

INTERNATIONAL COVENANT  
ON CIVIL AND POLITICAL RIGHTS

SELECTED DECISIONS OF THE  
HUMAN RIGHTS COMMITTEE  
under  
THE OPTIONAL PROTOCOL

Volume 4

*Fortieth to forty-sixth sessions  
(October 1990 – October 1992)*

## NOTE

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<sup>c</sup> Pursuant to rule 94(3) of the rules of procedure (CCPR/C/3/Rev.3), an individual opinion or joint individual opinions is/are appended to the Views.

## INTRODUCTION

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

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

3. Under the Optional Protocol, individuals who claim that any of their rights set forth in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Human Rights Committee for consideration. No communication can be received by the Committee if it concerns a State party to the Covenant that is not also a party to the Optional Protocol. As of 31 December 1992, 67 of the 114 States that had acceded to or ratified the Covenant had accepted the competence of the Committee to receive and consider individual complaints by ratifying or acceding to the Optional Protocol.

4. Under the terms of the Optional Protocol, the Committee may consider a communication only if certain conditions of admissibility are satisfied. These conditions are set out in articles 1, 2, 3 and 5 of the Optional Protocol and restated in rule 90 of the Committee's rules of procedure (CCPR/C/3/Rev.2), pursuant to which the Committee shall ascertain:

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

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

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

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

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

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

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

7. The Committee started work under the Optional Protocol at its second session in 1977. From then until its forty-sixth session in the autumn of 1992, 524 communications relating to alleged violations by 66 States parties were placed before it for consideration. As at the end of 1992, the status of these communications was as follows:

(a)	Concluded by adoption of Views under article 5(4) of the Optional Protocol	146
(b)	Declared inadmissible	160
(c)	Discontinued or withdrawn	85
(d)	Declared admissible but not yet concluded	40
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8. In its first sixteen years, the Committee received many more than the 524 registered communications mentioned above. The Secretariat regularly receives inquiries from individuals who intend to submit a communication to the Committee. Such inquiries are not immediately registered as cases. In fact, the number of authors who eventually submit cases for consideration by the Committee under the Optional Protocol is relatively small, partly because the authors discover that their cases do not satisfy certain basic criteria of admissibility, such as the required exhaustion of domestic remedies, and partly because they realize that a reservation or a declaration by the State party concerned may operate to preclude the Committee's competence to consider the case. These observations notwithstanding, the number of communications placed before the Committee is increasing steadily, and the Committee's work is becoming better known to lawyers, researchers and the general public. The purpose of the *Selected Decisions* series is to contribute to the dissemination of its work.

9. The first step towards wider dissemination of the Committee's work was the decision taken during the seventh session to publish its Views: publication was desirable in the interests of the most effective exercise of the Committee's functions under the Protocol, and publication in full was preferable to the publication of brief summaries. From the Annual Report of the Human Rights Committee in 1979 up to the 1993 report incorporating the forty-sixth session, all the Committee's Views (146) and a selection of its decisions declaring communications inadmissible, decisions in reversal of admissibility and decisions to discontinue consideration were published in full.<sup>a</sup>

<sup>a</sup> 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);*

10. At its fifteenth session, the Committee decided to proceed with a separate project, the periodical publication of a selection of its decisions under the Optional Protocol, including certain important decisions declaring communications admissible and other decisions of an interlocutory nature. Volume 1 of this series, covering decisions taken from the second to the sixteenth session inclusive, was published in 1985 in English.<sup>b</sup> Volume 2 covers decisions taken under article 5(4) of the Optional Protocol from the seventeenth to the thirty-second session and includes all decisions declaring communications admissible, two interim decisions requesting additional information from the author and State party, and two decisions under rule 86 of the Committee's rules of procedure, requesting interim measures of protection.<sup>c</sup>

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*Thirty-ninth Session, Supplement No. 40 (A/39/40); Fortieth Session, Supplement No. 40 (A/40/40); Forty-first Session, Supplement No. 40 (A/41/40); Forty-second Session, Supplement No. 40 (A/42/40); Forty-third Session, Supplement No. 40 (A/43/40); Forty-fourth Session, Supplement No. 40 (A/44/40); Forty-fifth Session, Supplement No. 40 (A/45/40); Forty-sixth Session, Supplement No. 40 (A/46/40); Forty-seventh Session, Supplement No. 40 (A/47/40); Forty-eighth Session, Supplement No. 40 (A/48/40).*

<sup>b</sup> *Human Rights Committee, Selected Decisions under the Optional Protocol (Second to sixteenth sessions)*, New York, 1985 (United Nations publication, Sales No. E.84.XIV.2), hereinafter referred to as *Selected Decisions*, vol.1. French and Spanish versions were published in June 1988 (CCPR/C/OP/1).

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

For a more recent discussion, see A. de Zayas, "The examination of Individual Complaints by the United Nations Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights" in *International Human Rights Monitoring Mechanisms, Essays in Honour of Jakob Th. Möller*, Martinus Nijhoff, 2001, pp. 67-121; see also A. de Zayas and J. Möller, *The Case Law of the United Nations Human Rights Committee 1977-2002, A Handbook*, Kluwer (forthcoming).

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

11. Volume 3 covers sessions thirty-three to thirty-nine and contains: four interlocutory decisions – two decisions requesting interim measures of protection and two decisions to deal jointly with communications under rule 88; one decision in reversal of admissibility; 16 decisions declaring a communication inadmissible; and 27 Views adopted during that period.<sup>d</sup>

12. The current volume contains 11 decisions declaring the communication inadmissible, including 1 decision requesting interim measures of protection under rule 86, and 22 Views under article 5(4) of the Optional Protocol.

13. In the case 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. In the case of interlocutory decisions, 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.

14. Communications under the Optional Protocol are numbered consecutively, indicating the year of registration (e.g. No. 1/1976, No. 415/1990).

15. During the period under review, there was an enormous increase in the Committee's caseload. The office of Special Rapporteur on New Communications, which had been established at the thirty-fifth session in 1989 under rule 91 of the Committee's rules of procedure, was amended at the forty-second session in July 1991 to cope with the new circumstances. Under the revised mandate, the Special Rapporteur was enabled to issue requests for interim protection under rule 86 (important in view of the steady increase in communications during the period under review from Jamaican nationals on death row) and could henceforth recommend that communications be declared inadmissible. In particular, the Special Rapporteur could recommend inadmissibility *ratione materiae, personae* or *temporis*, notably, but not exclusively, on grounds of an author's lack of standing to submit a communication, insufficient substantiation of allegations, abuse of

the right of submission, incompatibility with the provisions of the Covenant, lack of competence by the Committee under the Optional Protocol, non-exhaustion of domestic remedies, preclusion because of a State party's reservation, or simultaneous examination under another procedure of international investigation or settlement. From the end of the forty-fifth session until the end of the period under review, the Special Rapporteurs transmitted 35 new communications to the States parties concerned requesting information or observations relevant to the question of admissibility.

16. Another mechanism, the office of Special Rapporteur for Follow-up of Views established at the Committee's thirty-ninth session in July 1990 on the basis of the legal principle of "implied powers" recognized by the International Court of Justice in its Advisory Opinion in the Case of Certain Expenses (ICJ Reports, 1962), acquired greater visibility. In view of the general lack of knowledge regarding State compliance with the Committee's Views, the Special Rapporteur attempted to enter into dialogue with the State party on measures taken. In addition, in a number of Views contained in the current volume, the Committee requested the State party explicitly to report back within 90 days on progress made in this regard. Since it began to discuss follow-up matters in 1990, the Committee has considered follow-up information on a confidential basis from its forty-first session onwards, hence at all the sessions contained in this volume.

17. The new format of decisions on admissibility and Views adopted at its thirty-seventh session in 1989, which was designed to achieve greater precision and brevity, continued to be followed during the period under review.

18. An important development in terms of jurisprudence was the steady increase in the number of individual opinions appended by members of the Committee to decisions on admissibility (rule 92(3) of the rules of procedure) or Views (rule 94(3)). It is particularly noteworthy that some members appended a joint individual opinion, whether concurring or dissenting. In the present volume six opinions were written at the stage of admissibility and nineteen individual opinions were appended to the Views, including three times a joint individual opinion of four members.

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<sup>d</sup> *International Covenant on Civil and Political Rights, Selected Decisions under the Optional Protocol (Thirty-third to thirty ninth sessions)*, New York and Geneva, 2002 (CCPR/C/OP/3).

19. While only a few communications involving the State party Jamaica had been registered during the period covered by volume 3, an enormous increase in communications by Jamaican nationals awaiting execution led to the application of stricter criteria for the incorporation of such cases in volume 4. These cases also showed the impact of the Committee's Views on the viability of legal redress within the Jamaican domestic legal system. After the Committee adopted its Views in *Earl Pratt and Ivan Morgan* at its thirty-fifth session (see *Selected Decisions*, vol. 3, p. 121), the Committee considered in the *Collins* case (para. 6.5) and the *Wright* case (para. 7.3) whether an appeal to the Court of Appeal and the Judicial Committee of the Privy Council constituted "adequate means of redress" within the meaning of the Jamaican Constitution. The Supreme (Constitutional) Court had earlier

answered this question in the negative by agreeing to consider the constitutional motion of Pratt and Morgan. This is a clear example of the usefulness of the complaint procedure.

20. In this connection, another issue began to gain importance. In view of the fact that most people awaiting execution had been held on death row for a considerable period of time, the Committee was confronted with the question of whether such treatment could be considered inhuman or degrading treatment under article 7 of the Covenant. In its Views in *Barrett and Sutcliffe* (Nos. 270 and 271) the Committee replied in the negative, reiterating that prolonged judicial proceedings do not per se constitute cruel, inhuman and degrading treatment, even if they may be a source of mental strain and tension for detained persons (para. 8.4).

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## INTERLOCUTORY DECISIONS

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

#### Communication No. 486/1992

*Submitted by:* K.C. (name deleted) on 24 February 1992

*Alleged victim:* The author

*State party:* Canada

*Declared inadmissible:* 29 July 1992 (forty-fifth session)

*Subject matter:* Request for interim measures of protection pending extradition on charges of alleged murder

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

*Substantive issues:* Right to life—Threat to right to life—Death-row phenomenon

*Articles of the Covenant:* 6(1), 7 and 26

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

*Rules of procedure:* Rules 86 and 92(2)

1. The author of the communication (dated 24 February 1942) is K. C., a citizen of the United States of America born in 1952, currently detained at a penitentiary in Montreal and facing extradition to the United States. He claims to be a victim of violations by Canada of articles 6 *juncto* 26 and 7 of the International Covenant on Civil and Political Rights.

*The facts as submitted by the author*

2.1 On 27 February 1991, the author was arrested at Laval, Quebec, for theft, a charge to which he pleaded guilty. While in custody, the judicial authorities received from the United States a request for his extradition, pursuant to the 1976 Extradition Treaty between Canada and the United States. The author is wanted in the State of Pennsylvania on two charges of first-degree murder, relating to an incident that took place in Philadelphia in 1988. If convicted, the author could face the death penalty.

2.2 Pursuant to the extradition request of the United States Government and in accordance with the Extradition Treaty, the Superior Court of Quebec ordered the author's extradition to the

United States of America. Article 6 of the Treaty provides:

“When the offence for which extradition is requested is punishable by death under the laws of the requesting and State the laws of the requested State do not permit such punishment for that offence, extradition may be refused unless the requesting State provides such assurances as the requested State considers sufficient that the death penalty shall not be imposed or, if imposed, shall not be executed”.

Canada abolished the death penalty in 1976, except in the case of certain military offences.

2.3 The power to seek assurances that the death penalty will not be imposed is conferred on the Minister of Justice pursuant to section 25 of the 1985 Extradition Act.

2.4 Concerning the course of the proceedings against the author, it is stated that a habeas corpus application was filed on his behalf on 13 September 1991; he was represented by a legal aid representative. The application was dismissed by the Superior Court of Quebec. The author's representative appealed to the Court of Appeal of Quebec on 17 October 1991.

2.5 Counsel requests the Committee to adopt interim measures of protection because extradition of the author to the United States would deprive the Committee of its jurisdiction to consider the communication, and the author to properly pursue his communication.

*The complaint*

3. The author claims that the order to extradite him violates article 6 *juncto* 26 of the Covenant; he alleges that the way death penalties are pronounced in the United States generally discriminates against black people. He further alleges a violation of article 7 of the Covenant, in that he, if extradited and Sentenced to death,

would be exposed to “the death row phenomenon”, i.e. years of detention under harsh conditions, awaiting execution.

*The State party's observations*

4. On 30 April 1992, the State party informed the Committee of the author's situation in regard to remedies which are either currently being pursued by him before Canadian courts or which are still available for him to pursue. It indicates that the Court Of Appeal of Quebec is seized of the matter, and that, if it rendered a decision unfavourable to the author, he could appeal to the Supreme Court of Canada. In the event of an unfavourable decision there, he could still “petition the Minister of Justice to seek assurances under the Extradition Treaty between Canada and the United States that if surrendered, the death penalty would not be imposed or carried out. Counsel for K. C. has in fact indicated that, once remedies before the courts have been exhausted, he will be making representations to the Minister regarding assurances. A review of the Minister's decision is available in the Superior Court of Quebec on habeas corpus with appeals again to the Court of Appeal of Quebec and the Supreme Court of Canada or on application to the Federal Court Trial Division with appeals to the Federal Court of Appeal and the Supreme Court of Canada. Consequently, there is no basis for [K. C.]'s complaint as he has not exhausted all remedies available in Canada and has several opportunities to further contest his extradition.”

*Issues and proceedings before the Committee*

5.1 On 12 March 1992 the Special Rapporteur on New Communications requested

the State party, pursuant to rule 86 of the Committee's rules of procedure, to defer the author's extradition until the Committee had had an opportunity to consider the admissibility of the issues placed before it.

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

5.3 Article 5, paragraph 2(b), of the Optional Protocol precludes the Committee from considering a communication if the author has not exhausted all available domestic remedies. In the light of the information provided by the State party, the Committee concludes that the requirements of article 5, paragraph 2(b), of the Optional Protocol have not been met.

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 the Committee's request for interim measures pursuant to rule 86 of the rules of procedure is set aside;

(c) That, in accordance with rule 92, paragraph 2, of the Committee's rules of procedure, the author may, after exhausting local remedies, bring the issue again before the Committee.

## FINAL DECISIONS

### *A. Decisions declaring a communication inadmissible*

#### Communication No. 310/1988

*Submitted by:* M.T. (name deleted)

*Date of communication:* 17 February 1988

*Alleged victim:* The author

*State party:* Spain

*Declared inadmissible:* 11 April 1991 (forty-first session)

*Subject matter: Alleged torture practices inflicted upon the author while in prison*

*Procedural issue: Inadmissibility ratione temporis*

*Substantive issues: Torture—Confession under duress*

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

*Article of the Optional Protocol: 1*

1. The author of the communication is a Spanish citizen, born in 1954. At the time of submission he was detained in Finland, awaiting extradition to Spain. He alleges to be a victim of a violation of article 7 of the International Covenant on Civil and Political Rights by the Government of Spain. The Optional Protocol entered into force for Spain on 25 April 1985. The author is represented by counsel.

*The facts as submitted by the author*

2.1 The author, a former political activist, states that he lived in 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. He acknowledges that he was aware that some of his former friends had formed a political organization, Action Directe, but explains that he never joined the organization.

2.2 On 19 March 1984, the Special Services of the Spanish Guardia Civil arrested the author. He was detained for 10 days, during which time he was allegedly tortured repeatedly by the Guardia Civil and forced to sign a “confession” incriminating himself as a member of a terrorist group. During this period, the author also made statements to the examining magistrate in charge of the case. He was released because of several contradictions in his case.

2.3 On 26 August 1987, he travelled to Finland and requested political asylum. On 8 October 1987, he was taken into custody by the Finnish security police, in application of the Aliens Act. On 16 December 1987, the Government of Spain, through Interpol, requested the author’s extradition. On 4 March 1988, the Supreme Administrative Court of Finland decided that the author’s detention under the Aliens Act was lawful and on 10 March the Minister of Justice approved his extradition. He was extradited to Spain on 8 March 1988.<sup>1</sup>

2.4 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 to the Supreme Court of Spain and remains on bail.

*The complaint*

3. The author claims that the treatment he was subjected to in the Carabanchel prison in Madrid in March 1984 violated article 7 of the Covenant, and that in spite of the fact that the Optional Protocol only entered into force for Spain on 25 April 1985, the Committee should consider itself competent to consider his claim, since the torture allegedly suffered in 1984 continues to have “immediate effects”, in that he was extradited from Finland allegedly on the basis of his 1984 confession. He also states that he fears that he will again be subjected to torture in Spain.

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<sup>1</sup> In its Views in communication No. 291/1988, dated 2 April 1990, the Committee found that the author’s inability to challenge his detention under the Finnish Aliens Act during the first week of detention constituted a violation of article 9, paragraph 4, of the Covenant.

*The State party's observations*

4.1 The State party submits that with regard to the allegation of torture in 1984, the communication is inadmissible *ratione temporis*. It disputes that the alleged violation could be deemed as continuing after the entry into force of the Optional Protocol for Spain. Further, it submits that the extradition request of 16 December 1987 was based primarily on admissions made by the author before the examining magistrate in charge of the earlier case: the author had never claimed that these statements were made under duress.

4.2 The State party further argues that the author has failed to exhaust domestic remedies. Since torture constitutes an offence under article 204*bis* of the Spanish Civil Code, the author could have denounced the alleged events before the competent civil and criminal tribunals. He could have filed such a complaint with the Spanish authorities any time after March 1984 and thereby given the Government of Spain the possibility of investigating the alleged violation. In order to satisfy the requirement of exhaustion of domestic remedies, it was not necessary for the author to prove that he was a torture victim, but he should have at least filed a complaint. If dissatisfied with the judicial process, the author could still have had recourse to the constitutional remedy of *amparo*, pursuant to article 53 of the Constitution and article 43 of the Ley Orgánica del Poder Judicial.

*Issues and proceedings before the Committee*

5.1 Before considering any claims contained in a communication, the Human Rights

Committee must decide, in accordance with rule 87 of its rules of procedure, whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 With regard to the application of the Optional Protocol for Spain, the Committee recalls that it entered into force on 25 April 1985. It observes that the Optional Protocol cannot be applied retroactively and concludes that the Committee is precluded *ratione temporis* from examining acts said to have occurred in March 1984, unless these acts continued after the entry into force of the Optional Protocol and allegedly constituted a continued violation of the Covenant or had effects that themselves constitute a violation of the Covenant.

5.3 The Committee has also noted, *ex officio*, that the author's allegation that his confession in 1984 was obtained under duress could raise issues under article 14, paragraphs 1 and 3(g), of the Covenant. However, this alleged duress equally did not continue after the entry into force of the Optional Protocol for Spain.

5.4 Accordingly, the Committee finds that it is precluded *ratione temporis* from examining these allegations.

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 his counsel.

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**Communication No. 347/1988**

*Submitted by:* S. G. (name deleted)

*Date of communication:* 12 December 1988

*Alleged victim:* The author

*State party:* France

*Declared inadmissible:* 1 November 1991  
(forty-third session)\*

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\* On the same day, the Committee declared an identical case inadmissible for the same reasons (*G. B. v. France*, communication No. 348/1989). The Committee subsequently declared a case involving the teaching of the Breton language inadmissible at its forty-fourth session on 6 April 1992 (*R. L. M. v. France*, communication No. 363/1989). The Human

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Rights Committee had previously declared similar cases against the State party involving the Breton language inadmissible. See Communication No. 220/1987 contained in *Selected Decisions under the Optional Protocol*, volume 3, with reference to communications Nos. 222/1987 and 262/1987.

*Subject matter: Refusal to recognize road signs in the Breton language*

*Procedural issues: Standing of the author—Non-exhaustion of domestic remedies—Inadmissibility ratione materiae*

*Substantive issues: Complementary character of article 2—Equality before the law and recognition as a person before the law—Right to freedom of expression—Right to have access to public service—Discrimination on the ground of language—Rights of persons belonging to minorities—Interpretation of a declaration/reservation*

*Articles of the Covenant: 2(1), 16, 19(2), 25(c), 26 and 27*

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

*Individual opinion: Mrs. Rosalyn Higgins*

1. The author of the communication dated 12 December 1988 is S. G., a French citizen born in 1954 and a resident of Rennes, Bretagne. He claims to be a victim of violations by France of articles 2, 19, 25, 26 and 27 of the International Covenant on Civil and Political Rights.

*The facts as submitted by the author*

2.1 The author is an employee of the French Administration of Postal and Telecommunications (PTT) in Rennes. He was arrested during the night of 7 to 8 August 1987, on charges of having defaced several road signs in the area. His action, he states, was part of a campaign led by the movement “Stourm ar Brezhoneg” (Fight for the Breton Language), whose aim is the posting of bilingual road signs, in Breton and French, throughout the Bretagne.

2.2 In December 1987, the *Tribunal de Grande Instance* of Rennes fined the author 5,000 French francs and sentenced him to four months of imprisonment (suspended). At the same time, he and two co-defendants, Hervé Barzhig<sup>1</sup> and G. B.,<sup>2</sup> were sentenced to

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<sup>1</sup> See *Official Records of the General Assembly, Forty-sixth Session, Supplement No. 40 (A/46/40)*, annex XI, sect. F, communication No. 327/1988, Views adopted on 11 April 1991.

<sup>2</sup> See *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*,

pay 53,000 French francs, with interest, for the damage caused. On 4 July 1988, the Court of Appeal of Rennes confirmed the judgment of the court of first instance.

2.3 The author contends that since his arrest, he has been subjected to daily harassment by his employer. The official in charge of the administrative investigation against him initially proposed to suspend him from his post for a period of six months. At the end of January 1989, however, after several intercessions made on the author’s behalf by concerned citizens and the mayors of several municipalities in Bretagne, the disciplinary committee of the P. T. T. in Rennes suspended him from his post for eight days; this sanction was itself suspended. After consultations with his counsel, S. G. did not appeal the decision of the disciplinary committee.

*The complaint*

3. It is submitted that the facts described above constitute violations by France of articles 2, paragraphs 1 to 3, 19, paragraphs 1 and 2, 25, 26 and 27 of the International Covenant on Civil and Political Rights.

4.1 The State party contends that the communication is inadmissible on a number of grounds. As to the requirement of exhaustion of domestic remedies, it notes that the author failed to appeal the judgment of 4 July 1988 of the Court of Appeal of Rennes to the Court of Cassation.

4.2 As to the alleged violation of article 2 of the Covenant, the State party argues that this provision cannot be violated directly and in isolation. A violation of article 2 can only be admitted to the extent that other rights protected under the Covenant have been violated (paragraph 1) or if necessary steps to give effects to rights protected under the Covenant have not been taken. A violation of article 2 can only be the corollary of another violation of a Covenant right. The State party contends that the author has not based his argumentation on precise facts, and that he cannot demonstrate that he has been a victim of discrimination in his relations with the judicial authorities.

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annex X, sect. G, communication No. 348/1989, decision of 1 November 1991.

4.3 The State party rejects the author's allegation of a violation of his rights under article 19, paragraph 2, as an abuse of the right of submission. Apart from having failed to properly substantiate his allegation, the State party notes that the author was not prevented, at any stage of the proceedings against him, from freely expressing his views. Defacing road signs cannot, under any circumstances, be construed as a manifestation of the freedom of expression, within the meaning of article 19, paragraph 2.

4.4 Concerning the alleged violation of article 25, the State party notes that a disciplinary sanction of a six months' suspension of the author from his functions was never envisaged against him. The State party further notes that article 25(c) only protects the access to public service; it cannot be interpreted as encompassing a right of security of tenure in public office. In this respect, therefore, the communication is deemed inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

4.5 As to the claim of a violation of article 26, the State party notes that the author has failed to substantiate, for purposes of admissibility, how he was discriminated against on the ground of his language. Furthermore, he chose to express himself in French throughout the proceedings.

4.6 Finally, the State party recalls that upon ratification of the Covenant, the French Government entered the following declaration in respect of 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."

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

5.2 The Committee has considered the material placed before it by the parties. As to the claims under articles 19, paragraph 2, 25(c) and 26 of the Covenant, it considers that the author has failed to substantiate, for purposes of admissibility, how he was denied his freedom of expression, how he was denied his right to access, under general terms of equality, to public service, and how he was discriminated against on

the ground of language. The Committee observes that the defacing of road signs does not raise issues under article 19 and notes that the material before it shows that S. G. was able to express himself freely throughout the proceedings, that he chose to express himself in French, a language he did not claim not to understand, and that such sanctions as were imposed on him by the postal administration of Rennes were suspended and did not affect his employment in public service.

5.3 As to the claim of a violation of article 27, the Committee reiterates that France's "declaration" made in respect of this provision is tantamount to a reservation and therefore precludes the Committee from considering complaints against France alleging violations of article 27 of the Covenant.<sup>3</sup>

5.4 The author has also invoked article 2 of the Covenant. The Committee recalls that article 2 is a general undertaking by States parties and cannot be invoked, in isolation, by individuals under the Optional Protocol (communication No. 268/1987, *M. G. B and S.P. v Trinidad and Tobago* declared inadmissible on 3 November 1989, paragraph 6.2). Since the author's claims relating to articles 19, 25 and 26 of the Covenant are inadmissible pursuant to article 2 of the Optional Protocol, it follows that the author cannot invoke a violation of article 2 of the Covenant.

6. The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible under article 2 of the Optional Protocol;
- (b) That this decision shall be communicated to the State party and the author of the communication.

## APPENDIX

*Individual opinion submitted by Mrs. Rosalyn Higgins,  
pursuant to rule 92, paragraph 3. of the  
Committee's rules of procedure,*

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<sup>3</sup> See *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40 (A/45/40)*, vol. II, annex X, sect. A and appendices I and II, communication No. 220/1987, decision of 8 November 1989.

*concerning the Committee's decision to declare  
inadmissible  
communication No. 347/1988, S.G. v. France*

Taking the view already expressed in respect of communications Nos. 220/1987 (*T. K. v. France*) and 222/1987 (*H. K. v. France*)<sup>a</sup> that the French "declaration" on article 27 is not properly to be interpreted as a reservation, I am unable to agree with the provisions of paragraph 5.3 of the decision, that the Committee is precluded from considering complaints against France alleging a violation of article 27 of the Covenant.

However, the facts of the case reveal to me no substantiation of a claim under article 27, and I therefore also reach the conclusion that there are no grounds for admissibility.

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<sup>a</sup> See *Annual Report of the Human Rights Committee*, A/45/40, 1990, vol. II, annex X.A, appendix II; annex X.B, appendix II.

## Communication No. 354/1989

*Submitted by:* L. G. (name deleted)  
*Date of communication:* 17 February 1989  
*Alleged victim:* The author  
*State party:* Mauritius  
*Declared inadmissible:* 31 October 1990  
(fortieth session)\*

*Subject matter:* Removal from the Mauritian Bar  
in connection with alleged possession of  
proceeds from a robbery

*Procedural issues:* Inadmissibility ratione  
materiae—Non-exhaustion of domestic  
remedies

*Substantive issues:* Alleged miscarriage of justice

*Articles of the Covenant:* 14(6) and 26

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

*Individual opinions:* Ms. Christine Chanet  
and Mr. Birame Ndiaye (appendix I)  
Mrs. Rosalyn Higgins and Mr. Amos Wako  
(appendix II)  
Mr. Nisuke Ando (appendix III)  
Mr. Bertil Wennergren (appendix IV)

1. The author of the communication (initial submission dated 17 February 1989 and subsequent submissions) is L. G., a Mauritian citizen and former barrister. He claims to be the victim of a violation of articles 1, 2, 3, 14, 15 and 26 of the International Covenant on Civil and Political Rights by Mauritius.

### *The facts as submitted*

2.1 On 16 February 1979, the author was arrested in connection with the possession of parts of the proceeds from a robbery at a casino, perpetrated on the night of 21 January 1979. On 29 January 1979, a self-confessed participant in the robbery retained the services of the author and remitted two sums of money to him, first 3000 rupees representing the author's legal fees and then 7000 rupees to be put aside for the eventuality of retaining the services of senior counsel. Several days before the author's arrest,

his client's wife requested the author to return the 7000 rupees, allegedly because the client was ill and needed the money for medical expenses; she was accompanied by two plainclothes policemen who posed as relatives of the client. The author asked to personally meet his client, and a meeting was arranged at the client's house where, in the presence of the undercover agents, the author returned the 7000 rupees to his client. Upon leaving the house, he was arrested in a nearby street, and charged with possession of stolen money.

2.2 The author claims that he was framed by the police, who were in exclusive charge of the investigation related to the robbery. He alleges that there was strong evidence that a number of individuals of Chinese origin were directly associated with the crime but that all the participants of Chinese origin except one either denied their participation in the hold-up or were never questioned by the police about it. He further indicates that the police, instead of completing its investigations within a short period of time, engaged in "secret dealing" with those participants in the hold-up who were of Chinese origin.

2.3 During the trial the author's client appeared as the prosecution's principal witness, testifying that he had given the author the 7000 rupees for safekeeping. On 12 August 1979, the court of first instance, in a two to one majority decision, convicted the author. He appealed, but on 5 August 1980, the Supreme Court confirmed the judgment of first instance. The author envisaged a further appeal to the Judicial Committee of the Privy Council but claims that this was bound to fail due to the fact that the grounds of appeal were limited to the court record and the issues of law were not of fundamental importance; moreover, he submits that the Privy Council very rarely intervenes on issues of fact. This information was imparted to him by an English professor whose services he had retained; as a result, the author chose not to proceed with his petition, and on 20 December 1980, the Privy Council dismissed his appeal for

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\* Pursuant to rule 85 of the Committee's rules of procedure, Mr. Rajsoomer Lallah did not participate in the consideration of the communication or in the adoption of the Committee's decision.



“non-prosecution”, that is, failure to pursue the case.

2.4 Late in 1980, the author came across fresh evidence which led him to believe that the police inquiry had been “partial, discriminatory and deliberately selective”. On 17 March 1981, however, he was summoned to appear before the full bench of the Supreme Court under Section 2 of the Legal Practitioners (Disciplinary Proceeding) Ordinance and advised to remove his name from the roll of practicing barristers. The author subsequently requested his removal from the Roll of Barristers so as to prevent the continuation of disciplinary proceedings against him. In 1983 and 1986, he submitted petitions for pardon to the Commission on the Prerogative of Mercy; both were rejected. Since 1981, he has unsuccessfully sought to obtain the assistance of the Mauritius Bar Council in his efforts to be readmitted to the roll of practicing barristers. In 1986, he contemplated a formal motion before the Supreme Court but was advised to contact the Attorney General’s office instead, since a Letter from the Attorney General would be sufficient for him to resume his practice. He wrote to the Attorney General but did not receive any reply.

2.5 Early in 1989, the author wrote to the Chief Justice, who recommended to him to apply for re-instatement under the Law Practitioner’s Act 1984; the author did so. On 17 November 1989, the Chief Justice declined to issue the order for his re-instatement on the ground of the author’s previous conviction

#### *The complaint*

3.1 The author claims that there was no basis for suspending him indefinitely from the exercise of his profession. He notes that Mauritian legislation makes no provisions for a retrial in cases in which there exists new material evidence, which was unknown to the accused prior to the trial. As all criminal investigations are conducted by the police who have overall responsibility for a case, the judicial authorities, may only require supplementary information with respect to the investigation but have no control over it. Once an investigation is completed, it is submitted to the Crown Law Office. The author argues that at this juncture there exists a “no man’s land” bound to create situations in which the administration of justice may be jeopardized. He notes that the institution of the examining magistrate (Juge d’instruction) is unknown in Mauritius. For these reasons, the

author considers that he was not afforded a fair trial and is thus the victim of a miscarriage of justice.

3.2 With respect to the requirement of exhaustion of domestic remedies, the author states that he did not pursue his appeal to the Judicial Committee Of the Privy Council because of the prohibitive costs involved, and because it would not, in his opinion, have constituted an effective remedy, as the Privy Council does not entertain an appeal based on facts. He claims that after the decision of the Chief Justice not to grant his request for re-instatement, the only effective remedy for him would be the enactment of new legislation allowing for a retrial in cases in which new material evidence becomes available after the conclusion of the trial, or new legislation vesting disciplinary powers in the Mauritian Bar Council along the same lines as those vested in the British Bar Council. He concludes that he has exhausted available judicial remedies, and affirms that the prolongation of the pursuit of remedies is not solely attributable to him.

#### *The State party’s observations*

4.1 The State party contends that the communication should be declared inadmissible pursuant to articles 2 and 5, paragraph 2(b), of the Optional Protocol. It argues that it is inadmissible on the ground of non-exhaustion of domestic remedies because the author, although availing himself of several non-judicial remedies, failed to pursue the avenue provided for under Mauritian law: to first apply to the Registrar for reinsertion of his name on the Roll of Barristers, and, in the event of a negative decision, to seek judicial review of the Registrar’s decision. The State party claims that the communication is also inadmissible because of the author’s failure to pursue his petition for leave to appeal to the Judicial Committee of the Privy Council.

4.2 The State party further affirms that the communication is inadmissible pursuant to article 2, of the Optional Protocol, since it does not disclose a claim under article 2 of the Optional Protocol. It notes that in as much as the author’s claim of a violation of article 14, on the ground that he had discovered new evidence not available to him during the trial, is concerned, the communication does not disclose in precise terms what this new evidence was. It contends that all the evidence referred to in the communication was available during the trial, and that the allegation of an “elaborate police frame up”

amounts to no more than a personal conclusion drawn from evidence available at the time. Moreover, the State party observes, the Mauritian courts acted properly in deciding to rely on the evidence presented by the author's own client and that of other witnesses, after having directed them properly on issues of law, and that the object of the communication would convert the Human Rights Committee into a Court of Appeal on findings of fact.

#### *The issues before the Committee*

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

5.2 In respect of the author's claim that Mauritian Law does not provide for a retrial in cases in which fresh material evidence becomes available after the conclusion of the trial, the Committee notes that no substantiation of such fresh material evidence has been made. Therefore, the author has failed to advance a claim under the Covenant within the meaning of article 2 of the Optional Protocol.

5.3 As to the author's claim that he has been unjustly denied re-instatement on the Roll of Barristers and that no remedy exists for this, the Committee notes that the author failed to apply for judicial review of the Chief Justice's decision of 17 November 1989. Until he avails himself of the possibility of a judicial review, no issue under article 14 of the Covenant arises. The author's claim is thus incompatible with the provisions of the Covenant within the meaning of article 3 of the Optional Protocol.

6. The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible;
- (b) That this decision shall be transmitted to the State party and to the author.

#### APPENDIX I

*Individual opinion submitted by Ms. Christine Chanet and Mr. Birame Ndiaye, pursuant to rule 92, paragraph 3, of the Committee's rules of procedure, concerning the Committee's decision to declare*

*inadmissible communication No. 354/1989, L. G. v. Mauritius*

The authors of the present individual opinion endorse the Committee's decision to declare this communication inadmissible.

Nevertheless, they do not consider it possible to single out, as is done in paragraph 5.3 of the text of the decision, one provision of the Covenant among those referred to by the author of the communication in order to declare that the communication is incompatible with the provisions of the Covenant within the meaning of article 3 of the Optional Protocol.

When it considers a communication under the Optional Protocol, the Committee must ascertain whether the communication satisfies the requirements laid down successively in the provisions of the Optional Protocol.

In the case in question the complainant's allegations, both concerning the violations of which he claims to have been a victim and concerning the domestic remedies available to him to have those allegations accepted, are not sufficiently well substantiated to permit the conclusion that, in submitting his communication, L.G. met the conditions set out in article 2 of the Optional Protocol.

#### APPENDIX II

*Individual opinion submitted by Mrs. Rosalyn Higgins and Mr. Amos Wako, pursuant to rule 92, paragraph 3, of the Committee's rule of procedure, concerning the Committee's decision to declare inadmissible communication No. 354/1989, L. G. v. Mauritius*

Article 14, paragraph 6, of the Covenant refers, *inter alia*, to what remedy is required when a person's conviction has been reversed or he has been pardoned on the basis of new or newly discovered facts.

Such reversal of conviction, or pardon, occurs in various ways in different jurisdictions. We wish to make it clear that the basis of the Committee's decision, as explained in paragraph 5.2, should not be read as a finding by the Committee that article 14, paragraph 6, necessarily requires an entitlement to retrial.

### APPENDIX III

*Individual opinion submitted by Mr. Nisuke Ando, pursuant to rule 92, paragraph 3, of the Committee's rules of procedure, concerning the Committee's decision to declare inadmissible communication No. 354/1989, L. G. v. Mauritius*

I do not oppose the Committee's view that the author's claim that Mauritian law does not provide for a retrial in cases in which fresh material evidence becomes available after the conclusion of the trial has not been substantiated (paragraph 5.2).

However, had the claim been substantiated, the Committee would have been required to determine the compatibility with the provision of article 14, paragraph 6, of a legal system under which no retrial is permissible and pardon remains the only recourse available for a convicted person, even if fresh evidence conclusively shows that the conviction was pronounced erroneously. In this connection, I would like to make the following observations.

Article 14, paragraph 6, provides that: "when a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered the punishment as a result of such a conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."•

It is possible to argue that this provision presupposes not only a legal system under which retrial is institutionalized, but also a legal system which does not allow for a retrial and under which pardon remains the only recourse available for the convicted person, even where new or newly discovered facts show conclusively that the conviction was arrived at erroneously, on the ground of the provision's wording "when his

conviction has been reversed or he has been pardoned" (emphasis added).

While I do not intend to rule out this possibility, I feel obliged to express my concern about legal systems under which no retrial is permissible and pardon remains the only available recourse in such cases. For one thing, a retrial provides an opportunity for the judiciary to re-examine its own conviction and sentence in the light of fresh evidence and correct its errors. In my opinion, pardon being the prerogative of the executive, the institution of retrial is essential far the principle of independence of the judiciary. Furthermore, retrial ensures that the erroneously convicted person is given an opportunity to have his or her case re-examined in the light of fresh evidence, and to be declared innocent. If he or she is innocent, it would be difficult to justify why he or she should need to be pardoned pursuant to the prerogative of the executive.

### APPENDIX IV

*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 inadmissible communication No. 354/1989, L. G. v. Mauritius*

I associate myself with the individual opinion submitted by Mrs. Rosalyn Higgins and Mr. Amos Wako, but I want to draw attention to the wording of article 14, paragraph 6, where it indicates the ground for a reversal of conviction or pardon, namely "that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice". Such a ground should according to my opinion justify a claim under article 14, paragraph 5, regarding the availability of review of conviction and sentence by a higher tribunal according to law. However, the Committee's decision, as explained in paragraph 5.2, makes it clear that the author has failed to advance such a claim.

## Communication No. 358/1989

*Submitted by:* R. L., M. B., M. H. (names deleted) and 14 other members of the Whispering Pines Band (represented by counsel)

*Date of communication:* 1 April 1989

*Alleged victims:* The authors

*State party:* Canada

*Declared inadmissible:* 5 November 1991 (forty-third session)

*Subject matter: Interpretation of Bill C-31 regulating "Indian" status\**

engage in raising cattle on 1,200 acres (750 ha) of land.

*Procedural issues: Notion of victim—Non-exhaustion of domestic remedies*

2.2 The communication challenges certain aspects of Bill C-31, i.e. the legislation which was enacted by the Government of Canada in 1985 in response to the recommendations of the Human Rights Committee in its Views in the case of *Sandra Lovelace v. Canada*.<sup>1</sup> By virtue of Bill C-31 certain persons formerly deprived of "Indian" status on the basis of sex were reinstated, but at the same time, other persons who formerly enjoyed Indian status were deprived of it on the basis of a racial quota.

*Substantive issues: Right of self-determination—Collective character of this right*

*Articles of the Covenant: 1(1) and 27*

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

1. The authors of the communication (initial submission dated 1 April 1989 and subsequent correspondence) are Chief R. L., M. B., M. H. and 14 other members of the Whispering Pines Indian Band, residing in the province of British Columbia, Canada. The authors allege violations by the Government of Canada of article 1, paragraph 1, article 2, paragraph 1, articles 17, 22, 23, 26 and 27 of the International Covenant on Civil and Political Rights. They are represented by counsel.

2.3 Owing to the small size of the Band, members frequently marry non-members. Because of its geographical isolation from other Shuswap communities and in view of the relative proximity to the city of Kamloops, social contact and inter-marriage with non-Indians has been common. Traditional Indian membership rules allowed for considerable flexibility and facilitated the incorporation of non-members into the various bands. Problems allegedly started with the enactment of the original Indian Act, 1876, which imposed the Euro-Canadian concept of patrilineal kinship and inheritance on the indigenous peoples of Canada. To be considered an "Indian" under the Indian Act, a person had to be the biological child of an Indian father, or have been adopted by an Indian father in accordance with Canadian family law. The Indian Act also provided that women would take their legal status from their husbands. A Shuswap woman who married a non-Indian Canadian continued to belong to her childhood band under Shuswap law, but became "white" under the Indian Act. Likewise, although a "white" Canadian woman who married a Shuswap became a member of her husband's

*The facts as submitted by the authors*

2.1 The Whispering Pines Indian Band belongs to the Shuswap Nation in south-central British Columbia. The Shuswap are the indigenous people of the region and constitute a single social, cultural, political and linguistic community distinct both from Euro-Canadians and from neighbouring indigenous peoples. Approximately half of the contemporary members of the Band live in a small farming community numbering about 26 persons and

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\* The Human Rights Committee, in an early decision *Sandra Lovelace v. Canada*, recommended the promulgation of a Bill regulating the status of "Indians" within Canada (see communication No. 24/1977; *Selected Decisions of the Human Rights Committee*, vol. 1, pp. 83 *et seq.*). See for a similar position the Committee's Views in communication No. 167/1984 (*B. Ominayak and the Lubicon Lake Band v. Canada*), 26 March 1990, paragraph 32.1, contained in *Selected Decisions under the Optional Protocol*, vol. 3, p. 78.

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<sup>1</sup> Communication No. 24/1977; see *Selected Decisions of the Human Rights Committee*, vol. I, pp. 83 *et seq.* See also the statement by the Government of Canada concerning the implementation of the Views in the case of *Lovelace*, in *ibid.*, *Selected Decisions*, vol. II, pp. 224 *et seq.*

band under the Indian Act, she was never regarded as Shuswap by her husband's band. As a result of the original Indian Act, Shuswap women who married non-Indians were removed from "band lists" maintained by the Government of Canada, thereby losing their rights to live on lands set aside for Shuswap bands ("Indian reserves"). In 1951 the Indian Act was amended to the extent that minor Indian children would also lose their status if their mother marries a non-Indian; bands could, however, apply for an exemption from this rule. Other Shuswaps lost their Indian Status upon obtaining off-reserve employment, serving in the Canadian armed forces, or completing higher education. The authors conclude that it was Government policy to remove from Indian reserves anyone deemed capable of assimilating into non-Indian Canadian society.

2.4 By virtue of Bill C-31 women who, on account of their marriage to non-Indians prior to 17 April 1985, had lost their Indian status under the former Indian Act, together with any of their children who had lost status with them, could be reinstated and thus be re-considered band members. In addition, Bill C-31 authorized the reinstatement of men or women who were deprived of their status before 1951 for other reasons. The children of such persons, however, were added to a band list only if both parents were Indians or were entitled to be registered as Indians. Children born before 17 April 1985, merely required the child's father (or, if the parents were unmarried, mother) to have Indian status.

2.5 Bill C-31 provides that a band "may assume control of its own membership if it establishes membership rules for itself in writing". It is submitted, however, that few bands were able to obtain approval of their own rules before 28 June 1987, the deadline established by Bill C-31. The net effect has been that persons who left the reserves before 1985, together with most of their children, have been reinstated upon request, and that all children born out of interracial marriages after 1985 have been, or will be, deleted from band lists.

### *The complaint*

3.1 The authors submit that two aspects of Bill C-31 affect them adversely: bringing in new band members whom the community cannot house or support, and imposing new standards for Indian status which will operate to deprive

many of the authors' children and grandchildren of their Band membership and right to live on the reserve. The net result on the Band is a gain of nine persons, in terms of Indian status, and a loss of two. In addition, since the Band's, proposed membership rules were not approved by the Minister before 28 June 1987, all persons acquiring the legal status of Indians are entitled to Band membership. Another problem arises with respect to children born after 17 April 1985, since they may acquire such status only if they have two Indian parents. The continued application of Bill C-31 will have an increasingly negative effect on the authors' families if their children marry non-Indians in the same proportions as their parents. To avoid the termination of family lines through the operation of Section 6 (2) of Bill C-31, the authors would have to arrange all future marriages of Band members with members of other Bands. This is said to force them to choose between gradually losing their legal rights and their reserve land, and depriving their children of personal freedom and privacy, which would be incompatible with the Covenant and the Canadian Charter of Rights and Freedoms.

3.2 Another current problem is that twenty-eight persons who are not directly related to the families now residing on the reserve have applied for Indian status and Band membership. This would entail a 50 per cent increase in housing requirements, which the Band cannot meet. So as to accommodate new members, the Band would have to develop a cluster-housing project requiring new water wells, sewer systems and power lines, at an estimated cost of \$223,000 Canadian dollars. Federal adjustment assistance under Bill C-31 is, however, extremely limited. Even if new members could be housed on the reserve, there is very little possibility of ensuring their employment. Cultural problems also arise, because some of the newcomers have never lived on an Indian reserve and others have lived off-reserve for more than ten years. Considering that most are single, older adults without children, their social impact on a community which has consisted of three to four self-sufficient farm families would be overwhelming.

3.3 The authors believe that the Committee's Views in the *Lovelace* case confirm that States cannot unreasonably restrict freedom of association and co-habitation of individual families, nor of the related families which comprise an ethnic, religious or linguistic community. The authors consider that their

“freedom of association with others” (article 22, paragraph 1) has been interfered with, in that they cannot themselves determine membership in their small farming community. They can be forced to share their limited land and resources with persons who acquire Indian status and membership, while their own direct descendants may lose the right to be part of the community.

3.4 It is submitted that the implementation of Bill C-31 constitutes “arbitrary and unlawful interference” with the authors’ families (article 17, paragraph 1), on account of the fact that the Government, and not the Band, determines who may live on the reserve. Moreover, this interference is said to be arbitrary in that it distinguishes among family members on the basis of whether they were born before or after 17 April 1985, and in that it distinguishes among family members on the basis of whether one or both of their parents were Indians, a purely racial criterion contrary to articles 2, paragraph 1, and 26 of the Covenant.

3.5 The implementation of Bill C-31 allegedly conflicts with article 23 of the Covenant, in that it restricts the freedom of Band members to choose their own spouses, particularly considering that marriage to non-Indians would result in disenfranchising the children.

3.6 Further, the authors claim a violation of article 26 of the Covenant, which prohibits “any discrimination” on the ground of race, in that it makes racial quantum, rather than cultural factors and, individual allegiance, the basis for allocating indigenous rights and indigenous peoples’ lands. Traditional Shuswap law regarded as Shuswap anyone who was born in the territory or raised as a Shuswap. Bill C-31 requires that, in the future, both parents be “Indian” as defined under Canadian law. Children born to a Shuswap mother or father and raised on Shuswap territory in the Shuswap culture would still be denied Indian status and Band membership.

3.7 Concerning article 27. of the Covenant, the authors point out that they regard themselves as an indigenous people rather than an “ethnic (or) linguistic minority”, but that since the indigenous and minority categories overlap, indigenous peoples should also be entitled to

exercise the rights of minorities. They conclude that Bill C-31 violates article 27 by imposing restrictions on who can reside in, or share in the economic and political life of the community.

3.8 The Shuswap consider themselves a distinct people and thus entitled to determine the form and membership of their own economic, social and political institutions, in accordance with article I, paragraph 1, of the Covenant. Control of membership being one of the inherent and fundamental rights of indigenous communities, the authors invoke article 24 of the draft Universal Declaration of Indigenous Rights.

3.9 As to the requirement of exhaustion of domestic remedies, the authors state that they endeavoured to counter the detrimental effects of Bill C-31 by attempting to assume control of Band membership. On 23 June 1987 they adopted rules which were duly transmitted to the Ministry of Indian Affairs. On 25 January 1988, the Minister replied that the proposed rules were inconsistent with Bill C-31, in that they excluded certain classes of persons eligible for reinstatement. In this connection the authors invoke Section 35 of the Constitution Act, 1982, which was intended to secure “aboriginal and treaty rights of the aboriginal peoples of Canada” against future legislative erosion. The authors admit that, in theory, the Supreme Court of Canada could determine that Bill C-31 is of no effect if it is found to conflict with the authors’ “aboriginal rights”. But they claim that it would take several years of litigation to settle the issue at a financial cost considerably beyond the means of three farm families. According to the authors, an attempt to solve the matter by appeals to the Canadian courts would entail “unreasonably prolonged” proceedings in the sense of article 5, paragraph 2(b), of the Optional Protocol. Moreover, once the legal issue is determined by the Supreme Court, it would be too late to reverse the effects on the community of losing some of its members and accommodating others under Bill C-31. Therefore, the authors seek immediate measures to preserve the status quo *pendente lite* and request the Committee, pursuant to rule 86 of the rules of procedure, to urge the State party to refrain from making any additions to or deletions from the Band List of the Whispering Pines Indian Band, except as may be necessary to ensure that every direct descendant of the authors is included for the time being as a member of the Band.

*The State party's observations and the authors' comments*

4.1 The State party contends that the communication is inadmissible *ratione personae*, pursuant to article 1 of the Optional Protocol. It notes that the authors contend that Bill C-31 threatens to deprive their descendants of Indian status, and observes that the victims of such a claim would be children born after 1985, of one parent who is non-Indian and another parent who alone cannot pass on Indian status (i.e. a child out of a marriage between a status Indian and a non-status Indian, who marries a non-status Indian). In the State party's opinion, the authors have not shown that there are in the Band individuals meeting these criteria and who therefore could claim to be victims. The State party further contends that the Committee itself has repeatedly acknowledged that it will not entertain claims of abstract or potential breaches of the Covenant; it adds that the communication does not identify anyone currently affected by Bill C-31, and that the communication is inadmissible on that ground.

4.2 The State party submits that the authors have not complied with their obligation to exhaust domestic remedies. It emphasized that article 5, paragraph 2(b), of the Optional Protocol reflects a fundamental principle of general international law that local remedies be exhausted before resorting to an international instance. This rule ensures that domestic courts are not superseded by an international organ, and that a State has an opportunity to correct any wrong which may be shown before its internal fora, before that State's international responsibility is engaged. Domestic courts are generally better placed to determine the facts of and the law applicable to any given case, and where necessary, to enforce an appropriate remedy. In the present case, mere doubts about the success of remedies does not absolve the authors from resorting to them, a principle recognized by the Committee in its decisions in cases *R. T. v. France* (communication No. 262/1987)<sup>2</sup> and *S. S. v. Norway* (communication No. 79/1980).<sup>3</sup>

4.3 With regard to the alleged prohibitive cost of, and length of time for exhausting

domestic remedies, the State party refers to the Committee's decisions in *J. R. C. v. Costa Rica* (communication No. 296/1988)<sup>4</sup> and *S. H. B. v. Canada* (communication No. 192/1985)<sup>5</sup> where, in similar circumstances, the communications were declared inadmissible.

4.4 Moreover, the State party points out that judicial remedies remain available to the authors: thus, it remains open to them to apply to the Federal Court, Trial Division, for a declaration that "aboriginal rights" include control over the Band's own membership. The State party notes that the recent judgment of the Supreme Court of Canada in the case of *R. v. Sparrow* clarifies both meaning and scope of the "aboriginal rights" referred to in Section 35 of the *Constitution Act 1982*; in this case, it was held that the Government must meet exacting standards before implementing actions that impinge upon the enjoyment of existing aboriginal and treaty rights. The State party submits that this judgment underlines the importance of first allowing local courts to address national issues.

4.5 Further, it is open to the authors to file an action in the same court, based on breach(es) of the Canadian Charter of Rights and Freedoms. Among the rights guaranteed in the Charter are the right to freedom of association (s. 2(d)), the right not to be deprived of life, liberty or security of the person except in accordance with principles of fundamental justice (s. 7), and the right to equality "before and under the law and ... the right to equal protection and equal benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability" (s. 15). These rights are guaranteed to individuals in relation to federal and provincial governments (s. 32). Anyone whose Charter rights have been infringed may apply to a competent court jurisdiction to obtain such remedy as the court considers appropriate and just within the circumstances (s. 24).

4.6 The State party notes that the two avenues of recourse described above have been tried by a number of Indian Bands. In *Twinn v. R.* members of six Alberta Indian Bands applied to the Federal court Trial Division, for a

<sup>2</sup> Declared inadmissible at the Committee's thirty-fifth session. See *Selected Decisions*, vol. II.

<sup>3</sup> Declared inadmissible at the Committee's fifteenth session. See *Selected Decisions*, vol. I.

<sup>4</sup> Declared inadmissible at the Committee's thirty-fifth session. See *Selected Decisions*, vol. III.

<sup>5</sup> See *ibid.*, *Forty-second Session, Supplement No. 40* (A/42/40).

declaration: (a) that Bill CA31 is inconsistent with section 35 of the Constitution Act, 1982, to the extent that it limits, or denies, the aboriginal and implied treaty rights of Indian Bands to determine their own membership: or (b) that the imposition of additional members on the plaintiff Bands pursuant to the Bill, without the Bands' consent, constitutes a violation of the right to freedom of association, guaranteed by section 2(d) of the Charter. Evidence-gathering examinations were initiated early in 1989, but because of several interlocutory motions and the large number of parties seeking to intervene, they have not been completed. The State party expresses its hope that the matter will go on trial late in 1991. Similar issues have been raised in the cases of *Martel v. Chief Omeasoo* before the Federal Court, Trial Division, and of *Chief Omeasoo v. The Queen* before the Federal Court, Appeals Division: the State party indicates, however, that the plaintiffs in these cases are not currently actively pursuing their actions.

4.7 In respect of allegedly prohibitive costs of litigation, the State party argues that the Department of Indian Affairs and Northern Development has provided funding to various of the parties involved in the cases discussed above. In *Twinn*, approximately \$55,000 was given to the Native Council of Canada and Indian Rights for Indian Women, to assist in the preparation of court documentation. In September 1988, the government approved a Bill C-31 Litigation Funding Program. Since funds have already been granted to certain litigants in the *Twinn* case pursuant to this programme, it is, however, unlikely that further funds will be made available for the litigation of identical issues between different parties, at least until the *Twinn* case is resolved. The State also contends that the authors may seek financial assistance through the Court Challenges Program, which was established in 1985 to assist litigants in cases involving important and novel issues relating to the applicability of the Charter's equality clause to federal laws. The State party notes that there is no indication whether the authors have sought financial assistance under this programme from its independent administering body. Finally, the State party refers to the existence of a Test Case Funding Programme, but observes that there is no indication that the authors applied for assistance under it.

4.8 Bill C-31 also allows Indian Bands to determine their own membership rules if two conditions are met. These conditions are that the

rules be approved by a majority of band electors, and that certain specified groups of persons be included in the membership list.

4.9 In 1987 the authors submitted their membership rules for approval to the Department of Indian Affairs and Northern Development. By letter dated 25 January 1988, the Chief of the Whispering Pines Band was advised that the membership rules were not acceptable because they excluded certain specified groups, such as women who lost their entitlement to band membership as a result of marriage to non-Indians, their minor children, and others. The Minister invited the Band to amend its membership rules in accordance with the reconditions, and re-submit the amended rules for approval by the Department. The two year deadline to which the Band refers does not apply to re-submission of proposed rules. Therefore, the Minister's offer to the Band remains valid and would provide a remedy to the alleged violations of the Covenant.

5.1 In response to the State party's submission, the authors assert that since the complaint arises directly from the State party's efforts to implement a previous decision of the Committee involving the same State, the same category of persons and the same basic principles, it constitutes a case of "continuing jurisdiction". They invoke the principles of natural justice, that the author of a communication may return to the Committee for a clarification and reaffirmation of its Views without first having to re-litigate the matter before domestic tribunals. The authors believe that not only the author of a communication could seek further action following the transmittal of the Committee's Views, but also other individuals, similarly placed and similarly affected, should be entitled to address the Committee for clarifications of the application of its Views to them.

5.2 The authors argue that the Committee's Views were not properly implemented, as Bill C-31 merely replaced gender restrictions by racial ones, and that it would be unreasonably formalistic to require prior exhaustion of domestic remedies in these circumstances.

5.3 In respect of the availability of domestic remedies, the authors reiterate their view that litigation would not afford them an "effective and available" remedy and that the cost and time required for judicial resolution would not be



reasonable under the circumstances. They also claim irreparable harm as *pendente lite* there would be no protection for children not registered as Indians or as members of the Band. Finally, the authors reiterate that a constitutional challenge could take at least 4 1/2 years, a period the Committee has deemed unreasonably prolonged within the meaning of article 5, paragraph 2(b), of the Optional Protocol on previous occasions.<sup>6</sup>

5.4 The authors further contend that they have been offered neither financial nor legal assistance. Funding remains entirely at the discretion of the Minister for Indian Affairs and Northern Development, and none of the government's comments suggest that legal assistance would be forthcoming if the current complaint were to be dismissed.

5.5 In respect of revising and re-submitting their Band by-laws to the competent Minister, the authors underline that by-laws cannot override the provisions of Bill C-31, including the racial standards they have challenged. The Minister cannot approve by-laws which conflict with statutory norms.

5.6 In another submission, dated 3 October 1990, the authors explain that they have not applied for financial assistance from the Department of Justice, since they were advised that there is little hope of success and that this assistance is ordinarily available only for appeals, rather than for the preparation for trial and initial complaints. In addition, the authors have ascertained that in other domestic litigation concerning rights of indigenous peoples, no judicial decisions have been handed down. In particular, the *Twinm* case is not expected to go to trial before 1991.

5.7 Author's counsel indicates that there are presently six adults in the Whispering Pines Band with so-called "6(2)" status under Bill C-31 -i.e. adults who, if marrying a non-status Indian, cannot pass on Indian status to their children. None of these children can be registered under Bill C-31. The consequences for the others depend on whom they will marry; in view of the small size of the Band, counsel notes that it is unlikely that they will marry anyone with status

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<sup>6</sup> *Weinberger Weisz v. Uruguay* (communication No. 28/1978, in *Selected Decisions of the Human Rights Committee*, United Nations publication (Sales No. E.89.XIV.1), vol. I, pp. 57 *et seq.*

under Bill C-31. Thus, the children of P. E. and V. E. will be ineligible to become Band members, since P. E. and V. E. married non-Indians: counsel adds that it is unlikely that any of the future children of other registered Band members will be eligible. This situation, it is submitted, does not involve hypothetical and future violations of the Covenant: some of the Band's children will grow up in the knowledge that they can only protect their cultural heritage if they marry an Indian registered under Bill C-31. The Bill is thus said to constitute an infringement on the right to marry even in circumstances where no individualized child has as of yet been disenfranchised.

#### *The issues and proceedings before the Committee*

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

6.2 With respect to the authors claim of a violation of article 1 of the Covenant, the Committee recalls its constant jurisprudence that pursuant to article 1 of the Optional Protocol, it may receive and consider communications only if they emanate from individuals who claim that their individual rights have been violated by a State party to the Optional Protocol. While all peoples have the right to self-determinations and the right freely to determine their political status, pursue their economic, social and cultural development (and may, for their own ends, freely dispose of their natural wealth and resources) the Committee has already decided that no claim for self-determination may be brought under the Optional Protocol.<sup>7</sup> Thus, this aspect of the communication is inadmissible under article 1 of the Optional Protocol.

6.3 With regard to the requirement of exhaustion of domestic remedies, the Committee has noted the authors' arguments that they have unsuccessfully endeavoured to challenge

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<sup>7</sup> See *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40 (A/45/40)*, vol. II, annex IX, sect. A, communication No. 167/1984, Views adopted on 26 March 1990, para. 32.1; and *ibid.*, *Forty-sixth Session, Supplement No. 40 (A/46/40)*, annex XII, sect. O, communication No. 413/1990, decision of 2 November 1990, para. 3.2.

Bill C-31 by attempting to assume control of Band membership. It observes, however, that the authors themselves concede that the Supreme Court of Canada could rule Bill C-31 to have no effect where it conflicts with the authors' "aboriginal rights", i.e. the desired control of Band membership.

6.4 The Committee further observes that other Indian Bands have instituted proceedings before the Federal Courts, the outcome of which is pending, notably in the case of *Twinn v. R.*, and that the alleged high cost of litigation can, under specific circumstances, be offset by funding provided pursuant to a number of programmes instituted by the State party. As to the authors' concern about the potential length of proceedings, the Committee reiterates its constant jurisprudence that fears about the length of proceedings do not absolve authors from the requirement of at least making a reasonable

effort to exhaust domestic remedies (*A. and S. N. v. Norway*)<sup>8</sup>. In this light, the Committee finds that available domestic remedies that may indeed prove to be effective remain to be exhausted.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 1 of the Optional Protocol in so far as it concerns the right of self-determination and under article 5, paragraph 2(b), of the Optional Protocol in so far as it concerns the authors' other allegations;

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

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<sup>8</sup> See *ibid.*, *Forty-third Session, Supplement No. 40 (A/43/40)*, annex VIII, sect. C, communication No. 224/1987, decision adopted on 11 July 1988, para. 6.2.

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### Communication No. 397/1990

*Submitted by:* P. S. (name deleted) on his own behalf and on behalf of his son

*Date of communication:* 15 February 1990

*Alleged victims:* The author and his son

*State party:* Denmark

*Declared inadmissible:* 22 July 1992 (forty-fifth session)

*Subject matter:* *The right to custody of a child following divorce procedures*

*Procedural issues:* *Notion of victim—Standing of non-custodial parent to represent son before the Committee—Admissibility ratione personae—Non-exhaustion of domestic remedies—Effective remedy*

*Substantive issues:* *Interpretation of right to freedom of religion*

*Articles of the Covenant:* *14(2) and (3)(c), 17(2), 18(2), 23(4), 24(1) and 26*

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

*Individual Opinion:* *Mr. Bertil Wennergren*

1. The author of the communication (initial submission dated 15 February 1990 and subsequent submissions) is P. S., a Danish citizen born in 1960. He submits the communication on his own behalf and that of his son, T. S., born in January 1984. The author claims that he and his son are victims of violations by Denmark of articles 14, paragraphs 2 and 3(c), 17, 18, 21, 22, 23, 24, 26 and 27 of the International Covenant on Civil and Political Rights.

*The facts as submitted by the author*

2.1 The author married in 1983. In 1986, he and his wife were separated by decision of the County Authorities of North Jutland, which also decided on joint custody of the son. In 1988 the Municipal Court of Varde pronounced the divorce and awarded custody to the mother. The author appealed to the Court of Appeal and claimed custody of his son. On 10 May 1988, the Court of Appeal confirmed the Municipal Court's judgment in respect of the custody question.

2.2 During the proceedings, a temporary agreement on the right of access was concluded between the author and his ex-wife; yet, after discovering that the author had converted to the faith of Jehovah's Witnesses, and that he had taken his son to a rally of Jehovah's Witnesses, the mother requested the County Authorities in Odense to decide on her conditions for granting access to T-S., under which the author had to refrain from teaching the faith of Jehovah's Witnesses to his son. In this context, it is noted that under Danish law, the parent who has custody may decide on the child's religious education.

2.3 On 13 October 1988, a meeting was arranged between the author and his ex-wife; expert advice on child and family matters was given to both parties, in accordance with relevant Danish legislation. Despite this advice, the author refused to refrain from teaching his son the tenets of his religion. He also rejected the mother's suggestion to limit the right of access to visits at the address of the son's paternal grandmother. By letters of 30 November and 11 December 1988, the author requested the County Authorities of Funen to settle the dispute.

2.4 By decision of 13 December 1988, the County Authorities of Funen determined the extent of time father and son were entitled to spend together, and the conditions under which such visits might take place. In this connection, the County Authorities stated: "Access to T. is granted on condition that T., while visiting his father, is not taught the faith of Jehovah's Witnesses and that T. does not participate in Jehovah's Witnesses' rallies, gatherings, meetings, missions or similar activities". Under Danish law, it is possible to stipulate exact conditions for the exercise of visiting rights, but only if such conditions are deemed necessary for the well-being of the child. In this case, the

authorities found that the child was facing a "loyalty crisis" vis-à-vis his parents, and that if no limitations were imposed on the religious influence he was exposed to during his contacts with the father, his normal development might be jeopardized.

2.5 On 17 December 1988, the author appealed to the Directorate of Family Affairs, arguing that the decision of the County Authorities constituted unlawful persecution on religious grounds.

2.6 By letter of 7 January 1989, the author notified the County. Authorities that his ex-wife refused to comply with the access arrangements determined by the authorities. To enforce his right of access, he requested the Sheriff's Court (*Fogedretten*) of Odense to issue an access order. By decision of 3 February 1989, the Court decided to stay the proceedings on the ground that the author was in no position to make a clear and explicit declaration that he would fully comply with the conditions imposed on his right of access, and that the matter was still pending before the Directorate of Family Affairs.

2.7 By interlocutory judgment of 29 June 1989, the Court of Appeal dismissed the author's appeal against the decision of the Sheriff's Court of 3 February 1989, on the ground that the statute of limitations had expired. By the same judgment, the Court of Appeal dismissed another (interlocutory) appeal of the author, which had been directed against a decision on access of the Sheriff's Court of 19 May 1989. The Court of Appeal contended that the claims could not be put forward under the procedure used by the author.

2.8 On 19 March 1989, the author informed the Danish Minister of Justice of his case. By decision of 30 March 1989, the Directorate of Family Affairs upheld the County Authorities' decision of 13 December 1988 on the right of access. The author then filed a complaint with the Parliamentary Ombudsman.

2.9 On 27 June 1989, the Sheriff's Court of Odense issued yet another order concerning the enforcement of the author's right of access. It argued that, according to the statements of the mother, the author had disregarded the conditions pertaining to the exercise of his right of access during one of T.'s visits. The Court again suspended the proceedings on the ground that the

question of validity of said conditions was still under review by the Court of Appeal.

2.10 In his reply of 1 November 1989 to the author, the Ombudsman acknowledged that the parents' freedom of religion must be taken into consideration, but that this did not exclude consideration of exceptional circumstances, especially where the best interests of the child are concerned, in which case limitations on the exercise of religious freedom could be imposed during contacts with the child. The Ombudsman reiterated that, in the present case, the conditions imposed on the author's right of access should be deemed to be in the best interest of the son. On the other hand, he conceded that the author's freedom of religion must also be taken into consideration, in the sense that only "strictly necessary conditions" could be imposed in this respect. The Ombudsman noticed that the authorities had not found any reason to deny the author contact with the son on account of his being a Jehovah's Witness, even though it was known that the daily life of Jehovah's Witnesses is strongly influenced by their beliefs. Accordingly, the Ombudsman requested the authorities to define exactly the circumstances under which the son's visits might take place.

2.11 On 28 February 1990, after consultations with the author and the mother, the County Authorities formulated the following conditions:

"The right of access shall continue only on condition that the son, during visits to his father, will not be taught the faith of Jehovah's Witnesses. This means that the father will agree not to bring up the subject of Jehovah's Witnesses faith in the company of the child, nor start conversations about this subject. Moreover, the father will agree not to play tapes, show films or read literature about the faith of Jehovah's Witnesses, nor to read the bible or say prayers in conformity with this faith in the presence of the child.

Another condition of the continued right of access is that the son will not participate in Jehovah's Witnesses' rallies, gatherings, meetings, missions or similar activities. The expression 'or similar activities' means that the son will not be allowed to participate in any other social gatherings . . . where texts from the bible are read aloud or interpreted, where prayers are said in conformity with the faith of Jehovah's Witnesses or where literature, films or tapes are

presented about the faith of Jehovah's Witnesses".

2.12 On 1 March 1990, the author appealed to the Department of Private Law (the former Directorate of Family Affairs), arguing that he and his son were experiencing continuous persecution and that his rights to freedom of religion and thought had been violated. He submitted another complaint to the Parliamentary Ombudsman against the decision of the County Authorities. By decision of 10 May 1990, the Department of Private Law upheld the County Authorities' decision of 13 December 1988, as defined on 28 February 1990. It stated, inter alia, that the conditions imposed on the author's right of access were not excessive having regard to his freedom of religion.

2.13 Further submissions from the author reveal that he has continued to petition the authorities. At present, his right to access can only be exercised under supervision, as he has been unwilling to comply with the conditions imposed on him.

#### *The complaint*

3. The author claims violations of:

(a) Article 14, paragraph 2, because his visiting rights allegedly were refused on the mere suspicion that he might do something wrong in the future;

(b) Article 14, paragraph 3 (c), as the dispute dates back to August 1986 and has not been settled by the authorities five and a half years later;

(c) Article 17, as the conditions imposed on him by administrative and judicial decisions constitute an unlawful interference with his privacy and family life. On account of said decisions he claims to have been subjected to unlawful attacks on his honour and reputation;

(d) Article 18, because if the authorities had respected its provisions, there would have been no case in the first place;

(e) Articles 21 and 22, as the restrictions to which he and his son are subjected entail violations of the exercise of their rights of peaceful assembly and freedom of association;

- (f) Article 23; at no time did the Danish authorities try to protect the family unit;
- (g) Article 24, in respect of his son;
- (h) Article 26, which is said to follow from the violations of articles 14, paragraphs 2 and 3(c), 18, 21 and 22;
- (i) Article 27, which is said to follow from the violation of article 18.

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

4.1 The State party explains the operation of Danish legislation governing separation of spouses, divorce, custody and access to children, and of the relevant administrative and judicial authorities. It adds preliminary comments on the author's grievances.

4.2 The State party notes that custody of the son was awarded to the mother, in compliance with Danish legislation and court practice. Accordingly, she has the exclusive right to decide on the son's personal affairs and to act on his behalf. The State party claims that the communication should be declared inadmissible *ratione personae* in respect of T. S., on the ground that the author has no standing under Danish law, to act on behalf of his son without the consent of the custodial parent.

4.3 The State party claims that the author has failed to exhaust available domestic remedies. It notes that on 10 May 1990, the Department of Private Law rendered its final decision in respect of the conditions imposed on the author's right of access: with this, only the available administrative procedures were exhausted. Pursuant to section 63 of the Danish Constitutional Act, the author should then have requested from the courts a judicial review of the terms and conditions imposed by the decision.

4.4 The State party also observes that the courts may directly rule on the alleged violations of Denmark's international obligations under the International Covenant on Civil and Political Rights. It concludes that, as the author failed to submit his complaint to the Danish courts, the communication is inadmissible under articles 2 and 5, paragraph 2(b), of the Optional Protocol.

4.5 In his comments on the State party's submission, the author states, *inter alia*, that he does not want to seize the courts because of the unnecessary expenditure of taxpayers, money and for reasons of time and stress. He also expresses his doubts about the effectiveness of a trial in his case.

*Issues and proceedings before the Committee*

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

5.2 The Committee has taken notice of the State party's contention that the author has no standing to act on behalf of his son, as Danish law limits this right to the, custodial parent. The Committee observes that standing under the Optional Protocol may be determined independently of national regulations and legislation governing an individual's standing before a domestic court of law. In the present case, it is clear that T. S. cannot himself submit a complaint to the Committee; the relationship between father and son and the nature of the allegations must be deemed sufficient to justify representation of T. S. before the Committee by his father.

5.3 As regards the author's claims of a violation of articles 14, 21, 22 and 27, the Committee considers that the facts as submitted by the author do not raise issues under these articles. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

5.4 With regard to the author's allegations of violations of articles 17, 18, 23, 24 and 26, the Committee observes that article paragraph 2(b), of the Optional Protocol precludes it from considering a communication unless it has been ascertained that domestic remedies have been exhausted. In this connection the Committee notes that the author has only exhausted administrative procedures: it reiterates that article 5, paragraph 2(b), of the Optional Protocol, by referring to "all available domestic remedies if, clearly refers in the first place to judicial remedies.<sup>1</sup> The Committee recalls the

<sup>1</sup> See *Official Records of the General Assembly, Forty-fourth Session, Supplement No. 40 (A/44/40)*, annex

State party's contention that judicial review of administrative regulations and decisions, pursuant to section 63 of the Danish Constitutional Act, would be an effective remedy available to the author. The Committee notes that the author has refused to avail himself of these remedies, because of considerations of principle and in view of the costs involved. The Committee finds, however, that financial considerations and doubts about the effectiveness of domestic remedies do not absolve the author from exhausting them. Accordingly, the author has failed to meet the requirements of article 5, paragraph 2(b), in this respect.

6. The Human Rights 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.

#### 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 on communication No. 397/1990,  
P.S. v. Denmark*

The author's communication concerns the modalities of contacts with his son T., now eight years old, as well as the position of the Danish authorities on this matter since 1986.

The Parliamentary Ombudsman became involved in this matter following a complaint by the author. In his decision of 1 November 1989, the Ombudsman accepted in principle the standpoint of the administrative authorities, namely that limitations on the author's exercise of his religious freedom during his contacts with his son were necessary. Against this background he merely requested the authorities to define the conditions more precisely, particularly with regard to the terms "teach" and "or similar activities". The author claims that the Ombudsman's decision, in conjunction with the administrative decisions in his case, violated his rights under article 18 of the Covenant.

The State party, in its observations, informed the Committee about the Ombudsman's status and functions, but did not address the content of the Ombudsman's decision nor its role in the process. It may well be that the State party deemed the Ombudsman to be a supervisory body who did not participate in the process. However, even if it were true that the Ombudsman's decisions are supervisory decisions and that they are not legally binding as such, they have considerable de facto effects on an administrative process. Had the Ombudsman found that the limitations on the author's exercise of his freedom of religion imposed by the administrative authorities were excessive, he would have informed the administrative authorities and requested them to reconsider their position accordingly. In principle they would have had to comply, as they complied with the decision of 1 November 1989. By endorsing the authorities' standpoint, the Ombudsman de facto prevented them from reconsidering and modifying their standpoint. And the Ombudsman is not independent to such an extent that the State party would not be responsible for his actions.

The Optional Protocol allows "communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant". The author claims that he is a victim of a violation committed by the Ombudsman. Given the effects the Ombudsman's decision must be assumed to have had, I come to the conclusion that said claims may raise issues under the Covenant, first under article 18 but equally under article 19, as the conditions prescribed also limited the author's freedom of expression. There are no remedies available against a decision of the Parliamentary Ombudsman. The communication therefore is, in my opinion, admissible as far as it regards claims directed against the Ombudsman; otherwise I am in full agreement with the Committee's decision. I do however want to add that, had the communication been declared admissible, further attention should have been given to the issue of standing of the author, in respect of his son. I consider that from some points of view the author might be said to have interests that conflict with those of the son, and which might disqualify him from representing his son.

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XI, sect. D, communication No. 262/1987 (*R. T. v. France*), decision of 30 March 1989, para. 7.4.

## Communication No. 408/1990

*Submitted by:* W. J. H. (name deleted) (represented by counsel)

*Date of communication:* 15 November 1989

*Alleged victim:* The author

*State party:* The Netherlands

*Declared inadmissible:* 22 July 1992 (forty-fifth session)

*Subject matter: Request for compensation for damages resulting from time spent in pre-trial detention*

*Procedural issues: Inadmissibility ratione materiae*

*Substantive issues: Presumption of innocence—Miscarriage of justice*

*Articles of the Covenant: 9(5), 14(2) and (6)*

*Article of the Optional Protocol: 3*

1. The author of the communication (dated 15 November 1989) is W. J. H., a citizen of the Netherlands, currently residing in Belgium. He claims to be a victim of a violation by the Netherlands of article 14, paragraphs 2 and 6, of the International Covenant on Civil and Political Rights. He is represented by counsel.

*The facts as submitted by the author*

2.1 The author was arrested on 8 December 1983 and kept in pre-trial detention until 8 February 1984. On 24 December 1985, the Arnhem Court of Appeal convicted him on a variety of criminal charges, including forgery and fraud. On 17 March 1987, the Supreme Court (*Hoge Raad*) quashed the earlier conviction and referred the case to the 's-Hertogenbosch Court of Appeal, which acquitted the author on 11 May 1988.

2.2 Pursuant to sections 89 and 591a of the Code of Criminal Procedure, the author subsequently filed a request with the 's-Hertogenbosch Court of Appeal for award of compensation for damages resulting from the time spent in pre-trial detention and for the costs of legal representation. Section 90, paragraph 1, of the Code of Criminal Procedure provides that, after an acquittal, the Court may grant compensation for reasons of equity. On 21 November 1988, the Court of Appeal rejected the author's request. The Court was of the opinion that it would not be fair to grant compensation to the author, since his acquittal

was due to a procedural error: it referred in this context to the judgment of the Arnhem Court of Appeal of 24 December 1985, by which the author was convicted on the basis of evidence that later was found to have been irregularly obtained.

2.3 The author claims that, as no legal remedy for the denial of compensation is available, domestic remedies have been exhausted.

*The complaint*

3.1 The author claims that the 's-Hertogenbosch Court of Appeal, by its decision of, 21 November 1988, violated his right to be considered innocent, pursuant to article 14, paragraph 2, of the Covenant. He submits that, since he was not found guilty by the court, he should not suffer financial damage as a result of the institution of criminal proceedings against him.

3.2 He further contends that the failure to grant him compensation constitutes a violation of article 14, paragraph 6, of the Covenant. He claims that the judgment of the Arnhem Court of Appeal of 24 December 1985 was a final decision within the meaning of article 14, paragraph 6, because it was the judgment of the highest factual instance. In this context, he argues that the subsequent judgments acquitting the author, constitute "new facts" within the meaning of article 14, paragraph 6. He finally claims that his pre-trial detention should be considered equivalent to "punishment" in said paragraph.

*The State party's observations and the author's comments*

4.1 By submission of 9 July 1991 the State party argues that the communication is inadmissible on the ground of non-exhaustion of domestic remedies. It submits that the author did not invoke article 14, paragraph 6, of the Covenant when requesting compensation, but

only argued that doubt concerning guilt or innocence should not be allowed to influence his right to compensation under article 89 of the Code of Criminal Procedure. The State party further contends that the author could, pursuant to article 1401 of the Civil Code, have demanded compensation in a civil action.

4.2 The State party also argues that article 14, paragraphs 2 and 6, of the Covenant does not apply to the author's case, and that the communication is therefore inadmissible as incompatible with the provisions of the Covenant under article 3 of the Optional Protocol.

4.3 The State party submits that the presumption of innocence, within the meaning of article 14, paragraph 2, does not preclude the imposition of pre-trial detention; it refers in this connection to article 9, paragraph 3, of the Covenant. It states that the author did not submit that his detention was unlawful and argues that no provision of the Covenant grants an accused the right to compensation for having undergone lawful pre-trial detention, in the event that he is subsequently acquitted.

4.4 The State party further notes that the judgment of the Supreme Court of 17 March 1987 cannot be regarded as a "new fact" within the meaning of article 14, paragraph 6, but that it is the outcome of an appeal and as such a continuation of the proceedings concerning the facts conducted before the lower courts. It also argues that, since an appeal to the Supreme Court is the final domestic remedy, the judgment of the Arnhem Court of Appeal of 24 December 1985 cannot be regarded as a "final decision". Finally, it contends that pre-trial detention cannot be considered as punishment within the meaning of article 14, paragraph 6, as it is an initial coercive measure and not imposed as a result of a conviction.

5.1 In his reply to the State party's observations, the author contests that a civil action under article 1401 of the Civil Code is available to him. He submits that a civil claim for compensation is only possible in case of governmental tort and refers in this connection to a judgment of the Supreme Court of 7 April 1989. Since his pre-trial detention is to be considered-lawful, the question of tort does not arise in his case. He further submits that it is highly unlikely that a civil court will refute the criminal court's judgment.

5.2 The author also states that he was not obliged to invoke the specific article's of the Covenant during the court proceedings. In this context, he refers to the Committee's Views in communication No. 305/1988.<sup>1</sup> He submits that his argument that doubt about guilt or innocence should not be allowed to influence his right to compensation, clearly referred to the *presumptio innocentiae*, as reflected in article 14, paragraph 2.

5.3 The author submits that the interpretation by the State party of article 14, paragraphs 2 and 6, is too restrictive. He argues that there is no reason to make a distinction between a reversal of a conviction and an acquittal on appeal, as far as compensation for damages is concerned. He further stresses that an accused, who has not been proved guilty according to the law, should not bear the costs incurred in connection with the criminal prosecution. In this connection, he submits that his acquittal was exclusively due to the legal assistance provided by his counsel. He argues that under these circumstances the principle of fair procedure implies that the acquitted accused cannot be burdened with the costs of the defence.

#### *Issues and proceedings before the Committee*

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

6.2 With respect to the author's allegation of a violation of the principle of presumption of innocence enshrined in article 14, paragraph 2, of the Covenant, the Committee observes that this provision applies only to criminal proceedings and not to proceedings for, compensation; it accordingly finds that this provision does not apply to the facts as submitted.

6.3 With regard to the author's claim for compensation under article 14, paragraph 6, of the Covenant, the Committee observes that the conditions for the application of this article are:

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<sup>1</sup> See *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40 (A/45/40)*, vol. II, annex IX, sect. M, Views adopted on 23 July 1990, para. 5.5.



(a) A final conviction for a criminal offence;

(b) Suffering of punishment as a consequence of such conviction; and

(c) A subsequent reversal or pardon on the ground of a new or newly discovered fact showing conclusively that there has been a miscarriage of justice;

The Committee observes that since the final decision in this case, that of the Court of Appeal of 11 May 1988, acquitted the author, and since

he did not suffer any punishment as the result of his earlier conviction of 24 December 1985, the author's claim is outside the scope of article 14, paragraph 6, of the Covenant.

7. The Human Rights Committee therefore decides:

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

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

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### Communication No. 409/1990

*Submitted by:* E. M. E. H. (name deleted)

*Date of communication:* 19 December 1989

*Alleged victim:* The author

*State party:* France

*Declared inadmissible:* 2 November 1990 (fortieth session)

*Subject matter:* Suspension of payment of pension outside the territory of employment

*Procedural issues:* State party to the Optional Protocol—Inadmissibility *ratione materiae*

*Substantive issues:* Equal protection of the law—Equality before the law

*Article of the Covenant:* 26

*Articles of the Optional Protocol:* 1 and 3

1. The author of the communication dated 19 December 1989 is E. H. E. H., a French citizen of Moroccan origin, aged 72. He claims to be the victim of a violation by France of article 26 of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for France on 17 May 1984 and for Algeria on 12 December 1989.

*The facts as submitted by the author*

2.1 From 1941 to 1963, the author was a full time employee the Chemins de Fer Marocains (C. F. M.). In 1963 he was transferred to the Société Nationale des Chemins de Fer Algériens (SNCFA). He served as station manager ("Chef de gare lère classe au 9ème echelon") until 1972. In 1973, he retired and received from the

Algerian SNCFA the pension he was entitled to, until 1983, when he moved to France. By letter of 4 February 1984 from the SNCFA Pension fund in Algiers, he was informed that, pursuant to Article 53, Title V of Law No. 83-12 of 2 July 1983, the payment was suspended on the ground that pensions are not paid outside the national territory of Algeria.

2.2 The author contends that his situation is similar to that in Communication No. 196/1985 (*I. Gueye and 742 retired Senegalese Soldiers of the French Army v. France*), in which the Human Rights Committee had found, in its views adopted on 3 April 1989, a violation of article 26, because retired Senegalese soldiers who had served in the French army prior to Senegal's independence received lower pensions than other retired soldiers of French nationality.

2.3 The author points out that he served for thirty-two years in two countries, one which had been part of France until 1962 (Algeria) and the other which had been a protectorate until 1956.

2.4 With respect to the exhaustion of domestic remedies, the author states that he wrote, inter alia, to the Board of the French National Railways, the French Minister of Transports, the Minister of Foreign Affairs, the Prime Minister and the President of the Republic

of France. It appears from the context of his submission that he did not submit his case to any French tribunal. He does not mention what steps, if any, he took before Algerian administrative or judicial instances.

#### *The complaint*

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

3.2 With respect to article 1 of the Optional Protocol, the Committee reaffirms that it may only receive and consider communications from individuals subject to the jurisdiction of a State party to the Covenant and Optional Protocol “who claim to be victims of a violation *by that State party* of any of their rights set forth in the Covenant” (emphasis added). In this connection the Committee notes that although the author has addressed his complaint against France, his grievances actually relate to the laws and regulations in so far as they govern the retirement practices of the Algerian SNCFA. Although the author has, since his retirement, set up residence

in France and is generally subject to French jurisdiction, he does not come within French jurisdiction in respect of his claims to retirement benefits from the Algerian SNCFA. Moreover, the Committee finds that the facts of this communication are materially different from those of communication No. 196/1985, in which the retired Senegalese Soldiers received payments from the French State pursuant to the French Code of Military Pensions, whereas in the instant case E. M. E. H. never received payments from France but rather from the Algerian SNCFA, which also discontinued them. Accordingly, the Committee cannot entertain E. M. E. H.’s communication against France under article 1 of the Optional Protocol.

4. The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible;
- (b) That this decision shall be communicated to the author and, for information, to the State party.

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### **Communication No. 413/1990**

*Submitted by:* A. B. *et al.* (names deleted)

*Date of communication:* 30 April 1990

*Alleged victims:* The author and 14 other persons

*State party:* Italy

*Declared inadmissible:* 2 November 1990 (fortieth session)

*Subject matter:* Claim to self-determination as a collective right

*Procedural issues:* Notion of victim—Standing of the authors—Inadmissibility *ratione materiae*

*Substantive issue:* Right of self-determination

*Article of the Covenant:* 1(1)

*Article of the Optional Protocol:* 1

1. The authors of the communication are A. B., President of the Union für Südtirol, and 14 other members of the executive

committee of the Union. All are Italian citizens. The author and two other signatories are delegates to the Provincial Council of the autonomous Province of Bozen-South-Tirol (Bolzano, Alto Adige). The authors claim that the rights of the people of South Tirol under article 1 of the International Covenant on Civil and Political Rights have been violated by Italy.

*The facts as submitted by the authors*

2.1 The authors allege that the right of self-determination of the people of South Tirol has been violated by numerous acts and decrees adopted by the Italian Parliament, which are said

to encroach on the “autonomous legislative and executive regional power” of the Province, provided for in the De Gasperi-Gruber Accord of 5 September 1946 (the “Paris Agreement”) and developed further in the Autonomy Statutes of 1948 and 1972. They refer to 33 decisions of the Italian Constitutional Court since 1983, concerning actions brought by the South Tirol Provincial Assembly which upheld the powers of direction and control of the Italian Government over matters previously held to be within the competence of the Province. They allude to the underlying grievance in only one of these suits, namely that Law No. 183 of 18 May 1989 “about safeguard of the soil” requires plans concerning the “catchment area” of the Etsch Valley to be approved by the Council of Ministers.

2.2 An advisory opinion of the Procedural Aspects of International Law Institute, appended to the communication, refers to more specific grievances presumably shared by the authors. These include: Law No. 217 of 17 May 1983 which establishes State control over tourism and hotel classifications; laws of 1982 and 1987 concerning housing subsidies, Law No. 529 of 7 August 1982 allowing hydroelectric concessions to remain in private hands after the expiration of their grants, thus by-passing provincial control (most of the electricity is consumed in other regions of Italy); failure of the State to transfer property to the province, as provided by article 68 of the 1972 Autonomy Statute; denial of unilingual trials in the defendant’s mother tongue; and lack of ethnolinguistic proportionality in public employment. All of the above have been upheld by the Constitutional Court, with the exception of the property question, which was pending before the Court of Cassation as of November 1988.

2.3 According to the authors, the Italian Government concedes the validity of the Paris Agreement in international law but considers the Autonomy Statute of 1948 to constitute fulfilment of its obligations thereunder. The Government considers the Autonomy Statute of 1972 to be a purely unilateral political act, while the authors claim that it is a result of the “package” agreement of 1969 between Austria and Italy arising out of disputes concerning the Paris Agreement.

2.4 As there is no appeal from decisions of the Italian Constitutional Court, and as the population of South-Tirol is not sufficiently

numerous to initiate a constitutional amendment, the authors claim that domestic remedies have been exhausted.

2.5 The matter of implementation of the Paris Agreement was taken up by the United Nations General Assembly in 1960 and 1961 (G. A. Resolution 1497 (XV) and G. A. Resolution 1661 (XVI)) and the European Commission of Human Rights (Opinion of 31 March 1960, Application No. 788/60) as well as in the above-mentioned negotiations between Austria and Italy in 1969.

### *The complaint*

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

3.2 With regard to the issue of the authors’ standing under the Optional Protocol, the Committee recalls its constant jurisprudence that pursuant to article 1 of the Optional Protocol it can receive and consider communications only if they emanate from individuals who claim that their individual rights have been violated by a State party to the Optional Protocol. 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 may, for their own ends, freely dispose of their natural wealth and resources, the Committee has already decided that no claim for self-determination may be brought under the Optional Protocol.<sup>1</sup> Thus, the Committee is not required to decide whether the ethno-German population living in South Tirol constitute “peoples” within the meaning of article 1 of the International Covenant on Civil and Political Rights.

4. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible;

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<sup>1</sup> See Committee’s Views in communication No. 167/1984 (*B. Ominayak and the Lubicon Lake Band v. Canada*), decision of 26 March 1990, para. 32.1; communication No. 318/1988 (*E. P. et al. v. Colombia*), inadmissibility decision of 25 July 1990, para. 8.2.

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

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### Communication No. 432/1990

*Submitted by:* W. B. E. (name deleted)

*Date of communication:* 20 July 1990

*Alleged victim:* The author

*State party:* The Netherlands

*Declared inadmissible:* 23 October 1992 (forty-sixth session)

*Subject matter: Request for compensation following release after alleged unduly prolonged pre-trial detention*

*Procedural issues: Substantiation of claim—Incompatibility with the provisions of the Covenant ratione materiae—Non-exhaustion of domestic remedies*

*Substantive issues: Unlawful detention—Right to compensation—Fair hearing*

*Articles of the Covenant: 9(3) and (5) and 14(1), (2) and (6)*

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

1. The author of the communication is W. B. E., a Dutch businessman residing in Amsterdam. He claims to be the victim of a violation by the Netherlands of articles 9, paragraphs 3 and 5, and 14, paragraphs 1 and 2, of the International Covenant on Civil and Political Rights.

*Facts as submitted by the author*

2.1 The author was detained from 10 December 1979 to 27 April 1980 on suspicion of involvement in drug smuggling activities. On 27 March 1980 the District Court (*Arrondissementsrechtbank*) of Haarlem acquitted him of the charges on a point of law. The Public Prosecutor appealed to the Amsterdam Court of Appeal (*Gerechtshof*), which, on 29 December 1980, acquitted the author, considering that the charges against him had not been proven lawfully and convincingly.

2.2 On 20 March 1981, the author submitted two petitions to the Amsterdam Court of Appeal, pursuant to articles 89 and 591a of the Dutch Code of Criminal Procedure (*Wetboek van Strafvordering*), for award of compensation for damages resulting from the time spent in detention and from lost revenue (altogether DFL 19,612,550). By decision of 10 February 1982, the Court rejected his petitions on the ground that, although he had been acquitted of the charges against him, the evidence produced at the trial showed that he had been closely involved in the realization of the plan for the illegal import of a substantial amount of heroin and had played an important role in the transport.

2.3 On 15 February 1982, the author appealed this decision to the Supreme Court (*Hoge Raad*), which, on 20 April 1982, declared his appeal inadmissible, on the ground that under Dutch law a refusal of the Court of Appeal to grant compensation is not appealable.

2.4 On 14 October 1983, the author initiated a civil action against the State before the District Court of The Hague (*Arrondissementsrechtbank*), with a view to having declared void the Amsterdam Court of Appeal judgement of 10 February 1982. The Court rejected his request on 10 April 1985. His subsequent appeal against this decision was rejected by The Hague Court of Appeal on 11 December 1986. This judgement was confirmed by the Supreme Court on 25 November 1988.

2.5 On 15 October 1983, the author filed an application with the European Commission of Human Rights, which declared it inadmissible on 6 May 1985.

## *Complaint*

3.1 The author claims that his continued detention constituted a violation of article 9, paragraph 3, of the Covenant. He acknowledges that a reasonable suspicion that criminal acts had taken place was present in his case, but contends that continued pre-trial detention should only be allowed in order to prevent flight or the commitment of further crimes. The author claims that, in the absence of serious grounds to assume that he would leave the jurisdiction or commit further crimes, 107 days of pre-trial detention was unreasonably long. He submits that he had offered bail, but that this offer was ignored by the Dutch authorities.

3.2 The author further claims that he has a right to compensation, pursuant to article 9, paragraph 5, since he was acquitted of the charges against him. In his opinion, the ground given by the Court of Appeal to reject his petitions for compensation constitutes a violation of article 14, paragraph 2, of the Covenant. He argues that this provision must be interpreted broadly and should also apply to procedures for compensation following acquittal of a criminal charge.

3.3 Finally, he claims that the decisions rejecting his petitions pursuant to articles 89 and 591a of the Code of Criminal Procedure were beset with irregularities which constitute a violation of article 14, paragraph 1. With respect to his petition under article 89, he points to two irregularities: firstly, the Chamber (*Raadkamer*) of the Amsterdam Court of Appeal was not composed of the judges who had previously decided on the criminal case, as is prescribed by law, and secondly, one of the judges participating in the decision had not even taken part in the examination of his request. With respect to the rejection of his petition under article 591a, the author claims that the written judgement of the Court of Appeal did not permit the identification of its signatories. The author alleges that the refusal to grant him compensation is the direct result of the composition of the Chamber.

## *State party's observations and the author's comments thereon*

4.1 By submission, dated 25 October 1991, the State party argues that the communication is inadmissible on the grounds of non-exhaustion of domestic remedies, non-substantiation of the

allegations, and incompatibility of the claims with the Covenant.

4.2 The State party contends that the author has not exhausted domestic remedies, since he never invoked the substantive rights of the Covenant during the domestic procedures, although he had the opportunity to do so.

4.3 As regards the author's allegation that article 9, paragraph 3 of the Covenant was violated by keeping him in pre-trial detention for 107 days, the State party refers to its legislation, which prescribes that detention, after an initial 4 days, be ordered by an examining magistrate, and after another 12 days, by the District Court. The District Court can only order detention not exceeding 30 days, which period may be extended twice. Grounds on which pre-trial detention may be ordered are laid down in articles 67 and 67a of the Code of Criminal Procedure, and only apply when there is a high level of evidence that the suspect committed a serious crime, carrying a prison sentence of 4 years or longer.

4.4 The State party argues that the author's detention was in accordance with the law, given the seriousness of the suspicions against him. The Court ordered his detention under article 67a, paragraph 2.3 of the Code, which provides that pre-trial detention can be lawfully imposed if it is reasonable to suppose that this is necessary to enable the facts to be established, other than through statements made by the suspect. The State party argues that the detention was necessary in order to prevent the investigation from being impeded by the author influencing fellow suspects and witnesses, and obliterating the traces of the offence in other ways.

4.5 As regards the author's allegation that article 9, paragraph 5, has been violated, the State party submits that serious suspicions existed that the author had committed criminal offences and that his detention was not unlawful. Thus, the State party argues that this part of the communication should be declared inadmissible as incompatible with the provisions of the Covenant.

4.6 With regard to the alleged violation of article 14, paragraph 2, the State party argues that this provision applies to criminal proceedings only, and not to proceedings to assess

compensation for damages resulting from detention.

4.7 With regard to the alleged violation of article 14, paragraph 1, the State party submits that the composition of the Chamber hearing an application for compensation is regulated in article 89, paragraph 4, of the Code of Criminal Procedure. This provision stipulates that, in so far as it is possible, the Chamber shall be composed of the members of the Court who were present at the trial. The State party argues that this, however, is not a binding rule, and largely enacted for practical reasons. It argues that the fact that the Court in chambers had a different composition from the Court which had heard the criminal case does not imply that the decision was not arrived at independently and in objectivity, or that it was biased.

4.8 Moreover, the State party argues that article 14, paragraph 1, of the Covenant does not apply to the proceedings under article 89 of the Code of Criminal Procedure. It contends that these constitute neither the determination of a criminal charge nor of a civil right in a suit at law.

5.1 In his comments on the State party's submission, the author argues that he was not obliged to invoke the articles of the Covenant during the domestic procedures. He submits that he has exhausted all domestic remedies.

5.2 The author concedes that the statutory procedure regarding pre-trial detention is, as such, consistent with the provisions of the Covenant under article 9. However, he argues that the application of the statutory provisions in his case led to unlawful deprivation of his liberty. He denies the presence of serious reasons to suspect that he was involved in drug smuggling.

5.3 In this connection, he submits that, in 1979, he was working as a police informer, and in this capacity he allegedly informed an Amsterdam police chief inspector about a shipment of heroin from Turkey to the Netherlands. However, according to the author, due to a power struggle within the police, the intervention with the shipment failed, and the author's informer, a Turkish acquaintance, was killed. The author then decided to discontinue working for the police inspector.

5.4 The author contends that his arrest, on 10 December 1979, was a direct attempt to shift

the responsibility of the failing narcotics policy of the police department to him, by qualifying his activities as a police informer as crimes. He submits that there was no reason for the Public Prosecutor to believe that he had acted otherwise than under orders and as a police informer.

5.5 The author claims therefore that his detention was unlawful, and that he was entitled to compensation under article 89 of the Code of Criminal Procedure. Since this compensation was denied to him, he maintains that he is a victim of a violation of article 9, paragraph 5.

5.6 As regards the alleged violation of article 14, paragraph 2, the author argues that the compensation proceedings under articles 89 and 591a of the Code of Criminal Procedure are a continuation of the criminal proceedings. He reiterates his allegation that the Court of Appeal violated his right to be presumed innocent, when it considered that there was evidence that he had been closely involved in the illegal import of heroin.

5.7 As regards the compensation proceedings, the author maintains that he was denied a fair hearing by an impartial tribunal; since the judges were not familiar with his case, he alleges that the Public Prosecutor was in a position to influence their decision. He further submits that compensation after unlawful detention is a civil right and that article 14, paragraph 1, therefore applies also to the determination of compensation after unlawful arrest.

#### *Issues and proceedings before the Committee*

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

6.2 With regard to the State party's argument that the author has not exhausted domestic remedies because he did not invoke the relevant provisions of the Covenant before the Dutch courts, the Committee observes that, whereas the authors must invoke the substantive rights contained in the Covenant, they are not required, for purposes of the Optional Protocol, to do so by reference to specific articles of the

Covenant.<sup>1</sup> The Committee observes that in the instant case, the author contested his detention and claimed compensation through available domestic remedies, and thereby invoked the substantive rights contained in articles 9 and 14 of the Covenant.

6.3 With regard to the author's allegation that his pre-trial detention was in violation of article 9 of the Covenant, the Committee observes that article 9, paragraph 3, allows pre-trial detention as an exception; pre-trial detention may be necessary, for example, to ensure the presence of the accused at the trial, avert interference with witnesses and other evidence, or the commission of other offences. On the basis of the information before the Committee, it appears that the author's detention was based on considerations that there was a serious risk that, if released, he might interfere with the evidence against him.

6.4 The Committee considers that, since pre-trial detention to prevent interference with evidence is, as such, compatible with article 9, paragraph 3, of the Covenant, and since the author has not substantiated, for purposes of admissibility, his claim that there was no lawful reason to extend his detention, this part of the communication is inadmissible under articles 2 and 3 of the Optional Protocol.

6.5 With regard to the author's allegation that his right to compensation under article 9, paragraph 5, was violated, the Committee recalls that this provision grants victims of unlawful arrest or detention an enforceable right to compensation. The author, however, has not substantiated, for purposes of admissibility, his claim that his detention was unlawful. In this connection, the Committee observes that the fact that the author was subsequently acquitted does not in and of itself render the pre-trial detention unlawful. This part of the communication is therefore inadmissible under articles 2 and 3 of the Optional Protocol.

6.6 With respect to the author's allegation of a violation of the principle of presumption of innocence enshrined in article 14, paragraph 2, of the Covenant, the Committee observes that this provision applies only to criminal proceedings and not to proceedings for compensation; accordingly, it finds that this claim is inadmissible under article 3 of the Optional Protocol.

6.7 With regard to the author's allegation that the hearing regarding his claim for compensation was unfair, the Committee observes that he has not substantiated it, for purposes of admissibility, and that he has failed to advance a claim under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;
- (b) That this decision shall be transmitted to the State party and to the author.

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<sup>1</sup> See communication No. 273/1988 (*B. d. B. v. the Netherlands*), declared inadmissible on 30 March 1989.

## Communication No. 446/1991

*Submitted by:* J. P. (name deleted) (represented by Counsel)

*Date of communication:* 21 February 1991

*Alleged victim:* The author

*State party:* Canada

*Declared inadmissible:* 7 November 1991  
(forty -third session)\*

*Subject matter:* Refusal to pay taxes for reasons of conscientious objection

*Procedural issue:* Inadmissibility ratione materiae

*Substantive issue:* Right to freedom of religion

*Article of the Covenant:* 18(1)

*Article of the Optional Protocol:* 3

1. The author of the communication is Dr. J. P., a Canadian citizen residing in Vancouver, British Columbia, Canada. She claims to be a victim of a violation by Canada of article 18 of the International Covenant on Civil and Political Rights. She is represented by counsel.

*The facts as submitted by the author*

2.1 The author is a member of the Society of Friends (Quakers). Because of her religious convictions, she has refused to participate in any way in Canada's military efforts. Accordingly, she has refused to pay a certain percentage of her assessed taxes, equal to the amount of the Canadian Federal budget earmarked for military appropriations. Taxes thus withheld have instead been deposited with the Peace Tax Fund of Conscience Canada, Inc., a non-governmental organization.

2.2 On 28 August 1987, the author filed a statement of claims in the Federal Court of Canada, Trial Division, for a declaratory judgment that the Canadian Income Tax Act, in so far as it implies that a certain percentage of her assessed taxes goes towards military expenditures, violates her freedom of conscience

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\* The Committee subsequently declared a similar communication inadmissible on 23 July 1992 (see *J. v. K. and C. M. G. v. K. S. v. the Netherlands*, 483/1991)

and religion. On 3 February 1988, the Trial Division of the Federal Court dismissed the action on the ground that the author had no arguable claim. The author appealed to the Federal Court of Appeal which confirmed the earlier decision on 10 October 1989. The author then applied for leave to appeal to the Supreme Court of Canada, which refused leave to appeal on 22 February 1990. Subsequently, following another request by the author, it refused to reconsider its refusal to grant leave to appeal.

2.3 The author requests interim measures of protection pursuant to rule 86 of the Committee's rules of procedure, as the Canadian Internal Revenue Service is threatening to collect the taxes owned by the author.

*The complaint*

3. The author claims that the payment of taxes which will be used for military and defence purposes violates her freedom of conscience and religion under article 18 of the Covenant.

*The issues and proceedings before the Committee*

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

4.2 The Committee notes that the author seeks to apply the idea of conscientious objection to the disposition by the State of the taxes it collects from persons under its jurisdiction. Although article 18 of the Covenant certainly protects the right to hold, express and disseminate opinions and convictions, including conscientious objection to military activities and expenditures, the refusal to pay taxes on grounds of conscientious objection clearly falls outside the scope of protection of this article.

4.3 The Human Rights Committee concludes that the facts as submitted do not raise



issues under any of the provisions of the Covenant. Accordingly, the author's claim is incompatible with the Covenant, pursuant to article 3 of the Optional Protocol.

5. The Human Rights Committee therefore decides:

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

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

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## Communication No. 486/1992

*Submitted by:* K. C. [name deleted]

*Date of communication:* 24 February 1992 (initial submission)

*Alleged victim:* The author

*State party:* Canada

*Declared inadmissible:* 29 July 1992 (forty-fifth session)

*Subject matter:* Extradition to face capital charges

*Procedural issues:* Non-exhaustion of domestic remedies—Setting aside of the request for interim measures of protection—Possibility of resubmission of the case after exhaustion of domestic remedies

*Substantive issues:* Extradition to face capital charges as a violation of article 6

*Articles of the Covenant:* 6 and 26

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

*Rules of procedure:* Rule 86

1. The author of the communication (dated 24 February 1992) is K.C., a citizen of the United States of America born in 1952, currently detained at a penitentiary in Montreal and facing extradition to the United States. He claims to be a victim of violations by Canada of articles 6 *juncto* 26 and 7 of the International Covenant on Civil and Political Rights.

*The facts as submitted by the author*

2.1 On 27 February 1991, the author was arrested at Laval, Québec, for theft, a charge to which he pleaded guilty. While in custody, the judicial authorities received from the United States a request for his extradition, pursuant to the 1976 Extradition Treaty between Canada and the United States. The author is wanted in the State of Pennsylvania on two charges of first-degree murder, relating to an incident that took place in Philadelphia in 1988. If convicted, the author could face the death penalty.

2.2 Pursuant to the extradition request of the United States Government and in accordance with the Extradition Treaty, the Superior Court of Québec ordered the author's extradition to the United States of America. Article 6 of the Treaty provides:

“When the offence for which extradition is requested is punishable by death under the laws of the requesting State and the laws of the requested State do not permit such punishment for that offence, extradition may be refused unless the requesting State provides such assurances as the requested State considers sufficient that the death penalty shall not be imposed or, if imposed, shall not be executed”.

Canada abolished the death penalty in 1976, except in the case of certain military offences.

2.3 The power to seek assurances that the death penalty will not be imposed is conferred on the Minister of Justice pursuant to section 25 of the 1985 Extradition Act.

2.4 Concerning the course of the proceedings against the author, it is stated that a *habeas corpus* application was filed on his behalf on 13 September 1991; he was represented by a legal aid representative. The application was dismissed by the Superior Court of Québec. The author's representative appealed to the Court of Appeal of Québec on 17 October 1991.

2.5 Counsel requests the Committee to adopt interim measures of protection because extradition of the author to the United States would deprive the Committee of its jurisdiction to consider the communication, and the author to properly pursue his communication.

*The complaint*

3. The author claims that the order to extradite him violates article 6 *juncto* 26 of the Covenant; he alleges that the way death penalties are pronounced in the United States generally discriminates against black people. He further alleges a violation of article 7 of the Covenant, in that he, if extradited and sentenced to death, would be exposed to “the death row phenomenon”, i.e. years of detention under harsh conditions, awaiting execution.

*The State party's observations*

4. On 30 April 1992, the State party informed the Committee of the author's situation in regard to remedies which are either currently being pursued by him before Canadian courts or which are still available for him to pursue. It indicates that the Court of Appeal of Québec is seized of the matter, and that, if it rendered a decision unfavourable to the author, he could appeal to the Supreme Court of Canada. In the event of an unfavourable decision there, he could still "petition the Minister of Justice to seek assurances under the Extradition Treaty between Canada and the United States that if surrendered, the death penalty would not be imposed or carried out. Counsel for K.C. has in fact indicated that, once remedies before the courts have been exhausted, he will be making representations to the Minister regarding assurances. A review of the Minister's decision is available in the Superior Court of Québec on *habeas corpus* with appeals again to the Court of Appeal of Québec and the Supreme Court of Canada or on application to the Federal Court Trial Division with appeals to the Federal Court of Appeal and the Supreme Court of Canada. Consequently, there is no basis for [K.C.]'s complaint as he has not exhausted all remedies available in Canada and has several opportunities to further contest his extradition."

*Issues and proceedings before the Committee*

5.1 On 12 March 1992 the Special Rapporteur on New Communications requested the State party, pursuant to rule 86 of the Committee's rules of procedure, to defer the author's extradition until the Committee had had an opportunity to consider the admissibility of the issues placed before it.

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

5.3 Article 5, paragraph 2(b), of the Optional Protocol precludes the Committee from considering a communication if the author has not exhausted all available domestic remedies. In the light of the information provided by the State party, the Committee concludes that the requirements of article 5, paragraph 2(b), of the Optional Protocol have not been met.

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 the Committee's request for interim measures pursuant to rule 86 of the rules of procedure is set aside;

(c) That, in accordance with rule 92, paragraph 2, of the Committee's rules of procedure, the author may, after exhausting local remedies, bring the issue again before the Committee;

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

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

### **Communication No. 205/1986**

*Submitted by:* Grand Chief Donald Marshall, Grand Captain Alexander Denny and Adviser Simon Marshall, as officers of the Grand Council of the Mikmaq tribal society

*Date of communication:* 30 January 1986

*Alleged victims:* The authors and the Mikmaq tribal society

*State party:* Canada

*Date of adoption of Views:* 4 November 1991  
(forty-third session)\*

*Subject matter: Refusal of the State party to permit the representation of the Mikmaq tribal community at constitutional conferences pursuant to article 35(1) of the Constitution Act, 1982*

*Procedural issues: Notion of victim—No violation—Incompatibility ratione materiae*

*Substantive issues: Self-determination—Collective character of the right—Right to take part in the conduct of public affairs*

*Articles of the Covenant: 1(1) and 25(a)*

*Article of the Optional Protocol: 1*

1. The authors of the communication (initial letter of 30 January 1986 and subsequent correspondence) are Grand Chief Donald Marshall, Grand Captain Alexander Denny and Adviser Simon Marshall, the officers of the Grand Council of the Mikmaq tribal society in Canada. They submit the communication both as individually affected alleged victims and as trustees for the welfare and the rights of the Mikmaq people as a whole. Grand Chief Donald Marshall passed away in August 1991. The communication is, however, maintained by the other authors, who continue to be responsible for the conduct of the affairs of the Mikmaq Grand Council. They are represented by counsel.

*The facts as submitted by the authors*

2.1 The authors state that the Mikmaqs are a people who have lived in Mikmakik, their traditional territories in North America, since time immemorial and that they, as a free and independent nation, concluded treaties with the French and British colonial authorities, which guaranteed their separate national identity and rights of hunting, fishing and trading throughout Nova Scotia. It is further stated that for more than 100 years Mikmaq territorial and political rights have been in dispute with the Government of Canada, which claimed absolute sovereignty over Mikmakik by virtue of its independence from the United Kingdom in 1867. It is claimed, however, that the Mikmaqs' right of self-determination has never been surrendered and that their land, Mikmakik, must be considered as a non-self-governing territory within the meaning of the Charter of the United Nations.

2.2 By Constitution Act, 1982, the Government of Canada "recognized and affirmed" the "existing aboriginal and treaty rights of the aboriginal peoples of Canada" (art. 35(1)), comprising the Indian, Inuit and Métis peoples of Canada (art. 35(2)). With a view to further identifying and clarifying these rights, the Constitution Act envisaged a process which would include a constitutional conference to be convened by the Prime Minister of Canada and attended by the first ministers of the provinces and invited "representatives of the aboriginal peoples of Canada". The Government of Canada and the provincial governments committed themselves to the principle that discussions would take place at such a conference before any constitutional amendments would be made and included in the Constitution of Canada in respect of matters that directly affect the aboriginal peoples, including the identification and the definition of the rights of those peoples (articles 35(1) and 37(1) and (2)).

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\* The communication had been declared admissible on 25 July 1990, in so far as it could raise issues under article 25 (a). The Committee had earlier determined in another communication that a claim of an alleged violation of article 1 of the Covenant cannot be brought under the Optional Protocol (see Views of the Committee in communication No.167/1984, *Lubicon Lake v .Canada*, adopted on 26 March 1990, paragraph 32(1), reproduced in *Selected Decisions under the Optional Protocol*, vol. 3. p. 78).

In fact, several such conferences were convened by the Prime Minister of Canada in the following years, to which he invited representatives of four national associations to represent the interest of approximately 600 aboriginal groups. These national associations were: the Assembly of First Nations (invited to represent primarily non-status Indians), the Métis National Council (invited to represent the Métis) and the Inuit Committee on National Issues (invited to represent the Inuit). As a general rule, constitutional conferences in Canada are attended only by elected leaders of the federal and provincial governments. The conferences on aboriginal matters constituted an exception to that rule. They focused on the matter of aboriginal self-government and whether and in what form, a general aboriginal right to self-government should be entrenched in the Constitution of Canada. The conferences were inconclusive. No consensus was reached on any proposal and no constitutional amendments have as a result been placed before the federal and provincial legislatures for debate and vote.

2.3 While the State party indicated (on 20 February 1991) that no further constitutional conferences on aboriginal matters were scheduled, the authors point out (in comments dated 1 June 1991) that the State party's Minister of Constitutional Affairs announced, during the last week of May 1991, that a fresh round of constitutional deliberations, to which a "panel" of up to 10 aboriginal leaders would be invited, would take place later that year (1991).

#### *The complaint*

3.1 The authors sought, unsuccessfully, to be invited to attend the constitutional conferences as representatives of the Mikmaq people. The refusal of the State party to permit specific representation for the Mikmaqs at the constitutional conferences is the basis of the complaint.

3.2 Initially, the authors claimed that the refusal to grant a seat at the constitutional conferences to representatives of the Mikmaq tribal society denied them the right of self-determination, in violation of article 1 of the International Covenant on Civil and Political Rights. They subsequently revised that claim and argued that the refusal also infringed their right to take part in the conduct of public affairs, in violation of article 25(a) of the Covenant.

#### *The State party's observations and authors' comments*

4.1 The State party argues that the restrictions on participation in the constitutional conferences were not unreasonable, and that the conferences were not conducted in a way that was contrary to the right to participate in "the conduct of public affairs". In particular, the State party argues that "the right of citizens to participate in 'the conduct of public affairs' does not ... require direct input into the duties and responsibilities of a government properly elected. Rather, this right is fulfilled ... when 'freely chosen representatives' conduct and make decisions on the affairs with which they are entrusted by the constitution." The State party submits that the circumstances of the instant case "do not fall within the scope of activities which individuals are entitled to undertake by virtue of article 25 of the Covenant. This article could not possibly require that all citizens of a country be invited to a constitutional conference."

4.2 The authors contend, inter alia, that the restrictions were unreasonable and that their interests were not properly represented at the constitutional conferences. First, they stress that they could not choose which of the "national associations" would represent them, and, furthermore, that they did not confer on the Assembly of First Nations (AFN) any right to represent them. Secondly, when the Mikmaqs were not allowed direct representation, they attempted, without success, to influence the AFN. In particular, they refer to a 1987 hearing conducted jointly by the AFN and several Canadian Government departments, at which Mikmaq leaders submitted a package of constitutional proposals and protested "in the strongest terms any discussion of Mikmaq treaties at the constitutional conferences in the absence of direct Mikmaq representation". The AFN, however, did not submit any of the Mikmaq position papers to the constitutional conferences nor incorporated them in its own positions.

#### *Issues and proceedings before the Committee*

5.1 The communication was declared admissible on 25 July 1990, in so far as it may raise issues under article 25(a) of the Covenant. The Committee had earlier determined, in respect of another communication, that a claim of an

alleged violation of article 1 of the Covenant cannot be brought under the Optional Protocol.<sup>1</sup>

5.2 Article 25 of the Covenant stipulates that: “every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected in genuine periodic elections...;
- (c) To have access, on general terms of equality, to public service....”

At issue in the present case is whether the constitutional conferences constituted a “conduct of public affairs” and if so, whether the authors, or any other representatives chosen for that purpose by the Mikmaq tribal society, had the right, by virtue of article 25(a), to attend the conferences.

5.3 The State party has informed the Committee that, as a general rule, constitutional conferences in Canada are attended only by the elected leaders of the federal and 10 provincial governments. In the light of the composition, nature and scope of activities of constitutional conferences in Canada, as explained by the State party, the Committee cannot but conclude that they do indeed constitute a conduct of public affairs. The fact that an exception was made, by inviting representatives of aboriginal peoples in addition to elected representatives to take part in the deliberations of the constitutional conferences on aboriginal matters, cannot change this conclusion.

5.4 It remains to be determined what is the scope of the right of every citizen, without unreasonable restrictions, to take part in the conduct of public affairs, directly or through freely chosen representatives. Surely, it cannot be

the meaning of article 25(a) of the Covenant that every citizen may determine either to take part directly in the conduct of public affairs or to leave it to freely chosen representatives. It is for the legal and constitutional system of the State party to provide for the modalities of such participation.

5.5 It must be beyond dispute that the conduct of public affairs in a democratic State is the task of representatives of the people, elected for that purpose, and public officials appointed in accordance with the law. Invariably, the conduct of public affairs affects the interest of large segments of the population or even the population as a whole, while in other instances it affects more directly the interest of more specific groups of society. Although prior consultations, such as public hearings or consultations with the most interested groups may often be envisaged by law or have evolved as public policy in the conduct of public affairs, article 25(a) of the Covenant cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs. That, in fact, would be an extrapolation of the right to direct participation by the citizens, far beyond the scope of article 25(a).

6. Notwithstanding the right of every citizen to take part in the conduct of public affairs without discrimination and without unreasonable restrictions, the Committee concludes that, in the specific circumstances of the present case, the failure of the State party to invite representatives of the Mikmaq tribal society to the constitutional conferences on aboriginal matters, which constituted conduct of public affairs, did not infringe that right of the authors or other members of the Mikmaq tribal society. Moreover, in the view of the Committee, the participation and representation at these conferences have not been subjected to unreasonable restrictions. Accordingly, the Committee is of the view that the communication does not disclose a violation of article 25 or any other provisions of the Covenant.

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<sup>1</sup> See *Official Records of the General Assembly, Forth-fifth Session, Supplement No. 40, (A/45/40)*, vol. II, annex IX, sect. A, communication No. 167/1984 (*Lubicon Lake Band v. Canada*), Views adopted on 26 March 1990, para. 32.1.

## Communications Nos. 221/1987 and 323/1988

*Submitted by:* Yves Cadoret and Hervé le Bihan

*Dates of communications:* 15 January 1987 and 25 July 1988

*Alleged victims:* The authors

*State party:* France

*Date of adoption of Views:* 11 April 1991 (forty-first session)

*Subject matter:* Use of the Breton language in court proceedings

Appeal of Rennes allegedly again denied them the possibility to address the Court in Breton.

*Procedural issues:* Joinder of communication—Incompatibility *ratione materiae*—Non-exhaustion of domestic remedies—Effective remedy

2.2 With respect to the requirement of exhaustion of domestic remedies, the authors allege that no remedies are available, because the French judicial system does not recognize the use of Breton.

*Substantive issues:* Right to a fair hearing—Right to free assistance of an interpreter—Examination of witnesses—Right to freedom of expression—Discrimination on the ground of language—Right to use one's own language

*The complaint*

3.1 The authors claim that they were denied a fair trial, in violation of article 14, paragraphs 1 and 3 (e) and (f) because they were denied the right to express themselves in Breton before the French courts and therefore did not testify. In particular, they allege that the courts steadfastly refuse to provide the services of interpreters for accused persons of Breton mother tongue on the ground that they are deemed to be proficient in French. In this connection, they maintain that the Tribunal Correctionnel did not ascertain whether they were proficient in French. Mr. Cadoret similarly denies that he was interrogated in French before the Court of Appeal. In this context, he claims that he never pretended that he was not fluent in French, but merely insisted on being heard in Breton. This also applies to his interrogation before the Court of Appeal, where he only spoke one sentence, by which he manifested his desire to express himself in Breton.

*Articles of the Covenant:* 2(1), 14(1), (3)(e) and (f), 19(2), 26 and 27

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

*Rules of procedure:* Rule 88(2)

1. The authors of the communications (initial submissions dated 15 January 1987 and 25 July 1988, respectively) are Yves Cadoret and Hervé Le Bihan, two French citizens employed as a teacher and an education advisor, respectively, and residing at Bretagne, France. They claim to be the victims of a violation by France of articles 14, 19, 26 and 27 of the International Covenant on Civil and Political Rights.

*The facts as submitted by the authors*

2.1 On 20 March 1985, the authors appeared before the Tribunal Correctionnel of Rennes on charges of having vandalized three road signs near Rennes in June 1984. They state that although Breton is their mother tongue, they were not allowed to express themselves in that language before the Tribunal, and that three witnesses they had called were unable to testify in the Breton language. No information about the actual sentences against the authors is provided, but they state that they appealed against the decision of the Tribunal Correctionnel. At its hearing of 23 September 1985, the Court of

3.2 Mr. Cadoret contends that no provision of the French Code of Penal Procedure obliges the accused or a party to a case to express himself or herself in French before criminal tribunals. More specifically, he refers to article 407 of the French Code of Penal Procedure and argues that this provision does not impose the use of the French language. This is said to have been confirmed by a letter from the Minister of Justice, dated 29 March 1988, which indicates that article 407 only appears to impose the use of the French language (“semble imposer l’usage de la seule langue française”), and that the use of languages other than French in

court is left to the discretion and case-by-case appreciation of the judicial authorities. This “uncertain situation”, according to Mr. Cadoret, explains why some tribunals allow individuals charged with criminal offences as well as their witnesses to express themselves in Breton, as did, for example, the Tribunal of Lorient (Bretagne) on 3 February 1986 in a case similar to his. Mr. Cadoret further contends that the provisions of the Code of Penal Procedure governing the court language cannot be said to be designed to guarantee the equal treatment of citizens. Thus, one of the authors’ witnesses, a professor at the University of Rennes, was denied the opportunity to testify in Breton on behalf of the authors, while he was permitted to do so in a different case.

3.3 The authors claim that the refusal of the courts to let them present their defence in Breton is a clear and serious restriction of their freedom of expression, and that this implies that French citizens mastering both French and Breton can only air their ideas and their views in French. This, it is claimed, is contrary to article 19, paragraph 2, of the Covenant.

3.4 Mr. Cadoret further contends that the denial of the use of Breton before the courts constitutes discrimination on the ground of language. He adds that even if he were bilingual, this would in no way prove that he has not been a victim of discrimination. He reiterates that French tribunals do not apply the Code of Penal Procedure with a view to guaranteeing equal treatment of all French citizens. In this context, he again refers to differences in the application of article 407 of the Code of Penal Procedure by the French tribunals and especially those in Bretagne, where some tribunals allegedly are reluctant to allow accused individuals to express themselves in Breton even if they experience severe difficulties of expression in French, whereas others now accept the use of the Breton language in court. In this way, he claims, French citizens who speak Breton are subjected to discrimination before the courts.

3.5 With respect to article 27, the authors argue that the fact that the State party does not recognize the existence of minorities on its territory does not mean that they do not exist. Although France has only one official language, the existence of minorities in Bretagne, Corsica or Alsace that speak languages other than French is well known and documented. There are said to

be several hundred thousand French citizens who speak Breton.

#### *The State party’s observations*

4.1 In its submissions, the State party provides a detailed account of the facts of the cases and contends that available domestic remedies have not been exhausted by the authors. Thus, while the authors appealed against the sentence of the Tribunal Correctionnel, they did not appeal against the decision of the judge of first instance not to make available to them and their witnesses an interpreter. As a result, the State party claims, the authors are precluded from seizing the Human Rights Committee on the ground that they were denied the right to express themselves in Breton before the courts because, in that respect, they did not avail themselves of existing remedies.

4.2 The State party rejects the allegations that the authors were denied a fair hearing, that they and their witnesses were not afforded the possibility to testify and that therefore article 14, paragraph 1, and article 14, paragraphs 3 (e) and (f), of the Covenant have been violated. It contends that the authors’ allegations concerning article 14, paragraph 1, cannot be determined *in abstracto* but must be examined in the light of the particular circumstances of the case. It submits that on numerous occasions during the judicial proceedings, the authors clearly established that they were perfectly capable of expressing themselves in French.

4.3 The State party further submits that criminal proceedings are an inappropriate 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.

4.4 The State party affirms that in the light of the above considerations, the President of the Tribunal of Rennes was justified in not applying article 407 of the French Penal Code, as requested by Mr. Cadoret. This provision



stipulates that whenever the accused or a witness does 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 has 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.<sup>1</sup> It adds that article 407 of the Code of Penal Procedure, which stipulates that the language used in criminal proceedings is French, is not only compatible with article 14, paragraph 3 (f), of the Covenant, but 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 has not sufficiently mastered the French language.

4.5 The State party recalls that the authors and all the witnesses called on their behalf were francophone. In particular, it observes that Mr. Le Bihan did not specifically request the services of an interpreter. The State party further acknowledges that two French courts -those of Guingamp and Lorient in Bretagne allowed, in March 1984 and February 1985 respectively, French citizens of Breton origin to resort to interpreters: it contends, however, that these decisions were exceptions to the rule, and that the Court of Appeal of Rennes as well as the Tribunaux de Grande Instance de Guingamp and Lorient usually refuse to apply them *vis-à-vis* accused individuals or witnesses who are proficient in French. Accordingly, it is submitted, there can be no question of a violation of article 14, paragraph 3(f).

4.6 The State party rejects the authors' argument that they did not benefit from a fair trial in that the court refused to hear the witnesses called on their behalf, in violation of article 14, paragraph 3(e), of the Covenant. Rather, Mr. Cadoret 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 power, the President of the Court found that it was neither alleged nor proved 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 owing to the behaviour of the witnesses

themselves that the court did not hear them. The State party further contends that article 14, paragraph 3(e), does not cover the language used before a criminal jurisdiction by witnesses called on behalf of or against the accused and that, in any case, witnesses are not entitled, under the Covenant or under article of 407 Penal of the Procedure, Code to rights broader than those conferred upon the accused.

4.7 With respect to a violation of article 19, paragraph 2, the State party contends that the authors' freedom of expression was in no way restricted during the proceedings against them. They were not allowed to express themselves in Breton because they are bilingual. They were at all times at liberty to argue their defence in French, without any requirement to use legal terminology. If the need had arisen, the tribunal itself would have determined the legal significance of the arguments put forth by the authors.

4.8 As to 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 further submits that the prohibition of discrimination laid down in article 26 does not extend to the right of an accused person to choose, in proceedings against him or her, whatever language he or she sees fit to use; rather, it implies that the parties to a case accept and submit to the same constraints. The State party contends that the authors have not sufficiently substantiated their allegation to have been victims of discrimination, and adds that the authors' argument that an imperfect knowledge of French legal terminology justified their refusal to express themselves in French before the courts is irrelevant for purposes of article 26. The authors were merely requested to express themselves in "basic" French. Furthermore, article 407 of the Code of Penal Procedure, far from operating as discrimination 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. The sole exception in article 407 of the Code of Penal Procedure concerns accused persons and witnesses who objectively do not understand or speak the language of the court. This distinction is couched *on* "reasonable and objective criteria" and thus is compatible with article 26 of the Covenant. Finally, the State party charges that the principle of *venire contra factum proprium* is applicable to

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<sup>1</sup> See, for example, the judgements of the Criminal Chamber of the Court of Cassation of 21 November 1973 (Motta) and of 30 June 1981 (Fayomi).

the authors' behaviour: they refused to express themselves in French before the courts under the pretext that they had not mastered the language sufficiently, whereas their submissions to the Committee were made in "irreproachable" French.

4.9 With respect to the alleged violation of article 27, the State party recalls that, upon ratification of the Covenant, the French Government made 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 is not opposable to 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 . . . ' (indivisible, laïque démocratique et sociale)".

#### *Issues and proceedings before the Committee*

5.1 In considering the admissibility of the communications, the Committee took account of the State party's contention that the communications were inadmissible because the authors had not appealed against the decision of the judge of the Tribunal Correctionnel of Rennes not to make available to them and their witnesses the services of an interpreter. The Committee observed that what the authors sought was the recognition of Breton as a vehicle of expression in Court. It recalled that domestic remedies need not be exhausted if they objectively have no prospect of success. This is the case where, under applicable domestic laws, the claim would inevitably be dismissed, or where established jurisprudence of the highest domestic tribunals precluded a positive result. On the basis of these observations, and taking into account relevant French legislation as well as article 2 of the French Constitution, the Committee concluded that there were no effective remedies that the authors should have pursued in this respect. *De lege lata*, the objective pursued by the authors cannot be achieved by resorting to domestic remedies.

5.2 As to the authors' claim that they had been denied their freedom of expression, the Committee observed that the fact of not having been able to speak the language of their choice

before the French courts raised no issues under article 19, paragraph 2. The Committee therefore found that this aspect of the communications was inadmissible under article 3 of the Optional Protocol as incompatible with the Covenant.

5.3 In respect of the authors' claim of a violation of article 27 of the Covenant, the Committee noted the French "declaration" but did not address its scope, finding that the facts of the communications did not raise issues under this provision.<sup>2</sup>

5.4 With respect to the alleged violations of articles 14 and 26, the Committee considered that the authors had made reasonable efforts sufficiently to substantiate their allegations for purposes of admissibility.

5.5 On 25 July and 9 November 1989, the Human Rights Committee, accordingly, declared the communications admissible in so far as they appeared to raise issues under articles 14 and 26 of the Covenant. On 9 November 1989, the Committee also decided to deal jointly with the two communications.

5.6 The Committee has noted the authors' 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 or herself in the language in which he or she normally expresses himself or herself, and that the denial of an interpreter for himself or herself and his or her witnesses constitutes a violation of article 14, paragraphs 3(e) and (f). The Committee observes, as it has done on a previous occasion,<sup>3</sup> 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 obligate States parties to make available to a person: whose mother tongue differs from

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<sup>2</sup> Following the decision on admissibility in these cases, 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; cf. also separate opinion by one Committee member).

<sup>3</sup> See communication No. 273/1988 (*B. d. B. v. Netherlands*), decision on inadmissibility of 30 March 1989, para. 6.4.

the official court language, the services of an interpreter, if that person is capable of understanding and expressing himself or herself adequately in the official language. Only if the accused or the witnesses have difficulties in understanding or expressing themselves in the court language is it obligatory that the services of an interpreter be made available.

5.7 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 authors have not shown that they, or the witnesses called on their behalf, were unable to understand and express themselves adequately in French before the tribunals. 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 or herself in the language that he or she 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 are sufficiently proficient in the court's language, it need not take into account whether it would be preferable for the accused to express themselves in a language other than the court language.

5.8 French law does not, as such, give everyone a right to speak his or her own language in court. Those unable to speak or understand French are provided with the services of an interpreter. This service would have been available to the authors had the facts required it; as they did not, they suffered no discrimination under article 26 on the ground of their language.

6. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not sustain the authors' claim that they are victims of a violation of any of the provisions of the Covenant.

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### Communication No. 237/1987

*Submitted by:* Denroy Gordon (represented by counsel)

*Date of communication:* 29 May 1987

*Alleged victim:* The author

*State party:* Jamaica

*Date of adoption of Views:* 5 November 1992 (forty-sixth session)

*Subject matter:* Denial of a fair trial by an independent and impartial tribunal in a capital punishment case

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

*Procedural issues:* Burden of proof—State party failure to make a submission on the merits—Exhaustion of domestic remedies—Unreasonably prolonged domestic remedies—Effective remedy

*Substantive issues:* Right to a fair hearing—Right to adequate time and facilities for the preparation of the defence—Right to be tried in one's presence—Right to defend oneself in person or through legal assistance—Right to examine witnesses—Availability of legal aid

*Articles of the Covenant:* 6(4) and 14(1) and 3(b), (d) and (e)

1. The author of the communication, dated 29 May 1987, is Denroy Gordon, a Jamaican citizen, born in 1961, formerly a police officer. At the time of submission the author was awaiting execution of a death sentence. Following the commutation of sentence in 1991, the author has been serving a sentence of life imprisonment at Gun Court Rehabilitation Centre, Jamaica. He claims to be the victim of a violation by Jamaica of article 14, paragraphs 1 and 3(b), (d) and (e) of the International Covenant on Civil and Political Rights. He is represented by counsel.

### *The facts as submitted by the author*

2.1 The author was arrested on 3 October 1981 on suspicion of having murdered, on the same day, Ernest Millwood. In January 1983, he was put on trial before the Manchester Circuit Court. As the jury failed to arrive at a unanimous verdict - 11 jurors were in favour of acquittal, only one supported a “guilty” verdict - the presiding judge ordered a retrial. In May 1983, at the conclusion of the retrial before the same court, the author was convicted of murder and sentenced to death. The Court of Appeal of Jamaica dismissed his appeal on 22 November 1985 and issued a written judgment in the case on 16 January 1986. A petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 25 January 1988. On 19 February 1991, the Governor-General of Jamaica commuted the author’s death sentence to life imprisonment.

2.2 The prosecution’s case was that for some time there had been friction between the author and the wife of the deceased, who was employed as a cleaner at Kendal Police Station in the Manchester District to which the author was attached as a young police constable. On the day of the crime, he was on duty and therefore armed with his service revolver. He went up to Mr. Millwood who was cutting grass with a machete, nearby the police station. An argument developed between them, following which the author set out to arrest Mr. Millwood for using indecent language. The latter ran away and the author followed him trying to effect the arrest. In the course of the chase the author shot in the air, but Mr. Millwood did not stop. Subsequently the author caught up with Mr. Millwood, who allegedly chopped at him with the machete. The author, in what he claims was lawful self-defence, fired a shot aimed at the left shoulder of the man, so as to disarm him. The shot, however, proved to be fatal. Immediately thereafter Corporal Afflick arrived on the scene. The author gave him his service revolver and Mr. Millwood’s machete, explaining that he had pursued Mr. Millwood and warned him to drop the machete and that he shot Mr. Millwood when he resisted. The author returned to the police station and was formally arrested several hours later, after a preliminary investigation had been conducted.

### *Complaint*

3.1 The author claims to be innocent and maintains that he was denied a fair trial by an independent and impartial tribunal, in violation of article 14, paragraph 1, of the Covenant. Firstly, he alleges that the members of the jury at the retrial were biased against him. He indicates that most of them were chosen from areas close to the community where the crime had occurred and surmises that, for that reason, they had already formed their opinion in the case, in particular on hearsay, before the start of the trial. Moreover, the jurors were allegedly sympathetic to the deceased and his relatives and, as a result, did not base their verdict on the facts of the case. In this connection, the author claims that, in spite of numerous requests for a change of venue on the ground that the jurors had displayed bias against the author the Court refused to change the venue.

3.2 Furthermore, it is claimed that the judge abused his discretion in ruling inadmissible the author’s statement to Corporal Afflick immediately after the shooting. The author contends that the statement was admissible as part of the *res gestae* and that it confirmed that his trial defence was not a later concoction.

3.3 As to the issue of self-defence the author submits that the judge should have directed the jury that the prosecution had to prove that the violence used was unlawful and that if the accused honestly believed that the circumstances warranted the use of force, he should be acquitted of murder, since the intent to act unlawfully would be negated by his belief, however mistaken or unreasonable. This the trial judge did not do.

3.4 The author further claims that the trial judge misdirected the jury by withdrawing from it the issue of manslaughter. According to the author, although the case was based on self-defence, the jury, if properly directed, could have arrived at a verdict of manslaughter on the basis of the evidence of some of the Crown’s witnesses. The judge, however, in his summation, instructed the jury as follows: “I tell you this as a matter of law that provocation does not apply in this case. I tell you this as a matter of law again that manslaughter does not arise in this case ... It is my responsibility to decide what

verdicts I leave to you, and I take the responsibility of telling you that there are only two verdicts open to you on the evidence: 1. guilty of murder; 2. not guilty of murder, ...". According to Jamaican law a murder conviction carries a mandatory death sentence.

3.5 In the author's opinion article 14, paragraph 3(b), of the Covenant was also violated in his case. While acknowledging that he was assisted by a lawyer in the preparation of his defence and during the trial, he alleges that he was not given sufficient time to consult with his lawyer prior to and during the trial. In this context, the lawyer is further said to have failed to employ the requisite emphasis in requesting a change of venue.

3.6 The author further alleges a violation of article 14, paragraph 3 (d), of the Covenant, since he was not present during the hearing of his appeal before the Jamaican Court of Appeal. In this connection, he claims that the issue of self-defence on which the case was factually based, was not adequately dealt with. Moreover, the Court of Appeal allegedly erred in not admitting into evidence a statement made by police Corporal Afflick.

3.7 Finally, the author submits that he has been a victim of a violation of article 14, paragraph 3(e), of the Covenant in that no witnesses allegedly testified on his behalf, although, he claims, one would have been readily available. He indicates that the witnesses against him were cross-examined and that his lawyer sought, on several occasions, to test the credibility of the Crown's witnesses; in particular, since his trial was actually a retrial, the lawyer sought to point out contradictions in what the witnesses had testified during the preliminary inquiry, during the first trial and the retrial. The trial judge, however, allegedly intervened and instructed the lawyer to confine his questions to the retrial only.

3.8 In respect of the requirement of exhaustion of domestic remedies, the author argues that he should be deemed to have complied with this requirement, since his petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 25 January 1988. Moreover, he submits that, taking into account the length of time between the hearings in his case and the span of time

actually spent on death row, the application of domestic remedies has been "unreasonably prolonged" within the meaning of article 5, paragraph 2(b), of the Optional Protocol.

3.9 The author is aware of the possibility of filing a constitutional motion under Sections 20 and 25 of the Jamaican Constitution, but contends that such a motion is not an effective remedy available to him, within the meaning of article 5, paragraph 2(b), of the Optional Protocol. He argues that because of his lack of financial means to retain counsel and the unavailability of legal aid for purposes of filing a constitutional motion before the Supreme (Constitutional) Court of Jamaica, he is effectively barred from exercising his constitutional rights.

#### *State party's observations*

4.1 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 argues that the communication remains inadmissible because of the author's failure to seek redress under Sections 20 and 25 of the Jamaican Constitution for the alleged violation of his right to a fair trial.

4.2 In addressing the author's contention that the application of domestic remedies has been "unreasonably prolonged" within the meaning of article 5, paragraph 2(b), of the Optional Protocol, the State party submits that the delays encountered are partly attributable to the author himself.

4.3 With respect to the substance of the author's allegation that he did not receive a fair trial, the State party submits that the facts as presented by the author seek to raise issues of facts and evidence, which the Committee does not have the competence to evaluate. The State party refers to the Committee's decision in communication No. 369/1989, in which it had been held that "while article 14 of the Covenant guarantees the right to a fair trial, it is for the appellate courts of the States parties to the Covenant to evaluate facts and evidence in a particular case".<sup>1</sup>

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<sup>1</sup> Decision of 8 November 1989 (*G. S. v. Jamaica*), para. 3.2.

*Decision on admissibility and review thereof*

5.1 On the basis of the information before it, the Human Rights Committee concluded that the conditions for declaring the communication admissible had been met, including the requirement of exhaustion of domestic remedies. Accordingly, on 24 July 1989, the Human Rights Committee declared the communication admissible.

5.2 The Committee has noted the State party's submissions of 10 January and 4 September 1990, made after the decision on admissibility, in which it reaffirms its position that the communication is inadmissible on the ground of non-exhaustion of domestic remedies.

5.3 On 24 July 1991, the Committee adopted an interlocutory decision requesting the State party to furnish detailed information on the availability of legal aid or free legal representation for the purpose of constitutional motions, as well as examples of such cases in which legal aid may have been granted or free legal representation may have been procured by the applicant. The State party was further requested to submit to the Committee written explanations or statements relating to the substance of the author's allegations.

5.4 On 14 January 1992, the State party reiterates its position that the communication is inadmissible for non-exhaustion of domestic remedies and requests the Committee to revise its decision on admissibility. It submits that there is no provision for legal aid or free legal representation in constitutional motions. With regard to the Committee's decision that the communication is admissible in so far as it may raise issues under article 14 of the Covenant, the State party demurs that article 14 has seven paragraphs and that it is not clear to what particular paragraph the finding of admissibility relates. "The Committee should indicate the specific provisions of article 14 or indeed of any of the articles to which its findings of admissibility relate, and in relation to which, therefore, Government is being asked to reply; additionally, the Committee must indicate the allegation made by the applicant which has given rise to the finding of admissibility in relation to a particular paragraph of article 14 or any other article. Failure by the Committee to provide this indication will leave the Government in the dark as to the precise allegation and breach to which it must respond in commenting on the merits. For it

could not be the case that the Committee expects a reply on each and every allegation made by the applicant, since some of these are patently unmeritorious."

5.5 With regard to the State party's objection that the Committee's decision on admissibility was too broad, the Committee notes that the author's allegations were sufficiently precise and substantiated so as to allow the State party to address them. As to the merits of the author's allegations, it is for the Committee to consider them after declaring the communication admissible, in light of all the information provided by both parties.

5.6 With regard to the State party's arguments on admissibility, especially in respect of the availability of constitutional remedies which the author may still pursue, the Committee recalls that the Supreme Court of Jamaica has, in recent cases, allowed applications for constitutional redress in respect of breaches of fundamental rights, after the criminal appeals in these cases had been dismissed.

5.7 However, the Committee notes that by submission of 14 January 1992, the State party indicated that legal aid is not provided for constitutional motions; it also recalls that the State party has argued, by submission of 10 October 1991 concerning another case<sup>2</sup> that it has no obligation under the Covenant to make legal aid available in respect of such motions, as they do not involve the determination of a criminal charge, as required under article 14, paragraph 3 (d), of the Covenant. In the view of the Committee, this supports the finding, made in the decision on admissibility, that a constitutional motion is not an available remedy for an author who has no means of his own to pursue it. In this context, the Committee observes that the author does not claim that he is absolved from pursuing constitutional remedies because of his indigence; rather it is the State party's unwillingness or inability to provide legal aid for the purpose that renders the remedy one that need not be pursued for purposes of the Optional Protocol.

5.8 The Committee further notes that the author was arrested in 1981, tried and convicted in 1983, and that his appeal was dismissed

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<sup>2</sup> Communication No. 283/1988 (*Aston Little v. Jamaica*), Views adopted on 1 November 1991.

in 1985. The Committee deems that for purposes of article 5, paragraph 2 (b), of the Optional Protocol, the pursuit of constitutional remedies would, in the circumstances of the case, entail an unreasonable prolongation of the application of domestic remedies. Accordingly, there is no reason to revise the decision on admissibility of 24 July 1989.

#### *Examination of the merits*

6.1 In so far as the author's claims under article 14 are concerned, the Committee notes that the State party has not addressed these allegations. 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 make available to the Committee all the information at its disposal. The summary dismissal of the author's allegations, in general terms, does not meet the requirements of article 4, paragraph 2. In the circumstances, due weight must be given to the author's allegations, to the extent that they have been substantiated.

6.2 In respect of the author's claim of a violation of article 14, paragraph 3 (b) and (d), the Committee notes that the right of an accused person to have adequate time and facilities for the preparation of his defence is an important element of the guarantee of a fair trial and a corollary of the principle of equality of arms. The determination of what constitutes "adequate time" depends on an assessment of the particular circumstances of each case. On the basis of the material before it, however, the Committee cannot conclude that the author's two lawyers were unable to properly prepare the case for the defence, nor that they displayed lack of professional judgment or negligence in the conduct of the defence. The author also claims that he was not present at the hearing of his appeal before the Court of Appeal. However, the written judgment of the Court of Appeal reveals that the author was indeed represented before the Court by three lawyers, and there is no evidence that author's counsel acted negligently in the conduct of the appeal. The Committee therefore finds no violation of article 14, paragraph 3(b) and (d).

6.3 As to the author's allegation that he was unable to have witnesses testify on his behalf, although one, Corporal Afflick, would have been readily available, it is to be noted that the Court of Appeal, as is shown in its written judgment, considered that the trial judge rightly refused to

admit Corporal Afflick's evidence, since it was not part of the *res gestae*. The Committee observes that article 14, paragraph 3(e), does not provide an unlimited right to obtain the attendance of any witness requested by the accused or his counsel. It is not apparent from the information before the Committee that the court's refusal to hear Corporal Afflick was such as to infringe the equality of arms between the prosecution and the defence. In the circumstances, the Committee is unable to conclude that article 14, paragraph 3 (e), has been violated.

6.4 There remains one final issue to be determined by the Committee: whether the directions to the jury by the trial judge were arbitrary or manifestly unfair, in violation of article 14, paragraph 1, of the Covenant. The Committee recalls that the judge denied the jury the possibility to arrive at a verdict of manslaughter, by instructing it that the issue of provocation did not arise in the case, thereby only leaving open the verdicts of "guilty of murder" or "not guilty of murder". It further observes that it is in general for the courts of States parties to the Covenant to evaluate facts and evidence in a given case, and for the appellate courts to review the evaluation of such evidence by the lower courts as well as the instructions by the jury. It is not in principle for the Committee to review the evidence and the judge's instructions, unless it is clear that the instructions were manifestly arbitrary or amounted to a denial of justice, or that the judge otherwise violated his obligation of impartiality.

6.5 The Committee has carefully examined whether the judge acted arbitrarily by withdrawing the possibility of a manslaughter verdict from the jury. It observes that this matter was put before, and dismissed by, the Court of Appeal of Jamaica. The Court of Appeal, it is true, did not examine the question of whether a verdict of manslaughter should, *as a matter of Jamaican law*, have been left open to the jury. The Committee considers, however, that it would have been incumbent upon author's counsel to raise this matter on appeal. In the circumstances, the Committee makes no finding of a violation of article 14, paragraph 1, of the Covenant.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before the Committee disclose no violation of any of the articles of the Covenant.

## Communication No. 240/1987

*Submitted by:* Willard Collins (represented by counsel)

*Date of communication:* 25 August 1987

*Alleged victim:* The author

*State party:* Jamaica

*Date of adoption of Views:* 1 November 1991 (forty-third session)

*Subject matter:* Denial of a fair trial by an independent and impartial tribunal in a capital punishment case

*Procedural issues:* State party failure to make a submission on the merits—Unreasonably prolonged domestic remedies—Effective remedy—Lack of competence to re-evaluate facts and evidence.

*Substantive issues:* Right not to be subjected to cruel or degrading treatment—Right to humane treatment—Right to a fair hearing—Right to a fair trial—Right to defend oneself in person or through legal assistance—Right to presumption of innocence—Right to examine witnesses—Death-row phenomenon

*Articles of the Covenant:* 2(3)(a), 6, 7, 10(1) and 14(1), (2) and (3)(e)

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

*Rules of procedure:* Rules 86 and 94(3)

*Individual opinion:* Dissenting opinion by Ms. Christine Chanet, Mr. Kurt Herndl, Mr. Francisco Aguilar Urbina and Mr. Bertil Wennegren

1. The author of the communication dated 25 August 1967 is Willard Collins, a Jamaican citizen currently awaiting execution at St. Catherine District Prison, Jamaica. He claims to be the victim of a violation by Jamaica of articles 7, 10, and 14, paragraphs 1, 2, and 3(e), of the International Covenant on Civil and Political Rights. He is represented by counsel.

*The facts as presented by the author*

2.1 The author is an ex-corporal in the Jamaican police force. He was arrested on 16 June 1981 in connection with the murder, on 23 November 1980, of one Rudolph Johnson in the parish of St. Catherine, Jamaica. The prosecution contended that the author shot the victim with his service weapon because he owed

him a substantial amount of money, and that he had procured the assistance of a taxi driver, one C. E., to drive him and the victim to the scene of the crime and to assist with the disposal of the body.

2.2 Initially, C. E. had been arrested on 28 November 1960 and detained in connection with the murder. Some months later, he was released upon direction of the investigating officer, one Detective Sergeant R. G., who had taken charge of the police investigations on his own initiative, in the author's opinion because he was C. E.'s brother-in-law and the father of a girl born to C. E.'s sister. C. E. later became the prosecution's principal witness and only purported eye-witness to the crime.

2.3 The author was initially brought before the Portland Magistrates Court in connection with his application for bail and for directions as to the most appropriate venue for the preliminary hearing. The Magistrate granted the author's application for a transfer of the venue of the preliminary hearing, as the author was well known in the Portland area and it was doubtful whether he would receive a fair trial there. More particularly, the author was well known to the business associates of the Magistrate himself, and the author was known to have bad business relations with those associates. During the hearing of the application, the Magistrate allegedly said, apparently only as an aside, that if he were to try the author he would ensure that a capital sentence be pronounced.

2.4 Mr. Collins' preliminary hearing took place in Spanish Town, parish of St. Catherine, on 15 October 1981; he was ordered to stand trial for murder. Detective G., then stationed in a different parish (Kingston), nevertheless remained in charge of the police investigations.

2.5 The author's trial began in the St. Catherine Circuit Court, Spanish Town, on 7 January 1982; he was represented by F.O.P., Q-C., and junior counsel, A. W. In spite of the prosecution's contention that the author



shot Mr. Johnson without provocation, no plausible motive for the killing could be advanced. The inference to be drawn from the prosecution's case was that Mr. Collins had sought to buy a car from a third party via the victim, and that he shot Mr. Johnson to avoid paying the balance of the amount owed for the car. Throughout the proceedings, the author maintained that C. E. himself had committed the crime, and that he used the author's service weapon after removing it from the author's apartment, Mr. Collins further asserts that he never thought of not honouring his debt towards the deceased and maintains that the balance was paid pursuant to an agreement which he had arranged for his bank manager to prepare. The bank manager, D. A., confirmed this version during the first trial.

2.6 During the trial in January 1982, several witnesses, including members of the author's family, testified on the author's behalf, confirming that he was at home when the victim was believed to have been shot. Five of the twelve days of the trial were devoted to testimony of defence witnesses. At the conclusion of the trial, the jury was unable to return a verdict. The author was ordered to be retried and remanded in custody.

2.7 The re-trial began in the Home Circuit Court, Kingston, on 24 October 1983. Mr. Collins was represented by H. C., Q. C. The author submits that Detective G. continued to manipulate the judicial process as well as the jurors. Justice G., who had heard previous applications on behalf of the author in the Portland Magistrates Court, was assigned to hear the re-trial ; the author immediately complained to counsel that the judge was biased against him, in the light of the statement referred to in paragraph 2.3 above. H. C. told him that nothing could be done about this.

2.8 The author notes that on 26 October 1963, two witnesses who were present in court and ready to testify on his behalf, K.S. E. H. and Ms. El. E., saw three members of the jury board a police car driven by Detective G. Bl. H. followed the car to 2 quiet lane, where she found G. and his assistant talking to the jury members, indicating that he depended on them and asking them not to let him down. A similar scene was witnessed by Bl. H. on the following day, upon which she informed counsel, in the author's presence, of the attempted jury tampering witnessed by her. H. C. promised to notify the judge but failed to do so. He was reminded of the

matter on 28 October 1983, the final day of the trial, when he allegedly told Mr. Collins that it was too late to act.

2.9 Finally, the author indicates that one other witness who would have been able to provide credible testimony to the effect that C. E. was the murderer and had in fact used the author's service weapon for the killing, was prepared to give evidence on his behalf during the second trial. This witness himself states that he was available to give evidence during the first trial, but was prevented from doing so by Detective G. and C. E., who threatened to kill him and his family if he were to testify in court. As a result, this witness moved to a remote part of Jamaica. When he returned to Spanish Town, he was assaulted by a group of individuals which included C. E. In the circumstances, the witness did not attend the re-trial.

2.10 On 28 October 1983, the author was found guilty as charged and sentenced to death. He states that his re-trial only lasted five days because none of the witnesses who were called to give evidence on his behalf during the first trial were called to do so at the re-trial. He blames this on the actions of his counsel, H. C., and of Detective G. In this context, he notes that his counsel mentioned to him that he did not wish the trial to proceed beyond Friday 28 October, as he had other professional obligations to attend to in another part of the country at the beginning of the following week. The author further notes that the jury was sent out to consider its verdict late on a Friday afternoon thereby putting undue pressure on it to return an early decision.

2.11 The author appealed to the Court of Appeal of Jamaica, which dismissed the appeal on 11 February 1986. He notes that he has encountered many problems in obtaining a copy of the written judgment of the Court of Appeal. As to the possibility of a petition or special leave to appeal to the Judicial Committee of the Privy Council, he notes that as leading counsel in London has opined that there is no merit in such a petition, this remedy provides no prospective avenue of redress.

2.12 As to the conditions of his detention, the author indicates that he has suffered ill-treatment on death row on several occasions, On 28 May 1990, the author was among a number of prisoners searched by approximately 60 prison warders, who not only injured the author but also forced him to undress in the presence of other inmates, warders, soldiers and policemen,

contrary to Section 192, paragraph 3, of the Jamaican Prisons Act 1947. When the author sought to invoke his rights under this provision, he was subjected to severe beatings by three warders, one of whom hit him several times with a heavy riot club. His counsel complained of the treatment to the authorities and the Parliamentary Ombudsman; no follow-up on the complaint has been notified to the author or to his counsel, although the author has served notice of his desire to see the behaviour of the warders sanctioned. On several subsequent occasions, in particular on 10 September 1990 when he complained to a warder who had been interfering with his mail and sometimes withholding it altogether, the author was physically assaulted; as a result, he was, injured on his hand, which required medical attention and several stitches to mend his injury.

#### *The complaint*

3.1 The author contends that the conduct of his re-trial in October 1983 violated article 14, paragraphs 1, 2, and 3(e), of the Covenant. In particular, he submits that the judge was biased against him, as manifested by his previous statement made in the Portland Magistrates Court. In the author's opinion, the appointment of the judge violated his rights to equality before the court, to a fair hearing by an impartial tribunal, and to be presumed innocent until found guilty according to law. In this context, he explains that it is a general rule of criminal procedure in Jamaica that the judge presiding over a trial should not have any prior involvement in the case, and no prior involvement with the defendant, unless such prior involvement is notified to all the parties and no objections are raised. It is further explained that the rationale for the general rule is that the presentation of the evidence at preliminary hearings in criminal cases is not subject to the same strict rules of evidence governing a trial, and that it is, accordingly, considered wrong for a trial judge to have heard evidence in those circumstances at an earlier stage of the proceedings. No such procedure was followed in the author's case.

3.2 As to the claim of jury tampering by Detective G., the author explains that although such allegations are rare in capital cases, they are not unheard of in Jamaica. In his case, Detective G. took charge of a police investigation in a matter in which he was personally involved through his family links with C. E., whom the author suspected of having killed Mr. Johnson.

The author claims that G.'s tampering with jury members, including the foreman of the jury, during the re-trial, as well as his intimidation of a key defence witness who might otherwise have testified on his behalf, constitute a serious violation of his rights under article 14, paragraphs 1 and 2.

3.3 The author affirms that the conduct of his defence by H. C. during the second trial, in its effect, deprived him of a fair trial and violated his right, under article 14, paragraph 3(e), to have witnesses testify on his behalf under the same conditions as the witnesses against him. Thus, counsel did not call several witnesses who were present in court throughout the re-trial and ready to testify on his behalf, including B. H. and Bl. H.; nor did he arrange for the author's bank manager to testify at the re-trial, although he had given evidence at the first trial.

3.4 It is further submitted that the non-availability of the author's alibi evidence during the re-trial was particularly crucial, in the light of the weakness of the prosecution's case which was based on the evidence of a witness who had initially been detained in connection with the murder and who, at the time of his testimony, had just served a prison term of 18 months for the theft of three cars. These circumstances are said to corroborate the author's claim of a violation of article 14, paragraphs 1 and 3(e): the absence of defence evidence violated a fundamental prerequisite of a fair trial, and H. C.'s failure to ensure that defence evidence be put before the court is said to constitute a gross violation of the author's rights.

3.5 The author submits that the beatings he was subjected to on death row in May and September 1990, as well as the interference with his correspondence, constitute violations of his rights under articles 7 and 10, paragraph 1, of the Covenant. He adds that Detective G. is now in charge of crime prevention in the parish of St. Catherine, where the prison is located, and expresses fear that G. may use his position for further attacks on his integrity.

3.6 Finally, the author's detention in the death row section of St. Catherine District Prison since 26 October 1963 is said to constitute a separate violation of article 7, as the severe mental stress suffered by the author due to the continued uncertainty about his situation is not a function of legal but primarily political considerations.

3.7 As to the requirement of exhaustion of domestic remedies, counsel recalls the Committee's established jurisprudence that remedies must not only be available but also effective, and that the State party has an obligation to provide some evidence that there would be a reasonable prospect that domestic remedies would be effective. He submits that neither a petition for special leave to appeal to the Judicial Committee of the Privy Council nor a constitutional motion in the Supreme (Constitutional) Court of Jamaica would provide effective remedies.

3.8 In this context, it is submitted that the case cannot be brought within the ambit of Section 110, paragraphs 1 and 2, of the Jamaican Constitution governing the modalities under which the Court of Appeal may grant leave to appeal to the Judicial Committee of the Privy Council. Firstly, at no stage in the judicial proceedings did a question as to the interpretation of the Jamaican Constitution arise, as required by Section 110, paragraph 1(c). Secondly, the general criteria for granting leave to the Privy Council in Section 110, paragraph 2(a) (a question of great general or public importance or otherwise such that it ought to be submitted to the Privy Council) were not met in the case.

3.9 As to the power of the Judicial Committee, under Section 110, paragraph 3, of the Constitution, to grant special leave to appeal from a decision of the Court of Appeal, counsel affirms that any application for special leave requires the submission of a legal opinion from Leading Counsel, to the effect that there is merit in seeking leave. In the author's case, Leading Counsel, the President of the Bar Council (United Kingdom), has advised that the substantive issues involved do not fall within the narrow jurisdiction of the Judicial Committee. Leading Counsel considers that although there were weaknesses in the evidence against the author during his re-trial, as well as in the handling of the defence case, the likelihood of the Judicial Committee to grant special leave to appeal in respect of those matters would be remote.

3.10 To petition the Judicial Committee in the current circumstances would involve discarding highly qualified legal advice that such an avenue would be inappropriate; counsel submits that since the author has diligently considered the possibility of petitioning the Judicial Committee,

he should not now be penalized for accepting the advice of Leading Counsel. Finally, it is submitted that recourse to the Judicial Committee in instances in which an application is likely to fail would involve the submission of a large number of unmeritorious petitions to the Judicial Committee, with damaging consequences for the judicial procedure before that body. Such a consequence, it is submitted, cannot have been the purpose of the rule laid down in article 5 of the Optional Protocol.

3.11 Counsel further asserts that a constitutional motion in the Supreme (Constitutional) Court does not provide the author with an effective domestic remedy. In this context, he advances three arguments: firstly, Section 25 of the Jamaican Constitution, which provides for the "enforcement" of the individual rights guaranteed under Chapter Three of the Constitution, including the right to a fair trial, would not provide an appropriate remedy in the circumstances of the case, as "enforcement" within the meaning of Section 25 would involve ordering a second re-trial which, more than 10 years after the murder of Mr. Johnson, is an impractical proposition. Secondly, it is submitted that the proviso to Section 25, paragraph 2, namely that the Supreme Court shall not exercise its powers if it is satisfied that adequate means of redress for the contravention alleged are, or have been, available to the applicant, applies to the author's case. Finally, a constitutional remedy is not "available" to the author, because the State party does not grant legal aid for the purpose of filing constitutional motions in the Supreme Court, and lawyers in Jamaica are generally unwilling to argue such motions on a pro bono basis.

#### *The State party's observations*

4. The State party, by submission of 20 July 1986, contends that the communication is inadmissible on the grounds of non-exhaustion of domestic remedies, since the author retains the right, under Section 11 of the Jamaican Constitution, to petition the Judicial Committee of the Privy Council for special leave to appeal. It adds that it issued the written judgment of the Court of Appeal of Jamaica on 17 March 1986 and that it was available to the author and to his counsel; legal aid would be available to the author to petition the Judicial Committee pursuant to Section 3, paragraph 1, of the Poor Prisoners' Defence Act.

*The Committee's admissibility considerations and decision*

5.1 During its 34th session, the Committee considered the admissibility of the communication. With regard to the requirement of exhaustion of domestic remedies, it found that, in the circumstances, a petition for special leave to appeal to the Judicial Committee of the Privy Council did not constitute an available and effective remedy within the meaning of the Optional Protocol. Furthermore, it emphasized that unreasonably prolonged delays had been encountered in obtaining the written judgment of the Court of Appeal of Jamaica, the submission of which to the Judicial Committee was a prerequisite for an application for leave to appeal to be entertained. In "Mr. Collins" case, it was undisputed that he had not received the written judgment of the Court of Appeal approximately two years after the dismissal of his appeal.

5.2 On 2 November 1988, accordingly, the Human Rights Committee declared the communication admissible.

*The State party's objections to the admissibility decision and the Committee's requests for further clarifications*

6.1 By two submissions of 25 May 1989 and 22 February 1990, the State party rejects the Committee's findings of admissibility and challenges the reasoning described in paragraph 5.1 above. In particular, it submits that the fact that the power of the Judicial Committee of the Privy Council to grant special leave to appeal pursuant to section 110, paragraph 3, of the Constitution, is discretionary, does not relieve Mr. Collins from his obligation to pursue this remedy. It contends that:

“[a] remedy is no less a remedy because there is, inherent in structure, a preliminary stage which must be undergone before the remedy itself becomes properly applicable. In the instant case, an application to the Privy Council for special leave [to appeal] from decisions of the Court of Appeal is considered in a judicial hearing and a determination thereon is made on grounds which are wholly judicial and reasonable. The Privy Council refuses to grant leave to appeal if it considers that there is no merit in the appeal. Therefore, where special leave was

refused, the applicant cannot say [that] he has no remedy . . .”.

6.2 The State party criticizes the Committee's interpretation of article 5, paragraph 2(b), of the Optional Protocol, according to which a domestic remedy must be both available and effective as “a gloss on the relevant provisions of the Optional Protocol”: in the instant case, the effectiveness of the remedy must in any event be demonstrated by the power of the Judicial Committee to entertain an appeal.

6.3 The State party affirms that even if the Judicial Committee were to dismiss the author's petition for special leave to appeal, the communication would remain inadmissible, on the ground of non-exhaustion of domestic remedies, since Mr. Collins would retain the right to apply for constitutional redress in the Supreme (Constitutional) Court, alleging a violation of his right to a fair trial, protected by section 20 of the Constitution.

6.4 Considering that further information about the constitutional remedy which the State party claims remains open to Mr. Collins would assist it in the consideration of the communication, the Committee adopted an interlocutory decision during its thirty-seventh session, on 2 November 1989. In it, the State party was requested to clarify whether the Supreme (Constitutional) Court had had the opportunity to determine, 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 constituted “adequate means of redress” for individuals who claim that their right to a fair trial, as guaranteed by section 20, paragraph 1, of the Constitution, had been violated. Should the answer be in the affirmative, the State party was asked to also clarify whether the Supreme (Constitutional) Court had declined to exercise its powers under section 25, paragraph 2, in respect of such applications, on the ground that adequate means of redress were already provided for in law. By submission of 22 February 1990, the State party replied that the Supreme (Constitutional) Court had not had the opportunity to consider the issue. It reiterated its request of 25 May 1989 that the decision on admissibility be revised, citing rule 93, paragraph b, of the Committee's rules of procedure.

6.5 In June 1991, author's counsel informed the Committee that the Supreme (Constitutional) Court had rendered its judgement in the cases of

Earl Pratt and Ivan Morgan, on whose behalf constitutional motions had been filed earlier in 1991.<sup>1</sup> In the light of this judgement and in order better to appreciate whether recourse to the Supreme (Constitutional) Court was a remedy which the author had to exhaust for purposes of the Optional Protocol, the Committee adopted a second interlocutory decision during its forty-second session, on 24 July 1991. In this decision, the State party was requested to provide detailed information on the availability of legal aid or free legal representation for the purpose of constitutional motions, as well as examples of such cases in which legal aid might have been granted or free legal representation might have been procured by applicants. The State party did not forward this information within the deadline set by the Committee, that is, 26 September 1991. By submission of 10 October 1991 concerning another case, the State party replied that no provision for legal aid in respect of constitutional motions exists under Jamaican law, and that the Covenant does not oblige the State party to provide legal aid for this purpose.

6.6 In both of the above interlocutory decisions, as well as by note verbale dated 18 April 1990 addressed to it by the Committee's secretariat, the State party was requested to also provide information and observations in respect of the substance of the author's allegations. In its interlocutory decision of 24 July 1991, the Committee added that should no comments be forthcoming from the State party on the merits of the author's allegations, it might decide to give due consideration to these allegations.

6.7 In spite of the Committee's repeated requests and reminders, the State party did not provide detailed information and observations in respect of the substance of the author's allegations. In this respect, it merely observed, by submission of 4 September 1990, that the facts as submitted by Mr. Collins seek to raise issues of facts and evidence in the case which the Committee has no Competence to evaluate, adducing in support of its contention a decision

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<sup>1</sup> On 6 April 1989, the Human Rights Committee had adopted its Views under article 5, paragraph 4, of the Optional Protocol in respect of these cases: see *Official Records of the General Assembly, Forty-fourth Session, Supplement No. 40 (A/44/40)*, annex X, sect. F.

adopted by the Human Rights Committee in November 1989.<sup>2</sup>

*Post-admissibility proceedings and examination of merits*

7.1 In the light of the above, the Committee decides to proceed with its consideration of the communication. The Committee has taken note of the State party's position, formulated after the decision on admissibility, and takes the opportunity to expand upon its admissibility findings.

7.2 The Committee has considered the State party's argument that the fact that the power of the Judicial Committee of the Privy Council to grant leave to appeal, pursuant to section 110, paragraph 3, of the Jamaican Constitution, is limited, does not absolve an applicant from availing himself of this remedy.

7.3 The Committee appreciates that the discretionary element in the Judicial Committee's power to grant special leave to appeal pursuant to section 110, paragraph 3, does not in itself relieve the author of a communication under the Optional Protocol of his obligation to pursue this remedy. However, for the reasons set out below, the Committee believes that the present case does not fall within the competence of the Judicial Committee, as also contended by leading counsel in the case.

7.4 In determining whether to grant leave to appeal to the Judicial Committee, the Court of Appeal of Jamaica must generally ascertain, under section 110, paragraphs 1(c) and 2(a) of the Jamaican Constitution, whether the proceedings involve a question as to the interpretation of the Jamaican Constitution or a question of great general or public importance or otherwise such that it should be submitted to the Privy Council. Pursuant to the powers conferred upon it by section 110, paragraph 3, the Judicial Committee applies similar considerations. In granting special leave to appeal, the Judicial Committee is concerned with matters of public interest arising out of the interpretation of legal issues in a case, such as the rules governing identification procedures. There is no precedent to support the conclusion that the Judicial Committee would consider issues of alleged

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<sup>2</sup> See *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40 (A/45/40)*, vol. II, annex X, sect. S, communication No. 369/1989 (*G.S. v. Jamaica*), decision of 8 November 1989, para. 3.2.

irregularities in the administration of justice, or that it would consider itself competent to inquire into the conduct of a criminal case. Such matters, however, are central to the author's complaint, which does not otherwise raise legal issues of general or public interest. In this context, the Committee notes that the evaluation of evidence and the summing up of relevant legal issues by the judge was neither arbitrary nor amounted to a denial of justice, and that the judgement of the Court of Appeal clearly addressed the grounds of appeal.

7.5 In the particular circumstances of the case, therefore, the Committee finds that a petition for leave to appeal to the Judicial Committee of the Privy Council would have no prospect of success; accordingly, it does not constitute an effective remedy within the meaning of the Optional Protocol.

7.6 Similar considerations apply to the author's possibility of obtaining the redress sought by applying for constitutional redress in the Supreme (Constitutional) Court. A remedy is not "available" within the meaning of the Optional Protocol where, as in the instant case, no legal aid is made available in respect of constitutional motions, and no lawyer is willing to represent the author for this purpose on a pro bono basis. The Committee further reiterates that in capital punishment cases, legal aid should not only be made available; it should also enable counsel to prepare his client's defence in circumstances that can ensure justice.<sup>3</sup>

7.7 For the reasons above, the Committee finds that a petition for special leave to appeal to the Judicial Committee of the Privy Council and a constitutional motion in the Supreme (Constitutional) Court are not remedies that the author would have to exhaust for purposes of the Optional Protocol. It therefore concludes that there is no reason to reverse its decision on admissibility of 2 November 1986.

8.1 With respect to the alleged violations of the Covenant, four issues are before the Committee: (a) whether the conduct of the author's re-trial by a judge with a previous involvement in the case violated the author's rights under article 14, paragraphs 1 and 2, of the Covenant; (b) whether the alleged tampering with members of the jury by the investigating

officer, and the alleged intimidation of witnesses by the same officer, violated the aforementioned provisions; (c) whether the failure of author's counsel in the re-trial to call witnesses on his behalf violated article 14, paragraph 3 (e); and (d) whether the author's alleged ill-treatment on death row amounts to violations of articles 7 and 10.

8.2 Concerning the substance of Mr. Collins' allegations, the Committee regrets that several requests for clarifications notwithstanding (requests which were reiterated in two interlocutory decisions adopted after the decision on admissibility of 2 November 1988), the State party has confined itself to the observation that the facts relied upon by the author seek to raise issues of facts and evidence that the Committee is not Competent to evaluate. The Committee cannot but interpret this as the State party's refusal to cooperate under article 4, paragraph 2, of the Optional Protocol. 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 make available to the Committee all the information at its disposal. The summary dismissal of the author's allegations, as in the present case, does not meet the requirements of article 4, paragraph 2. In the circumstances, due weight must be given to the author's allegations, to the extent that they have been credibly substantiated.

8.3 The Committee does not accept the State party's contention that the communication merely seeks to raise issues of facts and evidence which the Committee does not have the competence to evaluate. It is the Committee's established jurisprudence that it is in principle for the appellate courts of States parties to the Covenant to evaluate facts and evidence in a particular case or to review specific instructions to the jury by the judge, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice, or that the judge clearly violated his obligation of impartiality.<sup>4</sup> In the present case, the Committee has been requested to examine matters in this latter category. After careful consideration of the material before it, the Committee cannot conclude that the remark attributed to Justice G. in the committal

<sup>3</sup> See *ibid.*, annex IX, sect. J, communication No. 250/1987 (*Carlton Reid v. Jamaica*), Views adopted on 20 July 1990, para. 13.

<sup>4</sup> See *ibid.*, *Forty-sixth Session, Supplement No. 40* (A/46/40), annex XI, sect. D, communication No. 253/1987 (*Paul Kelly v. Jamaica*), Views adopted on 8 April 1991, para. 5.13.

proceedings before the Portland Magistrates Court resulted in a denial of justice for Mr. Collins during his re-trial in the Home Circuit Court of Kingston. The author has not even alleged in which respect the instructions given by the judge to the jury were either arbitrary or reflected partiality. The Committee further notes that the verdict of the jury necessarily entailed a mandatory death sentence, by which the judge was bound. Secondly, the Committee notes that, although the author states that he apprised his counsel of the judge's alleged bias towards him, counsel opined that it was preferable to let the trial proceed. Nor was the matter raised on appeal, although the author's case was at all times in the hands of a professional adviser. Even if the remark was indeed made, in the absence of clear evidence of professional negligence on the part of counsel, it is not for the Committee to question the latter's professional judgement. In the circumstances, the Committee finds no violation of article 14, paragraphs 1 and 2.

8.4 Similar considerations apply to the alleged attempts at jury tampering by the investigating officer in the case. In a trial by jury, the necessity to evaluate facts and evidence independently and impartially also applies to the jury; it is important that all the jurors be placed in a position in which they may assess the facts and the evidence in an objective manner, so as to be able to return a just verdict. On the other hand, the Committee observes that where alleged improprieties in the behaviour of jurors or attempts at jury tampering come to the knowledge of either of the parties, these alleged improprieties should have been challenged before the court. In the present case, the author claims that his counsel was informed, on 27 October 1983, that Detective G., the investigating officer, had sought to influence members of the jury. Counsel neither conveyed this information to the judge nor sought to challenge the jurors allegedly influenced by Detective G.; in the Committee's opinion, if it had been thought that the complaint was tenable, it would have been raised before the courts. Accordingly, the Committee cannot conclude that Mr. Collins' rights under article 14, paragraphs 1 and 2, were violated by the State party in this respect.

8.5 As to the author's claim of a violation of article 14, paragraph 3(e), the Committee notes that at least two witnesses who would have been willing to testify on the author's behalf were present in the courtroom during the re-trial.

Notwithstanding the author's repeated requests, they were not called. As author's counsel had been privately retained, his decision not to call these witnesses cannot, however, be attributed to the State party. In the view of the Committee, counsel's failure to call defence witnesses did not violate the author's right under article 14, paragraph 3(e).

8.6 As to the author's allegations of ill-treatment on death row, the Committee observes that the State party has not addressed this Claim, in spite of the Committee's request that it do so. It further notes that the author brought his grievances to the attention of the prison authorities, including the Superintendent of St. Catherine District Prison, and to the Parliamentary Ombudsman, and swore affidavits in this context. Apart from the relocation of some prison warders involved in the ill-treatment of the author on 28 May 1990, however, the Committee has not been notified whether the investigations into the author's allegation have been concluded some 18 months after the event, or whether, indeed, they are proceeding. In the circumstances, the author should be deemed to have complied with the requirement of exhaustion of domestic remedies, pursuant to article 5, paragraph 2 (b), of the Optional Protocol. With respect to the substance of the allegation and in the absence of any information to the contrary from the State party, the Committee finds the allegations substantiated and considers that the treatment of Mr. Collins on 28 May 1990 and on 10 September 1990 reveals a violation of article 10, paragraph 1.

8.7 As to the author's claim under article 7, the Committee observes that it equally has not been refuted by the State party. The claim having been sufficiently substantiated, the Committee concludes that the beatings Mr. Collins was subjected to by three prison warders on 28 May 1990, as well as the injuries he sustained as a result of another assault on 10 September 1990, constitute cruel, inhuman and degrading treatment within the meaning of article 7 of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 7 and 10, paragraph 1, of the Covenant.

10. Two consequences follow from the findings of a violation by the Committee. The

first is that the violation of article 7 of the Covenant should cease, and the author should be treated in accordance with the requirements of article 10, paragraph 1. In this regard the State party should promptly notify the Committee as to the steps it is taking to terminate the maltreatment and to secure the integrity of the author's person. The State party should also take steps to ensure that similar violations do not occur in the future. The second consequence is that the author should receive an appropriate remedy for the violations he has suffered.

11. The Committee would wish to receive information, within three months of the transmittal to it of this decision, on any relevant measures taken by the State party in respect of the Committee's Views.

#### APPENDIX

*Individual opinion submitted by Ms. Christine Chanet, Mr. Kurt Herndl, Mr. Francisco José Aguilar Urbina and 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. 240/1987, Willard Collins v. Jamaica.*

From our point of view, irrespective of the content and impact of the remarks attributed to Judge G. in the course of the proceedings, the fact that he had taken part in the proceedings in the Portland Magistrates Court in 1981 gave him a knowledge of the case prior to the trial. And this knowledge necessarily related to the charges against the author and the evaluation of those charges and of his character, since the purpose of the Magistrate's Court hearing was indictment and transfer. In our opinion, therefore, his appointment to preside over the second trial of the author in the Kingston Home Circuit Court in October 1983 was incompatible with the requirement of impartiality in article 14, paragraph 1, of the Covenant.

It is for the State party to decide on any incompatibility between the different judicial functions and to enforce its decision, so that a magistrate who has been involved in one phase of the proceedings concerning the pertinent albeit preliminary evaluation of charges against a person, may not take part in any capacity whatsoever in the trial of that person on matters of substance.

Failing that, there is a violation of article 14, paragraph 1. This is our opinion in this particular case.

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#### Communication No. 253/1987

*Submitted by:* Paul Kelly (represented by counsel)

*Date of communication:* 15 September 1987

*Alleged victim:* The author

*State party:* Jamaica

*Date of adoption of Views:* 8 April 1991 (forty-first session)

*Subject matter:* Alleged denial of a fair hearing by an independent and impartial tribunal in a capital punishment case

*Interim measures of protection:* Stay of execution granted

*Procedural issues:* Substantiation of claim—Burden of proof—State party failure to make a submission on the merits—Non-exhaustion of domestic remedies—Lack of competence to re-evaluate facts and evidence

*Substantive issues:* Effective remedy—Right to life—Right to be promptly brought before a

*judge—Entitlement to take proceedings before a court—Right to be informed promptly of any charges—Right to humane treatment—Right to a fair trial—Right to adequate time and facilities to prepare a defence—Right to be tried without undue delay—Right to legal assistance—Right not to be compelled to testify against oneself or to confess guilt—Right to examine witnesses—Right to have one's sentence and conviction reviewed by a higher tribunal*

*Articles of the Covenant:* 6(2), 7, 9(2), (3) and (4), 10(1) and 14(1), (3) (a), (b), (c), (d), (e) and (g) and (5)



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

*Rules of procedure: Rules 86 and 94(3)*

*Individual opinions: Partly dissenting opinions by Mr. Waleed Sadi and Mr. Bertil Wennergren*

1. The author of the communication (initial submission dated 15 September 1987 and subsequent correspondence) is Paul Kelly, a Jamaican citizen awaiting execution at St. Catherine District Prison, Jamaica. He claims to be the victim of a violation by Jamaica of articles 6, paragraph 2; 7; 9, paragraphs 3 and 4; 10; and 14, paragraphs 1 and 3(a)-(e) and (g), of the International Covenant on Civil and Political Rights. He is represented by counsel.

*The facts as submitted by the author*

2.1 The author was arrested and taken into custody on 20 August 1981. He was detained until 15 September 1981 without formal charges being brought against him. Following a statement to the police given on 15 September 1981, he was charged with having murdered Owen Jamieson on 2 July 1981. He was tried with a co-defendant, Trevor Collins, in the Westmoreland Circuit Court between 9 and 15 February 1983. He and Mr. Collins were found guilty of murder and sentenced to death. On 23 February 1983, the author appealed his conviction: on 28 April 1986, the Jamaican Court of Appeal dismissed his appeal without producing a reasoned judgement. On appeal, author's counsel merely stated that he found no merit in arguing the appeal. Because of the absence of a reasoned judgement of the Court of Appeal, the author has refrained from further petitioning the Judicial Committee of the Privy Council for special leave to appeal.

2.2 The evidence relied on during the trial was that on 1 July 1981 the author and Mr. Collins had sold a cow to Basil Miller and had given him a receipt for the sale. According to the prosecution, the cow had been stolen from Mr. Jamieson, who had visited Mr. Miller's home on the afternoon of 1 July and had identified the cow as his property. The accused had then purportedly killed Mr. Jamieson in the belief that he had obtained the receipt from Mr. Miller implicating them in the theft of the cow.

2.3 During the trial, the prosecution adduced certain evidence against the author and his co-

defendant: (a) blood-stained clothing that was found in a latrine at the house where the accused lived; (b) the presence of a motive; and (c) the oral evidence tendered by the sister of the author and the brother of Trevor Collins. In particular, the testimony of the author's sister was important as to the identification of the clothes found in the latrine. According to the prosecution, the author and Mr. Collins had fled the district after the murder. Mr. Collins brother testified that the accused had borrowed a suitcase from him in the early hours of the morning following the murder.

2.4 The author challenged the prosecution's contention that his statement of 15 September 1981 had been a voluntary one. In an unsworn statement from the dock, he claimed to have been beaten by the police, who had tried to force him to confess to the crime. He affirms that the police tried to have him sign a "blanko" confession, and that he withstood the beatings and refused to sign any papers presented to him. He further maintains that he never made a statement to the police and that he knows nothing about the circumstances of Mr. Jamieson's death.

*Complaint*

3.1 The author alleges a violation of articles 7 and 14, paragraph 3(g), of the Covenant on the ground that he was threatened and beaten by the police, who tried to make him give and sign a confession. Although the police sought to dismiss his version during the trial, the author contends that several factors support his claim: his voluntary confession" was not obtained until nearly four weeks after his arrest: no independent witness was present at the time when he purportedly confessed and signed his statement; and there were numerous inconsistencies in the prosecution's evidence relating to the manner in which his statement was obtained.

3.2 The author further notes that 26 days passed between his arrest (20 August 1981) and the filing of formal charges against him (15 September 1981). During this time, he claims, he was not allowed to contact his family nor to consult with a lawyer, in spite of his requests to meet with one. After he was charged, another week elapsed before he was brought before a judge. During this period, his detention was under the sole responsibility of the police, and he was unable to challenge it. This situation, he contends, reveals violations of article 9, paragraphs 3 and 4, in that he was not "brought promptly before a judge or other officer

authorized by law to exercise judicial power”, and because he was denied the means of challenging the lawfulness of his detention during the first five weeks following his arrest.

3.3 According to the author, the State party violated article 14, paragraph 3(a), because he was not informed promptly and in detail of the nature of the charges against him. Upon his arrest, he was held for several days at the central lock-up at Kingston, pending “collection” by the Westmoreland police, and merely told that he was wanted in connection with a murder investigation. Further details were not forthcoming even after his transfer to Westmoreland. It was only on 15 September 1981 that he was informed that he was charged with the murder of Owen Jamieson.

3.4 The author submits that article 14, paragraph 3(b), was violated in his case, since he was denied adequate time and facilities for the preparation of his defence, had no or little opportunity to communicate with counsel representing him at trial and on appeal, both before and during trial and appeal, and because he was unable to defend himself through legal assistance of his own choosing. In this context, he notes that he experienced considerable difficulty in obtaining legal representation. Counsel assigned to him during the trial did not meet with him until the opening day of the trial: moreover, this meeting lasted a mere 15 minutes, during which it was virtually impossible for counsel to prepare the author’s defence in any meaningful way. During the trial, he could not consult with the lawyers for more than a total of seven minutes, which means that preparation of the defence prior to and during the trial was restricted to 22 minutes. He points out that the lack of time for the preparation of the trial was extremely prejudicial to him, in that his lawyer could not prepare proper submissions on his behalf in relation to the admissibility of his “confession statement”, or prepare properly for the cross-examination of witnesses. As to the hearing of the appeal, the author contends that he never met with, or even instructed, his counsel, and that he was not present during the hearing of the appeal.

3.5 The author also alleges that article 14, paragraph 3(d), was violated. In this connection, he notes that, as he is poor, he had to rely on legal aid lawyers for the judicial proceedings against him. While he concedes that this situation does not in itself reveal a breach of article 14,

paragraph 3(d), he submits that the inadequacy of the Jamaican legal aid system, which resulted in substantial delays in securing suitable legal representation, does amount to a breach of this provision. He further notes that as he did not have an opportunity to discuss his case with the lawyers assigned to his appeal, he could not possibly know that this lawyer intended to withdraw the appeal and thus could not object to his intentions. He adds that had he been apprised of the situation, he would have sought other counsel.

3.6 The author contends that he has been the victim of a violation of article 14, paragraph 3(c), in that he was not tried without undue delay. Thus, almost 18 months elapsed between his arrest and the start of the trial. During the whole period, he was in police custody. As a result, he was prevented from carrying out his own investigations, which might have assisted him in preparing his defence, given that court-appointed legal assistance was not immediately forthcoming.

3.7 In the author’s opinion, he was denied a fair hearing by an independent and impartial tribunal, in violation of article 14, paragraph 1, of the Covenant. Firstly, he contends that he was poorly represented by the two legal aid lawyers who were assigned to him for the trial and the appeal. His representative during the trial, for instance, allegedly never was in a position to present his defence constructively; his cross-examination of prosecution witnesses was superficial, and he did not call witnesses on the author’s behalf, although the author notes that his aunt, Mrs. Black, could have corroborated his alibi. Furthermore, counsel did not call for the testimony of a woman -the owner of the house where the accused had lived -who had given the police information leading to the author’s arrest. This, he submits, constitutes a violation of article 14, paragraph 3(e). Secondly, the author alleges bias and prejudice on the part of the trial judge. The latter allegedly admitted hearsay evidence presented by Basil Miller and several other witnesses. When author’s counsel opened his defence statement, the judge reaffirmed his desire to dispose of the case expeditiously, while he refrained from similar attempts to curtail the presentation of the prosecution’s case. He allegedly made disparaging remarks related to the case for the defence, thus undermining the presumption of innocence. Finally, the judge’s conduct of the *voir dire* in connection with the determination of the voluntary character of the

author's confession is said to have been "inherently unfair".

3.8 Finally, the author affirms that he is the victim of a violation of article 10 of the Covenant, since the treatment he is subjected to on death row is incompatible with the respect for the inherent dignity of the human person. In this context, 'he encloses a copy of a report about the conditions of detention on death row at St. Catherine Prison, prepared by a United States non-governmental organization, which describes the deplorable living conditions prevailing on death row. More particularly, the author claims that these conditions put his health at considerable risk, adding that he receives insufficient food, of very low nutritional value, that he has no access whatsoever to recreational or sporting facilities and that he is locked in his cell virtually 24 hours a day. It is further submitted that the prison authorities do not provide for even basic hygienic facilities, adequate diet, medical or dental care, or any type of educational services. Taken together, these conditions are said to constitute a breach of article 10 of the Covenant. The author refers to the Committee's jurisprudence in this regard.<sup>1</sup>

3.9 In respect of the requirement of exhaustion of domestic remedies, the author maintains that although he has not petitioned the Judicial Committee of the Privy Council, he should be deemed to have complied with the requirements of article 5, paragraph 2(b), of the Optional Protocol. He notes that pursuant to rule 4 of the Privy Council rules, a written judgement of the Court of Appeal is required if the Judicial Committee is to entertain an appeal.

3.10 The author further points out that he was unaware of the existence of the Note of Oral Judgement until almost three years after the dismissal of his appeal, and counsel adds that the trial transcript obtained in October 1989 is incomplete in material respects, including the summing-up of the judge, which further hampers efforts to prepare properly an appeal to the Privy Council. Subsidiarily, he argues that as almost eight years have already elapsed since his conviction, the pursuit of domestic remedies has been unreasonably prolonged. Finally, he argues that a constitutional motion in the Supreme (Constitutional) Court of Jamaica would inevitably fail, in the light of the precedent set by

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<sup>1</sup> See final Views in para. 12.7 of communication No. 232/1987 (*Daniel Pinto v. Trinidad and Tobago*), adopted on 20 July 1990.

the Judicial Committee's decisions in *DPP v. Nasralla*<sup>2</sup> and *Riley et al. v. Attorney General of Jamaica*,<sup>3</sup> where it was held that the Jamaican Constitution was intended to prevent the enactment of unjust laws and not merely unjust treatment under the law.

*State party's observations*

4.1 The State party contends that the communication is inadmissible because of the author's failure to exhaust domestic remedies, since he retains the right, under section 110 of the Jamaican Constitution, to petition the Judicial Committee of the Privy Council for special leave to appeal. In this context, it points out that the rules of procedure of the Judicial Committee do not make a written judgement of the Court of Appeal a prerequisite for a petition for leave to appeal. While rule 4 provides that any petitioner for special leave to appeal must submit the judgement from which leave to appeal is sought, Rule 1 defines "judgement" as "decree order, sentence or decision of any court, judge or judicial officer". Thus, the State party argues, an order or a decision of the Court of Appeal, as distinct from a reasoned judgement, is a sufficient basis for a petition for special leave to appeal to the Judicial Committee. It adds that the Privy Council has heard petitions on the basis of the order or decision of the Court of Appeal dismissing the appeal.

4.2 With respect to the substance of the author's allegations, the State party affirms that the facts as presented by the author "seek to raise issues of facts and evidence in the case which the Committee does not have the competence to evaluate". The State party refers to the Committee's decisions in communications 290/1988 and 369/1989, in which it had been held that "while article 14 . . . 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".<sup>4</sup>

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<sup>2</sup> [1967] 2 All ER, at 161.

<sup>3</sup> [1982] 3 All ER, at 469.

<sup>4</sup> Decisions of 8 November 1989, 290/1988 (*A. W. v. Jamaica*), para. 82; 369/1989 (*G. S. v. Jamaica*), para. 3.2.

### *Issues and proceedings before the Committee*

5.1 On the basis of the information before it, the Human Rights Committee concluded that the conditions for declaring the communication admissible had been met, including the requirement of exhaustion of domestic remedies. In this respect, the Committee considered that a written judgement of the Court of Appeal of Jamaica was a prerequisite for a petition for special leave to appeal to the Judicial Committee of the Privy Council. It observed that in the circumstances, author's counsel was entitled to assume that any petition for special leave to appeal would inevitably fail because of the lack of a reasoned judgement from the Court of Appeal: it further recalled that domestic remedies need not be exhausted if they objectively have no prospect of success.

5.2 On 17 October 1989, the Human Rights Committee declared the communication admissible.

5.3 The Committee has noted the State party's submissions of 8 May and 4 September 1990, made after the decision on admissibility, in which it reaffirms its position that the communication is inadmissible on the ground of non-exhaustion of domestic remedies. The Committee takes the opportunity to expand on its admissibility findings, in the light of the State party's further observations. The State party has argued that the Judicial Committee of the Privy Council may hear a petition for special leave to appeal even in the absence of a written judgement of the Court of Appeal: it bases itself on its interpretation of rule 4 *juncto* rule 1 of the Privy Council's Rules of Procedure. It is true that the Privy Council has heard several petitions concerning Jamaica in the absence of a reasoned judgement of the Court of Appeal, but, on the basis of the information available to the Committee, all of these petitions were dismissed because of the absence of a reasoned judgement of the Court of Appeal. There is therefore no reason to revise the Committee's decision on admissibility of 17 October 1989.

5.4 As to the substance of the author's allegations of violations of the Covenant, the Committee notes with concern that several requests for clarifications notwithstanding, the State party has confined itself to the observation that the facts as submitted seek to raise issues of facts and evidence that the Committee is not competent to evaluate; it has not addressed the

author's specific allegations under articles 7, 9, 10 and 14, paragraph 3, of the Covenant. 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 make available to the Committee all the information at its disposal. The summary dismissal of the author's allegations, in general terms, does not meet the requirements of article 4, paragraph 2. In the circumstances, due weight must be given to the author's allegations, to the extent that they have been sufficiently substantiated.

5.5 As to the claim under articles 7 and 14, paragraph 3(g), of the Covenant, the Committee notes that the wording of article 14, paragraph 3(g), - i.e., that no one shall "be compelled to testify against himself or to confess guilt" - must be understood in terms of the absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt. *A fortiori*, it is unacceptable to treat an accused person in a manner contrary to article 7 of the Covenant in order to extract a confession. In the present case, the author's claim has not been contested by the State party. It is, however, the Committee's duty to ascertain whether the author has sufficiently substantiated his allegation, notwithstanding the State party's failure to address it. After careful consideration of this material, and taking into account that the author's contention was successfully challenged by the prosecution in court, the Committee is unable to conclude that the investigating officers forced the author to confess his guilt, in violation of articles 7 and 14, paragraph 3(g).

5.6 In respect of the allegations pertaining to article 9, paragraphs 3 and 4, the State party has not contested that the author was detained for some five weeks before he was brought before a judge or judicial officer entitled to decide on the lawfulness of his detention. The delay of over one month violates the requirement, in article 9, paragraph 3, that anyone arrested on a criminal charge shall be brought "promptly" before a judge or other officer authorized by law to exercise judicial power. Committee considers it to be an aggravating circumstance that, throughout this period, the author was denied access to legal representation and any contact with his family. As a result, his right under article 9, paragraph 4, was also violated, since he

was not in due time afforded the opportunity to obtain, on his own initiative, a decision by the court on the lawfulness of his detention.

5.7 In as much as the author's claim under article 10 is concerned, the Committee reaffirms that the obligation to treat individuals with respect for the inherent dignity of the human person encompasses the provision of, inter alia, adequate medical care during detention.<sup>1</sup> The provision of basic sanitary facilities to detained persons equally falls within the ambit of article 10. The Committee further considers that the provision of inadequate food to detained individuals and the total absence of recreational facilities does not, save under exceptional circumstances, meet the requirements of article 10. In the author's case, the State party has not refuted the author's allegation that he has contracted health problems as a result of a lack of basic medical care, and that he is only allowed out of his cell for 30 minutes each day. As a result, his right under article 10, paragraph 1, of the Covenant has been violated.

5.8 Article 14, paragraph 3 (a), requires that any individual under criminal charges shall be informed promptly and in detail of the nature and the charges against him. The requirement of prompt information, however, only applies once the individual has been formally charged with a criminal offence. It does not apply to, those remanded in custody pending the result of police investigations: the latter situation is covered by article 9, paragraph 2, of the Covenant. In the present case, the State party has not denied that the author was not apprised in any detail of the reasons for his arrest for several weeks following his apprehension and that he was not informed about the facts of the crime in connection with which he was detained or about the identity of the victim. The Committee concludes that the requirements of article 9, paragraph 2, were not met.

5.9 The right of an accused person to have adequate time and facilities for the preparation of his defence is an important element of the guarantee of a fair trial and an important aspect of the principle of equality of arms. In cases in which capital sentence may be pronounced on the accused, it is axiomatic that sufficient time must be granted to the accused and his counsel to prepare the defence for the trial. The determination of what constitutes "adequate time" requires an assessment of the individual circumstances of each case. The author also

contends that he was unable to obtain the attendance of witnesses. It is to be noted, however, that the material before the Committee does not disclose whether either counsel or author complained to the trial judge that the time or facilities were inadequate. Furthermore, there is no indication that counsel decided not to call witnesses in the exercise of his professional judgement, or that, if a request to call witnesses was made, the trial judge disallowed it. The Committee therefore finds no violation of article 14, paragraph 3(b) and (e).

5.10 As to the issue of the author's representation, in particular before the Court of Appeal, the Committee recalls that it is axiomatic that legal assistance should be made available to a convicted prisoner under sentence of death. This applies to all the stages of the judicial proceedings. In the author's case, it is clear that legal assistance was assigned to him for the appeal. What is at issue is whether his counsel had a right to abandon the appeal without prior consultation with the author. The author's application for leave to appeal to the Court of Appeal, dated 23 February 1983, indicates that he did not wish to be present during the hearing of the appeal, but that he wished legal aid to be assigned for this purpose. Subsequently, and without previously consulting with the author, counsel opined that there was no merit in the appeal, thus effectively leaving the author without legal representation. The Committee is of the opinion that while article 14, paragraph 3(d), does not entitle the accused to choose counsel provided to him free of charge, measures must be taken to ensure that counsel, once assigned, provides effective representation in the interests of justice. This includes consulting with, and informing, the accused if he intends to withdraw an appeal or to argue before the appeals court that the appeal has no merit.

5.11 With respect to the claim of "undue delay" in the proceedings against the author, two issues arise. The author contends that his right, under article 14, paragraph 3(c), to be tried without "undue delay" was violated because almost 18 months elapsed between his arrest and the opening of the trial. While the Committee reaffirms, as it did in its general comment on article 14, that all stages of the judicial proceedings should take place without undue delay, it cannot conclude that a lapse of a year and a half between the arrest and the start of the trial constituted "undue delay", as there is no suggestion that pre-trial investigations could

have been concluded earlier, or that the author complained in this respect to the authorities.

5.12 However, because of the absence of a written judgement of the Court of Appeal, the author has, for almost five years since the dismissal of his appeal in April 1986, been unable effectively to petition the Judicial Committee of the Privy Council, as shown in paragraph 5.3 above. This, in the Committee's opinion, entails a violation of article 14, paragraph 3(c), and article 14, paragraph 5. The Committee reaffirms that in all cases, and in particular in capital cases, the accused is entitled to trial and appeal proceedings without undue delay, whatever the outcome of these judicial proceedings may turn out to be.<sup>5</sup>

5.13 Finally, inasmuch as the author's claim of judicial bias is concerned, the Committee reiterates that it is generally for the appellate courts of States parties to the Covenant to evaluate the 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, or that the judge manifestly violated his obligation of impartiality. The Committee does not have sufficient evidence that the author's trial suffered from such defects.

5.14 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, while a petition to the Judicial Committee is in theory still available, it would not be an available remedy within the

meaning of article 5, paragraph 2(b), of the Optional Protocol, for the reasons indicated in paragraph 5.3 above. Accordingly, it may be concluded that the final sentence of death was passed without having met the requirements of article 14, and that as a result the right protected by article 6 of the Covenant has been violated.

6. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before the Committee disclose violations of articles 6, 9, paragraphs 2 to 4, 10 and 14, paragraphs 3(c) and (d) and 5 of the Covenant.

7. 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. The Committee is of the view that Mr. Paul Kelly, victim of a violation of article 14, paragraph 3(c) and (d) and 5 of the Covenant, is entitled to a remedy entailing his release.

8. The Committee would wish to receive information on any relevant measures taken by the State party in respect of the Committee's Views.

## APPENDIX I

*Individual opinion submitted by Mr. Waleed Sadi,  
pursuant to rule 94, paragraph 3, of the Committee's  
rules of procedure,  
concerning the Views of the Committee on  
communication No 253/1987,  
Paul Kelly v. Jamaica*

I respectfully submit hereafter a separate opinion to the Views adopted by the Human Rights Committee on 8 April 1991 with regard to communication No. 253/1987, submitted by Paul Kelly against Jamaica. In the Committee's view, the complainant was a victim of a violation of, *inter alia*, article 14, paragraph 3(d), of the Covenant, in the sense that he was essentially deprived of effective representation, as called for in said provision, because court-appointed counsel did not pursue Mr. Kelly's right of appeal properly by deciding against pursuing it without prior consultation with his client. The central issue which the Committee had to determine is whether any error of judgement by the complainant's legal counsel may be imputed to the State party, and therefore render it responsible for the alleged errors of counsel and accordingly serve as a ground to order the release of the victim from imprisonment and thus escape from the sentence imposed upon him by the Westmoreland Circuit Court for a murder committed on 2 July 1981.

<sup>5</sup> See, for example, the Views of the Committee in communications Nos. 210/1986 and 225/1987, para. 13.5 (Earl Pratt and Ivan Morgan), adopted on 6 April 1989.

While sharing the view of the Committee that in proceedings for serious crimes, especially capital punishment cases, a fair trial for accused persons must provide them with effective legal counsel if the accused are unable to retain private counsel, the responsibility of the State party in providing legal counsel may not go beyond the responsibility to act in good faith in assigning legal counsel to accused individuals. Any errors of judgement by court-appointed counsel cannot be attributed to the State party any more than errors by privately retained counsel can be. In an adversary system of litigation, it is unfortunate that innocent people go to the gallows for mistakes made by their lawyers, just as criminals may escape the gallows simply because their lawyers are clever. This flaw runs deep into the adversary system of litigation applied by the majority of States parties to the Covenant. If court-appointed lawyers are held accountable to a higher degree of responsibility than their private counterparts, and thus the State party is made accountable for any of their own errors of judgement, then, I am afraid, the Committee is applying a double standard.

I therefore beg to differ with the Committee's view that the author should be released on account of the alleged errors made by counsel assigned to him for the appeal. I would have been open to suggestions of other remedies to be granted to the complainant, including declaring a mistrial or calling for another judicial review of his case by the appellate court to determine the matter of alleged gross errors made by his counsel.

## 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. 253/1987, Paul Kelly v. Jamaica*

I concur in the views expressed in the Committee's decision. However, in my opinion, the arguments in paragraph 5.6 should be expanded.

Anyone deprived of his liberty by arrest or detention shall, according to article 9, paragraph 4, of the Covenant, be entitled to take proceedings before a court. In addition, article 9, paragraph 3, ensures that anyone arrested or detained *on criminal charges* shall be *brought before a judge* or other officer authorized

by law to exercise judicial power. A similar right is contained in article 5 of the European Convention on Human Rights, which is applicable to the "lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence, or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so."

The author was arrested and taken into custody on 20 August 1981; he was detained *incommunicado*. On 15 September 1981 he was charged with murder; only one week later was he brought before a judge.

While article 9, paragraph 1, of the Covenant covers all forms of deprivation of liberty by arrest or detention, the scope of application of paragraph 3 is limited to arrests and detentions "on a criminal charge". It would appear that the State party interprets this provision in the sense that the obligation of the authorities to bring the detainee before a judge or judicial officer does not arise until a formal criminal charge has been served to him. It is, however, abundantly clear from the *travaux préparatoires* that the formula "on a criminal charge" was meant to cover as broad a scope of application as the corresponding provision in the European Convention. All types of arrest and detention in the course of crime prevention are therefore covered by the provision, whether it is preventive detention, detention pending investigation or detention pending trial. The French version of the paragraph ("détenu du chef d'une infraction pénale") conveys this meaning better than the English version.

It should be noted that the words "shall be brought promptly" reflect the original form of *habeas corpus* ("Habeas corpus NN ad sub-judiciendum") and order the authorities to bring a detainee before a judge or judicial officer as soon as possible, independently of the latter's express wishes in this respect. The word "promptly" does not permit a delay of more than two to three days.

As the author was not brought before a judge until about five weeks had passed since his detention, the violation of article 9, paragraph 3, of the Covenant is flagrant. The fact that the author was held *incommunicado* until he was formally charged deprived him of his right, under article 9, paragraph 4, to file an application of his own for judicial review of his detention by a court. Accordingly, this provision was also violated.

## Communication No. 263/1987

*Submitted by:* Miguel González del Río

*Date of communication:* 19 October 1987

*Alleged victim:* The author

*State party:* Peru

*Date of adoption of Views:* 28 October 1992 (forty-sixth session )

*Subject matter:* Dismissal of a public servant

*Procedural issues:* State party failure to make a submission on the merits—Non-exhaustion of domestic remedies—Unreasonably prolonged proceedings

*Substantive issues:* Arbitrary arrest or detention—Right to take proceedings before a court—Right to leave any country, including one's own—Restrictions necessary to protect national security or public order—Right to be presumed innocent—Equality before the courts—Right to a trial before an impartial tribunal—Prohibition of unlawful attacks on one's honour or reputation

*Articles of the Covenant:* 9(1) and (4), 12(1) and (3), 14(1) and (2) and 17(1)

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

1. The author of the communication is Miguel González del Río, a naturalized Peruvian citizen of Spanish origin, at present residing in Lima, Peru. He claims to be a victim of violations by Peru of articles 9, paragraphs 1 and 4, 12, 14, paragraphs 1 and 2, 17 and 26 of the International Covenant on Civil and Political Rights.

*The facts as submitted*

2.1 From 10 February 1982 to 28 December 1984, the author served as Director-General of the penitentiary system of the Peruvian Government. By Resolution No. 072-85/CG of 20 March 1985, the Comptroller General of Peru accused the author and several other high officials of illegal appropriation of government funds, in connection with purchases of goods and the award of contracts for the construction of additional penitentiaries. With retroactive effect, Mr. González' resignation, tendered on 28 December 1984, was transformed into a dismissal.

2.2 The author contends that a libelous press campaign against him and the other accused in the case, including the former Minister of Justice, Enrique Elías Laroza, accompanied the 1986 presidential elections in Peru. In spite of this campaign, led by papers loyal to the Government, Mr. Elías Laroza was elected deputy. Because of his parliamentary immunity, Mr. Elías Laroza, the principal target of the Comptroller General's report, was not subjected to arrest or detention, although a congressional investigation as to the charges that could be filed against the former Minister was initiated. He notes that the lower officials, including himself, have been subjected to detention or threats of detention.

2.3 The author filed an action for *amparo* before the Vigésimo Juzgado Civil of Lima to suspend the Resolution of the Comptroller General. The judge granted the suspension and the Comptroller appealed, claiming that an action of *amparo* was premature and that the author should first exhaust available administrative remedies. The Court, however, ruled that in the circumstances it was not necessary to take the matter before the administrative tribunals, and as to the merits of the case, that the right of defence of the author and the other accused had been violated, since they had been ordered by the Comptroller General to make payments without proper determination of the sum or opportunity to study the books and compare the figures. The Court further decided that the Comptroller General did not have the authority to dismiss the author, nor to give retroactive effect to his resolutions. On appeal, however, the Superior Court of Lima reversed this finding, and the Supreme Court confirmed. The author then filed for *amparo* with the Constitutional Court (Tribunal de Garantías Constitucionales) alleging abuse of power by the Comptroller General, breach of the constitutional rights of defence and denial of access to documentation for the defence. By judgement of 15 September 1986, the Constitutional Court decided in the author's favour, ordering the suspension of the



Comptroller's Resolution, and declaring the dismissal order to be unconstitutional. The author complains that although the Constitutional Court referred the case back to the Supreme Court for appropriate action, none had been taken as of March 1992, five and a half years later, despite repeated requests from the author.

2.4 In spite of the judgment of the Constitutional Court, the Comptroller's Office initiated criminal proceedings for fraud against the author; Mr. González applied for *habeas corpus* with the criminal court of Lima on 20 November 1986, against the examining magistrate No. 43; his action was dismissed on 27 November 1986. The author appealed the following day; the Tenth Criminal Tribunal (Décimo Tribunal Correccional de Lima) dismissed the appeal on 5 December 1986.

2.5 The author filed an action for nullity of his indictment (*recurso de nulidad*); on 12 December 1986, the court referred the matter to the Supreme Court. On 23 December 1986, the Second Criminal Chamber of the Supreme Court confirmed the validity of the indictment. Against this decision, the author filed an "extraordinary appeal for cassation" (*recurso extraordinario de casación*) with the Constitutional Court. On 20 March 1987, the Constitutional Tribunal held, in a split decision (four judges against two), that it could not compel the Supreme Court to execute the Constitutional Court's decision of 15 September 1986, since the author had not been subjected to detention and the Tribunal's earlier decision could not be invoked in the context of the request for *amparo* filed against examining magistrate No. 43.

2.6 With respect to the criminal action for fraud and embezzlement of public funds pending against the author, the Twelfth Criminal Tribunal of Lima (Duodécimo Tribunal Correccional de Lima) decided, on 9 December 1988 and upon the advice of the Chief criminal prosecutor of Peru, to file the case and suspend the arrest order against the author, as the preliminary investigations had failed to reveal any evidence of fraud committed by him.

2.7 The author states that this decision notwithstanding, another parallel criminal matter remains pending since 1985, and although investigations have not resulted in any formal indictment, an order for his arrest remains pending, with the result that he cannot leave Peruvian territory. This, according to the author,

is where matters currently stand. In a letter dated 20 September 1990, he states that the Supreme Court has "buried" his file for years, and that, upon inquiry with the Court's president, he was allegedly told that the proceedings would "be delayed to the maximum possible extent" while he [the Court's president] was in charge, since the matter was a political one and he would not like the press to question the final decision, which would obviously be adopted in Mr. González' favour ("... que el caso iba a ser retardado al máximo mientras él estuviera a cargo, puesto que tratándose de un asunto político no quería que la prensa cuestionara el fallo final, obviamente a mi favor."). The author contends that the Supreme Court has no interest in admitting that its position is legally untenable, and that this explains its inaction.

### *Complaint*

3.1 The author complains that he has not been reinstated as a public official, although he has been cleared of the charges against him by the decision of the Constitutional Tribunal and the decision of the Twelfth Criminal Court suspending the proceedings against him. He further alleges that his reputation and honour will be tainted as long as the Supreme Court fails to implement the decision of the Constitutional Court of 15 September 1986.

3.2 The author further complains that as one arrest warrant against him remains pending, his freedom of movement is restricted, in that he is prevented from leaving the territory of Peru.

3.3 It is further claimed that the proceedings against the author have been neither fair nor impartial, in violation of article 14, paragraph 1, as may be seen from the politically motivated statements of magistrates and judges involved in his case (see statement referred to in paragraph 2.7 above).

3.4 Finally, the author contends that he is a victim of discrimination and unequal treatment, because in a case very similar to his own, concerning a former Minister, the Attorney-General allegedly declared that it would not be possible to accuse lower-level officials as long as the legal issues concerning this former minister had not been solved. The author contends that his treatment constitutes discrimination based on his foreign origin and on his political opinions.

### *Issues and proceedings before the Committee*

4.1 By decision of 15 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 on the admissibility of the communication. On 19 July 1988, the State party requested an extension of the deadline for its submission, but despite two reminders addressed to it, no information was received.

4.2 During its fortieth session in November 1990, the Committee considered the admissibility of the communication. With respect to the requirement of exhaustion of domestic remedies, it concluded that there were no effective remedies available to the author in the circumstances of his case which he should have pursued. It further noted that the implementation of the Constitutional Court's decision of 15 September 1986 had been unreasonably prolonged within the meaning of article 5, paragraph 2(b), of the Optional Protocol.

4.3 On 6 November 1990, the Committee declared the communication admissible. It requested the State party to clarify exactly what charges had been brought against the author and to forward all relevant court orders and decisions in the case. It further asked the State party to clarify the powers of the Constitutional Court and to explain whether and in which way the Constitutional Court's decision of 15 September 1986 had been implemented. After a reminder addressed to it on 29 July 1991, the State party requested, by note of 1 October 1991, an extension of the deadline for its submission under article 4, paragraph 2, of the Optional Protocol until 29 January 1992. No submission has been received.

4.4 The Committee notes with concern the lack of any co-operation on the part of the State party, both in respect of the admissibility and the substance of the author's allegations. It is implicit in rule 91 of the rules of procedure and article 4, paragraph 2, of the Optional Protocol, that a State party to the Covenant investigate in good faith all the allegations of violations of the Covenant made against it and in particular against its judicial authorities, and to furnish the Committee with detailed information about the measures, if any, taken to remedy the situation. In the circumstances, due weight must be given

to the author's allegations, to the extent that they have been substantiated.

5.1 As to the alleged violation of article 9, paragraphs 1 and 4, the Committee notes that the material before it does not reveal that, although a warrant for the author's arrest was issued, Mr. González del Río has in fact been subjected to either arrest or detention, or that he was at any time confined to a specific, circumscribed location or was restricted in his movements on the State party's territory. Accordingly, the Committee is of the view that the claim under article 9 has not been substantiated.

5.2 The Committee has noted the author's claim that he was not treated equally before the Peruvian courts, and that the State party has not refuted his specific allegation that some of the judges involved in the case had referred to its political implications (see para. 2.7 above) and justified the courts' inaction or the delays in the judicial proceedings on this ground. The Committee recalls that the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception. It considers that the Supreme Court's position in the author's case was, and remains, incompatible with this requirement. The Committee is further of the view that the delays in the workings of the judicial system in respect of the author since 1985 violate his right, under article 14, paragraph 1, to a fair trial. In this connection, the Committee observes that no decision at first instance in this case had been reached by the autumn of 1992.

5.3 Article 12, paragraph 2, protects an individual's right to leave any country, including his own. The author claims that because of the arrest warrant still pending, he is prevented from leaving Peruvian territory. Pursuant to paragraph 3 of article 12, the right to leave any country may be restricted, primarily, on grounds of national security and public order (*ordre public*). The Committee considers that pending judicial proceedings may justify restrictions on an individual's right to leave his country. But where the judicial proceedings are unduly delayed, a constraint upon the right to leave the country is thus not justified. In this case, the restriction on Mr. González' freedom to leave Peru has been in force for seven years, and the date of its termination remains uncertain. The Committee considers that this situation violates the author's rights under article 12, paragraph 2; in this context, it observes that the violation of the

author's rights under article 12 may be linked to the violation of his right, under article 14, to a fair trial.

5.4 On the other hand, the Committee does not find that the author's right, under article 14, paragraph 2, to be presumed innocent until proved guilty according to law was violated. Whereas the remarks attributed to judges involved in the case may have served to justify delays or inaction in the judicial proceedings, they cannot be deemed to encompass a pre-determined judgement on the author's innocence or guilt.

5.5 Finally, the Committee considers that what the author refers to as a libelous and defamatory press campaign against him, allegedly constituting an unlawful attack on his honour and reputation, does not raise issues under article 17 of the Covenant. On the basis of the information before the Committee, the articles published in 1986 and 1987 about the author's alleged involvement in fraudulent procurement policies in various local and national newspapers cannot be attributed to the State party's authorities; this is so even if the

newspapers cited by the author were supportive of the government then in force. Moreover, the Committee notes that it does not appear that the author instituted proceedings against those he considered responsible for the defamation.

6. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of articles 12, paragraph 2, and 14, paragraph 1, of the Covenant.

7. The Committee is of the view that Mr. González del Río is entitled, under article 2, paragraph 3(a), of the Covenant, to an effective remedy, including the implementation of the decision of 15 September 1986, delivered in his favour by the Constitutional Court. The State party is under an obligation to ensure that similar violations do not occur in the future.

8. The Committee would wish to receive information, within ninety days, on any relevant measures taken by the State party in respect of the Committee's Views.

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### Communications Nos. 270/1988 and 271/1988

*Submitted by:* Randolph Barrett and Clyde Sutcliffe (represented by counsel)

*Date of communication:* 4 and 7 January 1988

*Alleged victims:* The authors

*State party:* Jamaica

*Date of adoption of Views:* 30 March 1992 (forty-fourth session)

*Subject matter:* Death-row phenomenon

*Procedural issues:* State party failure to make a submission on the merits—Non-exhaustion of domestic remedies—Availability of effective domestic remedies—Unreasonably prolonged remedies

*Substantive issues:* Effective remedy—Right to life—Inhumane treatment or punishment—Right to a fair hearing

*Articles of the Covenant:* 6(1), 7, 10(1) and 14(1)

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

*Rules of Procedure:* Rules 86 and 94(3)

*Individual opinion:* Dissenting opinion by Ms. Christine Chanet

1. The authors of the communications are Randolph Barrett and Clyde Sutcliffe, two Jamaican citizens awaiting execution at St. Catherine District Prison, Jamaica. They claim to be victims of a violation of their human rights by Jamaica. They are represented by counsel. Although counsel only invokes a violation of

article 7 of the International Covenant on Civil and Political Rights, it transpires from some of the authors' submissions that they also allege violations of article 14.

*The facts as submitted by the authors*

2.1 The authors were arrested on 10 and 11 July 1977, respectively, on suspicion of having murdered two policemen at the Runaway Bay police station in the parish of St. Ann. The prosecution contended that they belonged to a group of five men who had been stopped by the police in the context of the investigation of a robbery that had occurred at a nearby petrol station. One of the men (neither Mr. Barrett. nor Mr. Sutcliffe) took a sub-machine-gun out of a bag and opened fire on the police officers, killing two of them. The authors were subsequently charged with murder on the basis of "common design"; they denied having participated in the robbery and having been in the possession of stolen goods.

2.2 The authors' trial in the Home Circuit Court of Kingston began on 10 July 1978 and lasted until 27 July 1978. Both Mr. Barrett and Mr. Sutcliffe were represented by legal aid attorneys. In the course of the trial, an independent ballistics expert was to appear for the defence but did not arrive in court in time. The adjournment requested by Mr. Barrett's attorney was refused by the judge. On 27 July 1978 the authors were found guilty as charged and sentenced to death. They appealed to the Jamaican Court of Appeal, which heard their appeals between 9 and 12 March 1981, dismissing them on 12 March: it produced a written judgement on 10 April 1981.

2.3 On 24 and 26 November 1987, respectively, warrants for the execution of Mr. Barrett and Mr. Sutcliffe, on 1 December 1987, were issued by the Jamaican authorities. Mr. Barrett's former legal aid representative obtained a stay of execution on his client's and on Mr. Sutcliffe's behalf, with a view to filing a petition with the Judicial Committee of the Privy Council. In 1988, a London law firm agreed to represent the authors for purposes of filing a petition to the Judicial Committee of the Privy Council. On 22 July 1991, the petition was dismissed by the Judicial Committee, which, however, expressed concern about the judicial delays in the case.

*The complaint*

3.1 The authors claim to be innocent and allege that their trial was unfair. Both challenge their identification parade as irregular, since it allegedly was organized by police officers who sought to influence witnesses and conspired to ensure that the authors would be identified as those responsible for the death of the policemen. Mr. Sutcliffe adds, without giving further details, that he was denied contact with legal counsel until he was formally charged and denounces the "battered state" in which he was placed on the identification parade, which allegedly was the result of rough treatment he had been subjected to while in custody.

3.2 Mr. Barrett further submits that following his arrest by the Browns Town police and a brief stay in the hospital (where fragments of a bullet were removed from his ankle), he was kept in solitary confinement at the Ocho Rios police station, without being able to see a relative or a lawyer. When he was told that he would be placed on an identification parade, he protested that he was without legal representation.

3.3 With respect to the conduct of the trial, Mr. Barrett claims, without further substantiating his claim, that the preparations for his defence were inadequate. He submits that he had no contact with his lawyer between the date of his conviction in July 1978 and the date of the issue of the warrant for his execution in November 1987. Letters addressed to this lawyer went unanswered.

3.4 With respect to the conditions of detention on death row, Mr. Sutcliffe submits that he was attacked by warders on several occasions. The most from his cell and beat him with batons and iron pipes until he lost consciousness. He was then locked in his cell for over 12 hours without either medical attention or food, despite the fact that he had sustained the fracture of an arm and other injuries to legs and ribs. It was only on the following day that he was taken to the hospital. He claims that he had to wait until his arm had healed before he could write to the Parliamentary Ombudsman about the incident. The Ombudsman promised to take up the matter, but the author states that he did not receive any further communication from him. Moreover, warders have allegedly threatened him so as to induce him not to pursue the matter further.

3.5 Counsel further submits that the time spent on death row, over 13 years. amounts to

cruel, inhuman and degrading treatment within the meaning of article 7 of the Covenant. In this context, it is argued that the execution of a sentence of death after a long period of time is widely recognized as cruel, inhuman and degrading, on account of the prolonged and extreme anguish caused to the condemned man by the delay.<sup>1</sup> This anguish is said to have been compounded by the issue of death warrants to the authors in November 1987.

3.6 As to the delays encountered in the judicial proceedings in the case, counsel notes that in spite of repeated requests for legal aid, it was only in 1988 that the authors succeeded in obtaining the pro bono services of a London law firm, for purposes of petitioning the Judicial Committee of the Privy Council. Several court documents deemed necessary for the preparation of the Petition for special leave to appeal could not be obtained until March 1991: accordingly, such delays as did occur cannot be attributed to the authors.

#### *The State party's observations on admissibility*

4. The State party contended, in submissions dated 20 July 1988 and 10 January 1990, that the communications were inadmissible on the ground of non-exhaustion of domestic remedies, since the authors retained the right to Petition the Judicial Committee of the Privy Council for special leave to appeal. It enclosed a copy of the written judgement of the Court of Appeal in the case, adding that it would have been available, upon request, to authors' counsel after its delivery on 10 April 1981.

#### *Committee's admissibility decision and request for further information*

5.1 On 21 July 1989, the Committee declared the communications admissible, noting that the authors' appeal had been dismissed in 1981 and that, in the circumstances, the pursuit of domestic remedies had been unreasonably prolonged.

5.2 During its forty-second session, the Committee further considered the communications; it decided to request additional

information and clarifications from the State party in respect of the authors' allegations under articles 7 and 10 of the Covenant.

#### *Review of admissibility*

6.1 By submissions of 23 and 30 January 1992, the State party challenges the decision on admissibility and reiterates that the complaints remain inadmissible on the ground of non-exhaustion of domestic remedies. In respect of the alleged violations of article 7 (ill-treatment on death row and anguish caused by prolonged detention on death row), it submits that the authors may file for constitutional redress under section 25 of the Jamaican Constitution, for violations of their rights protected by section 17. A decision of the Constitutional Court may be appealed to the Court of Appeal of Jamaica and to the Judicial Committee of the Privy Council.

6.2 The State party affirms that such delays as occurred in the judicial proceedings are attributable to the authors, who failed to avail themselves of their right to appeal against conviction and sentence in an expeditious manner. As there is no indication that the State party was responsible for any of these delays by either act or omission, the State party cannot be deemed to be in breach of article 7.

6.3 The State party adds that notwithstanding the inadmissibility of the claims under article 7, "it will, prompted by humanitarian considerations, take steps to have investigated the allegations concerning the conditions [of detention] on death row and brutal acts [in] the prison".

7.1 The Committee has taken due note of the State party's submissions, dated 23 and 30 January 1992, that the communications remain inadmissible on account of the authors' failure to resort to constitutional remedies.

7.2 The same issues concerning admissibility have already been examined by the Committee in its views on communications Nos. 230/1987 (*Henry v. Jamaica*) and 283/1988 (*Little v. Jamaica*).<sup>2</sup> In the circumstances of those

<sup>1</sup> Reference is made to the judgement of the United States Supreme Court in *Furman v. Georgia* (1972) 408 US 238, quoted in the dissenting opinion in *Riley & others v. Att. General of Jamaica* (1982) 2 All ER 469, at 479a.

<sup>2</sup> See *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex IX, sect. B, communication No. 230/1987, Views adopted on 1 November 1991, paras. 7.2-7.4; and sect. J, communication No. 283/1988, Views adopted on 1 November 1991, paras. 7.2-7.5.

cases, the Committee concluded that a constitutional motion was not an available and effective remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol, and that, accordingly, the Committee was not precluded from examining the merits.

7.3 The Committee has taken note of the fact that subsequent to its decision on admissibility the Supreme (Constitutional) Court of Jamaica has had an opportunity to determine whether an appeal to the Court of Appeal of Jamaica and the Judicial Committee of the Privy Council constitute “adequate means of redress” within the meaning of section 25(2) of the Jamaican Constitution. The Supreme Court has answered this question in the negative by taking jurisdiction over and examining the constitutional motions filed on behalf of Ivan Morgan and Earl Pratt (judgement entered on 14 June 1991). The Committee reiterates that whereas the issue is settled for purposes of Jamaican law, the application of article 5, paragraph 2(b), of the Optional Protocol is determined by different considerations, such as the length of judicial proceedings and the availability of legal aid.

7.4 In the absence of legal aid for constitutional motions and bearing in mind that the authors were arrested in July 1977, convicted in July 1978, and that their appeals were dismissed in March 1981 by the Court of Appeal of Jamaica and in July 1991 by the Judicial Committee of the Privy Council, the Committee finds that recourse to the Supreme (Constitutional) Court is not required under article 5, paragraph 2(b), of the Optional Protocol. There is, accordingly, no reason to reverse the Committee’s decision on admissibility of 21 July 1989.

#### *Examination of merits*

8.1 The Committee notes that, several requests for clarifications notwithstanding, the State party has essentially confined itself to issues of admissibility. Article 4, paragraph 2, of the Optional Protocol enjoins a State party to investigate in good faith and within the imparted deadlines all the allegations of violations of the Covenant made against it and its judicial authorities, and to make available to the Committee all the information at its disposal. In the circumstances, due weight must be given to the authors’ allegations, to the extent that they have been sufficiently substantiated.

8.2 With respect to the alleged violations of the Covenant, three issues are before the Committee: (a) whether the authors’ legal representation and the course of the judicial proceedings amounted to a violation of their rights under article 14; (b) whether the fact of having spent over 13 years on death row constitutes in itself cruel, inhuman and degrading treatment within the meaning of article 7; and (c) whether the authors’ alleged ill-treatment during detention and on death row violates article 7.

8.3 With regard to the claims relating to article 14, the Committee considers that the authors have not corroborated their allegations that their identification parade was unfair. Similar considerations apply to Mr. Barrett’s claim that the preparations for his defence and his legal representation were inadequate, and to Mr. Sutcliffe’s claim that he was denied access to counsel prior to his formal indictment. The Committee notes, in this context, that authors’ counsel has not put forward any claims under article 14.

8.4 The authors have claimed a violation of article 7 on account of their prolonged detention on death row. The Committee starts by noting that this question was not placed before the Jamaican courts, nor before the Judicial Committee of the Privy Council. It further reiterates that prolonged judicial proceedings do not per se constitute cruel, inhuman and degrading treatment, even if they may be a source of mental strain and tension for detained persons. This also applies to appeal and review proceedings in cases involving capital punishment, although an assessment of the particular circumstances of each case would be called for. In States whose judicial system provides for a review of criminal convictions and sentences, an element of delay between the lawful imposition of a sentence of death and the exhaustion of available remedies is inherent in the review of the sentence: thus, even prolonged periods of detention under a severe custodial regime *on* death row cannot generally be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely availing himself of appellate remedies. A delay of ten years between the judgement of the Court of Appeal and that of the Judicial Committee of the Privy Council is disturbingly long. However, the evidence before the Committee indicates that the Court of Appeal rapidly produced its written judgement and that

the ensuing delay in petitioning the Judicial Committee is largely attributable to the authors.

8.5 Concerning the allegations of ill-treatment during detention and on death row, the Committee deems it appropriate to distinguish between the individual claims put forth by the authors. While Mr. Barrett has made claims that might raise issues under articles 7 and 10, paragraph 1, of the Covenant, in particular concerning alleged solitary confinement at the Ocho Rios police station, the Committee considers that these have not been further substantiated and finds no violation of article 7 or article 10, paragraph 1.

8.6 Mr. Sutcliffe has alleged that he was subjected to beatings in the course of the preliminary investigation, and that he suffered serious injuries at the hand of prison officers. He submits that he unsuccessfully tried to seize the prison authorities and the Parliamentary Ombudsman of his complaint in respect of ill-treatment on death row, and that, far from investigating the matter, prison officers have urged him not to pursue the matter further. Concerning the first allegation, the author's contention that he was placed on the identification parade in "a battered state" has not been further substantiated; moreover, it transpires from the judgement of the Court of Appeal that the author's allegation was before the jury during the trial in July 1978. In that respect, therefore, the Committee cannot conclude that a violation of articles 7 or 10 has occurred. As to alleged ill-treatment in November 1986, however, the author's claim is better substantiated and has not been refuted by the State party. The Committee considers that the fact of having first been beaten unconscious and then left without medical attention for almost one day, in spite of a fractured arm and other injuries, amounts to cruel and inhuman treatment within the meaning of article 7 and, therefore, also entails a violation of article 10, paragraph 1. In the Committee's view it is an aggravating factor that the author was later warned against further pursuing his complaint about the matter to the judicial authorities. The State party's offer, made in January 1992, that is over five years after the event, to investigate the claim "out of humanitarian considerations" does not change anything in this respect.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the International Covenant on Civil and Political Rights, is of the

view that the facts before it disclose a violation of articles 7 and 10, paragraph 1, of the International Covenant on Civil and Political Rights in respect of Mr. Sutcliffe.

10.1 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 Mr. Sutcliffe, including the award of appropriate compensation, and to ensure that similar violations do not occur in the future.

10.2 The Committee would wish to receive information, within 90 days, on any relevant measures adopted by the State party in respect of the Committee's Views.

#### APPENDIX

*Individual opinion submitted by Ms. Christine Chanet, pursuant to rule 94, paragraph 3, of the rules of procedure, concerning the Views of the Committee on communications Nos. 270/1988 and 271/1988, Barrett and Sutcliffe v. Jamaica*

I cannot accept the content of the last sentence of paragraph 8.4 of the decision taken by the Human Rights Committee on communications Nos. 270/1988 and 271/1988 in that it holds the authors to be largely responsible for the length of their detention on death row because, during this period, they allegedly waited until the last moment before appealing to the Privy Council. On the basis of this argument, the Committee finds that there was no violation of article 7 of the Covenant in that respect.

In my view it is difficult for the criteria formulated by the Committee to assess the reasonableness of the duration of proceedings to be applied without qualification to the execution of a death sentence. The conduct of the person concerned with regard to the exercise of remedies ought to be measured against the stakes involved. Without being at all cynical, I consider that the author cannot be expected to hurry up in making appeals so that he can be executed more rapidly.

On this point, I share the position taken by the European Court of Human Rights in its judgement of 7 July 1989 on the *Soering* case: "Nevertheless, just as some lapse of time between sentence and execution is inevitable if appeal safeguards are to be provided to the condemned person, so it is equally part of human nature that the person will cling to life by exploiting those safeguards to the full. However well-intentioned and even potentially beneficial is the provision of the complex of post-sentence procedures in Virginia, the consequence is that the condemned prisoner has to endure for many years the conditions

on death row and the anguish and mounting tension of living in the ever-present shadow of death.”

Consequently, my opinion is that, in this type of case, the elements involved in determining the time factor cannot be assessed in the same way if they are attributable to the State party as if they can be ascribed to the condemned person. A very long period

on death row, even if partially due to the failure of the condemned prisoner to exercise a remedy, cannot exonerate the State party from its obligations under article 7 of the Covenant.

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### Communication No. 277/1988

*Submitted by:* Marieta Terán Jijón joined by her son Juan Terán Jijón

*Date of communication:* 21 January 1988

*Alleged victim:* Juan Terán Jijón

*State party:* Ecuador

*Date of adoption of Views:* 26 March 1992  
(forty-fourth session)\*

*Subject matter:* Ill-treatment of detainee

*Procedural issues:* Notion of victim—State party’s failure to make a submission on the merits—State party’s duty to investigate—Non-exhaustion of domestic remedies

*Substantive issues:* Right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment—Right not to be arbitrarily arrested or detained—Right to be promptly brought before a judge—Right not to be compelled to testify against oneself or to confess guilt—*Ne bis in idem*

*Articles of the Covenant:* 7, 9(1) and (3), 10(1) and 14(3)(g) and (7)

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

*Rules of procedure:* Rules 85(1) and 94(3)

*Individual opinion:* Partly dissenting by Mr. Bertil Wennegren

1. The author of the communication is Marieta Terán Jijón, an Ecuadorian citizen born in 1929, residing in Quito, Ecuador. She submits

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\* Pursuant to rule 84, paragraph 1, of the Committee’s rules of procedure, Mr. Julio Prado Vallejo did not take part in the examination of the communication or in the adoption of the Committee’s Views.

the communication on behalf of her son Juan Fernando Terán Jijón, an Ecuadorian citizen born in 1966, at the time of submission of the communication (21 January 1988) detained at the Penal Garcia Moreno in Quito, Ecuador.

*Facts as presented by the authors:*

2.1 After two years of detention, Juan Fernando Terán Jijón was released; he left Ecuador in August 1988 and currently resides in Mexico, where he pursues university studies. After his release, Mr. Terán Jijón confirmed the exactitude of his mother’s submissions and joined the communication as co-author, expressing the wish that the Committee proceed with the examination of the case.

2.2 Juan Fernando Terán Jijón was arrested on 7 March 1986 in Quito by members of an anti-subversive police unit known as Escudron Volante; according to the author, he was about to visit a relative. He claims to have been kept incommunicado for five days, shackled and blindfolded, subjected to physical and mental torture, and forced to sign more than ten blank sheets of paper. He was then transferred to the Garcia Moreno prison. The report of a medical examination carried out in the infirmary of the prison on 13 March 1986 records haematomas and skin lesions all over his body.

2.3 The author was charged with participation in the crime of bank robbery,



perpetrated on 7 March 1986 against the Banco de Pichincha and the Caja de Credito Agrícola of Sangolquí. He denies any involvement in the offence.

2.4 On 27 January 1987 the Tribunal Segundo Penal de Pichincha convicted and sentenced him to one year of imprisonment. Although this term was fully served on 7 March 1987 and the Tribunal ordered his release on 9 March 1987, he was not released but instead re-indicted, allegedly on the same facts and for the same offence.

2.5 With regard to the issue of exhaustion of domestic remedies, Mrs. Terán Jijón states that she instituted an action for *amparo*, appealed to the Tribunal de Garantías Constitucionales and to the National Congress. On 18 March 1988, her son was released, pending the adjudication of other criminal proceedings, involving charges of illegal possession of fire arms. On 22 August 1989, the Fourth Chamber of the Superior Court declared the charges null and void; it found that the re-indictment of the author in January 1987 violated article 160 of the Code of Criminal Procedure, according to which no one shall be tried or convicted more than once for the same offence.

3. It is claimed that Juan Terán Jijón is a victim of violations by Ecuador of article 7 of the Covenant, because he was subjected to torture and ill-treatment following his arrest, partly in order to extract a confession from him and in order to force him to sign blank sheets of paper, about whose subsequent use he was kept in the dark: the author adds that he was denied access to counsel. It is further claimed that he was a victim of a violation of article 9, paragraph 1, because he was subjected to arbitrary arrest and detention, since he allegedly was not involved in the bank robbery: in this context, it is submitted that the police report incriminating him was manipulated by the Ministry responsible for the police (Ministerio de Gobierno y Policía). The author further alleges a violation of article 9, paragraph 3, because he was not brought promptly before a judge. The fact of having been re-indicted for the same facts and the same offence is said to amount to a violation of the principle *ne bis in idem*.

#### *The State party's information and observations:*

4.1 The State party contends that on 7 March 1986 Juan Terán Jijón, together with

a group of armed men belonging to the terrorist movement "Alfaro vive", robbed the bank of Pichincha and the Caja de Credito Agrícola of Sangolquí.

4.2 According to the police report, eight persons were involved in the hold-up of the two banks, escaping in a pick-up truck, of which the author was said to be the driver. A police car which followed them was able to arrest three of them after a shoot-out. The remaining five were apprehended later. The report does not specify when or where Mr. Terán Jijón was apprehended.

4.3 The State party denies that Mr. Terán Jijón was at any time subjected to ill-treatment in detention. It further contends that the judicial proceedings against the author were at all times conducted in conformity with the procedures established under Ecuadorian law.

4.4 With respect to the second indictment against Mr. Terán Jijón, the State party explains that it was not based on the charge of bank robbery, but rather on the charge of illegal possession of fire arms.

#### *Issues and proceedings before the Committee*

5.1 During its 39th session, the Committee considered the admissibility of the communication and noted that the State party, while addressing issues of merit, had not shown whether any investigation with regard to the allegations of torture had taken place or was in progress, nor contended that effective domestic remedies remained open to the author. In the circumstances, the Committee concluded that the requirements of article 5, paragraph 2(b), of the Optional Protocol had been met.

5.2 The Committee further noted that the facts as submitted appeared to raise issues under provisions of the Covenant which had not specifically been invoked by the authors. It reiterated 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. So as to assist the State party in preparing its submission under article 4, paragraph 2, of the Optional Protocol, the Committee suggested that the State party should address the allegations (a) under article 10 of the Covenant, that Juan Terán Jijón was subjected to ill-treatment during detention, (b) under article 14, paragraph 3(b),

that he was denied access to a lawyer after his arrest, (c) under article 14, paragraph 3(g), that he was forced to sign blanco confessions, and (d) that his indictment in January 1987 corresponded to the same offence for which he had already been tried and convicted, which appeared to raise issues under article 14, paragraph 7.

5.3 On 4 July 1990, therefore, the Committee declared the communication admissible in so far as it appeared to raise issues under articles 7, 9, 10 and 14 of the Covenant.

5.4 The State party did not reply to the Committee's request for information and observations, in spite of a reminder addressed to it on 29 July 1991.

6.1 The Committee has considered the communication in the light of all the information made available by the parties, as required under article 5, paragraph 1, of the Optional Protocol. Concerning the substance of the authors' allegations, the Committee notes with concern that the State party has confined itself to statements of a general nature, by categorically denying that the author was at any time subjected to ill-treatment, and by asserting that the proceedings complied with the requirements of Ecuadorian law. 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 furnish the Committee with sufficient detail about the measures, if any, taken to remedy the situation. The dismissal of the allegations in general terms, as in the present case, does not meet the requirements of article 4, paragraph 2. In the circumstances, due weight must be given to the authors' allegations, to the extent that they have been substantiated.

6.2 Mr. Terán has claimed that he was subjected to torture and ill-treatment during detention, which included remaining shackled and blind-folded for five days; the State party dismisses this claim. The Committee notes that Mr. Terán has submitted corroborative evidence in support of his allegation: the medical report, prepared on 13 March 1986, i.e. shortly after his arrest, records haematomas and numerous skin lesions ("escoriaciones") all over his body. Moreover, the author has submitted that he was forced to sign more than ten blank sheets of paper. In the Committee's opinion, this evidence is sufficiently compelling to justify the

conclusion that he was subjected to treatment prohibited under article 7 of the Covenant, and that he was not treated with respect for the inherent dignity of his person, in violation of article 10, paragraph 1.

6.3 In respect of the authors' claim of a violation of article 9, paragraph 1, the Committee lacks sufficient evidence to the effect that Mr. Terán's arrest was arbitrary and not based on grounds established by law. On the other hand, the Committee notes that Mr. Terán was kept in detention on the basis of a second indictment, subsequently quashed, from 9 March 1987 until 18 March 1988. In the circumstances, the Committee finds that this continuation of his detention for one year following the release order of 9 March 1987 constituted illegal detention within the meaning of article 9, paragraph 1, of the Covenant. Moreover, Mr. Terán has claimed and the State party has not denied that he was kept incommunicado for five days without being brought before a judge and without having access to counsel. The Committee considers that this entails a violation of article 9, paragraph 3.

6.4 With regard to Mr. Terán's contention that the State party violated article 14, paragraph 7, of the Covenant, because he was re-indicted for the same events that had been the basis of his first trial and conviction, the Committee notes that article 14, paragraph 7, proscribes re-trial or punishment for an offence for which the person has already been convicted or acquitted. In the instant case, while the second indictment concerned a specific element of the same matter examined in the initial trial, Mr. Terán was not tried or convicted a second time, since the Superior Court quashed the indictment, thus vindicating the principle of *ne bis in idem*. Accordingly, the Committee finds that there has been no violation of article 14, paragraph 7, of the Covenant.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of articles 7, 9, paragraphs 1 and 3 and 10, paragraph 1, of the Covenant.

8. The Committee is of the view that Juan Fernando Terán Jijón is entitled to a remedy, including appropriate compensation. The State party is under an obligation to investigate the use to which the more than ten sheets of paper signed

by Mr. Terán Jijón under duress were put, to see to it that these documents are returned to him or destroyed, and to ensure that similar violations do not occur in the future.

9. The Committee would appreciate receiving information, within ninety days, from the State party in respect of measures adopted pursuant to the Committee's Views.

#### APPENDIX

*Individual opinion submitted by Mr. Bertil Wennergren, pursuant to rule 94, paragraph 3, of the rules of procedure, concerning the Views of the Committee on communication No. 277/1988, Juan Terán Jijón v. Ecuador*

I concur with the Committee's Views with the exception of the findings, in paragraph 5.4, on Mr. Terán's claim that he was forced to sign ten blank sheets of paper during the interrogation that took place when he was kept in incommunicado detention and subjected to maltreatment. The Committee has expressed the view, in paragraph 5.2, that the evidence submitted is sufficiently compelling to justify the conclusion that Mr. Terán Jijón was subjected to treatment prohibited under article 7 of the Covenant, and that he was not treated with respect for the inherent dignity of his person (in violation of article 10, paragraph 1). However, the Committee found that the element of signing ten blank sheets of paper did not raise an issue under article 14, paragraph 3(g). In that respect, I disagree.

I first note that the State party has not addressed Mr. Terán's allegation that he was forced to sign these blank sheets. In the circumstances, there is sufficient reason to believe that the allegation is based on verifiable events. I therefore believe that the Committee's findings should have been made on the basis of these facts as found. Pursuant to article 14,

paragraph 3(g), everyone shall, in the determination of any criminal charge against him, be entitled not to be compelled to testify against himself or to confess guilt. This means that during criminal proceedings, neither the prosecutor nor the judge nor anyone else may threaten the accused or otherwise try to exert pressure on him, so as to force him to testify against himself or to confess guilt.

It also would violate the principle of objectivity and impartiality if such incidents were to occur; it would further entail a violation of article 14, paragraph 3(g) if testimony or a confession obtained through compulsion in pre-trial interrogation were to be introduced as evidence. Article 15 of the Convention against Torture confirms this view by prescribing that each State party shall ensure that any statement which is found to have been made as a result of torture shall not be introduced as evidence in any judicial proceedings, except against an individual accused of torture, as evidence that the statement was made.

Nevertheless, it is difficult to avoid that an incrimination or confession, in spite of their not being given any weight as evidence, cast a shadow on the accused. All attempts to compel a person to incriminate him/herself or to confess guilt should thus be prevented. It is not unusual that, as a method of compulsion, an interrogator forces the accused to sign blank papers, insinuating that incriminations or confessions of crimes more serious than the ones he is accused of, would be added. In so doing, the interrogator of course violates articles 7 and 10, paragraph 1, but, in my opinion, he also violates article 14, paragraph 3(g). That conclusion follows my conviction that no form of compulsion to make an individual incriminate him/herself or to confess guilt, can be accepted; this is so regardless of whether it is an express incrimination or merely a hypothetical one. There is always the risk that what has been signed or recorded may exercise undue influence on the issue of proof in the determination of criminal charges at a subsequent stage.

## Communication No. 289/1988

*Submitted by:* Dieter Wolf

*Date of communication:* 30 January 1988

*Alleged victim:* The author

*State party:* Panama

*Date of adoption of Views:* 26 March 1992 (forty-fourth session)

*Subject matter:* Inhumane treatment of prisoner

*Procedural issues:* Notion of victim—  
*Substantiation of claim—State party's duty to investigate and clarify the matter—Non-exhaustion of domestic remedies*

*Substantive issues:* Right not to be subjected to cruel, inhuman or degrading treatment—Right not to be subjected to forced labour—Unlawful arrest—Right to be promptly brought before a judge—Right to humane treatment, including the right to be separated from convicted prisoners—Fair trial—Right to adequate time and facilities to prepare one's defence and to communicate with counsel—Right to be tried without undue delay—Right to be tried in one's presence—Equality of arms

*Articles of the Covenant:* 7, 8(3)(a), 9(1) and (3), 10(1) and (2)(a) and 14(1) and (3)(b), (c) and (d)

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

1. The author of the communication is Dieter Wolf, a German citizen who, at the time of his initial submission to the Committee, was detained at the Isla de Coiba penitentiary in Panama. In September 1988, he was released and allowed to leave the country: since July 1989, he has resided in Germany. By letter of 2 July 1990, he requested the Committee to proceed with the examination of his communication. The author claims that his human rights have been violated by the authorities of the Republic of Panama. Although he does not invoke violations of specific provisions of the International Covenant on Civil and Political Rights, it appears from the context of his submissions that he claims violations of articles 9, 10 and 14 of the Covenant.

*The facts as submitted by the author*

2.1 The author indicates that he was arrested on 14 January 1984 on charges of having issued a total of 12 uncovered cheques, for amounts ranging from US\$ 25 to \$3,000. He explains that

under article 281 of the Panamanian Criminal Code, individuals who issue uncovered cheques are entitled to a "grace period" of 48 hours to settle their debts, so as to avoid arrest and detention. The author was not given this grace period but was instead immediately imprisoned at the Modelo prison. When he complained and invoked article 281 of the Criminal Code, he was transferred 300 kilometres away to the island of Coiba, which houses a penitentiary for inmates sentenced to hard labour. He claims that he has never been brought before a judge.

2.2 The author insists that when he was transferred to Coiba, no judgement against him had been delivered. Furthermore, although he had requested legal assistance, he was not given access to legal counsel. If legal counsel was ever assigned in his case, he never had any contact with him.

2.3 As to the judicial proceedings in his case, the author notes that 11 of the above-mentioned cases of alleged fraud were joined by the court of first instance (*Juzgado Quinto*). In September 1985, the judge sentenced him to three years and seven months of imprisonment on nine of counts cheque fraud, while acquitting him on two counts. The author submits that no public hearing took place, and that he was unable to attend court, since he was detained at Coiba prison.

2.4 The author himself prepared and filed the appeal against the conviction, but surmises that this was never seen by the Court of Appeal. He subsequently learned that the appeal had been dismissed on an unspecified date, although he was never able to see the written judgement. He then wrote to the court and requested the assignment of a legal aid representative, so as to be able to appeal to the Court of Cassation, he did not receive any reply.

2.5 With regard to the proceedings concerning a twelfth cheque, issued in the amount of \$169 to the order of a local supermarket, the author states that he was tried

by the First Criminal Court (*Juzgado Primero*) of San Miguelito, although, under applicable Panamanian law, this case should also have been joined with the other ones. In respect of this case, the author explains that he received a notice of trial in October 1984, when detained at Coiba, without the text of the indictment. He was subsequently kept in the dark about the course of the proceedings and not called to appear before the judge. The Court passed judgement on 15 September 1988, four and a half years after his arrest.

2.6 In respect of both cases pending before the *Juzgado Quinto* and the *Juzgado Primero* of San Miguelito, the author posted bail on 14 March 1986 for a total of \$4,200. On an unspecified date in the spring of 1986, he was released on bail.

2.7 In August 1986, the author was rearrested and charged with issuing two more uncovered cheques. Bail was revoked, and the author returned to prison. The two new cases were assigned to the Eighth Criminal Court (*Juzgado Octavo*) of Panama. The author submits that, as in the other cases, no and oral public hearing took place, that he was denied access to counsel, and that he was informed of the judgement against him in July or August 1988, when still detained at Coiba prison.

2.8 The author notes that he informed the Embassy of the Federal Republic of Germany of his arrest. During his brief detention at the Modelo prison, he was not allowed to speak without supervision with officials from the Embassy. After the Embassy lodged a formal protest with the Foreign Ministry of Panama, he was allegedly ill-treated and confined to a special cell, together with a mentally disturbed prisoner, who allegedly had killed several other inmates. In the same context, the author states that all his property was stolen in the prison, and that he was denied food for five days. Finally, he contends that officials of the German Embassy were denied the right to visit him at Coiba prison.

### *Complaint*

3.1 The author claims that, in each of the criminal cases against him, he was denied a fair and public hearing by a competent, independent and impartial tribunal, in that he was not heard personally and not served sufficiently motivated indictments. He further complains that, at all times, he was denied access to legal counsel and

that he was never brought before a judge: he emphasizes that these elements constitute not only violations of the Covenant but also serious violations of Panamanian law.

3.2 It is further submitted that the judicial proceedings in the case were unreasonably prolonged: in particular, the *Juzgado Primero* of San Miguelito only rendered its judgement in respect of the allegedly uncovered cheque of \$169 in September 1988, over four and a half years after Mr. Wolf's arrest.

3.3 As to the conditions of detention, the author complains about ill-treatment in the Modelo prison (see para. 2.8 above). He adds that he had to perform forced labour at Coiba prison although no sentence had been pronounced against him. In the latter context, he claims, in general terms, that inmates on Coiba are physically abused, beaten, tied to trees, denied food and obliged to buy some of their food from the prison commander, who is said to confiscate 40 per cent of the food sent from Panama City and then sell it to the inmates.

### *State party's information and observations*

4.1 The State party contends, in submissions made both before and after the Committee's decision on admissibility, that the communication is inadmissible on the ground of non-exhaustion of domestic remedies and observes that criminal proceedings were still pending against him. It explains that "Panama's legal system provides effective remedies under its criminal law against (for example) the committal decision taken pursuant to articles 2426 to 2428 of the Panamanian Code of Criminal Procedure. The applicant faces a number of criminal charges in connection with which no judgement has yet been given; the normal procedure is being followed. He may, however, appeal to a higher court against the committal decision, in addition to resorting to all the remedies specified under criminal law".

4.2 As to the facts of the case, the State party notes that on 16 September 1985, the author was sentenced to three years' and seven months' imprisonment for 11 counts of cheque fraud.<sup>1</sup> Had he served the full term, he would have been released on 8 January 1988. He was, however, released on parole by Executive

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<sup>1</sup> The author claims to have been convicted on nine counts and acquitted on two (para. 2.3).

Decision of 24 November 1986, signed jointly by the President of Panama and the Minister of the Interior and Justice; he was free after that date, until he was rearrested for further offences.<sup>2</sup>

4.3 Concerning the further judicial proceedings against Mr. Wolf, the State party explains that on 15 September 1988 the *Juzgado Primero* of San Miguelito found the author guilty of signing an uncovered cheque to the order of a supermarket, and sentenced him to two years' and 10 months' imprisonment and an additional 87-day fine at the rate of 2.5 balboas a day. At the same time, the *Juzgado Octave* continued to investigate one further charge of fraud against the Compañía Xerox de Panama, and another one of forgery to the detriment of Apartotel Tower House Suites. Mr. Wolf was sentenced to three years' imprisonment on the first charge; he appealed, and the case was transferred to the Second High Court of Justice (*Segundo Tribunal Superior de Justicia*), which ordered the *Juzgado Quinto* to join the indictments and pronounce a single sentence. In the second case, oral proceedings had been scheduled but could not proceed, because the accused had left Panamanian territory.

4.4 The State party affirms that the author's claims are without any foundation (*reclamación carente de todo fundamento*), that the judicial proceedings against Mr. Wolf were conducted in full respect of the requirements laid down under Panamanian law, and that the author was not only represented, but that his representatives used the legal recourses available to them, in the best interest of their client. The State party adds that if some of the judicial decisions could not be notified to the author, this was probably because he had left the national territory. The State party does not, however, provide further details about the course of the judicial proceedings, nor about the author's legal representation or the identity of his representatives.

#### *Issues and proceedings before the Committee*

5.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of

<sup>2</sup> According to the author, however, he was released on bail in the spring of 1986 and rearrested in August 1986 (paras. 2.6 and 2.7). In his comments of 8 February 1989, the author claims not to know anything about the purported presidential pardon of November 1986, a time subsequent to this second arrest.

its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 At its thirty-sixth session, the Committee considered the admissibility of the communication. With respect to the requirement of exhaustion of domestic remedies, the Committee noted the State party's contention that the author had failed to avail himself of effective remedies but observed that it had not, at that point in time, denied that the author had no access to legal counsel, nor indicated how he could have resorted to further local remedies in the absence of such assistance. In the circumstances, the Committee concluded that the requirements of article 5, paragraph 2 (b), of the Optional Protocol had been met.

5.3 On 27 July 1989, the Committee declared the communication admissible and asked the State party to forward copies of the indictments against the author and of any relevant court orders and decisions. None were received.

5.4 The Committee has noted the State party's submission of 6 December 1989, made after the decision on admissibility, in which it again argues that the communication is inadmissible on the ground of non-exhaustion of domestic remedies, and that the author had had legal representation. The Committee takes the opportunity to expand on its admissibility findings.

5.5 The State party submits, in general terms, that judicial proceedings against the author remain pending, and that the latter was assigned legal counsel. It is implicit in rule 91 of the Committee's rules of procedure and article 4, paragraph 2, of the Optional Protocol, that a State party to the Covenant should make available to the Committee all the information at its disposal; this includes, at the stage of the determination of the admissibility of a communication, the provision of sufficiently detailed information about remedies pursued by the author. The State party has not forwarded such information. It has confined itself to the observation that the author's representatives availed themselves of the legal remedies open to the author, in his best interest. Thus, there is no reason to revise the Committee's decision on admissibility.

6.1 Concerning the substance of Mr. Wolf's allegations, the Committee notes that the State

party has confined itself to statements of a general nature, by categorically dismissing the author's claims as baseless and asserting that the judicial procedures in the case complied with the requirements of Panamanian law. Consistent with the considerations detailed in paragraph 5.5 above, 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 furnish the Committee with sufficient detail about the measures, if any, taken to remedy the situation. The summary dismissal of the allegations, as in the present case, does not meet the requirements of article 4, paragraph 2. At the same time, the Committee notes that it is incumbent upon the author of a complaint to substantiate his allegations properly.

6.2 While the author has not specifically invoked article 9 of the Covenant, the Committee considers that some of his claims raise issues, under this provision. Although he has claimed that he should have been granted a "grace period" of 48 hours to settle his debts before he could be arrested, the Committee lacks sufficient information to the effect that his arrest and detention were arbitrary and not based on grounds established by law. On the other hand, the author has claimed and the State party has not denied that he was never brought before a judge after his arrest, and that he never spoke with any lawyer, whether counsel of his own choice or public defender, during his detention. In the circumstances, the Committee concludes that article 9, paragraph 3, was violated because the author was not brought promptly before a judge or other judicial officer authorized by law to exercise judicial power.

6.3 The author has complained that he had no access to counsel. The State party explains, however, that he had legal representation, without clarifying whether such representation was provided by State-appointed counsel, nor contesting the author's allegation that he never actually saw a lawyer. In the circumstances, the Committee concludes that the requirement laid down in article 14, paragraph 3 (b), that an accused person have adequate time and facilities to communicate with counsel of his own choosing has been violated.

6.4 With respect to the author's right, under article 14, paragraph 3(c), to be tried without unreasonable delay, the Committee cannot conclude that the proceedings before the *Juzgado*

*Octavo* of Panama suffered from undue delays. Similarly, in respect of the proceedings before the *Juzgado Primero* of San Miguelito, it observes that investigations into allegations of fraud may be complex and that the author has not shown that the facts did not necessitate prolonged proceedings.

6.5 The author claims that the State party has violated his right to be tried in his presence, protected by article 14, paragraph 3(d). The Committee notes that the State party has denied this allegation but failed to adduce any evidence to the contrary, such as a copy of the trial transcript, and finds that this provision has been violated.

6.6 The author claims that he was denied a fair trial; the State party has denied this allegation by generally affirming that the proceedings against Mr. Wolf complied with domestic procedural guarantees. It has not, however, contested the allegation that the author was not heard in any of the cases pending against him, nor that he was never served a properly motivated indictment. The Committee recalls that the concept of a "fair trial" within the meaning of article 14, paragraph 1, must be interpreted as requiring a number of conditions, such as equality of arms and respect for the principle of adversary proceedings.<sup>3</sup> These requirements are not respected where, as in the present case, the accused is denied the opportunity to personally attend the proceedings, or where he is unable to properly instruct his legal representative. In particular, the principle of equality of arms is not respected where the accused is not served a properly motivated indictment. In the circumstances of the case, the Committee concludes that the author's right under article 14, paragraph 1, was not respected.

6.7 The Committee finally notes that the State party has not addressed the author's claim of ill-treatment during his detention. In the Committee's opinion, the physical ill-treatment to which the author was subjected and the denial of food for five days, while not amounting to a violation of article 7 of the Covenant, did violate the author's right, under article 10, paragraph 1,

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<sup>3</sup> See *Official Records of the General Assembly, Forty-fourth Session, Supplement No. 40 (A/44/40)*, annex 10, sect. E, communication No. 207/1986 (*Moraël v. France*), Views adopted on 28 July 1989, para. 93.

to be treated with respect for the inherent dignity of his person.

6.8 Finally, the Committee notes that the author was detained for a period of over a year at the penitentiary of Coiba, which according to the author's uncontested claim is a prison for convicted offenders, while he was unconvicted and awaiting trial. This, in the Committee's opinion, amounts to a violation of the author's right, under article 10, paragraph 2, to be segregated from convicted persons and to be subjected to separate treatment appropriate to his status as an unconvicted person. On the other hand, while the author has claimed to have been subjected to forced labour while awaiting his sentence, the Committee considers that this allegation has not been sufficiently substantiated as to raise issues under article 8, paragraph 3 (a), of the Covenant.

7. The Human Rights Committee, acting under article 5, paragraph 4. of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of articles 9, paragraph 3, 10, paragraphs 1 and 2, and 14, paragraphs 1 and 3(b) and (d), of the Covenant.

8. The Committee is of the view that Mr. Dieter Wolf is entitled to a remedy. The State party is under an obligation to ensure that similar violations do not occur in the future.

9. The Committee would appreciate receiving information, within 90 days, from the State party in respect of measures adopted pursuant to the Committee's Views.

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### Communications Nos. 298/1988 and 299/1988

*Submitted by:* G. and L. Lindgren and L. Holm; A. and B. Hjord, E. and I. Lundquist, L. Radko and E. Stahl (represented by counsel)

*Date of communication:* 25 May 1988

*Alleged victims:* The authors

*State party:* Sweden

*Date of adoption of Views:* 9 November 1990 (fortieth session)

*Subject matter:* Alleged discrimination in allocation of funds for private schools

*Procedural issues:* Substantiation of claim—  
Exhaustion of domestic remedies

*Substantive issue:* Objective and reasonable justification for differential treatment

*Article of the Covenant:* 26

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

*Rules of procedure:* Rule 88

1. The authors of the communication (initial letters dated 25 May 1988 and subsequent correspondences) are G. and L. Lindgren and L. Holm (communication No. 298/1988), A. and B. Hjord, E. and I. Lundquist, L. Radko and E. Stahl (communication No. 299/1988), Swedish citizens residing in the municipalities of

Norrköping and Upplands-Bro, Sweden. They claim to be victims of a violation by the Government of Sweden of article 26 of the International Covenant on Civil and Political Rights. They are represented by counsel.

2.1 The authors are the parents of children who attend the private Rudolf Steiner School in Norrköping and the Ellen Key School in Stockholm. For the school year 1987/88 they applied to the municipality of Norrköping for financial aid for the purchase of their children's textbooks and to the municipality of Upplands-Bro for financial aid for their children's school meals and for the purchase of their textbooks. On 20 April 1988 and 10 February 1988, respectively, their applications were rejected. The authors did not appeal and therefore the decisions became final. The authors consider that the rejection of financial aid constitutes a violation of article 26 of the Covenant since the kind of financial aid they applied for, the so called School Social Aid



(SSA), is normally granted by Swedish municipalities regardless of whether the children are attending private or public schools. Such aid is allegedly intended to relieve the parents of the additional expenses they face because of the compulsory school attendance of their children. Since, pursuant to the Parents Code, parents must support their children, who are under an obligation to attend comprehensive school, the Swedish legislature considers financial aid to be a social benefit and complementary to child allowances.

2.3 Children may attend either a public or a recognized private school in order to satisfy the requirement of compulsory school attendance. According to the authors, the award of free or subsidized textbooks and of free school meals is neither exempted from the scope of the equality rule nor from the scope of article 26 of the Covenant.

2.4 The Supreme Administrative Court has considered “SSA” to constitute services provided free of charge. This, the authors claim, is incorrect, since it is financed out of the municipal income tax, borne by all residents of the municipality. They further allege that, for ordinary Swedish families, public grants ensure a basic standard of living. “SSA”, therefore, constitutes a supplementary, tax-free income. Parents receiving “SSA” are said to be put in a better economic situation vis-à-vis parents who do not receive such aid. The authors consider this fact to compound the discriminatory effect of the municipality’s refusal to grant them “SSA”.

2.5 Since 1958, the decision to award financial aid has been delegated by the central Government to the municipal authorities. Pursuant to the Local Government Act, municipal authorities are prohibited from treating residents differently on any other than on objective bases, so as to ensure equality of treatment in the application of the law.

2.6 The authors claim that there is discrimination between their children and the pupils of public schools or private schools receiving financial aid. This difference in treatment is possible because the local authorities are under no legal obligation to grant financial aid to private schools, which renders the system arbitrary.

2.7 The authors claim that they have exhausted domestic remedies for purposes of

article 5, paragraph 2(b) of the Optional Protocol. In the light of a 1970 landmark decision of the Supreme Administrative Court rejecting an appeal filed by parents who complained about the denial of “SSA”, the authors contend that an appeal would be futile, especially considering that all similar appeals following the 1970 decision have been rejected.

3. By decisions dated 8 July 1988, the Working Group of the Human Rights Committee transmitted the communications under rule 91 of the rules of procedure to the State party, requesting information and observations relevant to the question of admissibility. In this context, it asked the State party to provide the Committee with the rules and regulations governing the granting and use of financial aid for private schools or their pupils in respect of school meals and teaching aids.

4.1 In its submissions under rule 91, dated 22 November 1988, the State party objected to the admissibility of the communications under article 3 of the Optional Protocol, on grounds of lack of merit. It admitted, however, that domestic remedies had been exhausted within the meaning of article 5, paragraph 2(b), of the Optional Protocol, since the legal situation in Sweden is such that any appeal would have been futile.

4.2 The State party submits that the Swedish School system is regulated by the 1985 School Act (*Skollagen* 1985: 1100). Sweden operates a uniform public school system comprising a compulsory basic school for pupils aged 7-16 years. The duty to attend school corresponds to the right to receive education within the framework of the public school system (chap. 3, sect. 1, of the 1985 Act). The duty to attend school shall, in principle, be fulfilled by attending a public school. Exceptions to this rule are Sami schools, approved independent schools (private schools) and national boarding schools (chap. 3, sect. 2, of the 1985 Act). The Act stipulates that the obligation to attend school may be satisfied through attendance at a private school approved for that purpose by the local school board. The Act provides that approval shall be granted if the school in question provides education of a quality that corresponds to that of the compulsory basic school.

4.3 The 1985 Act provides that basic compulsory school shall be free of charge for pupils (chap. 4, sect. 15). In particular, books, writing utensils and other aids shall be provided

to the pupils free of charge. The local government of each municipality is charged with the responsibility of providing education that meets the standards set by the State and to finance this public sector school system (chap. 4, sect. 6). In Sweden the municipalities enjoy a wide measure of autonomy with respect to their own elected municipal assembly and finance their own operations through taxation of their residents. Each municipality determines its own tax rate and the revenue constitutes the municipality's main source of income. Tax rates vary according to the needs and the financial situation of each municipality. The municipalities receive certain contributions from the State towards the expenses for the maintenance of the public school system. These contributions go primarily to the salaries of the staff. No particular grant is given to cover expenses for the purchase of textbooks or for provision of school meals. These are, as a result, borne by the municipalities.

4.4. The possibility for an approved private school at the compulsory school level to obtain State grants is regulated in decree 1983: 97. Pursuant to it, the State may, upon application from, the school, grant such aid, in practice when the school has been functioning for approximately three years. The grant is given as a fixed sum per pupil and differs depending on the educational level reached by the pupil. The grant can be subject to certain conditions. In principle, the school must be open to all and have reasonable fees and a pedagogic plan approved by the National Board of Education.

4.5 Decree 1967:270 on Private Schools and decree 1988:681 on State Grants for National Boarding Schools and Certain Private Schools apply to large private schools, which provide education at both the basic and higher levels. The grants are calculated in an exact manner, which resembles the method used for grants for the public sector schools in a municipality. The 1967 decree applies to the Ellen Key School in Stockholm and to the Rudolf Steiner School in Norrköping.

4.6 There are no particular rules concerning grants from municipalities to private schools or their pupils. The municipality must decide on these matters on the basis of the general rules of competence. The decision is subject to appeal in accordance with a special procedure.

4.7 The State adds that in Sweden a so-called general child grant (*barnbidrag*) is provided for children under 16 years of age. This grant is paid to the custodian of the child and at present amounts to 450 Swedish kronor per month. For children above 16 years attending school or higher level schools, study aid is granted up to the age of 20 years. The State designates the establishments where pupils are entitled to receive such study aid (1973 Act, chap. 3, sect. 1).

4.8 According to the State party, it cannot reasonably follow from article 26 of the Covenant that the State or a municipality should cover expenses incurred by attendance of a private school, voluntarily chosen by the student, instead of the corresponding public school. Failure to grant aid cannot constitute a discriminatory act within the meaning of article 26. Private schools are available, and any difference in the legal and/or financial situation of these schools and their pupils is laid down in a manner compatible with article 26.

4.9 With regard to the equality principle in municipal matters, the State party submits that this principle cannot change the fact that there is no statutory obligation for municipalities to grant private schools or their pupils financial aid. Consequently, a decision not to concede grants cannot be qualified as discriminatory.

4.10 Concerning the allegation of discrimination compared with pupils of other private schools, the State party submits that the decisions involved fall under the competence of the municipalities, which enjoy a large degree of autonomy. The legislation is based on the concept that the local authorities are best placed to take decisions relating to educational matters in their district. The difference in treatment that may result from this independence is, according to the State party, based on objective and reasonable criteria.

5.1 In their comments dated 21 December 1988, the authors note that 'parents' are not mentioned at all in the State party's submissions, although parents are the citizens being treated differently financially in spite of their identical obligation under the Parents' Code.

5.2 As regards textbooks, the authors contend that the legal duty imposed on Parents to have their children attend school implies that expenses should be shared equally by all parents,

regardless of the type of school chosen. Free textbooks are intended to relieve parents from their obligations under the Parents' Code and to eliminate unjust distinctions between families. "SSA" is not intended to subsidize education, but to ease the family budget generally. Consequently, it is in this purely social context that discrimination has occurred.

6.1 Before considering any claims 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 required under article 5, paragraph 2(a), of the Optional Protocol, that the same matter was not being examined under another procedure of international investigation or settlement. The Committee noted that the State party did not contest the admissibility of the communication with respect to article 5, paragraph 2(b), of the Optional Protocol. The Committee therefore concluded that, on the basis of the information before it, the requirements of article 5, paragraph 2, of the Optional Protocol, concerning prior exhaustion of domestic remedies, had been met.

6.3 With regard to the State party's submission that the "lack of merit" in the author's argumentation should be considered as sufficient to declare the communication inadmissible pursuant to article 3 of the Optional Protocol, the Committee recalled that article 3 provides that communications shall be declared inadmissible if they: (a) are anonymous, (b) constitute an abuse of the right of submission, or (c) are incompatible with the provisions of the Covenant. It observed that the authors had made a reasonable effort to substantiate their allegations, for purposes of admissibility, and that they had invoked a specific provision of the Covenant. Accordingly, the Committee decided that the issues before it should be examined on the merits.

7. On 30 March 1989 the Human Rights Committee therefore decided that the communications were admissible.

8.1 In its submissions under article 4, paragraph 2, of the Optional Protocol, dated 12 October 1989, the State party indicates that it does not approve the use by counsel of the term "School Social Aid" (SSA) since the term might convey a wrong impression that the

financial aid in question is a specific and clearcut form of social assistance. The State party recalls that in Sweden there exists a uniform public sector school system conceived to serve the entire population of the country and that, in principle, the duty to attend school prescribed by law is to be fulfilled within the framework of this public school system. The legislation here at issue is aimed at providing equal education for children all over the country and also reflects the political will to provide all children with an opportunity to attend the public sector education system. Accordingly, fulfilling the duty to attend school in schools other than those envisaged by the public sector must be seen as an exception to the general rule. In this context, the State party points out that there are relatively few private schools that qualify as a valid substitute to the compulsory part of the public sector school system. It is further submitted that the existing public school system has not disregarded the fact that people in Sweden might have different values in so far as education is concerned. In this connection, the State party quotes from a statement made in the context of the 1980 Teaching Plan for the compulsory basic school, "Aims and Directives", where, inter alia, it is stressed that . . . Schools should be open to the presentation of different values and opinions and stress the importance of personal concern". Moreover, it points out that the same objective is contemplated by the School Act of 1985, which, in Ch. 3, Sec. 2, provides that a school may, at the request of a custodian of a pupil under the duty to attend school, dispense such a pupil from the obligation to attend otherwise compulsory activities in the educational program of that school. These are but a few examples to demonstrate that the public sector school system in Sweden is intended and conceived to serve the needs of the whole population of Sweden and that, therefore, it is not necessary to establish a parallel school system.

8.2 The State party further argues that the compulsory part of the public sector school system remains always open to all children who are subject to the duty to attend school and that parents who have chosen to have their children fulfill this duty in alternative schools retain the right to request that their children be integrated within the public sector school system. This stems from the aim of the legislator that the duty to attend school should in principle be fulfilled within the framework of the public sector school system. Accordingly, it is contended that it cannot be reasonably expected that a

municipality should organize both the public sector school system, which is open to all children, and at the same time contribute towards covering the costs for privately organized schools. The State party acknowledges that certain municipalities may have agreed to contribute to the activities of certain private schools. Such contributions are granted for purposes of covering costs for school-books, school meals and medical care at school and are given either in the form of a grant of money or by granting pupils in a private school the possibility of having meals or visiting health care facilities. The municipal support of private schools, however, varies from one municipality to another or it may also differ from one school to another within the same municipality. This depends on the interest that the school represents in the eyes of the municipal board, but, more importantly, on the great liberty that a municipality enjoys when deciding whether and to what extent it intends to support a private school. In this context, the State party adds that, according to a number of decisions by the Supreme Administrative Court of Sweden, it does not, in principle, fall under the competence of a municipality to grant contributions to matters which are of no particular general interest to the inhabitants of the municipality. The State party therefore reiterates its contention that no violation of the Covenant has occurred in any of the respects alleged by the authors.

9.1 In their comments dated 22 December 1989, the authors observe that the State party's submissions focus on "education" and the "public school system" in order to divert attention from the authors' argument that the assistance at issue does not relate to education, but is intended to relieve parents from their obligations under the Parents' Code Act within a purely social context. They reiterate that the substance of the matter under consideration remains the differentiation between parents with regards to social benefits granted as personal relief of their obligations under the Parents' Code and points out that the State party, by referring to municipal contributions to private schools for purposes of covering their costs or supporting their activities, clearly shows no inclination to admit that such social benefits -free meals and textbooks-are granted to individuals.

9.2 As to the form, of the assistance under consideration, authors argue that, contrary to what the State party maintains, it is easily definable. They refer to the Government's annual

decrees on Intermunicipal Compensation that determine the per capita amount relating to free meals and textbooks applicable TV pupils attending the public sector schools of Sweden. The Decrees relating to the school years 1987/1988 and 1988/1989 are based on statistical figures concerning costs of meals, textbooks and other items, as compiled by the Swedish Association of Local Authorities. As to the value of this assistance, it is submitted that, independently of its various forms, the financial aid pertaining to pupils attending private schools is easily transformable into fixed amounts of money. In fact, since 1946 most Swedish municipalities (and not "certain" municipalities as the State party contends) administer this form of social assistance to parents on an equal basis.

9.3 In addressing the State party's argument that "according to a number of decisions of the Supreme Administrative Court, it does not in principle fall under the competence of a municipality to grant contributions to matters that are of no particular general interest to the inhabitants of the municipality", the authors point out that the matters referred to are not spelled out by the State party. In this respect, they add that since the beginning of this century it has been considered of general interest that Swedish municipalities provide all children within their boundaries with meals and basic textbooks.

9.4 With regard to the public costs for school meals and textbooks, the authors challenge the State party's statement according to which it cannot be reasonably expected that a municipality should organize the public sector school system and, at the same time, provide for contributions intended to cover the costs for private schools. This statement, it is submitted, clearly contradicts the declaration made in January 1988 by the Swedish Minister of Education on behalf of the Government:

"In my opinion it is reasonable that a local government pays contributions to private schools for pupils registered as resident in the municipality, contributions that shall in principle amount to the equivalent of economies effected as the municipality does not pay e-a. for school meals and textbooks." (Proposition 1987/88: 100).

9.5 Finally, the authors maintain that the description of the public school sector contained

in the State party's submission is intended to convey the impression that a private school system is unnecessary in Sweden. They therefore object to the State party's assertion that '... the public sector school system is intended to serve the needs of the entire population and does not make it necessary to build up parallel school systems...', and submit that this is largely contradicted by the fact that parents of more than 5000 pupils have nevertheless found it necessary, in 1989, to choose private schools. In this context, they add that many more parents would be willing to send their children to such schools, if they could afford them and if the authorities would not withhold the assistance in question.

10.1 The Human Rights Committee has considered the merits of the 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.

10.2 The main issue before the Committee is whether the authors of the communications are victims of a violation of article 26 of the Covenant because, as parents of children attending a private school, they have been denied subsidies from the municipality of Norrköping for the textbooks of their children attending the Rudolf Steiner School in Norrköping and from the municipality of Upplands-Bro for the textbooks and school meals of their children attending the Ellen Key School in Stockholm, whereas parents of children who attend public schools and parents whose children attend private schools in other municipalities do enjoy financial assistance for their children's textbooks and meals. In deciding whether or not the State party has violated article 26 by not granting the authors such benefits, the Committee bases its findings on the following observations.

10.3 The State party's educational system provides for comprehensive public sector schooling and allows for private education as an alternative to public education. In this connection the Committee observes that the State party and its municipalities make public sector schooling and a variety of ancillary benefits, such as free transport by bus, free textbooks and school meals, available to all children subject to compulsory school education. The State party cannot be deemed to be under an obligation to provide the same benefits to private schools; indeed, the preferential treatment given to public sector schooling is reasonable and based on objective criteria. The parents of Swedish

children are free to take advantage of the public sector schooling or to choose private schooling for their children. The decision of the authors of these communications to choose private education was not imposed on them by the State party or by the municipalities concerned, but reflected a free choice recognized and respected by the State party and the municipalities. Such free decision, however, entails certain consequences, notably payment of tuition, transport, textbooks and schoolmeals. The Committee notes that a State party cannot be deemed to discriminate against parents who freely choose not to avail themselves of benefits which are generally open to all. The State party has not violated article 26 by failing to provide the same benefits to parents of children attending private schools as it provides to parents of children at public schools.

10.4 The authors also allege discrimination by the State party because different private schools receive different benefits from the municipalities. The Committee notes that the authors complain about decisions taken not by the authorities of the Government of Sweden but rather by local authorities. The State party has referred to the decentralized system existing in Sweden, whereby decisions of the is nature are taken at the local level. In this connection the Committee recalls its prior jurisprudence that the State party's responsibility is engaged by virtue of decisions of its municipalities and that no State party is relieved of its obligations under the Covenant by delegating some of its functions to autonomous organs or municipalities.<sup>1</sup> The State party has informed the Committee that the various municipalities decide upon the appropriateness of private schools in their particular education system. This determines whether a subsidy will be awarded. This is how the Swedish school system (is conceived pursuant to the School Act of 1985. When a municipality makes such a decision, it should be based on reasonable and objective criteria and made for a purpose that is legitimate under the Covenant. In the cases under consideration, the Committee cannot conclude, on the basis of the information before it, that the denial of a subsidy for textbooks and school meals of students attending the Ellen Key School in Stockholm and the Rudolf Steiner School in Norrköping was incompatible with article 26 of the Covenant.

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<sup>1</sup> Communication No. 273/1988 (*B. d. B. et al. v. the Netherlands*) declared inadmissible on 30 March 1989, para. 6.5.

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 which have been placed before it do not disclose a violation of any provision of the Covenant.

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### Communication No. 319/1988

*Submitted by:* Edgar A. Canón García (represented by counsel)

*Date of communication:* 4 July 1988

*Alleged victim:* The author

*State party:* Ecuador

*Date of adoption of Views:* 5 November 1991 (forty-third session)

*Subject matter:* Unlawful expulsion of alleged drug trafficker

*Procedural issues:* Notion of victim—*Substantiation of claim—Exhaustion of domestic remedies*

*Substantive issues:* Right to an effective remedy—Right not to be subjected to cruel, inhuman or degrading treatment or punishment—Expulsion of an alien—Right to have one's expulsion case reviewed

*Articles of the Covenant:* 7, 9(1), 13, 14(5) and 17

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

1. The author of the communication (initial submission dated 4 July 1988 and subsequent correspondence) is Edgar A. Canón García, a Colombian citizen currently imprisoned on a drug-trafficking conviction at the penitentiary in Anthony (Texas/New Mexico), United States of America. He is represented by counsel.

*The facts as submitted by the author*

2.1 The author lived in the United States of America for 13 years until 1982, when he returned to Bogotá, Colombia, where he resided until July 1987. On 22 July 1987, he travelled to Guayaquil, Ecuador, with his wife. At around 5 p. m. the same day, while walking with his wife in the reception area of the Oro Verde Hotel, they were surrounded by 10 armed men, reportedly Ecuadorian police

officers acting on behalf of Interpol and the United States Drug Enforcement Agency (D. E. A.), who forced them into a vehicle waiting in front of the hotel. He adds that he asked an Ecuadorian police colonel whether the Ecuadorian police (Policía Nacional Ecuatoriana) had any information about him; he was told that the police merely executed an "order" coming from the Embassy of the United States. After a trip of approximately one hour, they arrived at what appeared to be a private residence, where Mr. Canón was separated from his wife.

2.2 He claims to have been subjected to ill-treatment, which included the rubbing of salt water into his nasal passages. He spent the night handcuffed to a table and a chair, without being given as much as a glass of water. At approximately 8 a. m. the next morning, he was taken to the airport of Guayaquil, where two individuals, who had participated in his "abduction" the previous day, identified themselves as agents of the D. E. A. and informed him that he would be flown to the United States on the basis of an arrest warrant issued against him in 1982.

2.3 In this context, the author notes that agents of the D. E. A. had offered him, in the course of a covert operation in 1982, to carry out a drug-trafficking operation, which he had declined. He submits that he never committed a drug-related offence, and argues that the U. S. authorities decided not to follow the formal extradition procedures under the United States-Ecuador Extradition Treaty, since the possibility of obtaining an extradition order by an Ecuadorian judge would have been remote.

2.4 After it had been ascertained that Mr. Canón spoke and understood English, the so-called “Miranda rights” (after a landmark decision of the United States Supreme Court requiring criminal suspects to be informed of their right to remain silent, to obtain the assistance of a lawyer during interrogation, and that statements made by them may not be used against them in court) were read out to him, and he was informed that he was detained by order of the United States Government. The author asked for permission to consult with a lawyer or to speak with the Colombian Consul at Guayaquil, but his request allegedly was turned down; instead, he was immediately made to board a plane bound for the United States.

2.5 As to the requirement of exhaustion of domestic remedies, the author indicates that he was unable to bring his case before an Ecuadorian judge so as to be able to determine the legality of his expulsion from the country. He further indicates that any recourse to the Ecuadorian courts in his current situation would not be effective; in this context, he notes that he does not have the financial means to seize the Ecuadorian courts, nor the benefit of legal assistance in Ecuador, which would enable him to start civil action and/or to seek criminal prosecution of those responsible for his alleged ill-treatment.

#### *The complaint*

3. The author submits that the facts described above constitute a violation of articles 2, 5, paragraph 2, 7, 9, paragraph 1, 13 and 17 of the International Covenant on Civil and Political Rights. In particular, he contends that, in the light of the existence of a valid extradition treaty between the State party and the United States at the time of his apprehension, he should have been afforded the procedural safeguards provided for in said treaty.

#### *The State party’s information and observations*

4.1 The State party did not make any submission prior to the adoption of the Committee’s decision declaring the communication admissible. On 11 July 1991, it informed the Committee as follows:

“The act in question occurred on 22 July 1987, before the present administration took office. Furthermore, the citizen in question has not submitted any kind of

application or recourse to the competent national authorities.

Notwithstanding the foregoing, since it is the basic policy of the Ecuadorian Government to monitor the application of and respect for human rights, especially by the law enforcement authorities, a thorough and meticulous investigation of the act has been conducted which has led to the conclusion that there were indeed administrative and procedural irregularities in the expulsion of the Colombian citizen, a fact which the Government deplors and has undertaken to investigate in order to punish the persons responsible for this situation and to prevent the recurrence of similar cases in the country.

Moreover, it should be pointed out that, in compliance with clear legal provisions emanating from international agreements and national legislation, Ecuador is conducting a sustained and resolute struggle against drug trafficking which, on this occasion, regrettably caused police officers to act with a degree of severity that went beyond their instructions and responsibilities. In any event, acts such as this are certainly not consistent with the Government’s policies and actions which are in fact directed towards assuring respect and observance of the human rights and fundamental freedoms of the individual, whether he is a national or a foreigner, while at the same time, ensuring public order and, in this specific case, meeting the Government’s concern to maintain such an especially valuable asset as social peace and its obligation to combat drug trafficking with every legal means available to it in order to avoid situations which would be regrettable and which are occurring in a number of countries in the region and adjoining Ecuador.

The Government will communicate the relevant information on the measures taken to punish the persons responsible for this act.”

4.2 The Committee welcomes the frank cooperation of the State party.

*Issues and proceedings before the Committee*

5.1 On 18 October 1990, the Committee declared the communication admissible inasmuch as it appeared to raise issues under articles 7, 9 and 13, in conjunction with article 2, of the Covenant. With respect to the requirement of exhaustion of domestic remedies, the Committee found that, on the basis of the information before it, there were no domestic remedies that the author could have pursued. The Committee further observed that several of the author's allegations appeared to be directed against the authorities of the United States, and deemed the relevant parts of the communication inadmissible, since the United States had not ratified, or acceded to, the Covenant or the Optional Protocol. Inasmuch as the author's claim under article 17 of the Covenant was concerned, the Committee found that Mr. Canón García had failed to sufficiently substantiate, for purposes of admissibility, his allegation.

5.2 As to the merits, the Human Rights Committee notes that the State party does not seek to refute the author's allegations, in so far as they relate to articles 7, 9 and 13 of the Covenant, and that it concedes that the author's

removal from Ecuadorian jurisdiction suffered from irregularities.

6.1 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, finds that the facts before it reveal violations of articles 7, 9 and 13 of the Covenant.

6.2 In accordance with the provisions of article 2 of the Covenant, the State party is under an obligation to take measures to remedy the violations suffered by Mr. Canón García. In this connection, the Committee has taken note of the State party's assurance that it is investigating the author's claims and the circumstances leading to his expulsion from Ecuador, with a view to prosecuting those held responsible for the violations of his rights.

7. The Committee would appreciate receiving from the State party, within ninety days of the transmittal to it of this decision, all pertinent information on the results of all its investigations, as well as on measures taken to remedy the situation, and in order to prevent the repetition of such events in the future.

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**Communication No. 327/1988**

*Submitted by:* Hervé Barzhig

*Date of communication:* 9 September 1988

*Alleged victim:* The author

*State party:* France

*Date of adoption of Views:* 11 April 1991 (forty-first session)

*Subject matter:* Use of Breton language in court proceedings

*Substantive issues:* Effective remedy—Equality before the courts and tribunals—Right to free assistance of an interpreter—Right to freedom of expression—Discrimination on the ground of language—Right to use one's own language

*Articles of the Covenant:* 2(1), 14(1) and (3)(f), 19(2), 26 and 27

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

*Procedural issue:* Exhaustion of domestic remedies\*

1. The author of the communication (initial submission of 9 September 1988 and subsequent correspondence) is Hervé Barzhig, a French citizen born in 1961 and a resident of Rennes, Bretagne, France. He claims to be the victim of a violation by France of articles 2, 14, 19, 26 and 27 of the International Covenant on Civil and Political Rights.

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\* See in this connection also the Committee's Views in communications Nos. 221/1987 and 323/1988 above.



*The facts as submitted by the author*

2.1 On 7 January 1988, the author appeared before the Tribunal Correctionnel of Rennes on charges of having defaced 21 road signs on 7 August 1987. He requested permission of the court to express himself in Breton, which he states is his mother tongue, and asked for an interpreter. The court rejected the request and referred consideration of the merits to a later date.

2.2 The author appealed the decision not to make an interpreter available to him. By decision of 20 January 1988, the President of the Criminal Appeals Chamber of the Tribunal Correctionnel of Rennes dismissed his appeal. On 3 March 1988, the case was considered on its merits: the author was heard in French. He was given a suspended sentence of four months' imprisonment and fined 5,000 French francs. The Department of Criminal Prosecutions appealed the decision.

2.3 On 4 July 1988, the Court of Appeal of Rennes confirmed the judgement of the court of first instance. On appeal, the author was heard in French.

*The complaint*

3.1 The author submits that the State party's refusal to respect the rights of Bretons to express themselves in their mother tongue constitutes a violation of article 2 of the Covenant as well as language-based discrimination within the meaning of article 26, because French-mother-tongue citizens enjoy the right to express themselves in their language, whereas Bretons are denied this right simply because they are deemed to be proficient in French. This, in the author's opinion, reflects a long-standing policy, on the State party's part, of suppressing or eliminating the regional languages spoken in France.

3.2 With reference to the French declaration entered in respect of article 27, the author contends that the State party's refusal to recognize the linguistic entity of the Breton minority and to apply article 27 of the Covenant violates the Universal Declaration of Human Rights. In this context, he invokes a resolution adopted by the European Parliament on 30 October 1987, addressing the need to protect European regional and minority languages and cultures.

3.3 Although the author does not specifically invoke article 14 of the Covenant, it is clear from his submissions that he considers the refusal of the services of an interpreter to be a violation of article 14, paragraph 3 (f), of the Covenant. He affirms that as a matter of principle, French courts refuse to provide the services of interpreters to accused persons of Breton mother tongue on the ground that they are deemed to be proficient in French.

3.4 As to the requirement of exhaustion of domestic remedies, the author submits that there are no effective remedies available after the decision of the Court of Appeal of Rennes of 4 July 1988, as the French judicial system refuses to recognize the use of the Breton language.

*The State party's observations*

4.1 As to admissibility, the State party contends that the communication is inadmissible on the grounds of non-exhaustion of domestic remedies, since the author did not lodge an appeal to the Court of Appeal of Rennes against the decision of the President of the Criminal Appeals Chamber of the Tribunal Correctionnel of 20 January 1988 not to allow him to express himself in Breton.

4.2 Concerning the author's allegations under article 14, the State party argues that the notion of a "fair trial" (*procès équitable*) in article 14, paragraph 1, cannot be determined *in abstracto* but must be examined in the light of the circumstances of each case. As to the judicial proceedings in Mr. Barzhig's case, the State party submits that the author and the witnesses he called on his behalf were perfectly capable of expressing themselves in French.

4.3 The State party submits that criminal proceedings are an inappropriate 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 judge and the accused. As the intervention of an interpreter encompasses the risk of the accused's statements being reproduced inexactly, resort to an interpreter should be reserved for strictly necessary cases, i.e., if the accused does not sufficiently understand or speak the court language.

4.4 In the light of these considerations, the President of the Criminal Appeals Chamber of the Tribunal Correctionnel of Rennes was justified in not applying section 407 of the French Code of Penal Procedure, as requested by the author. Pursuant to this provision, the President of the Court may, *ex officio*, order the services of an interpreter. In the application of article 407, the judge 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.<sup>1</sup>

4.5 The State party recapitulates that the author and the witnesses called on his behalf were francophone, a fact confirmed by the author himself in a submission to the Human Rights Committee dated 21 January 1989. Accordingly, the State party submits, there can be no question of a violation of article 14, paragraph 3(f).

4.6 In the State party's opinion, the author interprets the notion of "freedom of expression" in article 19, paragraph 2, in an excessively broad and abusive manner; it adds that Mr. Barzhig's freedom of expression was in no way restricted during the proceedings against him, and that he could always present the defence arguments in French.

4.7 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. More particularly, article 407 of the Code of Penal Procedure, far from operating as language-based discrimination within the meaning of article 26, ensures the equality of treatment of the accused and of witnesses before the criminal jurisdictions, since all are required to express themselves in French. In addition, the State party charges that the principle of *venire contra factum proprium* is applicable to the author's behaviour: he did not want to express himself in French before the courts under the pretext that he had not mastered the language sufficiently, whereas his submissions to the Committee were made in "irreproachable" French.

4.8 As to the alleged violation of article 27 of the Covenant, the State party recalls that upon accession to the Covenant, the French

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<sup>1</sup> See, for example, the judgement of the Criminal Chamber of the Court of Cassation of 30 June 1981 in the *Fayomi* case.

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 so far as the Republic is concerned." In the State party's opinion, the idea of ethnic, religious or linguistic minority invoked by the author is irrelevant to his case, and is not opposable to the 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 (indivisible, laïque, démocratique et sociale . . .)."

#### *Issues and proceedings before the Committee*

5.1 The Committee noted the State party's contention that the communication was inadmissible because the author had failed to appeal against the decision of the judge of the Tribunal Correctionnel of Rennes not to let him express himself in Breton. It observed that the author sought, in effect, the recognition of Breton as a vehicle of expression in court, and recalled that domestic remedies need not be exhausted if they objectively had no prospect of success: this is the case where, under applicable domestic laws, the claim would inevitably be dismissed, or where established jurisprudence of the highest domestic tribunals precluded a positive result. Taking into account relevant French legislation as well as article 2 of the French Constitution, the Committee concluded that there were no effective remedies that the author might have pursued: *de lege lata*, the objective pursued by him could not be achieved by resorting to domestic remedies.

5.2 In respect of the authors' claim of a violation of article 27 of the Covenant, the Committee noted the French "declaration" but did not address its scope, finding that the facts of the communications did not raise issues under this provision.<sup>2</sup> Nor did the Committee consider that the communication raised issues under article 19 of the Covenant.

5.3 On 28 July 1989, therefore, the Human Rights Committee declared the communication admissible in so far as it appeared to raise issues under articles-14 and 26 of the Covenant.

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<sup>2</sup> 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; cf. also separate opinion by one Committee member).

5.4 The Human Rights Committee has considered the communication in the light of all the material placed before it by the parties. It bases its views on the following considerations.

5.5 The Committee has noted the author's claim that the denial of an interpreter for himself and for a witness willing to testify on his behalf constituted a violation of article 14 of the Covenant. The Committee observes, as it has done on previous occasions,<sup>3</sup> 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 violate article 14 of the Covenant. Nor does the requirement of a fair hearing obligate States parties to make available to a person whose mother tongue differs from the official court language, the services of an interpreter, if that person is capable of understanding and expressing himself or herself adequately in the official language. Only if the accused or the witnesses have difficulties in understanding, or in expressing themselves in the court language, is it obligatory that the services of an interpreter be made available.

5.6 On the basis of the information before it, the Committee considers that the French courts complied with their obligations under article 14. The author has failed to show that he and the witness called on his behalf were unable to

understand and to express themselves adequately in French before the tribunal. 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 opportunity to express himself or herself in the language that he or she normally speaks or speaks with a maximum of ease. If the court is certain, as it follows from the decision of the Tribunal Correctionnel of Rennes, that the accused is sufficiently proficient in the court language, it need not take into account whether it would be preferable for the accused to express himself in a language other than the court language.

5.7 French law does not, as such, give everyone a right to speak his or her own language in court. Those unable to understand or speak French are provided with the services of an interpreter, pursuant to article 407 of the Code of Penal Procedure. This service would have been available to the author, had the facts required it; as the facts did not, he suffered no discrimination under article 26 on account of his language.

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 submitted do not disclose a violation of any of the provisions of the Covenant.

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<sup>3</sup> See communication No. 273/1988 (*B. d. B. v. the Netherlands*), inadmissibility decision of 30 March 1989, para. 6.4.

## Communication No. 336/1988

*Submitted by:* Nicole Fillastre (victim's wife)  
*Date of communication:* 27 September 1988  
*Alleged victims:* André Fillastre and Pierre Bizouarn  
*State party:* Bolivia  
*Date of adoption of Views:* 5 November 1991 (forty-third session)

*Subject matter:* Prolonged pre-trial detention

*Procedural issues:* Notion of victim—Exhaustion of domestic remedies—Unreasonably prolonged proceedings—No violation of articles 10 and 14(3)(b) and (d)

*Substantive issues:* Right to be promptly informed of any charges against one—Right to be promptly brought before a judge and tried within a reasonable period of time—Right to humane treatment—Right to adequate preparation of one's defence and to communicate with counsel—Right to be tried without undue delay—Right to privacy

*Articles of the Covenant:* 9(2) and (3), 10(1), 14(3)(b), (c) and (d), 17(1) and 24(1)

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

1. The author of the communication (initial submission dated 27 September 1988 and subsequent correspondence) is Nicole Fillastre, a French citizen residing in Le Havre, France. She submits the communication on behalf of her husband, André Fillastre, a French citizen and private detective by profession, currently detained at the prison of San Pedro in La Paz, Bolivia, together with another private detective, Pierre Bizouarn. By letter dated 25 May 1989, Mr. Bizouarn authorized Mrs. Fillastre to act on his behalf.

*The facts as submitted by the author*

2.1 The author states that on 26 August 1987, André Fillastre and Pierre Bizouarn travelled to La Paz accompanied by Ms. Silke Zimmerman, a German citizen then residing in France. André Fillastre was travelling in his capacity as a private detective on behalf of Ms. Zimmerman, who had requested his services in order to find and repatriate her four-year old son, Raphael Cuiza Zimmerman, living in Bolivia. Her son had allegedly been taken away from his mother by his Bolivian father, Jorge Cuiza, and flown to Bolivia.

2.2 On 3 September 1987, André Fillastre, Mr. Bizouarn and Ms. Zimmerman were arrested by the Bolivian police, after a complaint had been filed by the child's father, who claimed that they had manipulated their way into his home and started a brawl in which he was injured. The two detectives allegedly had abducted the child and left the home, together with the mother. Criminal proceedings were instituted against them. On 12 September 1987, the examining magistrate indicted the accused on three grounds: (a) kidnapping of a minor (*secuestro y rapto propio*), punishable under article 313 of the Bolivian Penal Code; (b) unauthorized entry into a home (*allanamiento de domicilio o sus dependencias*; article 298 of the Bolivian Penal Code), and (c) causing grievous bodily harm (*lesiones graves y leves*; article 271 of the Bolivian Penal Code). Allegedly, he did so without having interrogated the accused. Nevertheless, Ms. Zimmerman was released a few days later, apparently without plausible explanations. Messrs. Fillastre and Bizouarn, however, were placed under detention and imprisoned at the prison of San Pedro in La Paz, where they continue to be held.

2.3 With regard to the requirement of exhaustion of domestic remedies, the author states that the judicial proceedings against her husband and Mr. Bizouarn have been pending before the court of first instance since 12 September 1987. In this context, she indicates that, on 12 June 1990, the judge was expected to render his decision in the case but that, since the legal aid attorney assigned to her husband did not appear in court, he decided to further postpone the hearing.

*The complaint:*

3.1 It is submitted that Messrs. Fillastre and Bizouarn were not able to adequately communicate either with their lawyer or with the examining magistrate, before whom they were brought on 3 September 1988, one year after their arrest. In particular, it is alleged that the interpreter who had been designated to assist

them could only speak English, a language they did not master. Further, they allege that their statements before the examining magistrate were not only recorded incorrectly but deliberately altered.

3.2 It is submitted that Messrs. Fillastre and Bizouarn were held in custody for ten days without being informed of the charges against them; this was reportedly confirmed by the arresting officer, upon interrogation by the examining magistrate. As to the circumstances of the investigatory phase of the judicial proceedings, the author claims that several irregularities occurred in their course. Furthermore, the court hearings allegedly were postponed repeatedly because either the legal aid attorney or the prosecutor failed to appear in court. More generally, the author claims bias on the part of the judge and of the judicial authorities. This is said to be evidenced by the fact that the Bolivian authorities allowed Ms. Zimmerman to leave Bolivia without any plausible justification and never sought her testimony before the examining magistrate, although she had been indicted together with Messrs. Fillastre and Bizouarn.

3.3 As to the conditions of detention at the prison of San Pedro, they are said to be inhuman and degrading. In this context, the author submits that, on account of the psychological stress as well as the poor conditions of detention, her husband has become addicted to alcohol and drugs and lost his will to live.

3.4 Finally, the author claims that her countless efforts, since mid-September 1987, to obtain her husband's release have not met with any response. She maintains that, notwithstanding the various promises made to her by the French authorities, no official attempt was made to obtain her husband's release, nor to improve the conditions of his detention.

#### *The State party's information and observations*

4.1 The State party provides a chronology of the judicial proceedings in the case and indicates that a judgment at first instance may be expected by mid-August 1991. It notes that the preliminary investigations were initiated on 14 September 1987, with the consent of the examining magistrate (Juez Instructor en lo Penal); they were concluded by decision of 29 December 1988 (*auto final*), which committed Messrs. Fillastre and Bizouarn

to stand trial for the offences referred to in paragraph 2.2 above. This decision was challenged by the alleged victims on 16 and 22 February 1989, respectively.

4.2 The proceedings were then transferred to the Magistrates Court (Juez Quinto de Partido en lo Penal). The State party indicates that the process of evidence gathering, reconstruction of the facts and hearing of witnesses has been protracted, but that it is approaching its final stage. Such delays as occurred are said to be partly attributable to the judge's desire to gather further evidence, which would enable him to render his judgment.

4.3 The State party points out that Messrs. Fillastre and Bizouarn are likely to be found guilty of the offences for which they were indicted, in particular the kidnapping of a minor (article 313 of the Penal Code): this offence is punishable by imprisonment of one to five years. In the event of their conviction, they would retain the right to appeal conviction and sentence (*recurso de apelación*), pursuant to articles 284 and 288 of the Bolivian Code of Criminal Procedure. In the event of an unsuccessful appeal, they would be able to subsequently request the cassation of the judgment of the Court of Appeal (*recurso de nulidad*), pursuant to article 296 of the Code of Criminal Procedure.

4.4 In respect of the author's claim of a violation of articles 14, paragraph 3(b) and (d), the State party contends that both Mr. Fillastre and Mr. Bizouarn have received legal assistance throughout the proceedings, not only from the French consulate in La Paz, but also from one privately and one court-appointed lawyer. The alleged victims have consistently assisted the court sessions, together with their representatives.

4.5 The State party further contends that since the authors were properly indicted and the judicial proceedings continue to take their normal course, the accused remain lawfully detained at the Prison of San Pedro in La Paz. The State party does not, however, indicate whether the accused were promptly informed of the charges against them, and whether they were brought promptly before a judge or other officer authorized by law to exercise judicial power.

4.6 As to the author's complaint about undue delays in the judicial proceedings, the State party points out that criminal investigations

under Bolivian law are carried out in written form, which implies that administrative and other delays may occur. Furthermore, the absence of an adequate budget for a proper administration of justice means that a number of criminal cases and certain specific procedural phases of criminal proceedings have experienced delays.

4.7 The State party indicates that it has established a special commission of investigation to enquire into the author's allegation of ill-treatment and inhuman and degrading prison conditions. The report of this commission, whose findings are said to be confirmed by Messrs. Bizouarn and Fillastre, concludes that both prisoners are in good health and receive basic but adequate medical attention: that they are detained in the most comfortable sector of the San Pedro prison; that their diet is satisfactory; that they benefit from recreational facilities; and that they may communicate freely with friends, their relatives and their legal representatives.

#### *Issues and proceedings before the Committee*

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

5.2 During its 40th session, the Committee considered the admissibility of the communication. It took note of the State party's observations and clarifications concerning the current status of the case before the Bolivian courts, observing that the victims were still awaiting the outcome of the proceedings instituted against them in September 1987, that is, more than three years after their arrest. In the circumstances, the Committee considered that a delay of over three years for the adjudication of the case at first instance, discounting the availability of subsequent appeals, was "unreasonably prolonged" within the meaning of article 5, paragraph 2(b), of the Optional Protocol. From the available information, the Committee deduced that such delays as had been encountered were neither attributable to the alleged victims nor explained by the complexity of the case. It therefore concluded that the requirements of article 5, paragraph 2(b), had been met.

5.3 The Committee considered that the communication should be examined on the

merits as it appeared to raise issues under the Covenant in respect of the author's claims (a) that Messrs. Fillastre and Bizouarn were not promptly informed of the charges against them; (b) that they were not promptly brought before a judge and interrogated; (c) that they were not afforded adequate facilities for the preparation of their defence and were unable to properly communicate with counsel assigned to them; (d) that they were inadequately represented during the preliminary investigation; and (e) that they were being subjected to inhuman and degrading treatment.

5.4 On 6 November 1990, therefore, the Committee declared the communication admissible in so far as it appeared to raise issues under articles 9, paragraphs 2 and 3, 10, paragraph 1 and 14, paragraph 3(b), (c) and (d), of the Covenant.

6.1 The Committee has considered the present communication in the light of all the information provided by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

6.2 With respect to the allegation of a violation of article 10 of the Covenant, the Committee observes that the author has not corroborated, in a manner sufficiently substantiated, her claim that the prison conditions at the penitentiary of San Pedro are inhuman and do not respect the inherent dignity of the human person. The State party has endeavoured to investigate this claim, and the findings of its commission of inquiry, which have not been refuted either by the authors or by the alleged victims, conclude that Messrs. Fillastre and Bizouarn benefit from basic amenities during detention, including medical treatment, adequate diet, recreational facilities as well as contacts with their relatives and representatives. In the circumstances, the Committee concludes that there has been no violation of article 10.

6.3 As to the alleged violation of article 14, paragraph 3(b) and (d), the Committee reaffirms that it is imperative that accused individuals be afforded adequate time for the preparation of their defence, and that they be provided with free legal assistance if they cannot themselves afford the services of a legal representative. In the present case, it is uncontested that legal assistance was provided to both Mr. Fillastre and Mr. Bizouarn. Nor has the State party's claim that the alleged victims have benefitted

from such assistance throughout the proceedings, and that they have been able to attend hearings before the court together with their representatives, been refuted. In these circumstances, the Committee does not find that either article 14, paragraph 3(b), or article 14, paragraph 3(d), has been violated.

6.4 As to the alleged violation of article 9, paragraphs 2 and 3, the Committee observes that the author has stated in general terms that her husband and Mr. Bizouarn were held in custody for ten days before being informed of the charges against them, and that they were not brought promptly before a judge or other officer authorized by law to exercise judicial power. It remains unclear from the State party's submission whether the accused were indeed brought before a judge or judicial Officer between their arrest, on 3 September 1987, and 12 September 1987, the date of their indictment and placement under detention, pursuant to article 194 of the Bolivian Code of Criminal Procedure. The Committee cannot but note that there has been no specific reply to its request for information in this particular respect, and reiterates the principle that, if a State party contends that facts alleged by the author are incorrect or would not amount to a violation of the Covenant, it must so inform the Committee. The pertinent factor in this case is that both Mr. Fillastre and Mr. Bizouarn allegedly were held in custody for ten days before being brought before any judicial instance and without being informed of the charges against them. Accordingly, while not unsympathetic to the State party's claim that budgetary constraints may cause impediments to the proper administration of justice in Bolivia, the Committee concludes that the right of Messrs. Fillastre and Bizouarn under article 9, paragraphs 2 and 3, have not been observed.

6.5 Under article 9, paragraph 3, anyone arrested or detained on a criminal charge shall be entitled to trial within a reasonable time...". What constitutes "reasonable time is a matter of assessment for each particular case. The lack of adequate budgetary appropriations for the administration of criminal justice alluded to by the State party does not justify unreasonable delays in the adjudication of criminal cases. Nor does the fact that investigations into a criminal case are, in their essence, carried out by way of written proceedings, justify such delays. In the

present case, the Committee has not been informed that a decision at first instance had been reached some four years after the victims' arrest. Considerations of evidence-gathering do not justify such prolonged detention. The Committee concludes that there has been, in this respect, a violation of article 9, paragraph 3.

6.6 The author has further alleged that her husband and Mr. Bizouarn have not been tried, at first instance, for a period of time that she considers unreasonably prolonged. Under article 14, paragraph 3(c), the victims have the right to "be tried without undue delay". The arguments advanced by the State party in respect of article 9, paragraph 3, cannot serve to justify undue delays in the judicial proceedings. While the accused were indicted on several criminal charges under the Bolivian Criminal Code on 12 September 1987, the determination of these charges had not resulted in a judgment, at first instance, nearly four years later: the State party has not shown that the complexity of the case was such as to justify this delay. The Committee concludes that this delay violated the victims' right under article 14, paragraph 3(c).

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, finds that the facts before it reveal a violation of articles 9, paragraphs 2 and 3, and 14, paragraph, 3(c), of the Covenant.

8. 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 Messrs. Andre Fillastre and Pierre Bizouarn. The Committee has taken note of the State party's information that the offence for which the authors have been indicted under article 313 of the Bolivian Criminal Code is punishable by imprisonment of one to five years, and observes that the authors have already been detained for a period of four years and two months. In the circumstances, the State party should grant the authors a remedy in the form of their immediate release, and ensure that similar violations do not occur in the future.

9. The Committee would wish to receive information, within 30 day on any relevant measures adopted by the State party in respect of the Committee's Views.

## Communication No. 349/1989

*Submitted by:* Clifton Wright (represented by counsel)

*Date of communication:* 12 January 1989

*Alleged victim:* The author

*State party:* Jamaica

*Date of adoption of Views:* 27 July 1992 (forty-fifth session)

*Subject matter:* Denial of a fair trial by an independent and impartial tribunal in a capital punishment case

*Procedural issues:* Available remedy—  
Exhaustion of domestic remedies

*Substantive issues:* Effective remedy—Right to life—Permissibility of death sentence under the Covenant—Right to humane treatment—Right to a fair hearing—Right to a fair trial—Right to adequate time to prepare one's defence—Equality of arms

*Articles of the Covenant:* 2(3)(a), 6(1) and 6(2), 10(1) and 14(1); and 14(3)(b) and (e)

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

*Rules of procedure:* Rule 94(3)

*Individual opinion:* Dissenting opinion by  
Mr. Bertil Wennegren

1. The author of the communication dated 12 January 1989 is Clifton Wright, a Jamaican citizen currently awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of article 14, paragraphs 1 and 3 (b) and (e), of the International Covenant on Civil and Political Rights. He is represented by counsel.

*The facts as submitted by the author*

2.1 The author was convicted and sentenced to death on 29 March 1983, in the Home Circuit Court of Kingston, for the murder of Louis McDonald. The prosecution's case was that the deceased was last seen by his family in the afternoon of 28 August 1981. That evening, one Silvester Cole, a witness in the case, was trying to obtain a lift at a road junction in Kingston. The author and his co-defendant, Winston Phillips, were similarly waiting for a lift at the same junction. All three were picked up by a yellow Ford Cortina motor car: Mr. Cole and Mr. Phillips stopped after approximately two miles and left the vehicle. In court, Mr. Cole

testified that after they left the car, Mr. Phillips remained in the vicinity of the vehicle, looking up and down the road, while the author stayed in the car and held a gun to the driver's neck. Realizing that he was witnessing a hold-up, he first walked casually away from the scene, and only then began running. From a distance, he saw the car driving away with its lights turned off.

2.2 The author was arrested on 29 August 1981 at about 6 p.m., together with Winston Phillips. He had been seen driving Mr. McDonald's car by a friend of the latter; the car had been reported stolen on the same day. Both the author and Mr. Phillips were brought to the Waterford police station, where they were searched and found to be in possession of pieces of jewellery that the wife of the deceased later identified as belonging to her husband. The author submits that when they were arrested, the police could not possibly have known about the murder, since the deceased's body was recovered only in the afternoon of the next day, in a canefield close to where he had dropped off Messrs. Cole and Phillips.

2.3 No identification parade was held after the arrest of the accused on 29 August 1981, allegedly because a mob had sought to attack them at the police station when it became known that the deceased's jewellery had been found on them. The authors were moved to the Spanish Town police station thereafter, and Mr. Phillips was admitted to the hospital. No identification parade was conducted in Spanish Town, either, as the police officers conducting the investigation felt that because of the events at the Waterford police station, a parade would be unnecessary or even suspect.

2.4 A post-mortem was performed on 1 September 1981 at about 1 p. m. by Dr. Lawrence Richards. According to his evidence during the trial, which remained unchallenged, death had occurred an estimated 47 hours before, at around 2 p.m. on 30 August 1981, as a result of gunshot injuries inflicted no more than 10 to 20 minutes before death. Thus, it is submitted that death



occurred only shortly before the body was recovered, and when the author had already been in custody for about 20 hours.

2.5 On 3 September 1981, Mr. Cole was taken to the Spanish Town police station, where the author was then in custody. The author was brought out of a cell and identified by Mr. Cole as the man who had held the gun and threatened the driver of the yellow Cortina. He was not asked to identify Mr. Phillips before the trial and indicated that he would have been unable to identify him; during the trial, he could not identify Mr. Phillips.

2.6 During the trial, the author made an unsworn statement from the dock. He asserted that he had borrowed the deceased's car from a friend, to give his girlfriend a ride to Spanish Town. He denied having obtained a lift in this car on 28 August 1981, and affirmed that he was unaware that it had been stolen. He further claimed that he had been working at the garage where he was employed as a battery repairman until about midnight on the day of the crime. Finally, he denied having been in possession of any of the deceased's jewellery.

2.7 The author was tried with Winston Phillips. At the conclusion of the trial, the jury failed to return a unanimous verdict in respect of Mr. Phillips, who was released on bail and ordered to be retried. The author was found guilty as charged, convicted and sentenced to death. He appealed to the Court of Appeal of Jamaica which, on 11 July 1986, dismissed his appeal. On 24 September 1986 the court issued a written judgment. On 8 October 1987, the Judicial Committee of the Privy Council dismissed the author's petition for special leave to appeal.

2.8 On 13 February 1984, the author submitted a complaint to the Inter-American Commission on Human Rights, claiming that he had been the victim of a miscarriage of justice. The Commission registered the case under No. 9260 and held a hearing on 24 March 1988. The State party argued that the author had not exhausted domestic remedies because he had failed to avail himself of constitutional remedies in Jamaica. The Commission requested further information as to whether such remedies were effective within the meaning of article 46 of the American Convention on Human Rights; the State party did not reply. On 14 September 1988, the Commission approved resolution No. 29/88,

declaring "that since the conviction and sentence are undermined by the record in this case, and that the appeals process did not permit for a correction, that the Government of Jamaica has violated the petitioner's fundamental rights" under article 25 of the American Convention on Human Rights. The State party challenged this resolution by submission of 4 November 1988.

### *The complaint*

3.1 Counsel contends that the State party violated several of the author's rights under the Covenant. First, he claims that the author was subjected to ill-treatment by the police, which allegedly included the squirting of a corrosive liquid (Ajax) into his eyes, and that, as a result, he sustained injuries.

3.2 Counsel further claims that the author was not afforded a fair hearing within the meaning of article 14, paragraph 1, of the Covenant. More specifically, the trial transcript reveals that the pathologist's uncontested evidence, which had been produced by the prosecution, was overlooked by the defence and either overlooked or deliberately glossed over by the trial judge. This meant that the jury was not afforded an opportunity to properly evaluate this evidence which, if properly put, should have resulted in the author's acquittal. In fact, according to the pathologist's report, death occurred on 30 August 1981 at around 2 p. m., whereas Mr. Wright had been in police custody since approximately 6 p. m. on 29 August. It is submitted that no trial in which the significance of such crucial evidence was overlooked or ignored can be deemed to be fair, and that the author has suffered a grave and substantial denial of justice.

3.3 It is further alleged that throughout the trial, the judge displayed a hostile and unfair attitude towards the author as well as his representatives. Thus, the judge's observations are said to have been partial and frequently veined with malice, his directions on identification and on recent possession of stolen property biased. In this context, it is pointed out that no identification parade was held in the case and that the judge, in his summing up, endorsed the prosecution's contention that it was inappropriate to conduct an identification parade in the circumstances of the case. The judge also allegedly made highly prejudicial comments on the author's previous character and emphatically criticized the way in which the defence

conducted the cross-examination of prosecution witnesses. Counsel maintains that the judge's disparaging manner vis-8-vis the defence, coupled with the fact that he refused a brief adjournment of 10 minutes and thereby deprived the defence of the opportunity of calling a potentially important witness, points to a violation of article 14, paragraph 3(e), of the Covenant, in that the author was unable to obtain the examination of defence witnesses under the same conditions as witnesses against him.

3.4 Finally, the author alleges a violation of article, 14, paragraph 3(b), because he, or his representative, were denied adequate time for the preparation of the defence. In particular, it is submitted that the trial transcript reveals that the attorney assigned to the case was instructed on the very day on which the trial began. Accordingly, he had less than one day to prepare the case. This, according to counsel, is wholly insufficient to prepare adequately the defence in a capital case. Deficiencies in the author's defence are said to be attributable partly to lack of time for the preparation for the trial, and partly to the lack of experience of one of the author's two court-appointed lawyers.

3.5 With regard to the issue of domestic remedies, counsel rebuts the State party's contention that the communication is inadmissible on the ground of non-exhaustion of domestic remedies on grounds of a presumed right to apply for constitutional redress to the Supreme (Constitutional) Court. He adds that this argument is advanced without detailed consideration of the Constitution. He points out that chapter III of the Jamaican Constitution deals with individual rights, and section 20(5) deals with the right to a fair trial. In particular, section 25 makes provision for enforcement: section 25(2) stipulates that the Supreme Court has jurisdiction to "hear and determine applications", but adds the qualification that the Court shall not exercise its jurisdiction if it is satisfied that adequate means of redress have been available under any other law. The author's case is said to fall within the scope of the qualification of section 25(2) of the Jamaican Constitution: if it were not covered by this proviso, every convicted criminal in Jamaica alleging an unfair trial would have the right to pursue parallel or sequential remedies to the Court of Appeal and the Privy Council, both under criminal law and under the Constitution.

3.6 Counsel finally notes that the State party has failed to show that legal aid is available to the author for the purpose of constitutional motions. If the State party were correct in asserting that a constitutional remedy was indeed available, at least in theory, it would not be available to the author in practice because of his lack of financial means and the unavailability of legal aid. Counsel concludes that a remedy which cannot be pursued in practice is not an available remedy.

#### *The State party's information and observations*

4. The State party contends that the communication is inadmissible under article 5, paragraph 2(b), of the Optional Protocol. It argues that the author's rights under article 14 of the Covenant are coterminous with the fundamental rights guaranteed by section 20 of the Jamaican Constitution. Accordingly, under the Constitution, anyone who alleges that a fundamental right has been, is being or is likely to be infringed in relation to him may apply to the Supreme Constitutional Court for redress. Since the author failed to take any action to pursue his constitutional remedies in the Supreme Court, the communication is deemed inadmissible.

#### *The Committee's admissibility considerations and decision*

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

5.2 During its fortieth session, in October 1990, the Committee considered the admissibility of the communication. With regard to article 5, paragraph 2(a), of the Optional Protocol, the Committee ascertained that the case submitted by the author to the Inter-American Commission on Human Rights was no longer under examination by that body.

5.3 The Committee took note of the State party's contention that the communication was inadmissible because of the author's failure to pursue constitutional remedies available to him under the Jamaican Constitution. It observed 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 provision; 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” (section 25, paragraph 2, *in fine*). The Committee further noted that the State party had been requested to clarify, in several interlocutory decisions, whether the Supreme (Constitutional) Court had had an opportunity to determine the question 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 had replied that the Supreme Court had not had said opportunity. In the circumstances, the Committee found that recourse to the Constitutional Court under section 25 of the Jamaican Constitution was not a remedy available to the author within the meaning of article 5, paragraph 2(b), of the Optional Protocol.

5.4 The Committee also noted that part of the author’s allegations concerned claims of bias on the part of the judge, as well as the alleged inadequacy of the judge’s instructions to the jury. The Committee reaffirmed that it is generally beyond its competence to evaluate the adequacy of the judge’s instructions to the jury, unless it can be ascertained that these instructions were clearly arbitrary or amounted to a denial of justice, or unless it can be demonstrated that the judge manifestly violated his obligation of impartiality. In the case under consideration, the Committee considered that the circumstances which led to the author’s conviction merited further examination in respect of his claims relating to article 14, paragraphs 1 and 3(b) and (e), of the Covenant.

5.5 The Committee finally noted the author’s allegation concerning ill-treatment by the police, and observed that the State party had remained silent on the issue whether this part of the communication should be deemed admissible.

5.6 On 17 October 1990, the Committee declared the communication admissible in so far as it appeared to raise issues under articles 10 and 14, paragraphs 1 and 3(b) and (e), of the Covenant.

#### *The State party’s objections to the admissibility decision*

6.1 The State party, in a submission dated 12 February 1991, challenges the Committee’s findings on admissibility and objects to the reasoning described in paragraph 5.3 above. It argues, in particular, that the Committee’s reasoning reflects a “grave misunderstanding” of the relevant Jamaican law, especially the Operation of section 25, paragraphs 1 and 2, of the Jamaican Constitution. The right to apply for redress under section 25(1) is, in the terms of the provision itself, “without prejudice to any other action with respect to the same matter which is lawfully available”. The only limitation is to be found in section 25 (2) which, in the State party’s opinion, does not apply in the case, since the alleged breach of the right to a fair trial was not at issue in the criminal law appeal to the Court of Appeal and the Judicial Committee:

“ . . . If the contravention alleged was not the subject of criminal law appeals, *ex hypothesi*, those appeals could hardly constitute an adequate remedy for that contravention. The decision of the Committee would render meaningless and nugatory the hard-earned constitutional rights of Jamaicans . . . , by its failure to distinguish between the right to appeal against the verdict and sentence of the court in a criminal case, and the “brand new rights” to apply for constitutional redress granted in 1962”.

6.2 The State party submits that the admissibility decision attaches undue significance to the fact that the Jamaican courts have not yet had occasion to rule on the application of the proviso to section 25(2) of the Constitution in circumstances where the appellant has already exhausted his criminal law appellate remedies. It notes that in the case of *Noel Riley and others v. the Queen* [A-G. (1982) 3 AER 469], Mr. Riley was able to apply, after the dismissal of his criminal appeal to the Court of Appeal and the Judicial Committee, to the Supreme (Constitutional) Court and thereafter to the Court of Appeal and the Privy Council, albeit unsuccessfully. In the State party’s opinion, this precedent illustrates that recourse to criminal law appellate remedies does not render the proviso of section 25 (2) applicable in situations where, following criminal law appeals, an individual files for constitutional redress.

6.3 As to the absence of legal aid for the filing of constitutional motions, the State party submits that nothing in the Optional Protocol or in customary international law supports the contention that an individual is relieved of the obligation to exhaust domestic remedies on the mere ground that there is no provision for legal aid and that his indigence has prevented him from resorting to an available remedy. It is submitted that the Covenant only imposes a duty to provide legal aid in respect of criminal offences (article 14, paragraph 3(d)). Moreover, international conventions dealing with economic, social and cultural rights do not impose an unqualified obligation on States to implement such rights: article 2 of the International Covenant on Economic, Social and Cultural Rights provides for the progressive realization of economic rights and relates to the “capacity of implementation of States”. In the circumstances, the State party argues that it is incorrect to infer from the author’s indigence and the absence of legal aid in respect of the right to apply for constitutional redress that the remedy is necessarily non-existent or unavailable.

6.4 As to the author’s claim of ill-treatment by the police, the State party observes that this issue was not brought to its attention in the initial submission, and that the Committee should not have declared the communication admissible in respect of article 10 without previously having apprised the State party of this claim. It adds that, in any event, the communication is also, inadmissible in this respect, as the author did not avail himself of the constitutional remedies available to him under sections 17(1) and 25(1) of the Jamaican Constitution: any person alleging torture or inhuman and degrading treatment or other punishment may apply to the Supreme Court for constitutional redress.

6.5 In the light of the above, the State party requests the Committee to review its decision on admissibility.

*Post-admissibility considerations and examination of merits*

7.1 The Committee has taken note of the State party’s request, dated 12 February 1991, to review its decision on admissibility, as well as its criticism of the reasoning leading to the decision of 17 October 1990.

7.2 The same issues concerning admissibility have already been examined by the Committee in its Views on communications Nos. 230/1987<sup>1</sup> and 283/1988<sup>2</sup>. In the circumstances of those cases, the Committee concluded that a constitutional motion was not an available and effective remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol, and that, accordingly, the Committee was not precluded from examining the merits.

7.3 The Committee has taken due note of the fact that subsequent to its decision on admissibility the Supreme (Constitutional) Court of Jamaica has had an opportunity to determine the question whether an appeal to the Court of Appeal of Jamaica 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 Supreme (Constitutional) Court has since replied to this question in the negative by accepting to consider the constitutional motion of Earl Pratt and Ivan Morgan (judgment entered on 14 June 1991). The Committee observes that whereas the issue is settled under Jamaican constitutional law, different considerations govern the application of article 5, paragraph 2(b), of the Optional Protocol, such as the length of the judicial proceedings and the availability of legal aid.

7.4 In the absence of legal aid for constitutional motions and bearing in mind that the author was arrested in August 1981, convicted in March 1983, and that his appeals were dismissed in July 1986 by the Court of Appeal of Jamaica and in October 1987 by the Judicial Committee of the Privy Council, the Committee finds that recourse to the Supreme (Constitutional) Court is not required under article 5, paragraph 2(b), of the Optional Protocol in this case, and that there is no reason to reverse the Committee’s decision on admissibility of 17 October 1990.

7.5 As to the allegation concerning the author’s ill-treatment by the police, the Committee notes that this claim was reproduced in resolution 29/88 approved by the Inter-American Commission on Human Rights, a

<sup>1</sup> *Raphael Henry v. Jamaica*, Views adopted on 1 November 1991, forty-third session.

<sup>2</sup> *Aston Little v. Jamaica*, Views adopted on 1 November 1991, forty-third session.

copy of which was transmitted by the Committee to the State party on 28 April 1989. Furthermore, while the allegation of a violation of article 10 does not expressly figure under the header "Alleged Breaches of the International Covenant on Civil and Political Rights" (page 8 of the author's initial communication), reference to ill-treatment by the police is made on pages 51 and 52 of this communication, which was integrally transmitted to the Government of Jamaica a year and a half before the Committee's decision on admissibility. In the circumstances, the State party cannot claim that it was not apprised of the allegation of ill-treatment: nor is the Committee barred from considering the author's submission in its integrity, or from proceeding with its own evaluation as to whether the facts as presented may raise issues under certain provisions of the Covenant, even if these provisions have not been specifically invoked.

8.1 With respect to the alleged violations of the Covenant, four issues are before the Committee: (a) whether the judge showed bias in his evaluation of the evidence or in his instructions to the jury; (b) whether the overlooking of the significance of the time of death amounted to a violation of the author's right to a fair trial; (c) whether the author was afforded adequate time for the preparation of his defence and could secure the examination of witnesses on his behalf under the same conditions as witnesses against him; and (d) whether the alleged ill-treatment by the police violated his rights under article 10.

8.2 With respect to the first issue, the Committee reaffirms its established jurisprudence that it is generally 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 make such an evaluation or to review specific instructions to the jury by the judge, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality. In the present case, the Committee has been requested to examine matters belonging in the latter category.

8.3 In respect of the issue of the significance of the time of death of the victim, the Committee begins by noting that the postmortem on the deceased was performed on 1 September 1981 at approximately 1 p.m., and that the expert concluded that death had occurred forty-seven

hours before. His conclusion, which was not challenged, implied that the author was already in police custody when the deceased was shot. The information was available to the Court; given the seriousness of its implications, the Court should have brought it to the attention of the jury, even though it was not mentioned by counsel. Furthermore, even if the Judicial Committee of the Privy Council had chosen to rely on the facts relating to the post-mortem evidence, it could not have addressed the matter as it was introduced for the first time at that stage. In all the circumstances, and especially given that the trial of the author was for a capital offence, this omission must, in the Committee's view, be deemed a denial of justice and as such constitutes a violation of article 14, paragraph 1, of the Covenant. This remains so even if the placing of this evidence before the jury might not, in the event, have changed their verdict and the outcome of the case.

8.4 The right of an accused person to have adequate time and facilities for the preparation of his or her defence is an important element of the guarantee of a fair trial and a corollary of the principle of equality of arms. In cases in which a capital sentence may be pronounced, it is axiomatic that sufficient time must be granted to the accused and his or her counsel to prepare the defence for the trial; this requirement applies to all the stages of the judicial proceedings. The determination of what constitutes "adequate time" requires an assessment of the individual circumstances of each case. There was considerable pressure to start the trial as scheduled on 17 March 1983, particularly because of the return of the deceased's wife from the United States to give evidence; moreover, it is uncontested that Mr. Wright's counsel was instructed only on the very morning the trial was scheduled to start and, accordingly, had less than one day to prepare Mr. Wright's defence and the cross-examination of witnesses. However, it is equally uncontested that no adjournment of the trial was requested by either of Mr. Wright's counsel. The Committee therefore does not consider that the inadequate preparation of the defence may be attributed to the judicial authorities of the State party; if counsel had felt that they were not properly prepared, it was incumbent upon them to request the adjournment of the trial. Accordingly, the Committee finds no violation of article 14, paragraph 3(b).

8.5 With respect to the alleged violation of article 14, paragraph 3 (e), it is uncontested that

the trial judge refused a request from counsel to call a witness on Mr. Wright's behalf. It is not apparent, however, that the testimony sought from this witness would have buttressed the defence in respect of the charge of murder, as it merely concerned the nature of the injuries allegedly inflicted on the author by a mob outside the Waterford police station. In the circumstances, the Committee finds no violation of this provision.

8.6 Finally, the Committee has considered the author's allegation that he was ill-treated by the police. While this claim has only been contested by the State party in so far as its admissibility is concerned, the Committee is of the view that the author has not corroborated his claim, by either documentary or medical evidence. Indeed, the matter appears to have been raised in the court of first instance, which was unable to make a finding, and brought to the attention of the Court of Appeal. In the circumstances and in the absence of further information, the Committee is unable to find that article 10 has been violated.

8.7 The Committee is of the opinion that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, 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 of conviction and sentence by a higher tribunal."<sup>3</sup> In the present case, since the final sentence of death was passed without having met the requirements for a fair trial set out in article 14, it must be concluded that the right protected by article 6 of the Covenant has been violated.

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

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<sup>3</sup> See *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40)*, annex V, para. 7

before the Committee disclose a violation of article 14, paragraph 1, and consequently of article 6 of the Covenant.

10. In capital punishment cases, the obligation of States parties to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant admits of no exception. The Committee is of the view that Mr. Clifton Wright, a victim of violations of article 14 and consequently of article 6, is entitled, according to article 2, paragraph 3 (a), of the Covenant to an effective remedy, in this case entailing his release, as so many years have elapsed since his conviction.

11. The Committee would wish to receive information, within 90 days, 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 rules of  
procedure,  
concerning the Views of the Committee on  
communication No. 349/1989,  
Clifton Wright v. Jamaica*

I agree with the Committee to the extent that the trial judge should have brought the implications of the pathologist's estimation that the victim's death had occurred forty-seven hours before the post-mortem to the attention of the jury. I do not, however, consider that these implications were such that they could have influenced either verdict or sentence. I therefore disagree with the finding that said omission must be deemed a denial of justice and that this remains so even if the placing of this evidence before the jury might not, in the event, have changed the verdict and the outcome of the case. In my opinion, the omission was a minor irregularity that did not affect the conduct of the trial in as much as article 14 of the Covenant is concerned. My reasons are the following:

The pathologist testified both in respect of how and when death of the victim occurred. In the latter respect, he first stated that the "post-mortem examination was performed at the Spanish Town hospital morgue forty-seven hours after death". Upon the judge's question "When you [said] the examination was forty-seven hours after death you are estimating it?", he replied "That is my estimation". This estimation was not questioned during the trial, although death must have occurred ninety-one, and not forty-seven, hours before the post-mortem examination, namely when the victim's wife began to

search him. The discrepancy was also not addressed before or by the Court of Appeal. The first to raise the point was counsel before the Judicial Committee of the Privy Council, who made the point the central issue of the author's petition for special leave to appeal, although as a matter of law the Judicial Committee could not consider it. The Human Rights Committee thus is the first instance to consider this point on its merits.

I believe that an explanation for the situation described above is easy to find. The pathologist's testimony contained no more than a mere estimation, and it is known that it is impossible to determine the time of death with exactitude in a case such as the present one. Pathologist's estimations must allow for a broad margin of uncertainty. This implies that the pathologist's estimation did not really conflict with the remainder of the evidence against the author. I would

on the contrary say that it was consistent with it. However, I believe, as the Committee, that the judge *should* have told the jury not only about how they must evaluate the testimony of the pathologist in respect of the cause of death but also in respect of the time of death. He could not reasonably assume that what he knew about margins of uncertainty and errors of appreciation was also known to the members of the jury. However, I do not think that this omission affected the deliberations of the jury negatively. As the estimation was not in conflict with the other evidence, and this other evidence was indeed convincing, there is in my view no reason to conclude that there has been a denial of justice. I note in this context that the Court of Appeal, when dismissing the author's appeal, stated that "this was in fact one of the strongest cases against an accused that we have seen.

## Communication No. 387/1989

*Submitted by:* Arvo O. Karttunen (represented by counsel)

*Date of communication:* 2 November 1989

*Alleged victim:* The author

*State party:* Finland

*Date of adoption of Views:* 23 October 1992 (forty-sixth session)

*Subject matter:* Notion of “Impartiality” of the Court

*Procedural issue:* Exhaustion of domestic remedies

*Substantive issues:* Impartial tribunal—Fair trial—Public hearing—Equality of arms

*Article of the Covenant:* 14(1)

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

*Rules of procedures:* Rule 94(3)

*Individual opinion:* Dissenting opinion by Mr. Bertil Wennegren

1. The author of the communication is Arvo O. Karttunen, a Finnish citizen residing in Helsinki, Finland. He claims to be a victim of violations by Finland of article 14 of the International Covenant on Civil and Political Rights. He is represented by counsel.

*The facts as submitted by the author*

2.1 The author was a client of the Rääkkylä Cooperative Bank, which financed his business activities through regular disbursement of loans. In July 1983, he declared bankruptcy, and on 23 July 1986 he was convicted on a charge of fraudulent bankruptcy by the Rääkkylä District Court and sentenced to 13 months of imprisonment. The Itä-Suomi Court of Appeal (Court of Appeal for Eastern Finland) confirmed the judgment of first instance on 31 March 1988. On 10 October 1988, the Supreme Court denied leave to appeal.

2.2 Finnish district courts are composed of one professional judge and five to seven lay judges, who serve in the same judicial capacity as the career judge. The latter normally prepares the court’s decision and presents it to the full

court, which subsequently considers the case. The court’s decisions are usually adopted by consensus. In the event of a split decision, the career judge casts the decisive vote.

2.3 In Mr. Karttunen’s case, the court consisted of one career judge and five lay judges. One lay judge, V. S., was the uncle of E. M., who himself was a partner of the Sähköjohto Ltd. Partnership Company, which appeared as a complainant against the author. While interrogating the author’s wife, who testified as a witness, V. S. allegedly interrupted her by saying “She is lying”. The remark does not, however, appear in the trial transcript or other court documents. Another lay judge, T. R., allegedly was indirectly involved in the case prior to the trial, since her brother was a member of the board of the Rääkkylä Cooperative Bank at the time when the author was a client of the Bank; the brother resigned from the board with effect of 1 January 1984. In July 1986, the Bank also appeared as a complainant against the author.

2.4 The author did not challenge the two lay judges in the proceedings before the District Court; he did raise the issue before the Court of Appeal. He also requested that the proceedings at the appellate stage be public. The Court of Appeal, however, after having re-evaluated the evidence *in toto*, held that whereas V. S. should have been barred from acting as a lay judge in the author’s case pursuant to Section 13, paragraph 1, of the Code of Judicial Procedure, the judgement of the District Court had not been adversely affected by this defect. It moreover found that T. R. was not barred from participating in the proceedings, since her brother’s resignation from the board of the Rääkkylä Cooperative Bank had been effective on 1 January 1984, long before the start of the trial. The Court of Appeal’s judgement of 31 March 1988 therefore upheld the lower court’s decision and dismissed the author’s request for a public hearing.



### *Complaint*

3.1 The author contends that he was denied a fair hearing both by the Rääkkylä District Court and the Court of Appeal, in violation of article 14, paragraph 1, of the Covenant.

3.2 The author claims that the proceedings before the Rääkkylä District Court were not impartial, since the two lay judges, V. S. and T. R., should have been disqualified from the consideration of his case. In particular, he claims that the remark of V. S. during the testimony of Mrs. Karttunen, amounts to a violation of article 14, paragraph 1, of the Covenant. In this context, he argues that while Section 13, paragraph 1, of the Code of Judicial Procedure provides that a judge cannot sit in court if he was previously involved in the case, it does not distinguish between career and lay judges. If the court is composed of only five lay judges, as in his case, two lay judges can considerably influence the court's verdict, as every lay judge has one vote. The author further contends that the Court of Appeal erred in finding that (a) one of the lay judges, T. R., was not disqualified to consider the case, and (b) the failure of the District Court to disqualify the other lay judge because of conflict of interest had no effect on the outcome of the proceedings.

3.3 Finally, the author asserts that article 14, paragraph 1, was violated because the Court of Appeal refused to examine the appeal in a public hearing, despite his formal requests. This allegedly prevented him from submitting evidence to the court and from having witnesses heard on his behalf.

### *State party's information and observations*

4.1 The State party concedes that the author has exhausted available domestic remedies but argues that the communication is inadmissible on the basis of article 3 of the Optional Protocol. In respect of the contention that the proceedings in the case were unfair because of the alleged partiality of two lay judges, it recalls the Court of Appeal's findings (see para. 3.2) and concludes that since the career judge in practice determines the court's judgement, the outcome of the proceedings before the Rääkkylä District Court was not affected by the participation of a judge who could have been disqualified.

4.2 Concerning the author's contention that the Court of Appeal denied him his right to a

public hearing, the State party contends that the right to an oral hearing is not encompassed by article 14, paragraph 1, and that this part of the communication should be declared inadmissible *ratione materiae*, pursuant to article 3 of the Optional Protocol.

### *Committee's decision on admissibility*

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

5.2 During its forty-third session, the Committee considered the admissibility of the communication. While noting the State party's contention that the communication was inadmissible under article 3 of the Optional Protocol, it observed that the material placed before it by the author in respect of alleged irregularities in the judicial proceedings raised issues that should be examined on the merits, and that the author had made reasonable efforts to substantiate his claims, for purposes of admissibility.

5.3 On 14 October 1991, the Committee declared the communication admissible in respect of article 14 of the Covenant. It requested the State party to clarify, in particular: (a) how Finnish law guarantees the impartiality of tribunals and how these guarantees were applied in the instant case, and (b) how domestic law safeguards the public nature of proceedings, and whether the procedure before the Court of Appeal could be considered to have been public.

### *State party's observations on the merits*

6.1 In its submission on the merits, the State party observes that the impartiality of Finnish courts is guaranteed in particular through the regulations governing the disqualification of judges (Chapter 13, Section 1, of the Code of Judicial Procedure). These provisions enumerate the reasons leading to the disqualification of a judge, which apply to all court instances; furthermore, Section 9 of the District Court Lay Boards Act (No. 322/69) provides that the disqualification of district court lay judges is governed by the regulations on disqualification of judges. These rules suffer no exception: no one who meets any of the disqualification criteria may sit as judge in a case. The Court must,

moreover, *ex officio* take the disqualification grounds into consideration.

6.2 The State party concedes that the proceedings before the Rääkkylä District Court did not meet the requirement of judicial impartiality, as was acknowledged by the Court of Appeal. It was incumbent upon the Court of Appeal to correct this procedural error; the court considered that the failure to exclude lay judge V. S. did not influence the verdict, and that it was able to reconsider the matter *in toto*, on the basis of the trial transcript and the recording thereof.

6.3 The State party concedes that the Court of Appeal's opinion might be challenged, in that the alleged improper remarks of V. S. could very well have influenced the procurement of evidence and the content of the court's decision. Similarly, since the request for a public appeal hearing was rejected by the Court of Appeal, it could be argued that *no* public hearing in the case took place, since the procedure before the District Court was flawed, and the Court of Appeal did not return the matter for reconsideration by a properly qualified District Court.

6.4 Concerning the issue of publicity of the proceedings, the State party affirms that while this rule is of great practical significance in proceedings before the lower courts (where they are almost always oral), the hearing of an appeal before the Court of Appeal is generally a written procedure. Proceedings as such are not public but the documents gathered in the process are accessible to the public. Wherever necessary, the Court of Appeal may hold oral proceedings, which may be confined to only part of the issues addressed in the appeal. In the author's case, the Court of Appeal did not consider it necessary to hold a separate oral hearing on the matter.

6.5 The State party notes that neither the Committee's General Comment on article 14 nor its jurisprudence under the Optional Protocol provides direct guidance for the resolution of the case; it suggests that the interpretation of article 6 of the European Convention of Human Rights and Fundamental Freedoms may be used to assist in the interpretation of article 14 of the Covenant. In this context, the State party observes that the evaluation of the fairness of a trial in the light of article 14 of the Covenant must be made on the basis of an overall evaluation of the individual case, as the shortcomings in the proceedings before a lower court may be corrected through a

hearing in the Court of Appeal. It is paramount that the principle of equality of arms be observed at all stages, which implies that the accused must have an opportunity to present his case under conditions which do not place him at a disadvantage in relation to other parties to the case.

6.6 The State party contends that while the Committee has repeatedly held that it is not in principle competent to evaluate the facts and evidence in a particular case, it should be its duty to clarify that the judicial proceedings as a whole were fair, including the way in which evidence was obtained. The State party concedes that the issue of whether a judge's possible personal motives influenced the decision of the court is not normally debated; thus, such motives cannot normally be found in the reasoned judgement of the court.

6.7 The State party observes that if the obvious disqualification of lay judge V. S. is taken into account, "neither the subjective, nor the objective test of the impartiality of the court may very well said to have been passed. It may indeed be inquired whether a trial held in th[ese] circumstances together with its documentary evidence may be regarded to such an extent reliable that it has been possible for the court of appeal to decide the matter solely ... by a written procedure".

6.8 On the other hand, the State party argues, the author had indeed the opportunity to challenge the disqualification of V. S. in the District Court, and to put forth his case in both the appeal to the Court of Appeal and the Supreme Court. Since both the prosecutor and the author appealed against the verdict of the District Court, it could be argued that the Court of Appeal was in a position to review the matter *in toto*, and that accordingly the author was not placed in a position that would have significantly obstructed his defence or influenced the verdict in a way contrary to article 14.

6.9 The State party reiterates that the publicity of judicial proceedings is an important aspect of article 14, not only for the protection of the accused but also to maintain public confidence in the functioning of the administration of justice. Had the Court of Appeal held a public oral hearing in the case, or quashed the verdict of the District Court, then the flaw in the composition of the latter could have been deemed corrected. As this did not occur in

the author's case, his demand for an oral hearing may be considered justified in the light of article 14 of the Covenant.

*Examination of the merits*

7.1 The Committee is called upon to determine whether the disqualification of lay judge V. S. and his alleged disruption of the testimony of the author's wife influenced the evaluation of evidence by, and the verdict of, the Rääkkylä District Court, in a way contrary to article 14, and whether the author was denied a fair trial on account of the Court of Appeal's refusal to grant the author's request for an oral hearing. As the two questions are closely related, the Committee will address them jointly. The Committee expresses its appreciation for the State party's frank cooperation in the consideration of the author's case.

7.2 The impartiality of the court and the publicity of proceedings are important aspects of the right to a fair trial within the meaning of article 14, paragraph 1. "Impartiality" of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties. Where the grounds for disqualification of a judge are laid down by law, it is incumbent upon the court to consider *ex officio* these grounds and to replace members of the court falling under the disqualification criteria. A trial flawed by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be fair or impartial within the meaning of article 14.

7.3 It is possible for appellate instances to correct the irregularities of proceedings before lower court instances. In the present case, the Court of Appeal considered, on the basis of the written evidence, that the District Court's verdict had not been influenced by the presence of lay judge V. S., while admitting that V. S. manifestly should have been disqualified. The Committee considers that the author was entitled to oral proceedings before the Court of Appeal. As the State party itself concedes, only this procedure would have enabled the Court to proceed with the re-evaluation of all the evidence submitted by the parties, and to determine whether the procedural flaw had indeed affected the verdict of the District Court. In the light of the above, the Committee concludes that there has been a violation of article 14, paragraph 1.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal a violation of article 14, paragraph 1, of the Covenant.

9. In accordance with the provisions of article 2 of the Covenant, the State party is under an obligation to provide the author with an effective remedy for the violation suffered.

10. The Committee would wish to receive from the State party, within 90 days, information about any measures adopted 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. 387/1989, Arvo O. Karttunen v. Finland*

Mine is not a dissenting opinion; I merely want to clarify my view on the Committee's reasoning in this case. Mr. Karttunen's case concerns procedural requirements before an appellate court in criminal proceedings. The relevant provisions of the Covenant are laid out in article 14, firstly the general requirements for fair proceedings in paragraph 1, secondly the special guarantees in paragraph 3. Paragraph 1 applies to all stages of the judicial proceedings, be they before the court of first instance, the court of appeal, the Supreme Court, a general court of law or a special court. Paragraph 3 applies only to criminal proceedings and primarily to proceedings at first instance. The Committee's jurisprudence, however, has found the requirements of paragraph 3 to be also applicable to review and appellate procedures in criminal cases, i.e. the rights to have adequate time and facilities for the preparation of the defence and to communicate with counsel of one's own choosing (art. 14, para. 3(b)), to be tried without undue delay (art. 14, para. 3(c)), to have legal assistance assigned in any case where the interests of justice so require and without payment by the accused if he does not have sufficient means to pay for it (art. 14, para. 3(d)), to have free assistance of an interpreter if the accused cannot understand or speak the language used in court (art. 14, para. 3(f)), and finally the right not to be compelled to testify against himself or to confess guilt (art. 14, para. 3(g)). That all these provisions should, *mutatis mutandis*, also apply to review procedures is only normal, as they are emanations of a fair trial, which in general terms is required under article 14, paragraph 1.

Under article 14, paragraph 1, everyone is entitled not only to a fair but also to a public hearing; moreover, according to article 14, paragraph 3(d), the accused is entitled to be tried in his presence. According to the *travaux préparatoires* to the Covenant, the concept of a “public hearing” must be read against the background that in the legal system of many countries, trials take place on the basis of written documentation, which is deemed not to place at risk the parties’ procedural guarantees, as the content of all these documents can be made public. In my opinion, the requirement, in paragraph 1 of article 14, for a “public hearing” must be applied in a flexible way and cannot *prima facie* be understood as requiring a public *oral* hearing. I further consider that this explains why, at a later stage of the *travaux préparatoires* on article 14, paragraph 3 (d), the right to be tried in one’s own presence before the court of first instance was inserted.

In accordance with the Committee’s case law, there can be no *a priori* assumption in favour of public *oral* hearings in review procedures. It should be

noted that the right to be tried in one’s own presence has not explicitly been spelled out in the corresponding provision of the European Convention on Human Rights (art. 6, para. 3(c)). This in my opinion explains why the European Court of Human Rights, unlike the Committee, has found itself bound to interpret the concept of “public hearing” as a general requirement of “oral”. The formulations of article 14, paragraphs 1 and 3(d), of the Covenant leave room for a case-by-case determination of when an oral hearing must be deemed necessary in review procedures, from the point of view of the concept of “fair trial”. With regard to Mr. Karttunen’s case, an oral hearing was in my view undoubtedly required from the point of view of “fair trial” (within the meaning of article 14, paragraph 3(d)), as Mr. Karttunen had explicitly asked for an oral hearing that could not *a priori* be considered meaningless.

## Communication No. 395/1990

*Submitted by:* M. Th. Sprenger

*Date of communication:* 8 February 1990

*Alleged victim:* The author

*State party:* The Netherlands

*Date of adoption of Views:* 31 March 1992 (forty-fourth session)

*Subject matter: Differentiation in insurance coverage entitlements between married and unmarried couples*

*Procedural issue: No challenge to admissibility*

*Substantive issues: Discrimination on the ground of other status (marital status)—Objective and reasonable justification*

*Articles of the Covenant: 2(1) and 26*

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

*Rules of procedure: Rule 94(3)*

*Individual opinion: Dissenting opinions by Mr. Nisuke Ando, Mr. Kurt Herndl and Mr. Birame Ndiaye*

1. The author of the communication is Ms. M. Th. Sprenger, a citizen of the Netherlands, residing at Maastricht, the Netherlands. She claims to be a victim of a violation by the Netherlands of article 26 of the International Covenant on Civil and Political Rights.

*The facts as submitted by the author*

2.1 The author received unemployment benefits under the Netherlands Unemployment Benefits Act until 20 August 1987. At that date, the maximum benefits period came to an end. As a result of the termination of her benefits payment under the Netherlands Unemployment Benefits Act, her public health insurance also expired, pursuant to the Health Insurance Act. The author then applied for benefits pursuant to the State Group Regulations for Unemployed Persons, under which she would be equally entitled to public insurance under the Health Insurance Act.

2.2 The author's application was rejected on the grounds that she cohabited with a man whose income was higher than the benefits then

applicable under the State Group Regulations for Unemployed Persons. Her companion was, through his employment, insured under the Health Insurance Act. Under article 4, paragraph 1, of the Health Insurance Act, the spouse of an insured person may also be insured if she is below 65 years of age and shares the household, and if the insured person is considered as her, or his, breadwinner. The author explains that she had lived with her companion since October 1982 and that, on 8 August 1983, they formally registered their relationship by notarial contract, providing for the shared costs of the common household, property and dwelling.

2.3 The author's application for registration as a co-insured person with her partner was rejected by the regional social security body on 4 August 1987, on the ground that the Health Insurance Act did not provide for co-insurance to partners other than spouses. In this context, the author stresses that the very circumstance that she shares a household with her partner prevents her from receiving benefits under the State Group Regulations for Unemployed Persons, by virtue of which she herself would be insured under the Health Insurance Act, in which case the question of co-insurance would never have arisen.

2.4 On 3 February 1988, the Board of Appeal (*Raad van Beroep*) quashed the decision of 4 August 1987, stating that the discrimination between an official marriage and a common law marriage constituted discrimination within the meaning of article 26 of the Covenant. The judgement was in turn appealed by the regional social security board to the Central Board of Appeal (*Centrale Raad van Beroep*) which, on 28 September 1988, ruled that the decision of 4 August 1987 did not contravene article 26 of the Covenant. In its decision, the Central Board of Appeal referred to the decision of the Human Rights Committee in communication No. 180/1984, *Danning v. the Netherlands*<sup>1</sup> in

<sup>1</sup> See *Official Records of the General Assembly, Forty-second Session, Supplement No. 40 (A/42/40)*,

which it had been held that, in the circumstances of the case, a difference of treatment between married and unmarried couples did not constitute discrimination within the meaning of article 26 of the Covenant.

2.5 The author states that the Health Insurance Act has been amended and that it recognizes the equality of common law and official marriages as of 1 January 1988.

#### *The complaint*

3. The author claims that she is a victim of a violation by the State party of article 36 of the Covenant, because she was denied co-insurance under the Health Insurance Act, which distinguished between married and unmarried couples, whereas other social security legislation already recognized the equality of status between common law and official marriages.

#### *Committee's admissibility decision*

4.1 At its forty-first session, the Committee considered the admissibility of the communication. It noted that the State party had not raised any objection to the admissibility of the communication and it ascertained that the same matter was not being examined under another procedure of international investigation or settlement.

4.2 On 22 March 1991, the Committee declared the communication admissible in respect of article 26 of the Covenant.

#### *State party's submission on merits and the author's comments thereon*

5.1 In its submission, dated 15 November 1991, the State party argues that the differentiation between married and unmarried persons in the Health Insurance Act does not constitute discrimination within the meaning of article 26 of the Covenant. In this context, it refers to the Committee's views in communication No. 180/1984.

5.2 The State party contends that, although the author has entered into certain mutual obligations by notarial contract, considerable differences between her status and that of a

married person remain. The State party states that the Civil Code imposes additional obligations upon married persons, which the author and her partner have not taken upon themselves; it mentions, inter alia, the imposition of a maintenance allowance payable to the former spouse. The State party argues that nothing prevented the author from entering into the legal status of marriage, subsequent to which she would have been entitled to all corresponding benefits.

5.3 The State party submits that it has at no time taken any general decision to abolish the distinction between married persons and cohabitants, and that it has introduced equal treatment only in certain specific situations and on certain conditions. It further submits that each social security law was reviewed separately with regard to the introduction of equal treatment between married persons and cohabitants; this explains why in some laws equal treatment was incorporated sooner than in others.

6.1 In her reply to the State party's submission, the author submits that the differences between married and unmarried couples should be seen in the context of family law; they do not affect the socio-economic circumstances, which are similar to both married and unmarried couples.

6.2 The author further submits that the legal status of married couples and cohabitants, who confirmed certain mutual obligations by notarial contract, was found to be equivalent by the courts before. She refers in this context to a decision of the Central Board of Appeal, on 23 November 1986, concerning emoluments to married military personnel. She further contends that, as of 1 January 1987, equal treatment was accepted in almost all Dutch social security legislation, except for the Health Insurance Act and the General Widows and Orphans Act.

#### *Consideration on the merits*

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

7.2 The Committee observes that, although a State is not required under the Covenant to adopt social security legislation, if it does, such

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annex VIII, sect. C, Views adopted on 9 April 1987 at the twenty-ninth session.

legislation must comply with article 26 of the Covenant. Equality before the law implies that any distinctions in the enjoyment of benefits must be based on reasonable and objective criteria.<sup>2</sup>

7.3 In the instant case, the State party submits that there are objective differences between married and unmarried couples, which justify different treatment. In this context the State party refers to the Committee's views in *Dannina v. the Netherlands*, in which a difference of treatment between married and unmarried couples was found not to constitute discrimination within the meaning of article 26 of the Covenant.

7.4 The Committee recalls that its jurisprudence permits differential treatment only if the grounds therefore are reasonable and objective. Social developments occur within States parties and the Committee has in this context taken note of recent legislation reflecting these developments, including the amendments to the Health Insurance Act. The Committee has also noted the explanation of the State party that there has been no general abolition of the distinction between married persons and cohabitants, and the reasons given for the continuation of this distinction. The Committee finds this differential treatment to be based on reasonable and objective grounds. The Committee recalls its findings in Communication No. 180/1984 and applies them to the present case.

7.5 Finally, the Committee observes that the decision of a State's legislature to amend a law does not imply that the law was necessarily incompatible with the Covenant: States parties are free to amend laws that are compatible with the Covenant, and to go beyond Covenant obligations in providing additional rights and benefits not required under the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of any article of the International Covenant on Civil and Political Rights.

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<sup>2</sup> See *ibid.*, sect. B, *Broeks v. the Netherlands*, communication No. 172/1984; and *ibid.*, sect. D, *Zwaan-de Vries v. the Netherlands*, communication No. 182/1984, Views adopted on 9 April 1987.

## APPENDIX

*Individual opinion submitted by Mr. Nisuke Ando, Mr. Kurt Herndl and Mr. Birame Ndiaye, pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the Views of the Committee on communication No. 395/1990, M. Th. Sprenger v. the Netherlands*

We concur in the Committee's finding that the facts before it do not reveal a violation of article 26 of the Covenant. We further believe that this is an appropriate case to expand on the Committee's rationale, as it appears in these Views and in the Committee's Views in Communications Nos. 180/1984, *Danning v. the Netherlands* and 182/1984, *Zwaan-de Vries v. the Netherlands*.<sup>1</sup>

While it is clear that article 26 of the Covenant postulates an autonomous right to non-discrimination, we believe that the implementation of this right may take different forms, depending on the nature of the right to which the principle of non-discrimination is applied.

We note, firstly, that the determination whether prohibited discrimination within the meaning of article 26 has occurred depends on complex considerations, particularly in the field of economic, social and cultural rights. Social security legislation, which is intended to achieve aims of social justice, necessarily must make distinctions. While the aims of social justice vary from country to country, they must be compatible with the Covenant. Moreover, whatever distinctions are made must be based on reasonable and objective criteria. For instance, a system of progressive taxation, under which persons with higher incomes fall into a higher tax bracket and pay a greater percentage of their income for taxes, does not entail a violation of article 26 of the Covenant, since the distinction between higher and lower incomes is objective and the purpose of more equitable distribution of wealth is reasonable and compatible with the aims of the Covenant.

Surely, it is also necessary to take into account the reality that the socio-economic and cultural needs of society are constantly evolving, so that legislation - in particular in the field of social security - may well, and often does, lag behind developments. Accordingly, article 26 of the Covenant should not be interpreted as requiring absolute equality or non-discrimination in that field at all times; instead, it should be seen as a general undertaking on the part of the States parties to the Covenant to

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<sup>1</sup> See *Official Records of the General Assembly, Forty-second Session, Supplement No. 40 (A/42/40)*, annex VIII, sects. C and D, Views adopted on 9 April 1987.

regularly review their legislation in order to ensure that it corresponds to the changing needs of society. In the field of civil and political rights, a State party is required to respect Covenant rights such as the right to a fair trial, to freedom of expression and freedom of religion, immediately from the date of entry into force of the Covenant, and to do so without discrimination. On the other hand, with regard to rights enshrined in the International Covenant on Economic, Social and Cultural Rights, it is generally understood that States parties may need time for the progressive implementation of these rights and to adapt relevant legislation in stages; moreover, constant efforts are needed to ensure that distinctions that were reasonable and objective at the time of enactment of a social security provision are not rendered unreasonable and discriminatory by the socio-economic evolution of

society. Finally, we recognize that legislative review is a complex process entailing consideration of many factors, including limited financial resources, and the potential effects of amendments on other existing legislation.

In the context of the instant case, we have taken due note of the fact that the Government of the Netherlands regularly reviews its social security legislation, and that it has recently amended several acts, including the Health Insurance Act. Such review is commendable and in keeping with the requirement, in article 2, paragraphs 1 and 2, of the Covenant, to ensure the enjoyment of Covenant rights and to adopt such legislative or other measures as may be necessary to give effect to Covenant rights.



## Communications Nos. 406/1990 and 426/1990

*Submitted by:* Lahcen B. M. Oulajin and Mohamed Kaiss (represented by counsel)

*Date of communication:* 24 April 1990 and 22 August 1990

*Alleged victims:* The authors

*State party:* The Netherlands

*Date of adoption of Views:* 23 October 1992 (forty-sixth session)

*Subject matter:* Differentiation between parents of natural children and parents of foster children in social security entitlements

*Procedural issues:* Joinder of communication—*inadmissibility* *ratione materiae*

*Substantive issues:* Right to non-interference with family life—Right to privacy—Discrimination on the ground of other status—Objective and reasonable justification

*Articles of the Covenant:* 17(1) and 26

*Article of the Optional Protocol:* 3

*Rules of procedure:* Rules 88 and 94(3)

*Individual opinion:* By Mr. Kurt Herndl, Mr. Rein Müllerson, Mr. Birame Ndiaye and Mr. Waleed Sadi

1. The authors of the communications are Lahcen Oulajin and Mohamed Kaiss, Moroccan citizens born on 1 July 1942 and 7 July 1950 respectively, at present residing in Alkmaar, the Netherlands. They claim to be victims of a violation by the Netherlands of articles 17 and 26 of the International Covenant on Civil and Political Rights. They are represented by counsel.

*The facts as submitted by the authors*

2.1 Mr. Oulajin's wife and two children live in Morocco. On 19 October 1981, the author's brother died, leaving four children, born in 1970, 1973, 1976 and 1979. Subsequently, the author's wife in Morocco assumed responsibility for her nephews, with the consent of their mother.

2.2 Mr. Kaiss' wife and child live in Morocco. On 13 July 1979 the author's father died, leaving two young children, born in 1971 and 1974. Subsequently, the author assumed responsibility for the upbringing of his siblings

and the children were taken in by the author's family in Morocco.

2.3 The authors, who claim to be the only persons to contribute financially to the support of said relatives, applied for benefits under the Dutch Child Benefit Act (*Algemene Kinderbijslagwet*) claiming their dependents as foster children.<sup>1</sup> By letters of 7 May 1985 and 2 May 1984 respectively the Alkmaar Board of Labour (*Raad van Arbeid*) informed the authors that, while they were entitled to a benefit for their own children, they could not be granted a benefit for their siblings and nephews. It held that these children could not be considered to be foster children within the meaning of the Child Benefit Act, since the authors reside in the Netherlands and cannot influence their upbringing, as required under article 7, paragraph 5, of the Act.

2.4 Both authors appealed the decision to the Board of Appeal (*Raad van Beroep*) in Haarlem. On 19 February 1986 and 6 May 1986, the Board of Appeal rejected the appeals. They then appealed to the Central Board of Appeal (*Centrale Raad van Beroep*), arguing, *inter alia*, that because of lack of money, it had become impossible for them to support their foster children and that, as a result, their family life had suffered; they claimed that they formed a family with their foster children within the meaning of article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. They furthermore submitted that it would amount to discrimination if they were required to participate actively in the upbringing of the children concerned, as this requirement would be difficult to meet for migrant workers. They added that the requirement did not exist in respect of their own children.

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<sup>1</sup> For the purposes of this decision, a foster child is considered to be a child whose upbringing has been left to persons other than his or her natural or adoptive parents.

2.5 By decisions of 4 March 1987, the Central Board of Appeal dismissed the appeals. It held, *inter alia*, that in case of the upbringing of foster children, it was necessary to prove the existence of close links between the children and the applicant for purposes of the entitlement to child benefit. The Central Board of Appeal held that the cases did not raise the question of two similar situations being treated unequally, so that the issue of discrimination did not arise. In holding that a close, exclusive relationship between the children concerned and the individual applying for a child benefit is necessary, it argued that such a close relationship is presumed to exist in respect of one's own children, whereas it must be made plausible in respect of foster children.

2.6 The authors appealed to the European Commission of Human Rights, invoking articles 8 (*cf.* article 17 of the Covenant) and 14 (*cf.* article 26 of the Covenant) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. By decision of 6 March 1989, the Commission declared their communications inadmissible *ratione materiae*, holding that the Convention does not encompass a right to family allowances. In particular, article 8 could not be construed as obliging a State to grant such allowances. The right to family allowances was a social security right that fell outside the scope of the Convention. With regard to the alleged discrimination, the Commission reiterated that article 14 of the European Convention has no independent existence and that it only covers the rights and obligations recognized in the Convention.

### *Complaint*

3.1 The authors contend that the authorities of the Netherlands have violated article 26 of the Covenant. They refer to the Human Rights Committee's General Comment on article 26, which states, *inter alia*, that the principle of non-discrimination constitutes a basic and general principle relating to the protection of human rights. The authors argue that an inadmissible distinction is made in their case between "own children" and "foster children", all of which belong to the same family in Morocco.

3.2 The authors point out that the actual situation in which the children concerned live does not differ, and that, *de facto*, both have the same parents. The Dutch authorities do pay child benefits for natural children separated from their

parents and residing abroad, irrespective of whether the parent residing in the Netherlands is involved in the upbringing. The authors therefore consider it unjust to deny benefits for their foster children merely on the basis of the fact that they cannot actively involve themselves in their upbringing. In their opinion, the "differential treatment" is not based on "reasonable and objective" criteria.

3.3 The authors argue that not only "Western standards" should be taken into account in the determination of whether or not to grant child benefits. It was in conformity with Moroccan tradition that they had taken their relatives into their family.

3.4 The authors further allege a violation of article 17 of the Covenant. They state that they are unemployed in the Netherlands and depend on an allowance in accordance with the General Social Security Act. This allowance amounts to the social minimum. The child benefits are essential for them in order to support their family in Morocco. By refusing the child benefits for their foster children, the authors contend, a "family life with them is *de facto* impossible", thus violating their rights under article 17.

### *The Committee's decision on admissibility*

4.1 At its forty-first and forty-second sessions, respectively, the Committee considered the admissibility of the communications. It noted that the State party had raised no objection to admissibility, confirming that the authors had exhausted all available domestic remedies. It further noted that the facts as submitted by the authors did not raise issues under article 17 of the Covenant and that this aspect of the communication was therefore inadmissible *ratione materiae* under article 3 of the Optional Protocol.

4.2 As to the authors' allegations that they were victims of discrimination, the Committee took note of their claim that the distinction made in the Child Benefit Act between natural and foster children is not based on reasonable and objective criteria, and decided to examine this question in the light of the State party's submission on the merits.

4.3 By decision of 23 March 1991, the Committee declared Mr. Oulajin's communication admissible in so far as it might raise issues under article 26 of the

Covenant. By decision of 4 July 1991, the Committee similarly declared Mr. Kaiss' communication admissible. On 4 July 1991 the Committee decided to join consideration of the two communications.

*State party's merits submission and the authors' comments thereon*

5.1 By submission of 30 March 1992, the State party explains that, pursuant to the Child Benefit Act, residents of the Netherlands, regardless of their nationality, receive benefit payments to help cover the maintenance costs of their minor children. Provided certain conditions are met, an applicant may be entitled to a child benefit, not only for his own children, but also for his foster children. The Act lays down the condition that the foster child must be (a) maintained and (b) brought up by the applicant as if he or she were the applicant's own child.

5.2 The State party submits that the authors' allegations of discrimination raise two issues:

(1) Whether the distinction between an applicant's own children and foster children constitutes a violation of article 26 of the Covenant;

(2) Whether the regulations governing the entitlement to child benefit for foster children, as applied in the Netherlands, result in an unjustifiable disadvantage for non-Dutch nationals, residing in the Netherlands.

5.3 As to the first issue, the State party submits that to be entitled to child benefit for foster children, the applicant must raise the children concerned in a way comparable to that in which parents normally bring up their own children. This requirement does not apply to the applicant's own children. The State party argues that this distinction does not violate article 26 of the Covenant; it submits that the aim of the relevant regulations is to determine, on the basis of objective criteria, whether the relationship between the foster parent and the foster child is so close that it is appropriate to provide child benefit as if the child were the foster parent's own.

5.4 As to the second issue, the State party submits that no data exist to show that the regulations affect migrant workers more than Dutch nationals. It argues that the Act's

requirements governing entitlement to child benefit for foster children are applied strictly, regardless of the nationality of the applicant or the place of residence of the foster children. It submits that case law shows that applicants of Dutch nationality, residing in the Netherlands, are also deemed ineligible for child benefit for their foster children who are resident abroad. Moreover, if one or both of the parents are still alive, it is assumed in principle that the natural parent has a parental link with the child, which as a rule prevents the foster parent from satisfying the requirements of the Child Benefit Act.

5.5 Furthermore, the State party argues that, even if proportionally fewer migrant workers than Dutch nationals fulfil the statutory requirements governing entitlement to child benefit for foster children, this does not imply discrimination as prohibited by article 26 of the Covenant. In this connection, it refers to the decision of the Committee in communication No. 212/1986, *P. P. C. v. the Netherlands*,<sup>2</sup> in which it was held that the scope of article 26 does not extend to differences of results in the application of common rules in the allocation of benefits.

5.6 In conclusion, the State party submits that the statutory regulations concerned are a necessary and appropriate means of achieving the objectives of the Child Benefit Act, i.e. making a financial contribution to the maintenance of children with whom the applicant has a close, exclusive, parental relationship, and do not result in discrimination as prohibited by article 26 of the Covenant.

6.1 In his comments on the State party's observations, counsel maintains his allegation that the distinction between own children and foster children in the Child Benefit Act is discriminatory. He argues that the authors' foster children live in exactly the same circumstances as their own children. In this connection, reference is made to article 24 of the Covenant, which stipulates that a child is entitled to protection on the part of his family, society and the State without any discrimination as to, inter alia, birth. According to counsel, no distinction can be made between the authors' own and foster children regarding the intensity and exclusivity in the relationship with the authors.

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<sup>2</sup> Declared inadmissible on 24 March 1988, para. 6.2.

6.2 Counsel further argues that it is evident that this distinction affects foreign employees working in the Netherlands more than Dutch residents, since the foreign employees often choose to leave their family in the country of origin, while there is no such necessity for Dutch residents to leave their family abroad. In this connection, counsel contends that the State party ignores that the Netherlands is to be considered an immigration country.

*Examination of the merits*

7.1 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.

7.2 The question before the Committee is whether the authors are victims of a violation of article 26 of the Covenant, because the authorities of the Netherlands denied them a family allowance for certain of their dependants.

7.3 In its constant jurisprudence, the Committee has held that although a State party is not required by the Covenant on Civil and Political Rights to adopt social security legislation, if it does, such legislation and the application thereof must comply with article 26 of the Covenant. The principle of non-discrimination and equality before the law implies that any distinctions in the enjoyment of benefits must be based on reasonable and objective criteria.<sup>3</sup>

7.4 With respect to the Child Benefit Act, the State party submits that there are objective differences between one's own children and foster children, which justify different treatment under the Act. The Committee recognizes that the distinction is objective and need only focus on the reasonableness criterion. Bearing in mind that certain limitations in the granting of benefits may be inevitable, the Committee has considered whether the distinction between one's own

children and foster children under the Child Benefit Act, in particular the requirement that a foster parent be involved in the upbringing of the foster children, as a precondition to the granting of benefits, is unreasonable. In the light of the explanations given by the State party, the Committee finds that the distinctions made in the Child Benefit Act are not incompatible with article 26 of the Covenant.

7.5 The distinction made in the Child Benefit Act between own children and foster children precludes the granting of benefits for foster children who are not living with the applicant foster parent. In this connection, the authors allege that the application of this requirement is, in practice, discriminatory, since it affects migrant workers more than Dutch nationals. The Committee notes that the authors have failed to submit substantiation for this claim and observes, moreover, that the Child Benefit Act makes no distinction between Dutch nationals and non-nationals, such as migrant workers. The Committee considers that the scope of article 26 of the Covenant does not extend to differences resulting from the equal application of common rules in the allocation of benefits.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of any provision of the Covenant.

APPENDIX

*Individual opinion submitted by Mr. Kurt Herndl, Mr. Rein Müllerson, Mr. Birame N'Diaye and Mr. Waleed Sadi, pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the Views of the Committee on communications Nos. 406/1990 and 426/1990, L. Oulajin and M. Kaiss v. the Netherlands*

We concur in the Committee's finding that the facts before it do not reveal a violation of article 26 of the Covenant. While referring to the individual opinion attached to the decision concerning *Sprenger v. the Netherlands* (communication No. 395/1990),<sup>1</sup> we consider it proper to briefly expand on the Committee's rationale, as it appears in these views and in the Committee's views on communications

<sup>1</sup> Views adopted on 31 March 1992, forty-fourth session.

<sup>3</sup> See *Broeks v. the Netherlands*, communication No. 172/1984, and *Zwaan-de-Vries v. the Netherlands*, communication No. 182/1984, Views adopted on 9 April 1987, para. 12.4; *Vos v. the Netherlands*, communication No. 218/1986, Views adopted on 29 March 1989, para. 11.3; *Pauger v. Austria*, communication No. 415/1990, Views adopted on 26 March 1992, para. 7.2; *Sprenger v. the Netherlands*, communication No. 395/1990, Views adopted on 31 March 1992, para. 7.2.

Nos. 172/1984, *Broeks v. the Netherlands* and 182/1984, *Zwaan-de Vries v. the Netherlands*.<sup>2</sup>

It is obvious that while article 26 of the Covenant postulates an autonomous right to non-discrimination, the implementation of this right may take different forms, depending on the nature of the right to which the principle of non-discrimination is applied.

With regard to the application of article 26 of the Covenant in the field of economic and social rights, it is evident that social security legislation, which is intended to achieve aims of social justice, necessarily must make distinctions. It is for the legislature of each country, which best knows the socio-economic needs of the society concerned, to try to achieve social justice in the concrete context. Unless the distinctions made are manifestly discriminatory or arbitrary, it is not for the Committee to re-evaluate the complex socio-economic data and substitute its judgement for that of the legislatures of States parties.

Furthermore it would seem to us that it is essential to keep one's sense of proportion. With respect to the present cases, we note that the authors are asking for child benefits not only for their own children - to which they are entitled under the legislation of the Netherlands - but also for siblings, nephews and nieces, for whom they claim to have accepted responsibility and hence consider as dependants. On the basis of the information before the Committee, such demands appear to run counter to a general sense of proportion, and their denial by the government concerned cannot be considered unreasonable in view of the budget limitations which exist in every social security system. While States parties to the Covenant may wish to extend benefits to such wide-ranging categories of dependants, article 26 of the Covenant does not require them to do so.

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<sup>2</sup> Views adopted on 9 April 1987, twenty-ninth session.

## Communication No. 415/1990

*Submitted by:* Dietmar Pauger

*Date of communication:* 5 June 1990

*Alleged victim:* The author

*State party:* Austria

*Date of adoption of Views:* 26 March 1992 (forty-fourth session)

*Subject matter:* Discrimination in the allocation of pension benefits

*Procedural issue:* State party to the Optional Protocol

*Substantive issues:* Discrimination on the ground of sex—Equality before the law—Objective and reasonable justification

*Articles of the Covenant:* 3, 14(1) and 26

*Article of the Optional Protocol:* 1

*Rules of procedure:* Rule 94(3)

*Individual opinion:* Dissenting opinion by Mr. Nisuke Ando

1. The author of the communication is Dietmar Pauger, an Austrian citizen born in 1941 and a resident of Graz, Austria. He claims to be a victim of a violation by Austria of article 26 of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force with respect to Austria on 10 March 1988.

*The facts as submitted by the author*

2.1 The author works as a university professor. His wife died on 23 June 1984. She had been a civil servant and employed as a teacher in a public school in the province of Styria (*Land Steiermark*). On 24 August 1984, the author submitted a pension claim pursuant to the Pension Act of 1965 (*Pensionsgesetz* 1965). He notes that the Pension Act granted preferential treatment to widows, as they would receive a pension, regardless of their income, whereas widowers could receive pensions only if they did not have any other form of income. Since the author was gainfully employed, the provincial government of Styria (*Steiermärkische Landesregierung*) rejected his claim, which was similarly dismissed on appeal by the Constitutional Court of Austria (*Verfassungsgerichtshof*).

2.2 Subsequently, the eighth amendment to the Pension Act (8. *Pensionsgesetznovelle*) of 22 October 1985 introduced a general widower pension, applicable retroactively from 1 March 1985. However, a three-phase pension scheme was set up, providing reduced benefits in the first two stages: one third of the pension as of 1 March 1985, two thirds as of 1 January 1989, the full pension as of 1 January 1995.

2.3 On 13 May 1985 the author again applied for a widower's pension, which was granted at the reduced (one-third) level provided for in the eighth amendment. However, according to a particular provision of this amendment, applicable only to civil servants, the pension initially was not paid to the author but placed "in trust".

2.4 The author subsequently appealed to the Constitutional Court, requesting (a) payment of the full pension; and (b) the annulment of the provision stipulating that pensions of civil servants are "kept in trust" (*Ruhensbestimmung*). By decision of 16 March 1988, the Constitutional Court held the *Ruhensbestimmung* to be unconstitutional, but did not settle the question of the constitutionality of the three phases of pension benefits for widowers. After yet another appeal, the Constitutional Court dismissed, on 3 October 1989, the author's request for a full pension and the annulment of the three phases of implementation.

*Complaint*

3. The author claims to be a victim of a violation of article 26 of the Covenant, because, whereas a widow would have received a full pension under similar circumstances, he, as a widower, received no pension at all from 24 June 1984 to 28 February 1985, and has received only a partial pension since then. In particular, he contends that the inequality in pension benefits resulting from the three phases of implementation of the eighth amendment to the Pension Act constitutes discrimination, since the differentiation between widows and

widowers is arbitrary and cannot be said to be based on reasonable and objective criteria.

#### *Committee's admissibility decision*

4. At its forty-first session, the Committee considered the admissibility of the communication, noting that the State party had not raised any objections to admissibility. On 22 March 1991, the Committee declared the communication admissible in respect of article 26 of the Covenant.

#### *The State party's merits submission and the author's comments thereon*

5.1 In its submission, dated 8 October 1991, the State party argues that the former Austrian pension legislation was based on the fact that in the overwhelming majority of cases only the husband was gainfully employed, and therefore only he was able to acquire an entitlement to a pension from which his wife might benefit. It submits that, in response to changed social conditions, it amended both family legislation and the Pension Act; equality of the husband's position under pension law is to be accomplished in a number of successive stages, the last of which will be completed on 1 January 1995.

5.2 The State party further submits that new legislation, designed to change old social traditions, cannot be translated into reality from one day to the other. It states that the gradual change in the legal position of men with regard to their pension benefits was necessary in the light of the actual social conditions, and hence does not entail any discrimination. In this context, the State party points out that the equal treatment of men and women for purposes of civil service pensions has financial repercussions in other areas, as the pensions will have to be financed by the civil servants, from whom pension contributions are levied.

6.1 In his reply to the State party's submission, the author argues that pursuant to amendments in family law, equal rights and duties have existed for both spouses since 1 January 1976, in particular with regard to their income and their mutual maintenance. He further submits that in the public sector men and women receive equal payment for equal services and have also to pay equal pension fund contributions. The author states that there is no convincing reason as to why a period of nearly two decades since the emancipation of men and

women in family law should be necessary for the legal emancipation in pension law to take place.

6.2 According to the author, neither the financial burden on the State's budget, nor the fact that many men are entitled to pensions of their own, can be used as arguments against the obligation to treat men and women equally, pursuant to article 26 of the Covenant. The author points out that the legislator could have established other, such as income-related, criteria to distinguish between those who are entitled to a full pension and those who are not. He further submits that the financial burden caused by the equal treatment of men and women under the Pension Act would be comparatively low, because of the small number of widowers who are entitled to such a pension.

#### *Examination of the merits*

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

7.2 The Committee has already had the opportunity to express the view<sup>1</sup> that article 26 of the Covenant is applicable also to social security legislation. It reiterates that article 26 does not of itself contain any obligation with regard to the matters that may be provided for by legislation. Thus it does not, for example, require any State to enact pension legislation. However, when it is adopted, then such legislation must comply with article 26 of the Covenant.

7.3 The Committee reiterates its constant jurisprudence that the right to equality before the law and to the equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26.

7.4 In determining whether the Austrian Pension Act, as applied to the author, entailed a differentiation based on unreasonable or

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<sup>1</sup> See *Official Records of the General Assembly, Forty-second Session, Supplement No. 40 (A/42/401)*, annex VIII, sects. D and B, *Zwaan-de Vries v. the Netherlands*, communication No. 182/1984, and *Broeks v. the Netherlands*, communication No. 172/1984, Views adopted on 9 April 1987.

unobjective criteria, the Committee notes that the Austrian family law imposes equal rights and duties on both spouses, with regard to their income and mutual maintenance. The Pension Act, as amended on 22 October 1985, however, provides for full pension benefits to widowers only if they have no other source of income; the income requirement does not apply to widows. In the context of said Act, widowers will only be entitled to full pension benefits on equal footing with widows as of 1 January 1995. This in fact means that men and women, whose social circumstances are similar, are being treated differently, merely on the basis of sex. Such a differentiation is not reasonable, as is implicitly acknowledged by the State party when it points out that the ultimate goal of the legislation is to achieve full equality between men and women in 1995.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the application of the Austrian Pension Act in respect of the author after 10 March 1988, the date of entry into force of the Optional Protocol for Austria, made him a victim of a violation of article 26 of the International Covenant on Civil and Political Rights, because he, as a widower, was denied full pension benefits on equal footing with widows.

9. The Committee notes with appreciation that the State party has taken steps to remove the discriminatory provisions of the Pension Act as of 1995. Notwithstanding these steps, the Committee is of the view that the State party should offer Mr. Dietmar Pauger an appropriate remedy.

10. The Committee wishes to receive information, within 90 days, 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. 415/1990, D. Pauger v. Austria*

I do not oppose the Committee's Views that the application of the Austrian Pension Act to the author made him a victim of a violation of article 26 of the Covenant: this conclusion is in line with the jurisprudence of the Committee (see *Zwaan-de Vries v. the Netherlands*, communication No. 182/1984, and *Broeks v. the Netherlands*, communication No. 172/1984).<sup>1</sup>

However, concerning the application of the principle of non-discrimination and equality before the law, I would like to point to the following possibility, which the Committee should have taken into account in the adoption of its Views: had the author claimed that Austria amend the Pension Act so that the income requirement apply to widows as well as to widowers on equal footing, the Committee would have found it difficult to conclude that the Act is a violation of article 26.

The author himself points out that the legislator could have established "other, such as income-related, criteria" to distinguish between those who are entitled to a full pension and those who are not (see para. 6.2), although such income-related criteria could have deprived widows who have other forms of income of their existing entitlements to full pensions.

This implies that the State party's legislature could have circumvented violations of article 26 *either* by raising the status of widowers to that of widows *or* by lowering the status of widows to that of widowers. From a legalistic point of view, either choice might have been compatible with the principle of non-discrimination and equality before the law. Practical considerations, however, suggest that society would hardly have endorsed the second alternative.

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<sup>1</sup> See *Official Records of the General Assembly, Forty-second Session, Supplement No. 40 (A/42/40)*, annex VIII, sects. D and B.



## Annex I

**STATISTICAL SURVEY OF STATUS OF COMMUNICATIONS**  
as at 31 December 1992

<i>State</i>	<i>Living Cases</i>		<i>Concluded Cases</i>		
	<i>Pre-admissible &amp; Admissible</i>	<i>Inadmissible</i>	<i>Discontinued</i>	<i>Views (1)/(2)*</i>	<i>Total</i>
ALGERIA				-	-
ANGOLA				-	-
ARGENTINA	1	4	-	-	5
AUSTRALIA	3	1		-	4
AUSTRIA		1		1-0	2
BARBADOS	3			-	3
BELARUS				-	-
BENIN				-	-
BOLIVIA				2-0	2
BULGARIA				-	-
CAMEROON	1			-	1
CANADA	6	32	16	3-4	61
CENTRAL AFRICAN REPUBLIC	1			-	1
CHILE				-	-
COLOMBIA	1	3	5	6-0	15
CONGO				-	-
COSTA RICA		1	1	-	2
CYPRUS				-	-
CZECHOSLOVAKIA	2			-	2
DENMARK		7	1	-	8
DOMINICAN REPUBLIC	1			2-0	3
ECUADOR	3		2	3-0	8
EQUATORIAL GUINEA	2			-	2
ESTONIA				-	-
FINLAND	5	10	2	3-4	24
FRANCE	7	14		1-5	27
GAMBIA				-	-
HUNGARY	3	1	1	1-0	6
ICELAND			1	-	1
IRELAND				-	-
ITALY	1	7	2	0-1	11
JAMAICA	39	32	10	16-7	94
LIBYAN ARAB JAMAHIRIYA	1	1		-	2
LIECHTENSTEIN				-	-
LITHUANIA				-	-
MADAGASCAR	1		1	4-0	6

MALTA				-	-
MAURITIUS		1		1-0	2
MONGOLIA				-	-
NEPAL				-	-
NETHERLANDS	14	22		5-5	46
NEW ZEALAND	1			-	1
NICARAGUA	1	1	3	-	5
NIGER				-	-
NORWAY	1	7		-	8
PANAMA	9		1	1-0	11
PERU	1		4	3-0	8
PHILIPPINES	1			-	1
POLAND				-	-
PORTUGAL				-	-
REPUBLIC OF KOREA	2			-	2
RUSSIAN FEDERATION				-	-
SAINT VINCENT & THE GRENADINES				-	-
SAN MARINO				-	-
SENEGAL	1			-	1
SEYCHELLES				-	-
SOMALIA				-	-
SPAIN	6	1	1	-	8
SURINAME				8-0	8
SWEDEN	1	2	1	0-5	9
TOGO	4			-	4
TRINIDAD AND TOBAGO	12	5	3	1-0	21
UKRAINE		-	-	-	-
URUGUAY	2	4	28	44-1	79
VENEZUELA				1-0	1
ZAIRE	2	3	2	8-0	15
ZAMBIA	4			-	4
(67)	133	160	85	144-32	524

\* (1) Views disclose a violation of article(s) of the Covenant;  
(2) Views do not disclose a violation

## ANNEX II

### SUMMARY OF STATES PARTIES' REPLIES PURSUANT TO THE ADOPTION OF VIEWS BY THE HUMAN RIGHTS COMMITTEE

NOTE: Owing to logistical problems, the full text of the replies could not be reproduced. However, they are on file with the Committee's secretariat and references to follow-up on Views is regularly made in the Committee's annual reports. Pertinent references are indicated wherever possible.

#### Communication No. 167/1984

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

*Date of communication:* 14 February 1984

*Alleged victim:* Lubicon Lake Band

*State party:* Canada

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

#### **Response, dated 25 November 1991, of the Government of Canada to the Committee's Views\***

On 25 November 1991 the Government of Canada informed the Committee that the remedy awarded to the Lubicon Lake Band consisted of a comprehensive package of benefits and programmes valued at Can\$ 45 million (in addition to the value of land, mineral rights or possible provincial contributions) and a 95 square mile reserve. The Committee was also informed that the Band had withdrawn from negotiations on 24 January 1989 regarding the issue of whether the Band should receive additional compensation of approximately

Can\$ 170 million. Informal discussions continued in February 1990 between lawyers for the Canadian Government, the province of Alberta and leaders of the Band. The discussions terminated when the Band reopened its demand for additional compensation. The Government subsequently offered to have any outstanding issue resolved by arbitration.

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\* For the Committee's Views, see *Selected Decisions*, vol. 3, p. 62.

#### 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)

#### **Response, dated 7 June 1991, of the Government of Colombia to the Committee's Views\***

The State party, in a submission dated 7 June 1991, challenged the Committee's Views, considering that there had been no violations of articles 9 and 25(c) of the Covenant. The State party subsequently, on 21 April 1997,

forwarded a copy of resolution No. 10/96 adopted by a Ministerial Committee established pursuant to enabling legislation No. 288/1996 dated 11 September 1996, recommending payment of compensation to the author of the communication.

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\* For the Committee's Views, see *Selected Decisions*, vol. 3, p. 85.

**Communication No. 196/1985**

*Submitted by:* Ibrahima Gueye *et al* (represented by counsel)

*Date of communication:* 12 October 1985

*Alleged victim:* The authors

*State party:* France

*Date of adoption of Views:* 3 April 1989 (thirty-fifth session)

**Response, dated 30 January 1996, of the Government of France to the Committee's Views\***

On 30 January 1996, the French Government indicated that the pensions of former Senegalese soldiers of the French Army and those of former soldiers of the French Army who were citizens of other former French colonies had been readjusted on several occasions since the adoption of the Committee's Views. These adjustments had taken effect

on 1 July 1989 (general readjustment of 8 per cent); 1 January 1993 (readjustment of 8.2 per cent for Senegalese citizens); 1 September 1994 (general readjustment of military invalidity pensions by 4.75 per cent); 1 January 1995 (general readjustment of certain types of military invalidity pensions by 20 per cent). The State party further indicated that an association of former Senegalese soldiers of the French Army had filed a request for a readjustment of military pensions before the Administrative Tribunal in Paris.

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\* For the Committee's Views, see *Selected Decisions*, vol. 3, p. 89.

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**Communication No. 202/1986**

*Submitted by:* Graciela Ato del Avellanal

*Date of communication:* 13 January 1986

*Alleged victim:* The author

*State party:* Peru

*Date of adoption of Views:* 28 October 1988 (thirty-fourth session)

**Response, dated 24 September 1996, of the Government of Peru to the Committee's Views\***

In a submission dated 24 September 1996, the State party informed the Committee of investigations carried out in respect of the current situation of the case, including a meeting held with the victim's lawyer, who had expressed surprise at the actions taken by the Supreme Court. The case had been considered by the

recently established Consejo Nacional de Derechos Humanos, created to improve respect for human rights in Peru. The State party failed to indicate what measures, if any, had been taken to implement the Committee's recommendations. The author of the communication subsequently submitted various complaints indicating that the State party had not implemented the recommendations.

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\* For the Committee's Views, see *Selected Decisions*, vol. 3, p. 104.

**Communication No. 203/1986**

*Submitted by:* Rubén Toribio Muñoz Hermoza  
*Date of communication:* 31 January 1986  
*Alleged victim:* The author  
*State party:* Peru  
*Date of adoption of Views:* 4 November 1988 (thirty-fourth session)

**Response, dated 24 September 1996, of the Government of Peru to the Committee's Views\***

In its submission dated 24 September 1996, the State party indicated that it had contacted the author's counsel. Since 1989 the author had complained that the State party had not given effect to the Committee's Views. After

the author resubmitted the case to the Committee, the State party orally informed the Committee, at its seventieth session in October 2000, that a remedy had been granted to the author. No written confirmation of this information or clarification of the nature of the remedy was provided (A/56/40, para. 195).

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\* For the Committee's Views, see *Selected Decisions*, vol. 3, p. 106.

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**Communication No. 253/1987**

*Submitted by:* Paul Kelly (represented by counsel)  
*Date of communication:* 15 September 1987  
*Alleged victim:* The author  
*State party:* Jamaica  
*Date of adoption of Views:* 8 April 1991 (forty-first session)

**Response, dated 22 November 1995, of the Government of Jamaica to the Committee's Views\***

By a note dated 22 November 1995, the State party informed the Committee that the death sentence had been commuted. During the follow-up mission to Jamaica in June 1995, the Special Rapporteur had been informed that 22 death sentences had been commuted on the basis of reclassification of the offence or as a result of the Privy Council judgment of 2 November 1993 in the *Pratt and*

*Morgan* case. The State party informed the Committee also that the death sentence against Clyde Sutcliffe had been commuted (see Views on case No. 271/1988 in this volume).

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\* For the Committee's Views, see this volume, *supra*, p. 60.

**Communication No. 263/1987**

*Submitted by:* Miguel Gonzalez del Río

*Date of communication:* 19 October 1987

*Alleged victim:* The author

*State party:* Peru

*Date of adoption of Views:* 28 October 1992 (forty -sixth session)

**Response, dated 24 September 1996, of the Government of Peru to the Committee's Views\***

In its submission dated 24 September 1996, the State party informed the Committee of investigations carried out in respect of the status of the case, and noted that a meeting had been held with the author himself, who had presented

his version of the facts. The State party indicated that copies of the Constitutional Court files had been consulted, but did not indicate whether any measures had been taken to implement the Committee's recommendations.

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\* For the Committee's Views, see this volume, *supra*, p. 68.

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**Communication No. 277/1988**

*Submitted by:* Marietta Terán Jijón joined by her son Juan Terán Jijón

*Date of communication:* 21 January 1988

*Alleged victim:* Juan Terán Jijón

*State party:* Ecuador

*Date of adoption of Views:* 26 March 1992 (forty-fourth session)

**Response, dated 11 June 1992, of the Government of Ecuador to the Committee's Views\***

On 11 June 1992, the State party provided a formalistic reply in which it did not touch on any of the issues raised by the

Committee. It simply provided a copy of a report containing the results of an investigation by the national police into the alleged criminal activities of the author of the communication. It failed to indicate the whereabouts of Mr. Terán Jijón.

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\* For the Committee's Views, see this volume, *supra*, p. 76.

**Communication No. 305/1988**

*Submitted by:* Hugo van Alphen  
*Date of communication:* 12 April 1988  
*Alleged victim:* The author  
*State party:* The Netherlands  
*Date of adoption of Views:* 23 July 1990 (thirty-ninth session)

**Response, dated 15 May 1991, of the Government of the Netherlands to the Committee's Views\***

In a submission dated 15 May 1991, the State party informed the Committee that the Netherlands statutory regulations on pre-trial detention did not constitute a violation of article 9 of the Covenant. In particular, they did not breach the prohibition of arbitrariness contained therein. The Government of the Netherlands was unable to share the Committee's view that there

had been a violation of article 9, paragraph 1, of the Covenant. It further believed that the statutory rules in force furnished sufficient guarantees that its obligations under article 9 would be fulfilled in the future, as in the past. However, out of respect for the Committee, and taking into account all relevant circumstances, the Government was prepared to make an *ex gratia* payment of 5,000 Netherlands guilders to Mr. van Alphen.

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\*For the Committee's Views, see *Selected Decisions*, vol. 3, p. 170.

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**Communication No. 336/1988**

*Submitted by :* Nicole Fillastre (victim's wife)  
*Date of communication:* 27 September 1988  
*Alleged victims:* Andre Fillastre and Pierre Bizouarn  
*State party:* Bolivia  
*Date of adoption of Views:* 5 November 1991 (forty-third session)

**Response, dated 23 April 1997, of the Government of Bolivia to the Committee's Views\***

In its submission dated 23 April 1997, the State party informed the Committee that the authors of the communication had been released from detention on 3 June 1993 and had immediately left the country without filing any

claim for compensation. The State party indicated that its domestic legislation governing bail had been changed in order to comply with the Committee's finding on article 9, paragraph 2, of the Covenant. In addition, the judicial system was being reformed in order to comply with article 9, paragraph 3, of the Covenant.

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\* For the Committee's Views, see this volume, *supra*, p. 96.

**Communication No. 349/1989**

*Submitted by:* Clifton Wright (represented by counsel)

*Date of communication:* 12 January 1989

*Alleged victim:* The author

*State party:* Jamaica

*Date of adoption of Views:* 27 July 1992 (forty-fifth session)

**Response, dated 16 June 1995, of the Government of Jamaica to the Committee's Views\***

In a submission dated 16 June 1995, the State party informed the Committee that the Jamaican Privy Council had recommended commutation of the death sentence rather than

the release of the author of the communication. By a subsequent note dated 22 November 1995, the State party informed the Committee that the death sentence had been commuted.

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\* For the Committee's Views, see this volume, *supra*, p. 100.

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**Communication No. 387/1989**

*Submitted by:* Arvo O. Karttunen (represented by counsel)

*Date of communication:* 2 November 1989

*Alleged victim:* The author

*State party:* Finland

*Date of adoption of Views:* 23 October 1992 (forty-sixth session)

**Response, dated 20 April 1999, of the Government of Finland to the Committee's Views\***

In a submission dated 20 April 1999, the State party informed the Committee that it had contacted the author's lawyer in 1993 and that agreement had been reached to request an annulment of the domestic decision to it by the Supreme Court and that the matter of awarding

compensation would be examined afterwards. Counsel had failed to present a request for annulment or compensation. The State party further informed the Committee that the Code of Judicial Procedure had been amended effective 1 May 1998. According to the new provisions of the Code, oral hearings could be requested by any of the parties before the Court of Appeal.

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\* For the Committee's Views, see this volume, *supra*, p. 108.



**Communication No. 415/1990**

*Submitted by:* Dietmar Pauer

*Date of communication:* 5 June 1990

*Alleged victim:* The author

*State party:* Austria

*Date of adoption of Views:* 26 March 1992 (forty-fourth session)

**Response, dated 11 August 1992, of the Government of Austria to the Committee's Views\***

By a note dated 11 August 1992, the State party informed the Committee that it could not compensate the author for lack of enabling legislation. The State party implied that

amendment of the challenged law would provide the author with an appropriate remedy. After the State party, in letters dated 11 September 1992 and 27 April 1993, invoked the "non-binding character" of the Committee's recommendations, the author filed a new communication dated 22 January 1996 with the Committee, registered as No. 716/1996.

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\* For the Committee's Views, see this volume, *supra*, p. 122.



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