prior to being indicted in December 1987. The delay in the proceedings is allegedly attributable to the involvement of military personnel who are using the author as a scapegoat to cover the colonel's crime. The author furthermore complains that whereas he has been continuously kept under detention, the other persons accused have been at liberty pending trial.

2.2 With respect of the exhaustion of domestic remedies, the author states that the pre-trial investigation was completed only in December 1987, when the President of the High Court of Justice in Quito indicted him and six other persons. The author appealed without success against the decision of the High Court to indict him as an accomplice.

3. By its decision of 19 October 1987, the Working Group of the Human Rights Committee transmitted the communication under rule 91 of the Committee's rules of procedure to the State party, requesting information and observations relevant to the question of the admissibility of the communication.

4.1 The Committee took note of the observations of the State party, dated 2 February 1988, that proceedings against the author were under way in the High Court of Justice in Quito, and of the author's comments thereon, dated 14 March 1988, that, because of the alleged involvement of military figures in the case, proceedings before the High Court had been unreasonably prolonged and that he had already been detained for five years and six months.

4.2 The Committee ascertained, as it is required to do 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. With regard to article 5, paragraph 2 (b), of the Optional Protocol, concerning the exhaustion of domestic remedies, the Committee noted that the judicial proceedings against Mr. Bolaños had been unreasonably prolonged and that the State party had not indicated that there were effective remedies against such prolongation. In the circumstances, the

Committee found that it was not precluded from considering the communication.

5. On 7 April 1988, the Human Rights Committee decided that the communication was admissible.

6.1 By note of 29 July 1988, the State party indicates that, on 24 June 1988, a hearing was held at the Superior Court in Quito concerning the murder of Iván Egas. The State party does not provide any explanations or statements concerning the specific violations of the Covenant alleged to have occurred.

6.2 In a letter dated 22 September 1988, the author reiterates his innocence, observing that he has been arbitrarily detained for six years and that no judgement has yet been issued, or is expected in the near future, in his case.

7. The Human Rights Committee has considered the present communication in the light of all written information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol. In adopting its views, the Committee stresses that it is not making any finding on the guilt or innocence of Mr. Bolaños but solely on the question whether any of his rights under the Covenant have been violated.

8.1 The author of the communication claims that there have been breaches of articles 3, 9 and 14 of the Covenant. In formulating its views, the Committee takes into account the failure of the State party to furnish certain information and clarifications, particularly with regard to the reasons for Mr. Bolaños' detention without bail and for the delays in the proceedings, and with regard to the allegations of unequal treatment of which the author has complained. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its authorities, and to furnish the Committee with all relevant information. In the circumstances, due weight must be given to the author's allegations.

8.2 With respect to the author's allegations concerning a violation of article 3 of the Covenant, it is not clear in what particular respect that article has been invoked and the Committee is unable to make a finding in this regard.

8.3 With respect to the prohibition of arbitrary arrest or detention enunciated in article 9 of the Covenant, the Committee observes that, although the State party has indicated that the author was suspected of involvement in the murder of Iván Egas, it has not explained why it was deemed necessary to keep him under detention for five years prior to his indictment in December 1987. In this connection, the Committee notes that article 9, paragraph 3, of the Covenant provides that anyone arrested on a criminal charge "shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial ...". The Committee further observes that article 9, paragraph 5, of the Covenant provides that "anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation".

8.4 With respect to the requirement of a fair hearing within the meaning of article 14, paragraph 1, of the Covenant, the Committee notes that the concept of fair hearing necessarily entails that justice be rendered without undue delay, and refers, in this connection, to its prior case law (*Muñoz v. Peru*, communication No. 203/1986, views adopted on 4 November 1988, para. 11.2). Furthermore, the Committee notes that article 14, paragraph 3 (c), guarantees the right to be tried without undue delay, and concludes that, on the basis of the information before it, the delays encountered by the author in the determination of the charges against him are incompatible with the aforementioned provision.

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 of this case disclose violations of article 9, paragraphs 1 and 3, because Mr. Floresmilo Bolaños was deprived of liberty contrary to the laws of Ecuador and not tried within a reasonable time, and of article 14, paragraphs 1 and 3 (c), of the Covenant, because he was denied a fair hearing without undue delay.

10. The Committee, accordingly, is of the view that the State party is under an obligation, in accordance with the provisions of article 2 of the Covenant, to take effective measures to remedy the violations suffered by Mr. Floresmilo Bolaños, to release him pending the outcome of the criminal proceedings against him, and to grant him compensation pursuant to article 9, paragraph 5, of the Covenant.

Communications Nos. 241 and 242/1987

Submitted by: F. Birindwa ci Birhashwirwa and E. Tshisekedi wa Mulumba

Alleged victims: The authors

State party: Zaire

Date of adoption of views: 4 April 1989 (thirty-seventh session)

Subject matter: *Ill-treatment of Zairian opposition par-liamentarians—Banishment of Zairian citizens after amnesty decree*

Procedural issues: *Joint examination of communication (rule 88) —Failure of State party to investigate allegations—Refusal by State party to follow-up on Committee views on author's previous communication*

Substantive issues: *Inhuman treatment during banishment—Freedom of internal movement—Internal exile—Detention after promulgation of amnesty—Unlawful attack on honour—Persecution for political opinions*

Articles of the Covenant: 2, 9 (1) and (3), 10 (11), 12 (1), 14 (1), 17 and 19

Article of the Optional Protocol: 4 (2)

1. The authors of the communications (initial submissions dated 25 and 31 August 1987, respectively, and subsequent correspondence) are Faustin Birindwa ci Birhashwirwa and Etienne Tshisekedi wa Mulumba, two Zairian citizens and founding members of the Union pour la Démocratie et le Progrès Social (U.D.P.S.: Union for Democracy and Social Progress), an opposition group in Zaire. They claim to be the victims of violations by Zaire of articles 9, paragraph 1; 10, paragraph 1; 12, paragraph 1; and 17 of the International Covenant on Civil and Political Rights. Mr. Tshisekedi is represented by counsel. The authors were among the co-authors of communication No. 138/1983 concerning themselves and 11 other Zairian parliamentarians. The Committee adopted its views on communication No. 138/1983 at its twenty-seventh session on 26 March 1986.

2.1 In the above-mentioned views, the Committee had observed that the facts disclosed violations of articles 9, paragraph 1; 10, paragraph 1; 12, paragraph 1; 14, paragraph 1; 19 and 25 of the Covenant and concluded that Zaire was under an obligation to take effective measures to remedy the violations that the authors had suffered, to grant them compensation, to conduct an inquiry into the circumstances of their ill-treatment, to take appropriate action thereon and to ensure that similar violations did not occur in the future.

2.2 The authors state that as a consequence of the Committee's views of 26 March 1986, the Zairian authorities, far from granting them compensation or investigating their ill-treatment, decided to impose another term of banishment on them and some of the other authors of communication No. 138/1983. In the case of Mr. Birindwa and Mr. Tshisekedi, this second period of internal exile is said to have lasted from mid- June 1986 to the end of June 1987. While Mr. Birindwa was confined to his native village in the province of Kivu (close to the border of Rwanda), Mr. Tshisekedi was kept under surveillance in his native village in the province of Kasai-Oriental. The relatives of both authors were also subjected to surveillance by the Zairian authorities. Mr. Tshisekedi was released from banishment on 27 June 1987, and Mr. Birindwa on 1 July 1987, following a presidential amnesty promulgated in the context of the Zairian elections of August 1987.

2.3 With regard to the requirement of exhaustion of domestic remedies, the authors refer to the procedures engaged by the counsel to the authors of communication No. 138/1983 before Zairian courts and to the ineffectiveness of appeals to Zairian courts. In that respect, they allege that an explicit order has been given to the registrars of the courts in Kinshasa not to make available to members of the political opposition or to their legal counsel any court orders or decisions in cases affecting them. They further allege that the pursuit of domestic remedies is obstructed in Zaire by the fact that any person in possession of official documents of the Human Rights Committee is deemed to be in possession of "subversive" documents and subject to arrest.

3. By decision of 2 November 1987, the Human Rights Committee transmitted communications Nos. 241/1987 and 242/1987 to the State party, re-requesting information and observations relevant to the question of the admissibility of their communications. The State party was requested, more particularly, to provide the Committee with information concerning all the measures taken by its authorities vis-a-vis the victims referred to in communication No. 138/1983, following the transmittal to the State party of the Committee's views in that case.

4.1 In its submission under rule 91, dated 28 January 1988, jointly relating to communications Nos. 241/1987 and 242/1987, the State party provides information concerning the authors' cases. This information relates exclusively to their situation after their release in mid- 1987.

4.2 The State Party indicates that in June 1987, President Mobutu declared an amnesty for members of the U.D.P.S., some of whose leaders returned to the Mouvement Populaire de la Révolution (M.P.R.), the National Party of Zaire. Senior officials of the U.D.P.S. were appointed to important posts in the hierarchy of the M.P.R. Others were appointed to responsible positions at the head of certain State enterprises.

4.3 With respect to the fate of the authors of these communications, it is stated that they also benefited from the Presidential amnesty. With respect to Mr. Tshisekedi, the State party explains that he was able to travel extensively throughout Europe and the United States, that he returned to Zaire towards the middle of January 1988, where he sought to organize a public demonstration in Kinshasa on 17 January 1988, without prior authorization. The State party explains that, under its laws, every demonstration must be notified to the authorities and meet certain requirements before it is approved. It adds that Mr. Tshisekedi nonetheless decided to proceed and that the police was forced to intervene. The author and other demonstrators were arrested and transferred to Makala prison in Kinshasa. The State party submits that as the author displayed "signs of mental disturbance, the judicial authorities decided that he should undergo a psychiatric examination, both in the interests of his health and to ensure a fair trial." With respect to Mr. Birindwa, the State party merely observes that he has remained abroad, and that no administrative or legal measures have been taken against him.

4.4 The State party's submission of 28 January 1988 does not provide any information on the remedies that would have been open to the authors with respect to the treatment allegedly suffered by them between mid-June 1986 and the time of their release at the end of June 1987.

5.1 In her comments on the State party's submission, dated 25 March 1988, Mr. Tshisekedi's counsel affirms that an authorization had been requested for the demonstration led by the author on 17 January 1988, but that it was denied. Allegedly, every request for authorization of a demonstration is refused in Zaire, since demonstrations are prohibited under the country's Constitution. In these circumstances, the author decided to defy the authorities. Counsel further claims that the security forces who intervened allegedly caused the death of several demonstrators, although the manifestation is said to have been peaceful.

5.2 Counsel provides further information about Mr. Tshisekedi's situation. Following his arrest and transfer to Makala prison, he was kept detained until 11 March 1988, when he was released. On 16 March 1988, he was, however, again placed under house arrest and military surveillance at his home in Gombe-Kinshasa. On 18 March 1988, the military allegedly began to harass the visitors to the author's home and, on 19 March, violent incidents occurred outside the home and in the neighbourhood, in the course of which numerous arrests are said to have occurred and several individuals who found themselves within the grounds of the author's home were maltreated. As to the reported "mental disturbance" of the author, counsel states that following concerted international pressure, the State party's authorities abandoned their idea of interning him in a psychiatric institution, continuing in the meantime to disseminate information about his allegedly disturbed mental state.

6.1 Before considering any claims presented 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 ascertained, as it is required to do under article 5, paragraph 2 (a), of the Optional Protocol, that the matters complained of by the authors had not been submitted to another procedure of international investigation or settlement. As to the question of exhaustion of domestic remedies, the Committee noted the authors' statement that appeals to the State party's courts with respect to events occurring prior to the presidential amnesty of June 1987 are ineffective. It observed that these allegations had remained untested and that the State party had not provided any information about remedies that would have been available to the authors. As to the State party's statements on the situation of Mr. Tshisekedi, the Committee considered that they related to issues of substance and that they should, accordingly, be examined on the merits.

7.1 On 4 April 1988, the Human Rights Committee therefore decided that the communications were admissible.

7.2 The Committee also decided, pursuant to rule 88, paragraph 2, of its rules of procedure, to deal jointly with the communications of Messrs. Birindwa and Tshisekedi.

8. In a submission dated 4 May 1988, Mr. Tshisekedi's counsel indicates that, on 8 April 1988, Mr. Tshisekedi was placed under arrest and taken to the State Security Court, where he was interrogated until midnight. The arrest is said to have been linked to his call for a boycott of the partial elections held in Kinshasa on 10 April 1988. During the night of 8 April, he was handed over to General Bolozi, Commander of the city of Kinshasa. He is said to have subsequently been transferred back and forth between various camps located in Upper Zaire and on the border between Zaire and Sudan, where frequent fighting between guerrilla forces is said to occur. Counsel points out that Mr. Tshisekedi suffers from various ailments, that he is without medical attention at the places of his detention, and that the climatic conditions in these places adversely affect his health. By letter of 18 August 1988, counsel supplements this information with excerpts from statements expressing concern about Mr. Tshisekedi's situation made in the international and in particular the Belgian press.

9. On 1 September 1988; the Secretariat was informed by the representative of the U.D.P.S. in Geneva, Mr. G. Wodia Mutombo, that Mr. Tshisekedi was under detention at the military camp of Kota Koli, and that Mr. Birindwa had been released from detention on 27 July 1988, and was reported to be in his home province of Kivu.

10.1 In a submission dated 21 September 1988, the State party informs the Committee "that the administrative measures of banishment taken against citizen Tshisekedi following the events of 17 January 1988 have been lifted with effect from 16 September 1988 by decision of ... the President of the Republic". It adds that the author has returned to his family and "enjoys complete freedom of movement"; as a result, the State party suggests that the "file concerning what has been called the Tshisekedi case may be regarded as definitely closed". As to the fate of those who were arrested at the same time as Mr. Tshisekedi, the State party indicates that many have already been released, and that the rest would be freed shortly. It points out that the procedures initiated against those guilty of other offences would be conducted "with complete legality".

10.2 In another submission dated 2 November 1988, the State party reaffirms that "the situation of citizens Birindwa ci Birhashwirwa and Tshisekedi wa Mulumba is perfectly clear as regards both their place of residence and their freedom of movement". Furthermore, the State party refers to its oral statement made in the Commission on Human Rights on 1 March 1988, concerning the availability of domestic remedies in Zaire.

10.3 In its oral statement to the Commission on Human Rights, made under the procedure governed by ECOSOC resolution 1503 (XLVIII), the State party had pointed out that the "recourse procedure" of complaints to the Department of Citizens' Rights and Freedoms (Département des Droits et Libertés du Citoyen) constitutes an effective domestic remedy and the ultimate recourse in cases of alleged human rights violations, and that the authors of communications submitted to the Commission on Human Rights or to the Human Rights Committee, in their quasi-totality, had not resorted to the remedy in question. The State party added that the procedure before the Department of Citizens Rights and Freedoms is governed by Departmental Decrees No. 005/CAB/CE/DLC/MAWU-/87 of 2 February 1987 and No. 0027/CAB/DLC/CE/BI-/87 of 29 June 1987, and that all complaints about alleged human rights violations after 1 January 1980 may be examined under it.

11.1 In comments dated 9 January 1989, on the State party's submissions, counsel reaffirms that Mr. Tshisekedi suffered serious violations of his rights under articles 19, paragraph 2; 21, 22 and 25 of the Covenant between the period of 17 January and 16 September 1988 and that he continues to be subjected to serious restrictions on his freedom, since the State party's authorities do not allow him to speak out freely.

11.2 In his own comments dated 21 February 1989, Mr. Tshisekedi confirms and supplements much of the information contained in paragraphs 5.1, 5.2 and 8 above, reiterating that the State party violated his fundamental human rights in the period from 17 January to 19 September 1988. With respect to the availability of domestic remedies, he claims that the laws and the Constitution of Zaire, in their daily application, render any efforts to exhaust domestic remedies futile. In this context, he submits that Zairian institutions act with the sole purpose of carrying out the ideas, words and acts of President Mobutu; in particular, the country's security services, which act independently of each other and are directly controlled by the President, allegedly engage frequently in human rights violations. If citizens complain about the practices of the security services, they are either accused of apostasy or

considered to be mentally unstable. The author therefore asserts that the Département des Droits et Libertés du Citoyen is no more than an instrument of the State destined to conceal the daily occurrence of human rights violations.

11.3 As to the events subsequent to 17 January 1988, Mr. Tshisekedi states that in the evening of that day he was due to deliver an address at the Place du Pont Kasa-Vubu in Kinshasa. Upon addressing the large crowd which had gathered in the square, he was seized by armed agents of the political police, while others attacked the crowd and violently suppressed the manifestation. The author was then taken into custody and brought to a secret place, where he was locked in a high security cell and deprived of food and drink for four days. It is submitted that during his detention, i. e. from 17 January to 11 March 1988, he was never visited or questioned by any examining magistrate.

11.4 One week after his arrest, he had to undergo a medical check-up at the General Hospital. An electro-encephalogram was also carried out on him at the Centre Neuro-Psycho-Pathologique of Kinshasa. The author was assured by the doctors who examined him, Prof. Mpania and Prof. Loseke, that all tests had produced satisfactory results. Notwithstanding, he was later informed that two days after his check-up, two agents of the political police broke into the office of Prof. Mpania, accused him of being a member of the U.D.P.S., and searched his office. They proceeded to do the same in Prof. Mpania's house : once they had obtained the author's medical file, they ordered it to be destroyed and to have a fake one prepared, which certified that the author was suffering mental disorders. Prof. Loseke was subjected to similar acts of intimidation and even kept in underground detention for some days, as he had attempted to oppose the police action.

11.5 According to the author, five days after his release on 11 March 1988, armed soldiers entered his estate and brutally dispersed the crowd who had gathered to celebrate. The commanding officer informed the author that, as he had been put under judicial supervision (*surveillance judiciaire*), he was not allowed to receive any visitors. On 11 April 1988, the *surveillance judiciaire* changed to internal banishment (*banissement intérieur*), without explanation. As a result, the author was again transferred two thousand km to the north of the country, to a camp close to the Sudanese border. Two months later, he was transferred to yet another place, located close to the presidential village of Gbadolite, where he was detained until 19 September 1988. The author explains that during the latter period, he had to endure tremendous physical and psychological pressure and had to live in deplorable sanitary conditions, as the place of his banishment was situated in the Equatorial rain forest. Only after he had gone on a hunger strike for 13 days did President Mobutu order him to be released.

12.1 The Human Rights Committee, having considered the present communications in the light of all the information made available to it, as provided in article 5, paragraph 1, of the Optional Protocol, hereby decides to base its views on the following facts which are not in dispute or which have not been contested by the State party.

12.2 The authors of the communications are two leading members of the Union pour la Démocratie et le Progrès Social (U.D.P.S.), a political party in opposition to the government of President Mobutu. From mid-June 1986 to the end of June 1987, they were subjected to administrative measures of internal banishment, as a result of the views adopted by the Human Rights Committee, on 26 March 1986, in communication No. 38/1983. On 27 June and 1 July 1987, respectively, they were released following a presidential amnesty, and decided to travel abroad. Upon his return to Zaire in mid-January 1988, Mr. Tshisekedi sought to organize a manifestation which met with the disapproval of the State authorities. On 17 January 1988, he was arrested and subjected to inhuman treatment, in that he was deprived of food and drink for several days and was placed in a high-security cell. Between 17 January and 11 March 1988, he was kept detained in a prison in Kinshasa; during this time, he was neither informed of the reasons for his arrest or of charges against him nor brought before a judge, while the State party's authorities ordered his psychiatric examination and consistently referred to him in the press as being mentally disturbed. From 16 March to the beginning of April 1988, Mr. Tshisekedi was kept under house arrest at his home in Gombo-Kinshasa, and from 11 April to 19 September 1988, he was intermittently subjected to renewed administrative measures of banishment, which included his internment in several military camps. During his internment, he had to live in unacceptable sanitary conditions.

12.3 The Committee has taken note of the State party's submission of 2 November 1988, contending that the communications should be declared inadmissible, and also of the information contained in its oral statement of 1 March 1988 before the Commission on Human Rights, in which the State party referred to a recourse procedure before the Zairian Department of Citizens Rights and Freedoms. The State party has not, however, established how the authors could have effectively availed themselves of this remedy in the circumstances of their cases. The Committee reiterates that it is incumbent on the State party to provide details of the remedies which it submits are available to the authors, together with evidence that there would be a reasonable prospect for such remedies to be successful. In the light of the above, the Committee concludes that there is no reason to review its admissibility decision of 4 April 1988.

12.4 In formulating its views, the Committee observes that the State party, while providing some information about the authors' situation following the presidential amnesty of June 1987 and their situation between 17 January and September 1988, has not addressed the substance of their allegations, particularly their claim that they were subjected to measures of administrative banishment as a result of the adoption of the Committee's views in communication No. 138/1983 on 26 March 1986. It is implicit in article 4, paragraph 2, of the Optional Protocol that States parties have a duty to investigate in good faith all the allegations of violations of the Covenant made against them and their authorities, and to furnish the Committee with all the information available to them. In the communications under consideration, the information provided by the State party addresses only some aspects of the allegations made by Mr. Tshisekedi and Mr. Birindwa. The Committee takes the opportunity to reiterate that while partial and incomplete information provided by States parties may assist in the examination of communications, it does not satisfy the requirement of article 4, paragraph 2, of the Optional Protocol. In the circumstances, due weight must be given to the authors' allegations.

12.5 The authors have alleged that they suffered retaliatory measures by the Zairian authorities as a direct consequence of their prior communication to the Human Rights Committee, No. 138/1983 (para. 2.2 above), and that any person in possession of official documents of the Human Rights Committee is deemed to be in possession of "subversive" documents and, therefore, subject to arrest (para. 2.3 above). The Committee notes that these serious allegations have not been commented on by the State party. The Committee stresses in this connection that it would be untenable and incompatible with the Covenant and the Optional Protocol if States parties to these instruments were to take exception to anyone placing a communication before the Committee under the Optional Protocol. Indeed, such allegations, if established as true, would disclose grave violations of a State party's obligations under the Covenant and the Optional Protocol.

The period from mid-June 1986 to June 1987

12.6 Article 12, paragraph 1, of the Covenant stipulates that "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence." Both Mr. Birindwa and Mr. Tshisekedi were, for a period of over one year, confined to their native villages and thus deprived of their freedom of movement within the State party's territory, in contravention of article 12, paragraph 1. In respect of the other allegations made by the authors for the period of mid-June 1986 to June 1987, the Committee lacks sufficient information to make specific findings.

The period from January to September 1988

12.7 Insofar as the authors' situation for the period from 17 January to September 1988 is concerned, the Committee finds it necessary to distinguish between the situation of Mr. Tshisekedi and that of Mr. Birindwa. With respect to Mr. Tshisekedi, it observes that he was kept in detention for some two months following the breakup of the demonstration of 17 January 1988. The State party has not contested his claim that during this period, he was not brought before a magistrate, contrary to article 9, paragraph 3, of the Covenant. Mr. Tshisekedi further suffered administrative measures of internal banishment for intermittent periods between 11 April and 16 September 1988 as a result of his call for a boycott of the partial elections held in Kinshasa on 10 April 1988. Finally, he was subjected

to unlawful attacks on his honour and his reputation, in that the authorities sought to have him declared insane, although medical reports contradicted that diagnosis.

12.8 With respect to Mr. Birindwa, the Committee observes that he has not provided any information about his situation following his return to Zaire. Accordingly, the Committee is not in a position to make any findings in this respect for the period from 17 January to September 1988.

13. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts of the communications disclose violations of the International Covenant on Civil and Political Rights:

(a) in respect of Faustin Birindwa ci Birhashwirwa:

– of article 12, paragraph 1, because he was deprived of his freedom of movement during a period of internal banishment which lasted from mid-June 1986 to 1 July 1987;

(b) in respect of Etienne Tshisekedi wa Mulumba:

– of article 7, because he was subjected to inhuman treatment, in that he was deprived of food and drink for four days after his arrest on 17 January 1988 and was subsequently kept interned under unacceptable sanitary conditions;

– of article 9, paragraph 2, because he was not informed, upon his arrest, on 17 January 1988, of the reasons for his arrest;

– of article 9, paragraph 3, because he was not brought promptly before a judge following his arrest on 17 January 1988;

– of article 10, paragraph 1, because he was not treated with humanity during his detention from 17 January to 11 March and from 11 April to 19 September 1988;

– of article 12, paragraph 1, because he was deprived of his freedom of movement during periods of internal banishment which lasted from mid-June 1986 to 27 June 1987 and again from 11 April to 19 September 1988;

– of article 17, paragraph 1, because he was subjected to unlawful attacks on his honor and reputation.

14. The Committee is therefore of the view that the State party is under an obligation, in accordance with the provisions of article 2 of the Covenant, to take effective measures to remedy the violations suffered by the authors, more particularly to ensure that they can effectively challenge these violations before a court of law, to grant appropriate compensation to Mr. Tshise-kedi and Mr. Birindwa, and to ensure that similar violations do not occur in the future. The Committee takes this opportunity to indicate that it would welcome information on any relevant measures taken by the State party in respect of the Committee's views.

Communication No. 250/1987

Submitted by: Carlton Reid (represented by counsel)

Alleged victim: The author

State party: Jamaica

Date of adoption of views: 20 July 1990 (thirty-ninth session)*

Subject matter: Capital conviction after trial which failed to meet procedural guarantees

Procedural issues: Interim measures of protection (rule 86)—Sufficiency of State party's reply under Article 4 (2)—Available and effective local remedies—Travaux préparatoires

Substantive issues : Right to a fair trial—Fair hearing—Right to life—Access to counsel—General comment—Vienna Convention on the Law of Treaties—Right to choose one's own counsel—Effective legal representation on appeal

Articles of the Covenant: 6, 7 and 14 (3) (b) and (d)

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

1. The author of the communication (initial submission dated 7 August 1987 and subsequent correspondence) is Carlton Reid, a Jamaican citizen awaiting execution at St. Catherine District Prison, Jamaica. He claims to be the victim of a violation by the Government of Jamaica of articles 6, 7 and 11 of the International Covenant on Civil and Political Rights. He is represented by counsel.

2.1 The author was arrested on 2 December 1983 and charged with the murder, on 10 June 1983, of one Miriam Henry, at the site of the Water Commission at Langley, Mount James. His trial took place in the Home Circuit of

Kingston on 25 and 26 March 1985; he was found guilty and sentenced to death. On 6 October 1986, the Jamaican Court of Appeal dismissed his appeal.

2.2 The prosecution accused the author of being one of three armed robbers who raided the payroll of the Water Commission Pumping Station on 10 June 1983. It is reported that the perpetrators first proceeded to the kitchen, where the author purportedly wounded a woman by shooting her in the arm. The shot was not fatal and she, together with others, escaped to another building where they locked themselves in a room on the first floor. Witnesses identified the author as being one of the robbers in the kitchen, but the murder allegedly took place in the upstairs room to where the group had

* An individual opinion submitted by Mr. Bertil Wennergren is appended.

fled. During the trial, the prosecution argued that the author had gone upstairs. Of the persons in the upstairs room, the only witness who was called, Mr. P. Josephs, testified that after the door had been opened, the author entered the room with a gun and that the wounded woman was shot in the head.

2.3 According to the author, Mr. Josephs' evidence was unreliable. Firstly, he had described him as wearing no mask, which was in complete contradiction to the evidence of all the other witnesses who had identified him as wearing a mask. Secondly, Mr. Josephs testified that the author had dragged him down the stairs, although none of those downstairs had seen this and no one had identified the author as either walking up or down the stairs at any time. Another witness who had been in the downstairs room, Miss Hermione Henry, testified during the preliminary inquiry that two men had run upstairs and that one of them was carrying a shotgun. It was agreed that the author was not the man with the shotgun, and Miss Henry never identified either man as the author. During the trial, Miss Henry retracted her testimony given during the preliminary inquiry and claimed that the man with the shotgun had remained downstairs with her all the time.

2.4 At the conclusion of the trial, the author claims, the judge failed to comply with his duty to direct the jury on the relevant points of law and to sum up for the jurors the evidence relevant to the charge. It is alleged that he failed to mention any of the evidence as to what had happened in the upstairs room, where the murder had taken place, and even forgot to tell the jury that the murder had occurred in that room. In short, according to the author, he did not refer to any of the evidence concerning the murder charge on which the jury had to return a verdict. This, in his opinion, was tantamount to summing up a different case altogether, since the judge only focused on the robbery-related evidence, where the identification evidence was strong, although none of that evidence related to the murder.

2.5 Following his conviction, the author appealed to the Jamaican Court of Appeal. He claims that, on appeal, few lawyers are willing to accept legal aid assignments. The lawyer who had been assigned to argue his appeal informed him that an appeal would be futile. The author requested that a different lawyer be assigned to his case. This notwithstanding and against his wishes, the lawyer who had first been assigned to argue the appeal appeared before the Court of Appeal and informed it that there were no grounds of appeal. This, apparently, relieved the Court of Appeal from having to examine the case *ex officio*, as it would have been required to do if no lawyer had appeared for the author. Faced with the lawyer's concession, the Court of Appeal dismissed the appeal on 6 October 1986.

3. By decision of 12 November 1987, the Human Rights Committee transmitted the communication, under

rule 91 of its rules of procedure, to the State party, requesting information and observations relevant to the question of the admissibility of the communication. The Committee further requested the State party, under rule 86 of its rules of procedure, not to carry out the death sentence against the author before the Committee had had the opportunity to decide on the question of admissibility. In addition, the Committee requested clarifications concerning the case from both the State party and the author.

4. By letter dated 29 December 1987, the author provided a number of clarifications. He indicated that the first time he was able to communicate with the legal-aid attorney assigned to his case was on the opening day of the trial. The lawyer requested a postponement because he had not been able to discuss the case with the accused, but the judge refused to grant it. Apparently, the lawyer was wholly unprepared and reportedly told the author that he did not know which questions to pose to the witnesses. With respect to the appeal, the author stated in a further letter dated 11 March 1988 that, prior to the hearing of his appeal, he had received a letter dated 1 September 1986 from the lawyer assigned to argue the appeal, reading as follows: "I am sorry to disappoint you, but having read the transcript of your case, I cannot find any merit in the appeal. Four witnesses identified you as the killer. That evidence cannot be overturned on appeal. Unfortunately, I will be unable to assist you any further." Although the author did request the services of a different attorney, this lawyer represented him in the Court of Appeal. In fact, he argued that "having carefully read the record and considered the learned trial judge's summation, he could find no arguable ground to support the application."

5. In its submission under rule 91, dated 26 May 1988, the State party argued that the communication was inadmissible on the grounds of the author's failure to exhaust all available domestic remedies, as required by article 5, paragraph 2 (b), of the Optional Protocol. It asserted that the author could still apply, pursuant to section 110 of the Jamaican Constitution, for special leave to appeal to the Judicial Committee of the Privy Council, and that legal aid would be available to him for that purpose. The State party also confirmed that the Court of Appeal dismissed the author's appeal on the grounds outlined in paragraph 4 above.

6.1 Commenting on the State party's submission, author's counsel, by letter dated 10 February 1989, indicates that the Judicial Committee of the Privy Council dismissed the author's petition for special leave to appeal on 29 November 1988. This, it is submitted, means that all available domestic remedies in the case have been exhausted. Counsel explains, in this context, that the only way for the author to file an application for special leave to appeal was to seek the assistance of English solicitors and counsel willing to act *pro bono*, as legal aid available for defendants to submit their case to the Privy Council is inadequate.

6.2 Counsel further states that the grounds on which the Privy Council will entertain appeals from Commonwealth countries in criminal matters are limited. The Privy Council has established the rule that it will not act as a court of criminal appeal and has restricted appeals in criminal matters to such cases where, in its opinion, some issues of constitutional importance arise or where a "substantial injustice" has occurred. The Privy Council's jurisdiction is, therefore, very narrow. In applying its narrow test, it dismissed the author's petition.

6.3 With respect to the alleged violation of article 14 of the Covenant, counsel specifies that the author was deprived of a fair trial within the meaning of article 14, paragraph 1, because the judge never put to the jury any of the evidence relating to the murder but only evidence relating to the robbery. His subsequent appeal to the Jamaican Court of Appeal, according to counsel, was never determined on the merits because of the concession made by the lawyer. This situation, it is submitted, also constitutes a violation of safeguard No. 4 of Economic and Social Council resolution 1984/50 of 25 May 1984 on "Safeguards guaranteeing protection of the rights of those facing the death penalty", which states: "Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts."

6.4 Counsel submits that the State party further violated article 14, paragraph 3 (d), of the Covenant, because the author was not present during the hearing of his appeal and did not have legal assistance of his own choosing. The lawyer who appeared for the author before the Court of Appeal had no retainer to act, nor did he seek to obtain the

author's express consent to appear before the Court of Appeal and state that there were no grounds of appeal. In these circumstances, the author should have been provided with an opportunity to obtain the services of a different attorney. It is submitted that an individual's right to legal representation of his own choosing does not only comprise the trial but also subsequent appellate procedures. Moreover, given that the author's lawyer failed to represent him, the author should have been allowed to be present during the hearing of the appeal and allowed to argue his own case, if the legal aid lawyer was not prepared to do so. As a consequence of being denied representation of his choosing and therefore not present at the appeal, the author was also deprived of his right to an effective review of his conviction and sentence by the Jamaican Court of Appeal, in violation of article 14, paragraph 5.

6.5 With respect to the alleged violation of articles 6 and 7 of the Covenant, counsel recalls that the author has been confined to death row since his conviction on 26 March 1985. It is claimed that the decision as to whether inmates on death row are to be executed does not depend on legal grounds, but is a function of political considerations, and thus that the author's continued uncertainty as to whether or not a warrant for his execution will be issued, and the concomitant mental anguish, amounts to cruel, inhuman and degrading treatment in violation of article 7. It is submitted that the resumption of executions after a long delay unconnected with legal arguments or procedures would amount to a violation of article 6.

7.1 The Committee ascertained, as it is required to do 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. With regard to article 5, paragraph 2 (b), the Committee concluded, on the basis of the information provided by the parties, that available domestic remedies had been exhausted.

7.2 On 30 March 1989, the Human Rights Committee therefore declared the communication admissible.

8.1 In its submission under article 4, paragraph 2, dated 15 June 1989, the State party contends that the fact that the author's petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed does not necessarily imply that all available domestic remedies have been exhausted. It points out that the rights under the Covenant which the author alleges have been violated are guaranteed to every Jamaican citizen under Chapter III of the Jamaican Constitution. Thus, section 20, paragraph 1, provides :

Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

Section 20, paragraph 6, provides:

Every person who is charged with a criminal offence:

(a) Shall be informed as soon as reasonably practicable, in a language which he understands, of the nature of the offence charged;

(b) Shall be given adequate time and facilities for the preparation of his defence;

(c) Shall be permitted to defend himself in person or by a legal representative of his own choice;

(d) Shall be afforded facilities to examine in person or by his legal representative the witness called by the prosecution before any court and obtain the attendance of witnesses, subject to the payment of their reasonable expenses, and carry out the

examination of such witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and

(e) Shall be permitted to have assigned to him without payment the assistance of an interpreter if he cannot understand the English language.

8.2 The State party adds that the right to life is protected by section 14 of the Constitution, while protection from inhuman or degrading punishment or other treatment is afforded by section 17. Under section 25, anyone who alleges that any of the rights protected by Chapter III have been, or are likely to be contravened in relation to him, may apply to the Supreme (Constitutional) Court for redress. An appeal lies from the decision of the Supreme Court to the Court of Appeal and from the decision of the Court of Appeal to the Judicial Committee of the Privy Council.

8.3 The State party concludes that the right to constitutional redress is a distinct action from an appeal to the Judicial Committee of the Privy Council in a criminal case. Since the author has failed to take steps to pursue his constitutional remedies, the State party argues that his communication is inadmissible on the ground of non-exhaustion of domestic remedies.

9.1 In her comments, dated 19 December 1989, counsel contends that the State party has failed to comply with the Committee's request of 30 March 1989 to provide explanations or statements on the merits of Mr. Reid's case, pursuant to article 4, paragraph 2, of the Optional Protocol. Instead, it tried to revisit the Committee's admissibility decision by arguing that Mr. Reid had failed to exhaust domestic remedies. According to counsel, the State party could have put forward its arguments in its submission under rule 91; at this stage, it is no longer open to the State party to introduce new arguments on admissibility, or at least to do so before providing the information requested by the Committee in its admissibility decision. In her opinion, a different view would be contrary to rule 93, paragraph 4, of the Committee's rules of procedure.

9.2 Counsel adds that the State party's new arguments on admissibility miss the point since article 5, paragraph 2 (b), of the Optional Protocol does not require individuals to prove that they have exhausted every possible domestic course of action which potentially might constitute a remedy. Only such remedies as are both available and effective must be pursued. Accordingly, it should be reasonably assumed that the remedy which the Jamaican Government claims remains open to the author would redress the alleged violations. But this would not be the case if established case law ran counter to the conclusion sought by the author, as is the situation in the instant case. She notes that the State party should provide, in support of its argument, clarifications on whether or not there is any case law which would assist her with her case, given that Mr. Reid is now being asked to argue certain points before a court of lesser jurisdiction in Jamaica, which he had already argued before the Judicial Committee of the Privy Council. Counsel contends that the Judicial Committee, if seized of the constitutional case, would most likely confirm its earlier decision in the case. Moreover, a court of lesser jurisdiction in Jamaica would be bound by the Judicial Committee's earlier decision. Finally, counsel argues that the constitutional remedy is not only an ineffective but also an unavailable remedy, since it is virtually impossible to secure legal representation in Jamaica to argue constitutional cases on a *pro bono* basis.

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

10.2 The Committee has taken due note of the State party's contention that with respect to the alleged violations of articles 6, 7 and 14 of the Covenant, domestic remedies have not been exhausted by Mr. Reid. It takes this opportunity to expand upon its admissibility findings.

10.3 The Committee has taken note of the State party's contention that the communication is

inadmissible because of the author's failure to pursue constitutional remedies available to him under the Jamaican Constitution. In this connection, the Committee observes that Section 20, paragraph 1, of the Jamaican Constitution guarantees the right to a fair trial, while Section 25 provides for the implementation of the provisions guaranteeing the rights of the individual. Section 25, paragraph 2, stipulates that the Supreme (Constitutional) Court may "hear and determine" applications with regard to the alleged non-observance of constitutional guarantees, but limits its jurisdiction to such cases where the applicants have not already been afforded "adequate means of redress for the contraventions alleged" (Sect. 25, para. 2, *in fine*). The Committee notes that the State party was requested to clarify, in a number of interlocutory decisions, whether the Supreme (Constitutional) Court has had the opportunity to determine the question pursuant to Section 25, paragraph 2, of the Jamaican Constitution, whether an appeal to the Court of Appeal and the Judicial Committee of the Privy Council constitute "adequate means of redress" within the meaning of Section 25, paragraph 2, of the Jamaican Constitution. The State party has replied that the Supreme Court has so far not had the said opportunity. Taking into account the State party's clarification, together with the absence of legal aid for filing a motion in the Constitutional Court and the unwillingness of Jamaican counsel to act in this regard without remuneration, the Committee finds that recourse to the Constitutional Court under Section 25 of the Jamaican Constitution is not a remedy available to the author within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

10.4 Finally, the author's claim that no legal aid is provided to those who envisage filing a constitutional motion and who cannot afford legal representation has remained uncontested. As Mr. Reid is unable to afford legal representation, it follows that even if a constitutional motion were considered an effective remedy, it would not be available to the author, in fact if not in law.

10.5 The Committee has also taken note of the State party's contention that the Committee's established jurisprudence on article 5, paragraph 2 (b), of the Protocol, namely that domestic remedies must be both available and effective, is merely the Committee's own interpretation of this provision.¹ It reiterates, in this context, that the local remedies rule does not require the resort to appeals which, objectively, has no prospect of success. This is an established principle of international law and of the Committee's jurisprudence.

10.6 For the reasons set out above, the Committee finds that a constitutional motion is not a remedy that the author would have to exhaust for purposes of the Optional Protocol. It therefore concludes that there is no reason to revise its decision on admissibility of 30 March 1989.

11.1 With respect to the alleged violation of article 14, three principal issues are before the Committee: (a) whether the alleged inadequacy of the judge's summing-up to the jury in the trial before the Home Circuit Court amounted to a denial of a fair trial; (b) whether the author had adequate time and facilities for the preparation of his defence and (c) whether the author's representation before the Court of Appeal by an attorney not of his choosing constituted a violation of article 14, paragraph 3 (d).

11.2 Concerning the first issue under article 14, the Committee reaffirms that it is generally for the appellate courts of States parties to evaluate the facts and the evidence in a particular case. It is not, in principle, for the Committee to review specific instructions to the jury by the judge in a trial by jury, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice. The Committee does not have sufficient evidence that the trial judge's instructions suffered from such defects.

11.3 The Committee notes that the State party has not denied the author's claim that the court failed to grant counsel sufficient minimum time to prepare his examination of witnesses. This amounts to a violation of article 14, paragraph 3 (b), of the Covenant.

11.4 Concerning the issue of the author's representation before the Court of Appeal, the Committee

reaffirms

¹ State party's submission dated 25 May 1989 in communication No. 249/1987 (*T. P. v. Jamaica*), not yet reported.

that it is axiomatic that legal assistance must be made available to a convicted prisoner under sentence of death.² This applies to the trial in the Court of First Instance as well as to appellate proceedings. In the author's case, it is uncontested that legal counsel was assigned to him for the appeal. What is at issue is whether the author had a right to contest the choice of his court-appointed attorney, and whether he should have been afforded an opportunity to be present during the hearing of the appeal. The author's application for leave to appeal to the Court of Appeal, dated 6 April 1985, indicates that he wished to be present for the hearing of his appeal. However, the State party did not offer this opportunity, since legal aid counsel had been assigned to him. Subsequently, his counsel considered that there was no merit in the author's appeal and was not prepared to advance arguments in favour of it being granted, thus effectively leaving him without legal representation. In the circumstances, and bearing in mind that this is a case involving the death penalty, the Committee considers that the State party should have appointed another lawyer for his defence or allowed him to represent himself at the appeal proceedings. To the extent that the author was denied effective representation at the appeal proceedings, the requirements of article 14, paragraph 3 (*d*), have not been met.

11.5 The Committee is of the opinion that the imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is available, a violation of article 6 of the Covenant. As the Committee noted in its general comment 6 (16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal". In the present case, since the final sentence of death was passed without having met the requirements for a fair trial set forth in article 14, it must be concluded that the right protected by article 6 of the Covenant has been violated.

11.6 As to the allegation that the delays in the execution of the sentence passed on the author amount to a violation of article 7 of the Covenant, and that the author's execution after the delays encountered would amount to an arbitrary deprivation of life, the Committee reaffirms its earlier jurisprudence pursuant

² See communication No. 223/1987 (*Robinson v. Jamaica*), final views adopted on 30 March 1989, para. 10.3.

to which prolonged judicial proceedings do not *per se* constitute cruel, inhuman or degrading treatment even if they can be a source of mental strain for convicted prisoners. However, the situation may be different in cases involving capital punishment, although an assessment of the circumstances of each case would be necessary.³ In the present case, the Committee does not find that the author has sufficiently substantiated his claim that delay in judicial proceedings constituted for him cruel, inhuman and degrading treatment under article 7.

12.1 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 disclose a violation of articles 6 and 14, paragraph 3 (*b*) and (*d*), of the Covenant.

12.2 It is the view of the Committee that, in capital punishment cases, the duty of States parties to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant is even more imperative. The Committee is of the view that Mr. Carlton Reid, a victim of a violation of articles 6 and 14, paragraph 3 (b) and (d), is entitled to a remedy entailing his release.

13. The Committee also takes this opportunity to express concern about the practical operation of the system of legal aid under the Poor Prisoners' Defence Act. On the basis of the information before it, the Committee considers that this system, in its current form, does not appear to operate in ways that would enable legal representatives working on legal aid assignments to discharge themselves of their duties and responsibilities as effectively as the interests of justice would warrant. The Committee considers that in cases involving capital punishment in particular, legal aid should enable counsel to prepare his client's defence in circumstances that can ensure justice. This does include provision for adequate remuneration for legal aid. While the Committee concedes that the State party's authorities are in principle competent to spell out the details of the Poor Prisoners' Defence Act, and while it welcomes recent improvements in the terms under which legal aid is made available, it urges the State party to review its legal aid system.

14. The Committee would wish to receive information on any relevant measures taken by the State party in respect of the Committee's views.

³ See communications Nos. 210/1986 and 225/1987 (*Earl Pratt and Ivan Morgan v. Jamaica*), final views adopted on 6 April 1989, para 13.6.

APPENDIX

Individual opinion submitted by Mr. Bertil Wennergren pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the views of the Committee on communication No. 250/1987, Carlton Reid v. Jamaica

The Vienna Convention on the Law of Treaties states, inter alia, that a treaty provision shall be interpreted in accordance with the ordinary meaning to be given to its terms, placed in their context and in the light of the treaty's object and purpose. The object and purpose of article 6, paragraph 2, of the Covenant is obvious. It is to circumscribe the imposition of death sentences. The travaux préparatoires characterize it as a yardstick to which national law authorizing the imposition of the death sentence must conform. This yardstick consists of a number of prerequisites, some of which reflect guarantees also laid down in other articles of the Covenant. The prerequisites are: (a) "only for the most serious crimes"; (b) "only in accordance with the law in force at the time of the commission of the crime", cf. article 15, paragraph 1; (c) "only pursuant to a final judgement rendered by a competent court", cf. article 14, paragraph 1. The same requirements are to be found in article 4 of the American Convention on Human Rights, which reads: the death penalty "may be imposed only for the most serious crimes and pursuant to a final judgement rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime." Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is less complete. It merely states that "no one shall be deprived of his life intentionally save in the execution of a sentence of a court following conviction of a crime for which this penalty is provided by law." Thus the Convention provision focuses more than similar provisions on the purpose to protect an individual from any intentional deprivation of his life by State organs. Article 6, paragraph 2, of the Covenant adds a prerequisite that is not included in either the European or the American Conventions, namely (d) "not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide". The latter Convention includes provisions that prohibit any killing – i.e. also execution pursuant to a death sentence – that can be subsumed under the term genocide. Article 6, paragraph 5, of the Covenant prohibits in addition the

imposition of a sentence of death for crimes committed by persons below eighteen years of age. Thus the prerequisite (*d*) evidently in the first place aims at those provisions in the Covenant and the Genocide Convention dealing with the imposition and execution of death sentences. It is, however, worded in such general terms that it might be understood as applying to other provisions of the Covenant as well, and not merely to provisions which would apply to the imposition itself of a death sentence, for instance article 26. The Committee has in this case interpreted it that way and found that a violation of the provisions in article 14 about a fair trial has to be looked upon as a violation also of article 6, paragraph 2, when the trial ended with a death sentence. I cannot find grounds for such an interpretation for the following reason: in the context where this prerequisite has been placed – i.e. in paragraph 2 and not in paragraph 1 – and in the light of the object and purpose of that paragraph, it is difficult to assume that it should be given an independent significance apart from its specific purpose (paragraph 5 and article 26 observance) and that it adds to what already is made clear by article 6, paragraph 5. The travaux préparatoires do not provide any useful guidance; moreover, any State power to investigate a crime that may lead to a death sentence, indict a person for such a crime and conduct a trial against him is outside the focal point of article 6, paragraph 2, that deals only with the power to sentence an individual to death. The exercise of these related powers will then instead fall under paragraph 1, which provides that no one shall be arbitrarily deprived of his life, a term which, according to the travaux préparatoires, was preferred to "without due process of law". In my opinion, violations of the safeguards for a fair trial in article 14 in a capital punishment case cannot be deemed to also constitute violations of article 6, paragraph 2. However, I agree with the Committee that unfairness in a capital punishment case is of the utmost gravity. When someone's life is at stake, all possible precautions and safeguards must come into full play. A breach of article 14 in such a case therefore constitutes a particularly grave violation. But, it cannot, even for that reason, be deemed to constitute a violation of article 6, paragraph 2. It is only in instances where the trial does not display the characteristics of a real trial but rather those of a mock trial, lacking the paramount characteristics of due process of law, that a violation of article 6 of the Covenant in addition to a violation of article 14 of the Covenant may arise, namely a violation of article 6, paragraph 1. The trial in this case undoubtedly was a very unsatisfactory one, but the information available does not, in my view, justify the conclusion that the elements of unfairness were such that the trial may be looked upon as arbitrary. I note in this connection that the Judicial Committee of the Privy Council received a petition from the author for special leave to appeal because of the trial deficiencies, but that the Judicial Committee did not grant leave. My conclusion therefore is that, in keeping with the American and European Conventions, violations of the fair trial safeguards cannot as such at the same time be deemed to be violations of provisions concerning the imposition of death sentences.

Bertil Wennergren

Communication No. 265/1987

Submitted by: Antti Vuolanne (represented by counsel)

Alleged victim: The author

State party: Finland

Date of adoption of views: 7 April 1989 (thirty-fifth session)

Subject matter: Impossibility of judicial review of disciplinary sanction imposed by military officer for disobedience of orders

Procedural issues: Sufficiency of State party's reply under Article 4 (2)—Travaux préparatoires

Substantive issues: Solitary confinement—Interference with correspondence—Access to judicial review of military authorities' decisions

Articles of the Covenant: 2 (1), (2) and (3), 7, 9 (4) and 10

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

1. The author of the communication (initial letter dated 31 October 1987; further submission dated 25 February 1989) is Antti Vuolanne, a Finnish citizen, 21 years of age, resident of Pori, Finland. He claims to be the victim of a violation by the Government of Finland of articles 2, paragraphs 1 to 3; 7; and 9, paragraph 4, of the International Covenant on Civil and Political Rights. He is represented by counsel.

2.1 The author states that he started his military service on 9 June 1987. Service duty allegedly caused him severe mental stress and, following his return from a military hospital early in July 1987, he realized that he could not continue with his service as an infantryman. Unable to discuss the situation with the head of his unit, he decided, on 3 July, to leave his garrison without permission. He alleges to have been greatly preoccupied by the fate of his brother who, about a year earlier, had committed suicide in a similar situation. The author's weekend off duty would have begun on 4 July at noon, ending on 5 July at midnight. On 5 July, he returned to the military hospital and asked to speak with a doctor, but was advised to return to his company, where he registered and left again without permission. On the advice of an army chaplain, he returned on 7 July to his unit, where he spoke to a doctor and was taken to the military hospital. Later on, he sought and obtained a transfer to unarmed service inside the military.

2.2 On 14 July, in a disciplinary procedure, he was sanctioned with 10 days of close arrest, i. e., confinement in the guardhouse without service duties. He claims that he was not heard at all, and that the punishment was immediately enforced. At this stage, he was not told that he could have availed himself of a remedy. In the guardhouse, he learned that the Law on Military Disciplinary Procedure provided for the possibility of having the punishment reviewed by a higher military officer through a so-called "request for review". This request was filed on the same day (although the author states that it was documented as having been made a day later, on 15 July) and based on the argument that the punishment was unreasonably severe, taking into account that the author was punished for departing without permission for more than four days, despite the fact that 36 hours overlapped with his weekend off duty, that his brief return to the garrison was considered as an aggravating circumstance and that the motive for his decision to depart was not taken into consideration.

2.3 The author states that after his written request to the supervising military officer, the punishment was upheld by decision of 17 July 1987 without a hearing. According to the author, Finnish law provides no other domestic remedies, because section 34 of the Law on Military Disciplinary Procedure specifically prohibits an appeal against the decision of the supervising military officer.

2.4 The author furnishes a detailed account of the military disciplinary procedure under Finnish law, which is governed by chapter 45 of the Criminal Code of 1983. Punishment for absence without leave is either of a disciplinary nature or may entail imprisonment of up to six months. Military confinement (close arrest) is the most severe type of disciplinary punishment. The maximum length of arrest imposable in a disciplinary procedure is 15 days and nights. Only the head of a unit or a higher officer has the authority to impose the punishment of close arrest, and only a commander of a body of troops can impose arrest for more than 10 days and nights.

2.5 If an arrest is imposed by disciplinary procedure, there is no possibility of appeal outside the military. The prohibition of appeal in section 34, paragraph 1, of the above-mentioned law covers both civil courts (the Supreme Court in the last instance) and administrative courts (the Supreme Administrative Court in the last instance). Thus, the lawfulness of the punishment cannot be reviewed by a court or any other judicial body. The only remedy available is the request for review made to a superior military officer. It is claimed that complaints either to a still higher military authority or to the Parliamentary Ombudsman do not constitute effective remedies in the case at issue, because the Ombudsman has no power to order the release of a person whose arrest is being enforced, even if a complaint reached him in time and if he considered the detention to be unlawful.

2.6 Concerning his military confinement, the author considers it "evident that Finnish military confinement in the form of close arrest imposed in a disciplinary procedure is a deprivation of liberty covered by the concepts 'arrest or detention' in article 9, paragraph 4, of the Covenant". He states that his punishment was enforced in two parts, during which he was locked in a cell of 2 x 3 metres with a tiny window, furnished only with a camp bed, a small table, a chair and a dim electric light. He was only allowed out of his cell for purposes of eating, going to the toilet and to take fresh air for half an hour daily. He was prohibited from talking to other detained persons and from making any noise in his cell. He claims that the isolation was almost total. He also states that in order to lessen his distress, he wrote personal notes about his relations with persons close to him, and that these notes were taken away from him one night by the guards, who read them to each other. Only after he asked for a meeting with various officials were his papers returned to him.

2.7 Finally, the author considers that the 10 days of close confinement constituted an unreasonably severe punishment in relation to the offence. More particularly, he objects to the fact that no relevance was attached to the motives of his temporary absence, although, as he claims, the Finnish Criminal Code provides for the consideration of special circumstances. In his opinion, the availability of an appeal to a court or other independent body would have had a real effect, since there would have been a possibility of having the punishment reduced.

3. By its decision of 15 March 1988, the Working Group of the Human Rights Committee transmitted the communication to the State party, requesting it, under rule 91 of the provisional rules of procedure, to provide

information and observations relevant to the question of admissibility.

4. In its submission under rule 91, dated 28 June 1988, the State party did not raise any objections to the admissibility of the communication and stated in particular that the author had exhausted all domestic remedies available to him by filing his request for review (*tarkastuspyyntö*) pursuant to the Act on Military Discipline. Under section 34, paragraph 1, of the Act, decisions made pursuant to such a request are not appealable.

5.1 Before considering any claims presented in a communication, the Human Rights Committee must, in accordance with rule 87 of its provisional rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant. In this connection, the Committee noted that the State Party did not object to the admissibility of the communication.

5.2 On 18 July 1988, the Committee decided that the communication was admissible. In accordance with article 4, paragraph 2, of the Optional Protocol, the State party was requested to submit to the Committee, within six months of the date of transmittal to it of the decision on admissibility, written explanations or statements clarifying the matter and the measures that may have been taken by it.

6.1 In its submission under article 4, paragraph 2, of the Optional Protocol, the State party first elucidates the relevant legislation as follows:

Provisions on the military disciplinary procedure followed in the Finnish Defence Forces are contained in the Law on Military Disciplinary Procedure (331/83), adopted on 25 March 1983, and in the relevant ordinance (969/83), adopted on 16 December 1983, both in force as of 1 January 1984. The above laws contain detailed provisions on disciplinary sanctions in military disciplinary procedure, on disciplinary competence, on the processing of a disciplinary matter, and on the appellate procedure.

The most severe sanction in a military disciplinary procedure is close arrest, to be put into effect in the guardhouse or other place of solitary confinement, usually without service duty. Close arrest may be imposed by a head of unit for a maximum of 5 days and nights, by a commander of unit for a maximum of 10 days and nights, and by a commander of a body of troops for a maximum of 15 days and nights. Prior to imposing a disciplinary punishment, the superior military officer responsible must submit his decision to the military legal advisor for a statement.

The victim may submit, within three days, a "request for review" concerning the decision on the disciplinary sanction. A request which concerns the decision of a head of a unit or commander of a unit may be submitted to a commander of a body of troops, and one that concerns the decision made by a commander of a body of troops may be appealed upon to the commander of the military county or a superior disciplinary officer. If the request for review is processed by a disciplinary officer superior to a commander, the matter must be presented by a legal advisor.

Close confinement can be put into effect only after the period for submitting an appeal has expired, or after the request submitted has been considered, unless the person concerned has agreed to immediate enforcement in a written declaration or in case the commander of a body of troops has ordered the close arrest to be enforced immediately because he finds it absolutely necessary in order to maintain discipline, order and security amongst the troops.

6.2 With regard to the factual background of the case, the State Party submits that:

Mr . Vuolanne was heard in preliminary investigations on 8 July 1987 concerning his absence from his unit from 3 to 7 July 1987. The military legal advisor of the military county of Southwestern Finland submitted his written statement to the superior disciplinary officer on 10 July 1987. The decision of the commander of the unit was made on 13 July 1987, stating that

Mr. Vuolanne had been found guilty of continued absence without leave (Criminal Code 45: 4.1 and 7: 2) and sanctioning him with 10 days and nights of close confinement.

Mr. Vuolanne was informed of the decision on 14 July 1987. When signing the acknowledgement of receipt, he had in the same connection indicated in writing that he agreed to an immediate enforcement of the punishment. Consequently, the close arrest was put into effect on the very same day, 14 July 1987. As Mr. Vuolanne was informed of the decision, he also received a copy of it, carrying clear and unambiguous instructions on how the decision could be appealed against by submitting a request for review. The request submitted by Mr. Vuolanne on 15 July 1987 was considered by the commander of the body of troops without delay, and he decided that there was no need to change the disciplinary sanction imposed.

In their basic training, all conscripts receive information on legal remedies relating to the disciplinary procedure, including the request for review. Relevant information is also contained in a book distributed to all conscripts at the end of the basic training period.

6.3 With regard to the applicability of article 9, paragraph 4, of the Covenant to the facts of this case, the State party submits:

It is not open for somebody detained on the basis of military disciplinary procedure, as outlined above, to take proceedings in a court. The only relief is granted by the system of request for review. In other words, it has been the view of Finnish authorities that article 9, paragraph 4, of the Covenant on Civil and Political Rights does not apply to detention in military procedure ...

In its General Comment 8 (16) of 27 July 1982, regarding article 9, the Committee had occasion to single out what types of detention were covered by article 9, paragraph 4. It listed detentions on grounds such as "mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc.". Significantly, the Committee omitted deprivation of liberty in military disciplinary procedure from this list. What is common to the forms of detention listed by the Committee is that they involve the possibility of prolonged, unlimited detention. Also in most cases, these forms of detention are not strictly regulated but the manner of detention is made dependent on its purpose (cure of illness, for example) and engages a wide degree of discretion on the part of the detaining authority. However, this is in striking contrast with the process of detention in military disciplinary procedure, where the grounds for detention, the length of detention and the manner of conducting the detention are clearly laid down in military law. In the event that the military authorities overstep the boundaries set by the law, the normal ways of judicial appeal are open. In other words, it might be that the Committee did not include military disciplinary process in its list of different kinds of "detention" because it realized the material difference between it and those other forms of detention from the point of view of an individual's need of protection.

It is clearly the case that an official – a commander – is acting in a judicial or at least quasi-judicial capacity as he, under military disciplinary procedure, orders detention. Likewise, the consideration of a request for review is comparable to judicial scrutiny of an appeal. As explained, the conditions and manner of carrying out military disciplinary detention are clearly set down by law. The discretion they imply is significantly less than discretion in some of the cases listed by the Committee. In this respect, too, the need to judicial control, if not strictly superfluous, is significantly less in military disciplinary procedure than in detention on, say, grounds of mental illness.

Notwithstanding these considerations concerning the non-applicability of article 9, paragraph 4, to Mr. Vuolanne's case, the State party notes that preparations are under way for amending the Law on Military Disciplinary Procedure so as to allow recourse to a court for detention under that procedure.

6.4 With regard to the author's allegations concerning a violation of article 7 of the Covenant, the State party notes:

Mr. Vuolanne claims that his treatment was degrading because it was "unreasonably severe in relation to the offence".

He contends that the commanding officer did not take adequately into account Finnish laws concerning mitigating circumstances and the measurement of sentences. However, this is not a matter on which the Committee is competent to pronounce, as it has itself acknowledged, namely that it is not a "fourth instance" entitled to review the conformity of the acts or decisions by national authorities with national law. The State party further observes that 10 days arrest in close confinement does not per se constitute the sort of Punishment prohibited by article 7; it does not amount to "cruel, inhuman or degrading treatment or punishment".

It is generally held that the terms "torture", "inhuman treatment" and "degrading treatment" in article 7 imply a sliding scale from the most serious violations ("torture") to the least serious – but nevertheless serious – ones ("degrading treatment"). What constitutes "degrading treatment" (or "degrading punishment") is nowhere clearly defined. In practice, cases which have been deemed to constitute "degrading treatment" have usually involved some sort of corporal punishment. Mr. Vuolanne does not claim that he was subjected to such punishment ... The question still remains whether Mr. Vuolanne's confinement can be interpreted as the kind of incommunicado detention which, as implied in General Comment 7 (16) by the Committee, amounts to a violation of article 7. The matter, as the Committee saw it, was to be determined on the basis of contextual appraisal. In the present case, the relevant contextual criteria go clearly against holding the detention of Mr. Vuolanne as "degrading treatment or punishment". In the first place, the detention of Mr. Vuolanne lasted only a relatively short period (10 days and nights) and even that was divided into a period of 8 and a further separate period of 2 days. Secondly, his confinement was not total. He was taken out for meals and for a short exercise daily – though he was not allowed to communicate with other detainees. Thirdly, there was no official hindrance to his correspondence; the fact that the guards on duty may have violated their duties by reading his letters does not involve a violation by the Government of Finland. Of course, it would have been open to Mr. Vuolanne to complain of his treatment by his guards. He appears to have made no formal complaint. In short, the context of Mr. Vuolanne's detention cannot be regarded as amounting to "degrading treatment" (or "degrading punishment") within the meaning of article 7 of the Covenant.

7.1 In his comments dated 25 February 1989, author's counsel submits, *inter alia*, that if the Committee considers the evidence presented by Mr. Vuolanne insufficient for finding a violation under article 7, article 10 might become relevant. He further contends that the State party is incorrect in implying that the behaviour of Mr. Vuolanne's guards would not come within its responsibility. He points out that the guards were "persons acting in an official capacity" within the meaning of article 2, paragraph 3 (a), of the Covenant. He further argues:

It is true that Mr. Vuolanne could have instituted a civil charge against the guards in question. In the communication, their behaviour is not, however, presented as a separate violation of the Covenant, but only as one part of the evidence showing the enforcement of military arrest to be humiliating or degrading. Also the State party seems to have accepted this line of argument: had the Government regarded the behaviour of Mr. Vuolanne's guards as something exceptional, it would surely have presented in its submission information on some kind of an inquiry into the concrete facts of the case. However, no measures concerning the behaviour of Mr. Vuolanne's guards have been taken.

7.2 With respect to article 9, paragraph 4, the author comments on the State party's reference to the Committee's General Comment No. 8 (16) on article 9, and notes that the State party does not mention that, according to the General Comment, article 9, paragraph 4, "applies to all persons deprived of their liberty by arrest or detention". He further submits:

Military confinement is a punishment that can be ordered either by a court or in military disciplinary procedure. The duration of the punishment is comparable to the shortest prison sentences under normal criminal law (14 days is the Finnish minimum) and exceeds the length of pre-trial detention acceptable in the light of the Covenant. This shows that there is no substantial difference between these forms of detention from the point of view of an individual's need of protection. It is true that the last sentence of paragraph 1 of the Committee's General Comment in question is somewhat ambiguous. This might be the basis for the State party's opinion that military confinement is not covered by article 9, paragraph 4. However, article 2, paragraph 3, would remain applicable "even in this case."

The author then offers the following comments in order to show that the Finnish military disciplinary procedure does not correspond to the requirements of article 2, paragraph 3, either:

(a) According to the State party, "the normal ways of judicial appeal are open in case the military authorities overstep the boundaries set by the law". This statement is misleading. There is no way a person punished with military confinement can bring the legality of the punishment before a court. What can in principle be challenged is the behaviour of the military authorities in question. This would mean instituting a civil charge in court, not any kind of an "appeal". This kind of a procedure is in no way "normal" and even if the procedure was instituted, the court could not order the release of the victim;

(b) Also some other statements are misleading. An official ordering detention and another officer considering the request for review are not acting in a "judicial or at least quasi-judicial capacity". The officers have no legal education. The procedure lacks even the most elementary requirements of a judicial process: the applicant is not heard and the final decision is made by a person who is not independent, but has been consulted already before ordering the punishment. It also is stated that Mr. Vuolanne, when informed of the decision to punish him with close confinement, indicated in writing that he agreed to an immediate enforcement of the punishment. This statement is somewhat misleading, because Mr. Vuolanne only signed the acknowledgement of receipt on a blank form. It is true that on this blank form there is a part printed with small letters, where one accepts the immediate enforcement by signing the acknowledgement itself.

7.3 With respect to the proposed amendment to the law (see para. 6.3 above), Mr. Vuolanne notes that a proposed model would possibly remedy the situation in relation to article 9, paragraph 4, but not in relation to article 7. He submits that the only proposal acceptable in this respect would be to amend the Law on military disciplinary procedure so that only a part (up to 8 or 10 days) of the punishment would be enforced as close confinement and the rest as light arrest (e. g., with service duties).

8. The Human Rights Committee has considered the present communication in the light of all written information made available to it by the parties as provided in article 5, paragraph 1, of the Optional Protocol. The facts of the case are not in dispute.

9.1 The author of the communication claims that there have been breaches of article 2, paragraphs 1 and 3, article 7, article 9, paragraph 4, and article 10 of the Covenant.

9.2 The Committee recalls that article 7 prohibits torture and cruel or other inhuman or degrading treatment. It observes that the assessment of what constitutes inhuman or degrading treatment falling within the meaning of article 7 depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim. A thorough examination of the present communication has not disclosed any facts in support of the author's allegations that he is a victim of a violation of his rights as set forth in article 7. In no case was severe pain or suffering, whether physical or mental, inflicted upon Antti Vuolanne by or at the instigation of a public official; nor does it appear that the solitary confinement to which the author was subjected, having regard to its strictness, duration and the end pursued, produced any adverse physical or mental effects on him. Furthermore, it has not been established that Mr. Vuolanne suffered any humiliation or that his dignity was interfered with apart from the embarrassment inherent in the disciplinary measure to which he was subjected. In this connection, the Committee expresses the view that for punishment to be degrading, the humiliation or debasement involved must exceed a particular level and must, in any event, entail other elements beyond the mere fact of deprivation of liberty. Furthermore, the Committee finds that the facts before it do not substantiate the allegation that during his detention Mr. Vuolanne was treated without humanity or without respect for the inherent dignity of the person, as required under article 10, paragraph 1, of the Covenant.

9.3 The Committee has noted the contention of the State party that the case of Mr. Vuolanne does not fall within the ambit of article 9, paragraph 4, of the Covenant. The Committee considers that this question must be answered by reference to the express terms of the Covenant as well as its purpose. It observes that, as a general proposition, the Covenant makes no provision for exempting from its application certain categories of persons. According to article 2, paragraph 1, "each State party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". The all-encompassing character of the terms of this article leaves no room for distinguishing between different categories of persons, such as civilians and members of the military, to the extent of holding the

Covenant to be applicable in one case but not in the other. Furthermore, the *travaux préparatoires* as well as the Committee's general comments indicate that the purpose of the Covenant was to proclaim and define certain human rights for all and to guarantee their enjoyment. It is, therefore, clear that the Covenant is not, and should not be conceived of in terms of the individuals whose rights shall be protected but in terms of what rights shall be guaranteed and to what extent. As a consequence, the application of article 9, paragraph 4, cannot be excluded in the present case.

9.4 The Committee acknowledges that it is normal for individuals Performing military service to be subjected to restrictions in their freedom of movement. It is self-evident that this does not fall within the purview of article 9, paragraph 4. Furthermore, the Committee agrees that a disciplinary penalty or measure which would be deemed a deprivation of liberty by detention, were it to be applied to a civilian, may not be termed as such when imposed upon a serviceman. Nevertheless, such a penalty or measure may fall within the scope of application of article 9, paragraph 4, if it takes the form of restrictions that are imposed over and above the exigencies of normal military service and deviate from the normal conditions of life within the armed forces of the State party concerned. In order to establish whether this is so, account should be taken of a whole range of factors such as the nature, duration, effects and manner of the execution of the penalty or measure in question.

9.5 In the implementation of the disciplinary measure imposed on him, Mr. Vuolanne was excluded from performing his normal duties and had to spend day and night for a period of 10 days in a cell measuring 2 x 3 metres. He was allowed out of his cell solely for purposes of eating, going to the toilet and taking air for half an hour every day. He was prohibited from talking to other detainees and from making any noise in his cell. His correspondence and personal notes were interfered with. He served a sentence in the same way as a prisoner would. The sentence imposed on the author is of a significant length, approximating that of the shortest prison sentence that may be imposed under Finnish criminal law. In the light of the circumstances, the Committee is of the view that this sort of solitary confinement in a cell for 10 days and nights is, in itself, outside the usual service and exceeds the normal restrictions that military life entails. The specific disciplinary punishment led to a degree of social isolation normally associated with arrest and detention within the meaning of article 9, paragraph 4. It must, therefore, be considered a deprivation of liberty by detention in the sense of article 9, paragraph 4. In this connection, the Committee recalls its General Comment No. 8 (16) according to which most of the provisions of article 9 apply to all deprivations of liberty, whether in criminal or in other cases warranting detention such as mental illness, vagrancy, drug addiction, as well as for educational purposes and immigration control. The Committee cannot accept the State party's contention that because military disciplinary detention is firmly regulated by law, it does not necessitate the legal and procedural safeguards stipulated in article 9, paragraph 4.

9.6 The Committee further notes that whenever a decision depriving a person of his liberty is taken by an administrative body or authority, there is no doubt that article 9, paragraph 4, obliges the State party concerned to make available to the person detained the right of recourse to a court of law. In this particular case, it matters not whether the court be civilian or military. The Committee does not accept the contention of the State party that the request for review before a superior military officer according to the Law on Military Disciplinary Procedure, currently in effect in Finland, is comparable to judicial scrutiny of an appeal and that the officials ordering detention act in a judicial or quasi-judicial manner. The procedure followed in the case of Mr. Vuolanne did not have a judicial character in that the supervisory military officer who upheld the decision of 17 July 1987 against Mr. Vuolanne cannot be deemed to be a "court" within the meaning of article 9, paragraph 4; therefore, the obligations laid down therein have not been complied with by the authorities of the State party.

9.7 The Committee observes that article 2, paragraph 1, represents a general undertaking by States parties in relation to which a specific finding concerning the author of this communication has been made in respect to the obligation in article 9, paragraph 4. Accordingly, no separate determination is required under article 2, paragraph 1.

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 communication discloses a violation of article 9, paragraph 4, of the Covenant, for the reason that Mr. Vuolanne was unable to challenge his detention before a court.

11. The Committee, accordingly, is of the view that the State party is under an obligation to take effective measures to remedy, in accordance with article 2, paragraph 3 (a), the violation suffered by Mr. Vuolanne and to take steps to ensure that similar violations do not occur in the future.

Communication No. 291/1988

Submitted by: Mario Ines Torres (represented by counsel)

Alleged victim: The author

State party: Finland

Date of adoption of views: 2 April 1990 (thirty-eighth session)

Subject matter: Detention of author under aliens legislation, pending extradition to country of origin

Procedural issues: Exhaustion of domestic remedies

Substantive issues: Pre-trial detention—Right to asylum—Rights of aliens—Right to a fair trial—Extradition—Unreasonably prolonged proceedings

Articles of the Covenant: 2, 7, 9 (4) and 14

Article of the Optional Protocol: 5 (2) (b)

1. The author of the communication dated 17 February 1988, is Mario I. Torres, a Spanish citizen born in 1954, who claims to be the victim of a violation by Finland of articles 7, 9, paragraph 4, and 14 of the International Covenant on Civil and Political Rights. He is represented by counsel.

The background

2.1 A former political activist, Mr. Torres resided at Toulouse, France, from 1957 to 1979. From 1974 to 1977, he served a prison sentence for acts of sabotage committed against Spanish property in France. In 1979, he returned to Spain.

2.2 On 19 March 1984, he was arrested by the special services of the Spanish Guardia Civil, on suspicion of being a member of a terrorist group, and was detained for 10 days.

2.3 From 1985 to 1987, the author resided in France.

2.4 On 26 August 1987, the author traveled to Finland and requested asylum. On 8 October 1987, however, he was detained by the security police pursuant to the Aliens Act. Since that date and until his extradition to Spain in March 1988, the detention order was renewed on seven occasions for seven days at a time by decision of the Ministry of the Interior. On 3 December 1987, the Minister of the Interior rejected the author's request for asylum and his request for a resident's permit. On 9 December 1987, the author appealed to the Supreme Court, requesting his release from detention and, on the same day, filed a second request for asylum which was refused by the Ministry of the Interior on 27 January 1988.

2.5 On 16 December 1987, the Government of Spain requested the author's extradition through the International Criminal Police Commission (Interpol). By decision of the same day, the author's detention was prolonged pursuant to the Finnish law on the Extradition of Criminals. On 23 December 1987, the City Court of Helsinki decided to prolong detention on the same grounds. On 4 January 1988, the Ministry of Justice decreed that, since extradition had not yet been officially requested by Spain, the author could no longer be detained pursuant to the Law on the Extradition of Criminals. On 5 January 1988, an order concerning the prolongation of his detention, pursuant to the Aliens Act, was issued by the police.

2.6 On 8 January 1988, the Embassy of Spain at Helsinki formally requested the extradition of Mr. Torres as a suspect in a robbery committed at Barcelona on 2 December 1984. By note verbale dated 3 February 1988, the request was extended to cover his alleged membership in an armed group. The City Court of Helsinki thereupon decided, on 11 January 1988, that Mr. Torres could be detained pursuant to the Law on the Extradition of Criminals. On 4 March 1988, the Supreme Administrative Court of Finland considered that there had been justifiable grounds for lawfully detaining the author pursuant to the Aliens Act. On 10 March 1988, the Minister of Justice approved the extradition request and the author was extradited to Spain on 28 March 1988. Until the author's extradition, the City Court of Helsinki reviewed the detention at two-week intervals.

2.7 The detention of Mr. Torres from 8 October to 15 December 1987 and from 5 to 10 January 1988 was based on the Aliens Act and from 16 December 1987 to 4 January 1988 and from 11 January to 28 March 1988 on the law on the Extradition of Criminals; during the entire period, Mr. Torres was detained at the Helsinki District Prison.

2.8 On 14 October 1988, the Juzgado Central de Instrucción convicted the author of armed robbery and sentenced him to seven years' imprisonment. He is currently appealing his conviction and remains on bail.

Complaint

3. The author claims that the extradition order of 10 March 1988 was contrary to article 7 of the Covenant, because the Finnish authorities had been provided with information, on the basis of which it could be feared that the author would be subjected to torture if he were to return to Spain. With regard to his complaint under article 9, paragraph 4, of the Covenant, the author argues that during his detention pursuant to the Aliens Act, he was denied

recourse to a judicial body, and that the proceedings before the Supreme Administrative Court were unreasonably prolonged.

State party's comments and observations

4.1 The State party submits that article 7 of the Covenant does not cover the issue of extradition, and adds that the decision on the extradition of Mr. Torres was taken in conformity with the international obligations of Finland:

The request for extradition by Spain concerned armed robbery as well as membership in an armed group. The extradition was considered possible only on the basis of the former but not of the latter. The Finnish extradition order specifically provided that the Spanish authorities do not prosecute Mr. Torres for crimes other than the one for which extradition was granted (armed robbery). The rights guaranteed under the Covenant have thus not been affected by the extradition. Even if an extradition were treated as potential complicity to a violation of article 7, the State party argues that Mr. Torres did not submit the necessary evidence to indicate that he would, after his extradition, be subjected to treatment in violation of article 7.

4.2 The State party further elaborates on the grounds for the author's detention: the first decision, dated 7 October 1987, was based on reasons relating to a presumed risk of crime (Alien's Act, section 23, subsections 1 and 2); the second decision, dated 3 December 1987, was justified by the preparations for his extradition to Spain and a presumed risk of crime and evasion (Aliens Act, section 23, subsections 1 and 2); the third decision, dated 5 January 1988, was predicated, *inter alia*, on a presumed risk of crime (Aliens Act, section 23, subsections 1 and 2).

4.3 Under section 33 of the Aliens Act, Mr. Torres could have appealed the extension of his detention to the Supreme Administrative Court within 14 days of the decision. He did appeal the decision made by the Ministry of the Interior on 26 November 1987 on the extension of detention, and his appeal was dismissed by the Supreme Administrative Court on 4 March 1988. Under section 32 of the Aliens Act ("Seeking annulment of a decision rendered by the police or a passport control officer"), Mr. Torres had the right to submit the decisions on detention (concerning the first seven days) taken by the police on 7 October 1987, 3 December 1987 and 5 January 1988, respectively, to review by the Ministry of the Interior. He did seek annulment of the two latter decisions of the police. In its decisions of 23 February 1988, the Ministry of the Interior considered that there had been reasonable grounds for detention.

4.4 The State party further submits that detention under the Extradition Act must, pursuant to section 19, be referred "without delay" to the City Court which in turn shall, according to section 20, decide "without delay" whether detention should be continued. The detention order of 16 December 1987 was prolonged by decision of 23 December 1987 of the Helsinki City Court. According to section 22 of the Extradition Act, an appeal can be lodged with the Supreme Court against the decision of the City Court. There is no time-limit for an appeal. The State party notes that the files do not indicate that Mr. Torres ever filed this appeal and submits that this domestic remedy was thus not exhausted and is, in principle, still available to him.

4.5 Finally, the State party indicates that a government bill with a view to amending the Aliens Act will be submitted to Parliament shortly so as to guarantee the right to have the detention order reviewed by a court without delay.

Issues to be considered by the Committee

5.1 On the basis of the information before it, the Committee concluded that all conditions for declaring the communication admissible were met, including the requirement of exhaustion of domestic remedies under article 5,

paragraph 2, of the Optional Protocol.

5.2 In its decision on admissibility, the Committee reserved consideration of the author's allegations under article 7 for the merits in order to be able to ascertain whether the Finnish Government, when deciding on Mr. Torres' extradition, was in possession of information indicating that he might upon extradition be subjected to torture or to other cruel, inhuman or degrading treatment.

5.3 The Committee further recalled that, according to the uncontested facts, Mr. Torres was unable to challenge his detention under the Aliens Act during the first week of detention on several occasions. The Committee noted that the Aliens Act did not contain a right of complaint for detention up to several days; therefore, it had to consider whether the provisions of the Aliens Act, which were concretely applied to the author, conformed with the requirements of article 9, paragraph 4, of the Covenant. The Committee observed that the State party had not furnished any information on the domestic remedies which the author could have pursued with respect to this particular complaint; it thus concluded that, in respect of this complaint, there were no domestic remedies available to Mr. Torres.

5.4 The Committee noted the State party's statement that although the author had, on 9 December 1987, filed an appeal to the Supreme Administrative Court against the decision by the Ministry of the Interior of 26 November 1987, the Court did not decide until some three months later. In the light of the circumstances, the Committee found that Mr. Torres' complaint relating to the delay in having his detention adjudicated upon could raise issues under article 9, paragraph 4, of the Covenant.

5.5 On the basis of the written information before it, the Committee considered that there was no evidence in substantiation of the author's claim that he was a victim of any of the rights set forth in article 14 of the Covenant.

5.6 On 30 March 1989, the Human Rights Committee declared the communication admissible insofar as it related to complaints under articles 7 and 9, paragraph 4, of the Covenant.

6. The Committee notes the author's allegation that Finland is in violation of article 7 of the Covenant for extraditing him to a country where there was reason to believe that he might be subjected to torture. The Committee finds, however, that the author has not sufficiently substantiated his fears that he would be subjected to torture in Spain.

7.1 Three separate questions arise with respect to article 9, paragraph 4, of the Covenant: (a) whether the fact that the author was precluded, under the Aliens Act, from challenging his detention for the periods of 8 to 15 October 1987, 3 to 10 December 1987 and 5 to 10 January 1988 before a court, when he was being detained under orders of the police, constitutes a breach of this provision; (b) whether once he was by law entitled to challenge his detention under the Aliens Act, alleged delays in the handing down of the judgement constitute a breach; and (c) whether the application of the Extradition Act to the author entails any violation of this provision.

7.2 With respect to the first question, the Committee has taken note of the State party's contention that the author could have appealed against the detention orders of 7 October, 3 December 1987 and 5 January 1988 pursuant to section 32 of the Aliens Act to the Ministry of the Interior. In the Committee's opinion, this possibility, while providing for some measure of protection and review of the legality of detention, does not satisfy the requirements of article 9, paragraph 4, which envisages that the legality of detention will be determined by a court so as to ensure a higher degree of objectivity and independence in relation to such control. The Committee further notes that while the author was detained under orders of the police, he could not have the lawfulness of his detention reviewed by a court. Review before a court of law was possible only when, after several days, the detention was confirmed by order of the Minister. As no challenge could have been made until the second week of detention, the author's detention from 8 to 15 October 1987, from 3 to 10 December 1987 and from 5 to 10 January 1988 violated the requirement of

article 9, paragraph 4; of the Covenant that a detained person be able "to take proceedings before a court, in order that court may decide *without delay* on the lawfulness of his detention and order his release if the detention is not lawful" (emphasis added).

7.3 With respect to the second question, the Committee emphasizes that, as a matter of principle, the adjudication of a case by any court of law should take place as expeditiously as possible. This does not mean, however, that precise deadlines for the handing down of judgements may be set which, if not observed, would necessarily justify the conclusion that a decision was not reached "without delay". The question of whether a decision was reached without delay must instead be assessed on a case-by-case basis. The Committee notes that almost three months passed between the filing of the author's appeal, under the Alien's Act, against the decision of the Ministry of the Interior and the decision of the Supreme Administrative Court. This period is in principle too extended, but as the Committee does not know the reasons for the judgement being issued only on 4 March 1988, it makes no finding under article 9, paragraph 4, of the Covenant.

7.4 With respect to the third question, the Committee notes that the Helsinki City Court reviewed the author's detention under the Extradition Act at two-week intervals. The Committee finds that such reviews satisfy the requirements of article 9, paragraph 4, of the Covenant

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts of the communication disclose a violation of article 9, paragraph 4, of the International Covenant on Civil and Political Rights, for the reason that the author was unable to challenge his detention from 8 to 15 October 1987, from 3 to 10 December 1987 and from 5 to 10 January 1988 before a court.

9. In accordance with the provisions of article 2 of the Covenant, the State party is under an obligation to remedy the violations suffered by the author and to ensure that similar violations do not occur in the future. The Committee takes this opportunity to indicate that it would welcome information on any relevant measures taken by the State party in respect of the Committee's views. In this context, the Committee welcomes the State party's expressed intention to amend its legislation so as to guarantee the right to have detention based on the Aliens Act reviewed without delay by a court.

Communication No. 295/1988

Submitted by: Aapo Järvinen (represented by counsel)

Alleged victim: The author

State party: Finland

Date of adoption of views: 25 July 1990 (thirty-ninth session)*

Subject matter: Alleged discriminatory length of alternative service when compared to military service

Procedural issues: N.A.

Substantive issues: ICCPR relationship to ICESCR—Discrimination based on political or other opinion—Reasonable and objective criteria in establishing different treatment—Freedom to choose belief

Articles of the Covenant: 8, 18 and 26

Article of the Optional Protocol: 5 (2) (b)

1. The author of the communication dated 16 March 1988 is Aapo Järvinen, a Finnish citizen born in February 1965, who claims to be the victim of a violation of article 26 of the International Covenant on Civil and Political Rights by Finland. He is represented by counsel.

The background

2.1 In Finland, until the end of 1986, applications for exemption from military service were dealt with under the Act on Unarmed and Civilian Service. Under this legislation, conscripts whose religious or ethical convictions did not allow them to perform their compulsory military service as armed service in accordance with the Conscription Act could be exempted from such service in times of peace and be assigned to unarmed or to civilian service. The duration of military service is eight months. The duration of unarmed service was 11 months, to be performed in the Defence Forces in duties not involving the carrying of arms. Civilian service lasted 12 months, to be performed in government civilian service, in the municipalities or in hospitals.

2.2 Under the law in force until the end of 1986, a written application as well as the genuineness of an applicant's religious or ethical convictions were examined by a particular examination board. At the end of 1986, this procedure was abolished by Act No. 647/85, the Act on the Temporary Amendment to the

* Individual opinions submitted (a) by Messrs. Francisco Aguilar Urbina and Fausto Pocar and (b) by Mr. Bertil Wennergren, respectively, are appended.

Act on Unarmed and Civilian Service and applicants are now assigned to civilian service solely on the basis of their own declarations. The duration of civilian service was set at 16 months. The *ratio legis* for the amendment reads as follows:

As the convictions of conscripts applying for civilian service will no longer be examined, the existence of these

convictions should be ascertained in a different manner so as not to let the new procedure encourage conscripts to seek an exemption from armed service purely for reasons of personal benefit or convenience. Accordingly, an adequate prolongation of the term of such service has been deemed the most appropriate indicator of a conscript's convictions.

2.3 On 9 June 1986, the author, who had been called upon to report for military service, submitted a written statement to the competent authorities stating that his ethical convictions did not permit him to perform armed or unarmed service in the Finnish Defence Forces. The headquarters of the military district of Tampere transmitted the author's statement to the Investigation Board on 8 December 1986. The Board failed to take a decision before the expiration of its mandate on 31 December 1986, and the documents were returned to headquarters, from where the matter was referred to the Commander of the military district for consideration under the implementation order of Act No. 647/85.

2.4 In January 1987, the author submitted a new application for exemption from military service; this was accepted in February 1987. On 9 June 1987, the author started alternative civilian service. Under the new provisions referred to above, the term of civilian service is determined in accordance with the provisions in force at the time of the service order. Accordingly, Mr. Järvinen's term of service was 16 months, because he did not receive the order assigning him to alternative civilian service until the amendment became effective. In reply to a complaint of discrimination filed by the author, the Parliamentary Ombudsman of Finland, on 17 February 1988, concluded that there had been no evidence of any intention on the part of the authorities deliberately to prolong the procedure in Mr. Järvinen's case; had his case been considered in the course of 1986, his ethical convictions would have had to have been considered, with the possibility of failing to persuade the authorities of their genuineness.

2.5 Certain categories of individuals are exempt from military or alternative service in Finland. An Act on the Exemption of Jehovah's Witnesses from Military Service has been in force since the beginning of 1987. Under this Act, the service of a conscript who adheres to the religious community of Jehovah's Witnesses may be deferred until his 28th birthday; after that, he may be exempted from military service in times of peace. This means that, in practice, Jehovah's Witnesses do not have to perform any type of military or alternative service.

The author's allegations

3.1 The author considers that he has been the victim of discrimination, since individuals who choose alternative service are required to serve for 16 months, whereas the term of military service is only eight months. While he concedes that the previous term of 12 months for alternative service was not necessarily discriminatory within the meaning of article 26 of the Covenant, he argues that a prolongation from 12 to 16 months is not justified and constitutes discrimination. A period of 16 months is disproportionately longer than that applicable to military conscripts, being twice as long. In the author's opinion, the Finnish Government has failed to adduce valid arguments to establish the proposition that increasing the period of alternative service to 16 months is a reasonable, non-discriminatory measure, proportionate to the stated objective; moreover, the determination of the new term of alternative service was not based on any empirical research but was selected arbitrarily. To the author, the stated *ratio legis* of the legislative amendment, Act. No. 647/85, is indicative of the Government's intention to introduce some punitive element in the prolongation of alternative service.

3.2 It is pointed out that the earlier term of alternative civilian service, 12 months, was in fact based on an argument of proportionality. The author refers, in this context, to government bill No. 136 on unarmed and civilian service, which had been presented to Parliament in 1967. Under the initial proposal, civilian service would have lasted six months longer than military service, i. e., a total of 14 months. The parliamentary Defence Matters Committee shortened the term of civilian service to 12 months, considering that the proposed term for alternative service was "unreasonably long", and that it was inappropriate to treat conscripts who had opted for unarmed or civilian service in a considerably more disadvantageous way than others. Accordingly, the Committee proposed to set the duration for unarmed service at 11 months and for civilian service at 12 months.

3.3 The author adds that if one were to compare the situation of conscientious objectors in Finland with that of conscientious objectors in other Western European countries, it would be apparent that a term of civilian service twice as long as that of armed military service is disproportionate to the aim of the measure, as in all those countries except one, civilian service usually lasts as long or only somewhat longer (up to 50 per cent longer) than military service. This is true not only of Western Europe but also of Poland and Hungary, which recently passed legislation governing civilian service.

3.4 In respect of the State party's argument that the simple abolition of the examination procedure for conscientious objectors might encourage conscripts to seek exemption from armed service on grounds of personal benefit and convenience, the author submits that the criteria for any differentiation in the term(s) of service are neither reasonable nor objective, as the prolongation of the term of service is applied to all groups of conscientious objectors except for one specific group, Jehovah's Witnesses, who are exempt from all forms of service. Under the current system, serious religious or ethical objectors are punished by an excessive prolongation of their service, while some seeking personal benefit or convenience opt for the shortest possible term of armed service, eight months. In the author's opinion, such criteria of differentiation cannot be considered reasonable and objective, as the entire burden is placed on those objectors whose genuineness of conviction has never been at issue. Further, for such objectors the matter is not one of choice but is inherent in their philosophy.

The State party's comments and observations

4.1 Referring to the Committee's decision in communication No. 185/1984,¹ the State party argues that inasmuch as States parties do not have any obligation to provide for alternative service, they may, whenever they do provide for such service, determine its conditions as they see fit, provided that these conditions do not *per se* constitute a violation of the Covenant. .

4.2 Invoking the *ratio legis* of Act No. 647/85, the State party contends that the duration of civilian service, although admittedly longer than that of armed conscripts, does not indicate any intention of, or actual, discrimination vis-à-vis civilian servicemen within the meaning of article 26 of the Covenant. Insofar as the specific circumstances of the author's case and the examination of his application of June 1986 are concerned, the State party considers that on the basis of the facts, and in the light of the opinion of the Parliamentary Ombudsman of 17 February 1988, the determination of his term of civilian service took place in accordance with Finnish law and with article 26 of the Covenant.

4.3 In respect of the general exemption of Jehovah's Witnesses from any form of service, the State party

¹ See communication No. 185/1984 (*L. T. K. v. Finland*), inadmissibility decision adopted on 9 July 1985; in this decision, the Committee held that the Covenant "does not provide for the right to conscientious objection", paragraph 5.2; *Selected Decisions of the Human Rights Committee*, volume 2, p. 62 of the English version.

points out that the Act on the Exemption of Jehovah's Witnesses from Military Service was passed in accordance with section 67 of the Parliament Act which lays down the procedural requirements for the enactment of constitutional legislation, and affirms that the Act cannot be regarded as discriminatory within the meaning of article 26 of the Covenant.

Issues and proceedings before the Committee

5.1 On the basis of the information before it, the Committee concluded that all conditions for declaring the communication admissible had been met, and that, in particular, it was agreed between the parties that available domestic remedies had been exhausted, pursuant to article 5, paragraph 2 (b), of the Optional Protocol.

5.2 On 23 March 1989, the Human Rights Committee declared the communication admissible.

6.1 Article 8 of the Covenant makes clear that "service of military character" or "national service required by law of conscientious objectors" is not to be regarded as forced or compulsory labour. The Committee notes that the new arrangements, whereby applicants are now assigned to civilian service solely on the basis of their own declarations, effectively allows a choice as to service and departs from the previous pattern of an alternative civilian service for proven conscientious objectors. Accordingly, any issue of alleged discrimination falls under article 26 rather than under article 2, paragraph 1, in relation to article 8.

6.2 Thus, the main issue before the Committee is whether the specific conditions under which alternative service must be performed by the author constitute a violation of article 26 of the Covenant. That the Covenant itself does not provide a right to conscientious objection does not change this finding. Indeed, the prohibition of discrimination under article 26 is not limited to those rights which are provided for in the Covenant.

6.3 Article 26 of the Covenant, while prohibiting discrimination and guaranteeing equal protection of the law to everyone, does not prohibit all differences of treatment. Any differentiation, as the Committee has had the opportunity to state repeatedly, must however be based on reasonable and objective criteria.²

6.4 In determining whether the prolongation of the term for alternative service from twelve to sixteen months by Act. No. 647/85, which was applied to Mr Järvinen, was based on reasonable and objective criteria, the Committee has considered in particular the

² See communication No. 196/1985 (*Gueye et al. v. France*), final views adopted on 3 April 1989, para. 9.4; *Official Records of the General Assembly, forty-fourth session, Supplement No. 40 (A/44/40)*, annex X, sect. B.

ratio legis of the Act (see paragraph 2.2 above) and has found that the new arrangements were designed to facilitate the administration of alternative service. The legislation was based on practical considerations and had no discriminatory purpose.

6.5 The Committee is, however, aware that the impact of the legislative differentiation works to the detriment of genuine conscientious objectors, whose philosophy will necessarily require them to accept civilian service. At the same time, the new arrangements were not merely for the convenience of the State alone. They removed from conscientious objectors the often difficult task of convincing the examination board of the genuineness of their beliefs; and they allowed a broader range of individuals potentially to opt for the possibility of alternative service.

6.6 In all the circumstances, the extended length of alternative service is neither unreasonable nor punitive.

6.7 Although the author has made certain references to the exemption of Jehovah's Witnesses from alternative or military service in Finland, their situation is not at issue in the present communication.

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 terms of alternative service imposed on Mr. Järvinen by Act No. 647/85 do not disclose a violation of article 26 of the Covenant.

APPENDIX I

Individual opinion submitted by Messrs. Francisco Aguilar Urbina and Fausto Pocar, pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the views of the Committee on communication No. 295/1988, Järvinen v. Finland

We share the view expressed by the majority of the Committee that the present case is to be considered under article 26 of the Covenant, as well as the view that the same article does not prohibit all differences of treatment, provided that a differentiation be based on reasonable and objective criteria. However, we do not share the view that reasonable and objective criteria exist in the present case.

A consideration of the *ratio legis* of the Finnish Act 647/85 discloses that the difference of duration between military and civilian service is not based on objective criteria, such as a more severe type of service or the need for a special training required in order to accomplish the longer service. The *ratio* of the law is rather to replace the earlier method of testing the sincerity of an applicant's conscientious objection with a procedure based on administrative convenience, whereby the longer duration of the civilian service results in a sanction against conscientious objectors. Such longer duration constitutes in our view a difference of treatment incompatible with the prohibition of discrimination on grounds of opinion enshrined in article 26 of the Covenant.

Francisco Aguilar Urbina

Fausto Pocar

APPENDIX II

Individual opinion submitted by Mr. Bertil Wennergren pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the views of the Committee on communication No. 295/1988, Järvinen v. Finland

Article 6 of the International Covenant on Economic, Social and Cultural Rights recognizes the right of everyone to gain his living by work which he freely chooses or accepts. The objective of article 8 of the Covenant on Civil and Political Rights is the protection against being forced to carry out work which one has not freely chosen. However, exception is made for any service of military character and, in conjunction herewith, for any national service required by law of conscientious objectors. As the national service in question is meant to replace military service, the question of equality before the law arises, as explained in paragraphs 6.1 to 6.3 of the Committee's views. I concur in the opinions expressed in these paragraphs. When considering the question of equality before the law, the natural starting-point for me is everyone's right freely to choose his work and the time to devote to it and the fact that the object of national service is a replacement of military service.

The *ratio legis* of Act No. 647/85 (see para. 2.2 of the views) was that, by choosing to prolong service time by as much as 240 days, the effect would be to discourage applicants without sincere and truly genuine convictions. Looked upon exclusively from the point of view of deterrence of objectors without genuine convictions, this method may seem both objective and reasonable. However, from the point of view of those for whom national service had been established in place of military service, the method is inadequate and runs counter to its purpose. As the Committee observes in paragraph 6.5, the impact of the legislative differentiation works to the detriment of genuine conscientious objectors whose philosophy will necessarily require them to accept civilian service, no matter how long it is in comparison to military service. From this finding, I draw the conclusion, contrary to the Committee, that, not only is the method inadequate in relation to its very purpose to make it possible

for those who, for reasons of conscience, are unable to discharge their military service, to discharge their civilian service instead. The effect of this practice is that these persons will be compelled to sacrifice a greater degree of their liberty in comparison with those who are able to discharge their military service on the basis of their beliefs.

In my view, this is unjust and runs counter to the requirement of equality before the law laid down in article 26 of the Covenant. The differentiation in question is, in my view, based on grounds that are neither objective nor reasonable. Nor does it, in my opinion, comply with the provisions of article 18, paragraph 2, which state that no one shall be subject to coercion which would impair his freedom to have or adopt a religion or belief of his choice. Obliging conscientious objectors to perform 240 extra days of national service on account of their beliefs is to impair their freedom of religion or their freedom to hold beliefs of their choice.

I am therefore of the view that the terms for performance of national service, in place of military service, imposed on Mr. Järvinen by Act No. 647/85, disclose violations of articles 18 and 26 in conjunction with article 8 of the Covenant.

Bertil Wennergren

Communication No. 305/1988

Submitted by: Hugo van Alphen

Alleged victim: The author

State party: The Netherlands

Date of adoption of views: 23 July 1990 (thirty-ninth session)*

Subject matter: Arrest and detention of Dutch lawyer for refusal to disclose information on a client suspected of tax evasion

Procedural issues: Inadmissibility *ratione materiae*—Travaux préparatoires

Substantive issues: Examination of witness—Arbitrary arrest and detention—Delay in judicial proceedings—Claim for compensation (Article 9 (5))

Articles of the Covenant: 9 (1), (4) and (5), 14 (3) (c) and 17

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

* The text of an individual opinion submitted by Mr. Nisuke Ando is appended.

1. The author of the communication dated 12 April 1988 is Hugo van Alphen, a Netherlands solicitor born in 1924, currently residing in The Hague, the Netherlands. He claims to be the victim of a violation by the Netherlands of articles 9, paragraphs 1 to 5; 14, paragraph 3; and 17 of the International Covenant on Civil and Political Rights.

Facts as submitted

2.1 The author was arrested on 5 December 1983 on the suspicion of having been an accessory or accomplice to the offence of forgery, or having procured the commission of the offence of forgery, and of having been an accessory to the intentional filing of false income tax returns for the years 1980 and 1981. He was taken from his home to the police station. On the same day, the author's home was searched by agents of the Tax Inquiry and Investigation Department pursuant to article 97 of the Code of Criminal Procedure; documents belonging to the author were seized on this occasion. The author complained of the seizure to the Examining Magistrate.

2.2 Immediately upon arrival at the police station, at 20:10 hours, the author was brought before an Assistant Public Prosecutor who decided that the author be remanded in custody. The author was informed of the reasons for the decision. On 7 December 1983, the Public Prosecutor extended the remand order. The previous day, on 6 December 1983, the Public Prosecutor had applied for a preliminary judicial investigation, and followed up with a further application for such an investigation on 16 December 1983. At the Prosecutor's request, the Examining Magistrate, a judge handling criminal cases at the District Court of Amsterdam, decreed on 8 December that the author be remanded in custody for a maximum of six days, after having heard the author. The order was subsequently extended.

2.3 After again hearing the author, the District Court of Amsterdam, on 15 December 1983, decided that the author be kept in custody for a maximum of 30 days. On 4 January 1984, the author's legal representative requested the court to release his client. After hearing the author, the court twice extended the remand order, first on 12 January and again on 31 January 1984. By further judgement of 31 January 1984, the remand period was terminated on 9 February 1984 at the author's request; on the latter date, the author was released.

2.4 Under Dutch law, the arrest and remand in custody of suspects in a criminal investigation is governed by articles 52 to 62 of the Code of Criminal Procedure. Suspects who are arrested are immediately brought before a public prosecutor. If the offence for which an individual has been arrested is a serious one, the public prosecutor or the assistant public prosecutor may issue a remand order in the interests of the criminal investigation, after having questioned the suspect. This remand order can normally be issued for not more than two days; if deemed necessary, the prosecutor may extend the remand order once for two days. Article 40 of the Code of Criminal Procedure stipulates that the suspect be provided with legal assistance for the period of his custody. If the public prosecutor considers that a prolongation of the detention is warranted by the circumstances, he may refer the suspect to an Examining Magistrate, who decides whether further to keep the suspect in detention for a further period, pursuant to article 64 of the Code of Criminal Procedure. Remand orders issued by an Examining Magistrate are valid for up to six days; the Magistrate may extend the order once for a maximum of six days.

2.5 Following application by the Public Prosecutor, the court may decide that a suspect who was remanded in custody by order of the Examining Magistrate shall be further detained in the interest of the investigation. Before the decision is taken, the suspect is heard by the court. The length of the period for which custody is extended may not exceed 30 days; at the request of the Public Prosecutor, this period may twice be extended. The court may rescind the order on its own initiative, at the request of the suspect, on the recommendation of the Examining Magistrate or upon application by the Public Prosecutor (article 69 of the Code of Criminal Procedure).

2.6 Examining magistrates in the Netherlands may also take a number of measures that restrict the freedom of suspects in a criminal investigation during the investigation. The legal basis for such measures is article 225, paragraph 1, of the Act establishing the Code of Criminal Procedure, in conjunction with article 132 of the Prison Rules, which empower examining magistrates to impose restrictions on a suspect's correspondence or visits. Following examination of an application for a six-day remand order, the examining magistrate generally informs the suspect as to whether restrictions are to be imposed, and what they would entail. Pursuant to article 225, paragraph 3, of the Act establishing the Code of Criminal Procedure, the suspect may appeal against such measures to the District Court.

2.7 When the author was first heard by the Examining Magistrate on 8 December 1983, following the Public Prosecutor's application for a six-day remand order, the Magistrate informed the author that restrictions would be imposed in the interest of the criminal investigation. From that day until 6 January 1984, the author could not contact his family or his office, and only his legal representative was allowed to visit him. The author did not appeal against the restrictions imposed by the Magistrate; on 6 January 1984, the restriction order was lifted with immediate effect.

2.8 In respect of the author's complaint against the search of his home and the seizure of documents, a meeting was convened by the Examining Magistrate on 16 December 1983, which, apart from the author, was attended by his counsel, two investigating officers of the Fiscal Intelligence Department and by the Dean of the Hague Branch of the Netherlands Bar Association. The purpose of the meeting was to discuss the reasons for the seizure of the documents on 5 December. On 3 January 1984, the Examining Magistrate, in the company of the Assistant Public Prosecutor and the Deputy Clerk of the Court, carried out a search of the author's home and office, after an application to this effect had been filed by the Public Prosecutor and a search warrant issued. Also present during this search was the Dean of the Hague Branch of the Netherlands Bar Association.

2.9 The principal reason for the length of the author's detention – over nine weeks – was his refusal to waive his professional obligation to secrecy, although the interested party had released him from his obligations in this respect. From 1984 to 1986, extensive judicial investigations took place into the complex tax fraud scheme in which the author was suspected of being an accomplice or an accessory. At the request of the Public Prosecutor, these investigations were discontinued in December 1986. The reason for this decision was the perceived impossibility to conclude the investigations and initiate criminal proceedings within a reasonable period of time, in the light of article 6 of the European Convention on Human Rights and article 14, paragraph 3 (c), of the International Covenant on Civil and Political Rights. On 23 January 1987, the author was informed that the Public Prosecutor had dropped the charges and that the case would be solved by fiscal means.

2.10 On 2 April 1987, the author filed two claims for damages with the Amsterdam District Court. Article 89 of the Code of Criminal Procedure provides that any individual suspected of having committed a criminal offence, whose case does not result in any court sentence being imposed, may submit a claim for damages to the court. The principal purpose is to provide for the possibility of compensation in cases involving pre-trial detention which, subsequently, was proven to have been a mistake. The possibility of filing a claim for compensation is not restricted to cases of unlawful pre-trial detention but extends to pre-trial detention deemed to have been lawful. Damages for pre-trial detention may only be granted in cases which were concluded without the imposition of a sentence and in respect of which, in the Court's opinion, award of damages is warranted. The author's first claim was based on article 89 of the Code of Criminal Procedure; the second claim was based on article 591a of the Code of Criminal Procedure, involving compensation for legal fees incurred between 1983 and 1986.

2.11 The Amsterdam District Court scheduled a hearing in request of the author's claim for 23 April 1987, but, owing to the Court's heavy workload, this hearing did not take place until 26 August 1987. By written judgement of 9 September 1988, the District Court awarded the author compensation for the legal aid costs incurred, as well as such compensation for the material and immaterial damages suffered as was considered reasonable and just.

2.12 On 6 October 1988, the author appealed against this judgement to the Amsterdam Court of Appeal. On 24 February 1989, the Court of Appeal quashed the District Court's judgement. No further remedies exist against the Court of Appeal's decision.

2.13 In its judgement, the Court of Appeal held that in the light of the statements made by the author and other witnesses heard in connection with the tax fraud scheme, the official reports of the Fiscal Intelligence and Investigation Department and the formal grounds for the application for a preliminary judicial investigation, serious grounds had existed for suspecting the author of involvement in a criminal offence. The Court of Appeal considered that the length of the author's detention was partly attributable to his consistent pleading of his professional obligation to observe confidentiality, even after the party directly concerned had relieved him of that obligation and that, that being so, it was not unreasonable to expect the author, as a former suspect, to bear the losses that had resulted from his pre-trial detention and his prosecution. In the light of these considerations, the Court of Appeal considered that there were no reasonable grounds for awarding the author damages.

Author's allegations

3.1 The author alleges that his arrest and his detention were arbitrary and therefore in violation of article 9, paragraphs 1 to 4, of the Covenant. In his opinion, the arrest and subsequent nine-week detention were used deliberately as a means of pressure against him, so as to force him to waive his professional obligation to secrecy and to solicit statements and evidence which could be used in the investigations against his clients. He claims that his arrest and detention remained arbitrary and unlawful even if those serving the arrest warrant and implementing the decisions relating to his detention complied with the applicable regulations and with the instructions they had received. It is submitted that detention based primarily on the observance of the professional duties of lawyers in itself amounts to a violation of the provisions of the Covenant, as a refusal to comply with the wishes of criminal investigators is not a criminal offence for which the law admits of detention. Furthermore, the author claims, he was deliberately left in the dark about the exact nature of the charges in connection with the search of his office and of his home. Finally, he alleges a violation of his enforceable right under article 9, paragraph 5, to compensation for unlawful detention. In this context, he submits that the Netherlands authorities are generally reluctant to deal with claims for damages and compensation filed by victims of unlawful acts in cases such as his, and that such cases as reach the courts are handled negligently.

3.2 In respect to his right to a fair trial, the author alleges that the Court of Appeal failed to observe the minimum guarantees of article 14, paragraph 3, of the Covenant. He contends that the length of the proceedings before the Amsterdam District Court, which postponed hearings on his claims for compensation on two occasions and did not produce a written judgement until 9 September 1988, i. e., over one year after the hearing on 26 August 1987, were incompatible with his right, under article 14, paragraph 3 (c), to have the trial proceed without undue delay. He further argues that the Court of Appeal did not afford him the opportunity to examine the content of various statements incriminating him made by third parties, and that he was denied the possibility to himself cross-examine prosecution witnesses, who had been heard in the course of the investigation more than five years ago, and to have witnesses examined on his behalf.

3.3 The author complains that coercive measures such as arrest, detention, house and office searches and widely disseminated adverse publicity are frequently used by the authorities in fiscal investigations, so as to force suspects either to confess or to make statements that can be used by the authorities against other individuals subject to taxation. In this respect, the author states that these coercive measures seriously affected his professional reputation

and his social position, and submits that they constituted arbitrary and unlawful interference with his privacy and family life, his correspondence, as well as an unlawful attack on his honour and reputation.

State party's comments and observations

4.1 The State party contends that the author did not, either in the course of the petition procedure governed by articles 89 and 591a of the Code of Criminal Procedure or during his detention, invoke the substantive rights protected by the Covenant before a court of law, and that therefore he cannot be deemed to have complied with the requirement of exhaustion of domestic remedies. It refers, in this context, to the decision adopted by the Human Rights Committee in communication No. 273/1988,¹ in which it had been held, *inter alia*, that "authors must invoke the substantive rights contained in the Covenant", in domestic proceedings. The State party adds that the author was entitled to apply to the competent court for an interlocutory injunction based on a claim of a violation of article 9, paragraph 1, or of any violation of the other provisions of article 9. Although himself a solicitor and represented by counsel of his choice throughout the period of pre-trial detention, the author made no use of that opportunity. The State party points out that it is a generally accepted principle of international law that individuals invoke the substantive rights enunciated in international instruments, in the course of domestic judicial proceedings, before petitioning an international instance. Since the author failed to comply with this requirement, the State party concludes his communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

4.2 With respect to the allegation of a violation of article 9, paragraph 5, the State party argues that the communication should be declared inadmissible as in-compatible with the provisions of the Covenant, pursuant

¹ See communication No. 273/1988 (*B. d. B. v. The Netherlands*), decision of 30 March 1989, para. 6.3.

to article 3 of the Optional Protocol. It contends that article 9, paragraph 5, is not applicable to the author's case because, in the light of serious reasons for suspecting the author of having committed criminal offenses, his pre-trial detention was not unlawful.

4.3 Concerning the right, under article 14, paragraph 3 (c), to be tried without undue delay, the State party considers that this provision merely concerns the determination of a criminal charge and does not apply to claims for compensation such as those initiated by the author. Accordingly, the State party considers the communication to be incompatible with the provisions of the Covenant insofar as it relates to a violation of article 14, paragraph 3 (c). Furthermore, the author did not, in his appeal to the Amsterdam Court of Appeal, complain about the undue prolongation of the proceedings in his case before the District Court. Accordingly, he also failed to exhaust domestic remedies in that respect.

4.4 As to the merits of the author's case, the State party contends that, given the strong reasons for suspecting the author of involvement in a serious criminal offence, and given that the Netherlands judicial authorities complied with the provisions of the Code of Criminal Procedure that govern the arrest and remand in custody of suspects in a criminal investigation, it cannot be said that the author was arbitrarily arrested or detained and that article 9, paragraph 1, was violated. As to the length of the author's detention, the State party notes that it was attributable to the fact "that the applicant continued to invoke his obligation to maintain confidentiality despite the fact that the interested party had released him from his obligations in this respect", and that "the importance of the criminal investigation necessitated detaining the applicant for reasons of accessibility". It further points out that the author was informed of the reasons for his arrest and detention, in accordance with the provisions of article 9, paragraph 2. Subsequently, the author had the option of applying to the competent court for an interlocutory injunction on the grounds of an alleged violation of article 9 of the Covenant. During his pre-trial detention, the author was heard on

repeated occasions by the Examining Magistrate and the District Court of Amsterdam in connection with the request of the public prosecutor for an extension of the pre-trial detention. Thus, in the State party's opinion, the claim that article 9, paragraphs 3 and 4, were violated cannot be sustained.

4.5 In respect of the alleged violation of article 17, the State Party points out that the search of the author's home on 5 December 1983 and on 3 January 1984 was carried out in accordance with the applicable regulations and that, accordingly, there can be no question of an arbitrary or unlawful interference with the author's privacy or home. The State party concludes that the author has not submitted any evidence in support of his claim of a violation of articles 9 and 17 of the Covenant.

The issues and proceedings before the Committee

5.1 When considering the communication at its thirty-fifth session, the Committee concluded, on the basis of the information before it, that the conditions for declaring the communication admissible were met, including the requirement of exhaustion of domestic remedies under article 5, paragraph 2 (b), of the Optional Protocol. On 29 March 1989, the Committee declared the communication admissible.

5.2 In its decision on admissibility, the Committee indicated that its decision might be reviewed in accordance with rule 93, paragraph 4, of its rules of procedure, in the light of any pertinent information submitted by the State party. In its subsequent submission of 26 October 1989 (see paras. 4.1 to 4.3 above), the State party did contest the admissibility of the communication in respect of the author's claims relating to violations of articles 9 and 14 of the Covenant.

5.3 The Committee has considered the present communication in the light of all the information provided by the parties. It has taken note of the State party's contention that with respect to the alleged violations of articles 9 and 14, the author has failed to exhaust domestic remedies because he did not invoke substantive rights guaranteed by the Covenant before the courts.

5.4 With respect to the alleged violation of article 14, paragraph 3 (c), the author has not contradicted the State party's contention that, in his appeal to the Amsterdam Court of Appeal, he did not complain about the length of the proceedings before the District Court. Further, it must be noted that the appeal was filed on 6 October 1988, almost six months after the author had submitted his communication to the Committee for consideration under the Optional Protocol to the Covenant (because of the delay of the District Court in providing its written judgement). The Committee is precluded from considering claims which had not been made, or in respect of which local remedies had not been exhausted, at the time the Committee was seized of the case. Accordingly, the communication is inadmissible in respect of the author's claim that his request for compensation was not adjudicated without undue delay.

5.5 Concerning the alleged violations of articles 9 and 17, the Committee begins by noting that no appeal is possible against the judgement of the Amsterdam Court of Appeal of 24 February 1989. The State party has contended that the author did not invoke the substantive rights in the Covenant during his detention or during the judicial proceedings, and that he is, accordingly, precluded from claiming violation of article 9 before the Committee. The Committee reiterates that authors are not required, for purposes of the Optional Protocol, to invoke specific articles of the Covenant in the course of domestic judicial proceedings, although they must invoke the substantive rights protected by the Covenant.² After the decision of the public prosecutor to drop the criminal charges against the author and to settle the case by fiscal means, on the grounds that criminal proceedings would be expected to infringe article 6 of the European Convention on Human Rights and article 14, paragraph 3 (c), of the Covenant, the author could only file a claim for compensation. He did file such a claim alleging that the detention between December 1983 and February 1984 had been an arbitrary one. Thus it cannot be said that the author failed, in the course of the proceedings, to invoke "substantive rights protected by the Covenant". The Committee

concludes, accordingly, that there is no reason to review its decision of 29 March 1989 in respect of alleged violations of articles 9 and 17.

5.6 The principal issue before the Committee is whether the author's detention from 5 December 1983 to 9 February 1984 was arbitrary. It is uncontested that the Netherlands judicial authorities, in determining repeatedly whether to prolong the author's detention, observed the rules governing pre-trial detention laid down in the Code of Criminal Procedure. It remains to be determined whether other factors may render an otherwise lawful detention arbitrary, and whether the author enjoys an absolute right to invoke his professional obligation to secrecy regardless of the circumstances of a criminal investigation.

5.7 In the instant case, the Committee has examined the reasons adduced by the State party for a prolongation of the author's detention for a period of nine weeks. The Committee observes that the privilege that protects a lawyer-client relationship belongs to the tenets of most legal systems. But this privilege is intended to protect the client. In the case under consideration, the client had waived the privilege. The Committee does not know the circumstances of the client's decision to withdraw the duty of confidentiality in the case. However, the author himself was a suspect, and although he was freed from his duty of confidentiality, he was not obliged to assist the State in mounting a case against him.

5.8 The drafting history of article 9, paragraph 1, confirms that "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime. The State party has not shown that these factors were present in the instant case. It has, in fact, stated that the

² *Idem.*

reason for the duration of the author's detention "was that the applicant continued to invoke his obligation to maintain confidentiality despite the fact that the interested party had released him from his obligations in this respect", and that "the importance of the criminal investigation necessitated detaining the applicant for reasons of accessibility". Notwithstanding the waiver of the author's professional duty of confidentiality, he was not obliged to provide such co-operation. The Committee therefore finds that the facts as submitted disclose a violation of article 9, paragraph 1, of the Covenant.

5.9 With respect to an alleged violation of article 17, the Committee finds that the author has failed to submit sufficient evidence to substantiate such a violation by the State party.

6. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts of the communication disclose a violation of article 9, paragraph 1, of the Covenant.

7. The State party is under an obligation to take effective measures to remedy the violation suffered by the author and to ensure that similar violations do not occur in the future. The Committee takes this opportunity to indicate that it would wish to receive information on any relevant measures taken by the State party in respect of the Committee's views.

APPENDIX

Individual opinion submitted by Mr. Nisuke Ando, pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the views of the Committee on communication No. 305/1988, van Alphen v. Netherlands

The central issue of the present case is whether the author's detention of nine weeks – from 5 December 1983 to 9 February 1984 – should be regarded as "arbitrary" under the provision of article 9, paragraph 1, of the International Covenant on Civil and Political Rights.

Article 9, paragraph 1, prohibits "unlawful" detention as well as arbitrary detention. With respect to the relationship between unlawful detention and arbitrary detention, I agree with the Committee's view that the latter is to be more broadly interpreted than the former to include the elements of inappropriateness, injustice, and lack of predictability. (See 5.8 of the views.) However, it is presumed that the laws of many States parties to the Covenant regulating detention under those laws should not be regarded as arbitrary unless the aforementioned elements are clearly established to exist by undoubted evidence. In this respect, I consider that the laws of the State party regulating detention are not *per se* arbitrary and that any lawful detention under those laws

should not be regarded as arbitrary unless the aforementioned elements are clearly established to exist by undoubted evidence. In this respect, I consider that the laws of the State party regulating detention are not *per se* arbitrary (2.4, 2.5) and that the author's detention was in compliance with those laws.

As to the question on the matter of whether this lawful detention of the author should be regarded as arbitrary, the Committee bases its views on the submission of the State party that "the reason for the length of the detention period was that the author continued to invoke his obligation to maintain confidentiality despite the fact that the interested party had released him from this obligation in this respect. The importance of the criminal investigation necessitated the author's detention for reasons of accessibility" (5.8). Presumably, the Committee considers that the facts as submitted, together with the search of the author's home and office and the seizure of documents as well as the subsequent dropping by the Public Prosecutor of the charges against the author, reveal the elements of inappropriateness, injustice and lack of predictability, thus making the detention arbitrary (2.1, 2.9).

On the other hand, the State party also submits that extensive judicial investigations took place for two years – from 1984 to 1986 – into the complex tax fraud scheme in which the author was suspected of being an accomplice or accessory. It is true that the Public Prosecutor requested the discontinuance of these investigations and dropped the charges against the author (2.9). Nevertheless, it is also true that the case was not terminated permanently but was to be settled by fiscal means (2.9, 5.5). In addition, in its judgements of 24 February 1989, the Netherlands Court of Appeal held that, in the light of statements made by the author and other witnesses heard in connection with the tax fraud scheme, the official reports of the Fiscal Intelligence and Investigation Department and the formal grounds for applications for a preliminary judicial investigation, *serious grounds* existed for suspecting the author of involvement in a criminal offence. The court further considered that the length of the author's detention was *partly* attributable to his consistent pleading of his professional obligation to observe confidentiality, even after the party directly concerned had relieved him of that obligation, thus quashing the lower court's decision to award compensation to the author (2.13, emphasis supplied).

Under the provision of article 5, paragraph 1, of the Optional Protocol to the Covenant, the Committee "shall consider communications received ... in the light of all written information made available to it" by the parties concerned. In other words, the Committee must base its views solely on the written information at hand and consequently it is in no better position than the Netherlands Court of Appeal in ascertaining facts which should have essential weight for the purpose of regarding the detention as arbitrary. Taking into account all the above, I am unable to convince myself to agree to the Committee's views that the facts as submitted reveal the elements of inappropriateness, injustice, and lack of predictability, thus making the author's detention arbitrary.

Nisuke Ando

Annex I

STATISTICAL SURVEY OF STATUS OF COMMUNICATIONS
as at 31 July 1990

<i>State</i>	<i>LIVING CASES</i>		<i>CONCLUDED CASES</i>			
	<i>R.91</i>	<i>ADM.</i>	<i>INADM</i>	<i>DISCO</i> <i>NT.</i>	<i>VEWS</i>	<i>TOTAL</i>
ALGERIA						–
ARGENTINA	1		4			5
AUSTRIA						–
BARBADOS						–
BOLIVIA	1				1	2
CAMEROUN						–
CANADA	8	1	26	13	6	54
C. A. R.						–
COLOMBIA	4		2	2	6	14
CONGO						–
COSTA RICA				1	1	2
DENMARK	1		6	1		8
DOMINICAN REPUBLIC					2	2
ECUADOR	3			1	1	5
EQUATORIAL GUINEA						–
FINLAND	3		7	1	6	17

FRANCE	4	3	8		3	18
GAMBIA						–
HUNGARY	2					2
ICELAND				1		1
IRELAND						–
ITALY			6	3	1	10
JAMAICA	35	25	17	3	4	84
LYBIA						–
LUXEMBOURG						–
MADAGASCAR	1				4	5
MAURITIUS	1				1	2
NETHERLANDS	9		12		7	28
NEW ZEALAND						–
NICARAGUA	1		1	3		5
NIGER						–
NORWAY			7			7
PANAMA	1	1				2
PERU	3			3	2	8
PHILIPPINES						–
PORTUGAL						–
REP. KOREA						–

SANVI						-
SANMARI						-
SENEGAL	1					1
SOMALIA						-
SPAIN	1			1		2
SURINAME					8	8
SWEDEN	1	2	2		3	8
TOGO						-
TRINIDAD AND TOBAGO	7		3	1	1	12
URUGUAY	1		4	28	45	78
VENEZUELA					1	1
ZAÏRE	1		2	2	8	13
ZAMBIA	3					3
(50)	92	33	108	64	110*	407
	125 living cases		* No violation in 18 cases.			

Annex II

RESPONSES RECEIVED FROM STATES PARTIES AFTER THE ADOPTION OF VIEWS BY THE HUMAN RIGHTS COMMITTEE

Communication No. 188/1984

Submitted by: Ramón B. Martínez Portorreal on 10 October 1984

Alleged victim: The author

State party: Dominican Republic

Date of adoption of views: 5 November 1987 (thirty-first session)

Response, dated 23 May 1990, of the Government of the Dominican Republic to the Committee's views*

1. The official response by the Government was preceded by an exchange of letters between the Secretary of State for Foreign Affairs (letter dated 31 August 1988) and the author of the communication (letter dated 10 October 1989).
2. With reference to case No. 188/1984, I am pleased to inform you that the Government of the Dominican Republic, pursuant to the decision taken by the Human Rights Committee, has addressed a communication, a copy of which is attached, to Dr. Ramón B. Martínez Portorreal, Chairman of the Executive Board of the Dominican

* For the Committee's views, see *Selected Decisions...*, vol. 2, p. 214.

Committee for Human Rights, who replied by a letter dated 10 October 1989 informing the Dominican Government that the Committee accepts as proper and valid the assurances and guarantees extended by the Dominican Government to the Committee, to its members and to its Chairman, to enable them freely to perform their functions of promoting, defending and speaking out against violations of human rights, in the Dominican Republic, and that it considers the case closed.

Dr. Martínez Portorreal has assured us that he will transmit to you the above mentioned letter which, as shown in the relevant correspondence, establishes the agreement of both parties to consider the case in question closed. In view of the foregoing, the Dominican Government considers that the aforementioned letter should remain in its possession.

Communication No. 238/1987

Submitted by: Floresmilo Bolaños

Alleged victim: The author

State party: Ecuador

Date of adoption of views: 26 July 1989 (thirty-sixth session)

Response dated 13 February 1990, from the Government of Ecuador*

On 2 August 1989, the Secretary-General of the United Nations, in accordance with the request of the Human Rights Committee at its thirty-seventh session, informed Ecuador of its views adopted on 26 July 1989 in regard to communication No. 238/1987.

In Note No. 427-17/90, dated 13 February 1990, the Permanent Mission of Ecuador requested the Secretary-General to inform the Human Rights Committee that Mr. Bolaños was at all times at the disposal of the courts, an independent power under the Ecuadorian Constitution,

* For the Committee's views, see this Volume, *supra* p. 140.

while the relevant proceedings were under way. Once the competent court handed down a decision, Mr. Bolaños was released, having been found innocent of the charges against him.

The National Government, concerned about the situation of Mr. Bolaños, immediately sought to assist him and at present he is employed to the Ecuadorian Development Bank (BEDE).

It should be pointed out that, notwithstanding the autonomy of the courts, the Government of Ecuador urged the competent authorities to expedite the cases before them and, as a consequence, the proceedings which had begun under the previous Administration were concluded by the competent judges.

Communication No. 265/1987

Submitted by: Antti Vuolanne

Alleged victim: The author

State party: Finland

Date of adoption of views: 7 April 1989 (thirty-fifth session)

Response, dated 27 July 1989, of the Government of Finland, to the Committee's views*

The Permanent Mission of Finland forwarded the following information on behalf of its Government.

In communication No. 265/1987 submitted to the Human Rights Committee by a conscript sanctioned with military confinement, the Committee was of the view that the Covenant was violated since the author has been unable to challenge his detention before a court.

* For the Committee's views, see this Volume, *supra* p. 153.

Legislative preparations are now under way to guarantee that persons who have been deprived of their liberty in an administrative process and who have not previously had the opportunity to have their detention examined by a court shall have that right after the new law has entered into force. A Government Bill, with a view to amending the Law on Military Disciplinary Procedure (331/83) and the relevant Ordinance (939/83) will be submitted to the Parliament in 1989. According to the Bill, a conscript shall have the right to have a decision on military confinement examined by a court.

Communication No. 291/1988

Submitted by: Mario Ines Torres

Alleged victim: The author

State party: Finland

Date of adoption of views: 2 April 1990 (thirty-eighth session)

Response, dated 9 April 1990, of the Government of Finland to the Committee's views *

On 21 December 1989, the Secretary-General of the United Nations, in accordance with the request of the Human Rights Committee at its thirty-eighth session, informed Finland of its views adopted on 2 April 1990 in regard to communication No. 291/1988.

In Note No. 2153, dated 9 April 1990, the Permanent Mission of Finland forwarded the following information on behalf of its government.

Reform of relevant Finnish legislation

A government bill (No. 29/1990) amending the Aliens Act of 26 April 1983 in respect of guaranteeing the right to have detention without delay reviewed by the court was submitted to Parliament on 2 April 1990. The amendments include, *inter alia*, the following relevant provisions which, as revised, read as follows:

Section 23: Taking into custody

An alien who has sought asylum and regarding whom it has been decided to refuse entry or deport, or

* For the Committee's views, see this volume, *supra* p. 158.

regarding whom such a decision is pending, can, if necessary, be taken into custody until such time as a decision on asylum has been made or the refusal of entry or deportation enforced, or the matter otherwise resolved.

The decision to take into custody shall be adopted only if, on account of the alien's personal or other circumstances, there is reason to believe that he will go into hiding or commit crimes in Finland, or if his identity is unclear.

It is proposed that an important ongoing investigation be dropped from the list of grounds for taking into custody.

Section 24: Decision to take into custody and obligation to report

An alien taken into custody shall be sent to an institution of custody specifically reserved for this purpose or other suitable institution of custody. The treatment of an alien taken into custody is governed, where applicable, provisions relating to prisoners on remand.

Section 24a: Reporting on the decision to take into custody and the procedure in the court

The police officer who has made the decision to take into custody shall report the decision without delay and, at the latest, the following day by twelve o'clock to

the Court of First Instance of the institution of custody or other Court of First Instance, as further ordained by the Ministry of Justice. This report can also be given by telephone. A report given by telephone shall be considered by the court without delay and, at the latest, within 96 hours submitting the decision in the order as prescribed for the consideration of warrants of remand for trial.

Section 24b: Decision to take into custody

If there are no grounds for keeping in custody, the court shall rule that the alien taken into custody shall be set free immediately.

Section 24d: Reconsideration of the decision to take into custody

If the person taken into custody has not been ruled to be set free, the Court of First Instance of the institution of custody shall reconsider the decision on its own initiative not later than two weeks after each decision to keep the alien in custody.

Section 34: Extraordinary appeal on the decision to take into custody

An alien taken into custody has a right to lodge an extraordinary appeal. There is no time-limit for the appeal. The appeal must be treated as urgent.

The law as amended is purported to enter into force as soon as possible, which is most likely in May 1990.

It is also proposed that the act on coercive means be amended so as to introduce a system of 24-hour duty in the Courts of First Instance, thus allowing the courts to consider the decisions to take the alien into custody also during the weekends.¹

¹ The amendments were adopted on 27 April 1990 and entered into force on 1 May 1990.

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