OFFICE OF THE UNITED NATIONS
HIGH COMMISSIONER FOR HUMAN RIGHTS

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE under THE OPTIONAL PROTOCOL

Volume 5

(Forty-seventh to fifty-fifth sessions)

UNITED NATIONS
New York and Geneva, 2005

NOTE

CCPR/C/OP/5

UNITED NATIONS PUBLICATION

Sales No 04.XIV.9

ISBN 92-1-154164-6

CONTENTS

(Selected decisions – Forty-seventh to fifty-fifth sessions)

ANNEX

INDEXES

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 1995, 86 of the 132 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 fifty-fifth session in the autumn of 1995, 675 communications relating to alleged violations by 49 States parties were placed before it for consideration. As at the end of 1995, the status of these communications was as follows:

(a)	Concluded by adoption of Views under article 5 (4) of the Optional Protocol	216
(b)	Declared inadmissible	219
(c)	Discontinued or withdrawn	108
(d)	Declared admissible but not yet concluded	40
(e)	Pending at pre-admissibility stage	92

8. In its first sixteen years, the Committee received many more than the 675 registered communications mentioned above. The Secretariat regularly receives inquiries from individuals who intend to submit a communication to the Committee. Such inquiries are not immediately registered as cases. In fact, the number of authors who eventually submit cases for consideration by the Committee under the Optional Protocol is relatively small, partly because the authors discover that their cases do not satisfy certain basic criteria of admissibility, such as the required exhaustion of domestic remedies, and partly because they realize that a reservation or a declaration by the State party concerned may operate to preclude the Committee's competence to consider the case. These observations notwithstanding, the number of communications placed before the Committee is increasing steadily, and the Committee's work is becoming better known to lawyers, researchers and the general public. The purpose of the *Selected Decisions* series is to contribute to the dissemination of its work.

9. The first step towards wider dissemination of the Committee's work was the decision taken during the seventh session to publish its Views: publication was desirable in the interests of the most effective exercise of the Committee's functions under the Protocol, and publication in full was preferable to the publication of brief summaries. From the Annual Report of the Human Rights Committee in 1979 up to the 1993 report incorporating the forty-sixth session, all the Committee's Views and a selection of its decisions declaring communications inadmissible, decisions in reversal of admissibility and decisions to discontinue consideration were published in full.[1]

10. At its fifteenth session, the Committee decided to proceed with a separate project, the periodical publication of a selection of its decisions under the Optional Protocol, including certain important decisions declaring communications admissible and other decisions of an interlocutory nature. Volume 1 of this series, covering decisions taken from the second to the sixteenth session inclusive, was published in 1985 in English.[2] Volume 2 covers decisions taken 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.[3]

11. Volume 5 covers sessions forty-seven to fifty-five 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.[4]

12. The current volume contains 3 decisions declaring the communication inadmissible, including 1 decision requesting interim measures of protection under rule 86, and 26 Views under article 5 (4) of the Optional Protocol.

13. In the case of decisions relating to communications declared inadmissible or on which

---

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

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

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

For a more recent discussion, see 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).

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

[4] *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).

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 covered by the present volume, there was a very significiant 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 could issue requests for interim protection under rule 86 (important in view of the steady increase in death penalties during the period under review) and could henceforth recommend that communications be declared inadmissible. 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. Given the absence of information on State compliance with the Committee's Views, the Special Rapporteur has considered it appropriate to establish a dialogue with States parties on measures taken to give effect to the Committee's Views. Since the inception of the follow-up procedure, the Committee has considered follow-up information on a confidential basis.

17. The new format of decisions on admissibility and final 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 final 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.

19. While only a few communications involving the State party Jamaica had been registered during the period covered by volume 5, a significant 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 Optional Protocol procedure.

20. In this connection, another issue assumed increasing 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 271/1988) 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).

A. Reversal of decision on admissibility

Communication No. 431/1990

Submitted by: O. S. et al on 18 December 1990 (represented by counsel)
Alleged victim: The authors
State party: Finland
Declared admissible: 9 July 1991 (forty-second session)
Declared inadmissible: 23 March 1994 (fiftieth session)

Subject matter: Claim that planned logging and road construction activities would adversely affect an indigenous community's traditional way of life

Procedural issues: Review of admissibility decision – Non exhaustion of domestic remedies

Substantive issues: Rights of indigenous peoples – Availability of local remedies and domestic relevance of international human rights standards, including the rights enshrined in the Covenant

Article of the Covenant: 27

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

1. The authors of the communication dated 18 December 1990 are Messrs. O. Sara, J. Näkkäläjärvi and O. Hirvasvuopio and Ms. A. Äärelä, all Finnish citizens. They claim to be the victims of a violation by Finland of article 27 of the International Covenant on Civil and Political Rights. They are represented by counsel.

The facts as submitted by the authors

2.1 The authors are reindeer breeders of Sami ethnic origin. Together with the Herdsmen's committees (cooperative bodies set up to regulate reindeer husbandry in Finland), they represent a substantial part of reindeer herding in Finnish Lapland. Mr. Sara is the chief and Mr. Näkkäläjärvi, the deputy chief of the Sallivaara Herdsmen Committee; Mr. Hirvasvuopio is the chief of the Lappi Herdsmen Committee. In terms of counted reindeer the Sallivaara Herdsmen Committee is the second largest herdsmen's committee in Finland; the Lappi Herdsmen's Committee is the third largest.

2.2 On 16 November 1990, the Finnish Parliament passed bill 42/1990, called the Wilderness Act (*erämaalaki*), which entered into force on 1 February 1991. The legal history of this bill is the result of a delicate compromise reached after protracted discussions between the Samis, environmental protection lobbyists and the Finnish Forest Administration about the extent of logging activities in northernmost Finland, that is, close to or north of the Arctic Circle. Under the provisions of the Act, specifically designated areas are off limits for logging, whereas in others, defined as "environmental forestry areas" (*luonnonmukainen metsänhoito*), logging is permitted. Another, third, category of forest areas remains unaffected by the application of the Act.

2.3 An important consideration in the enactment of the Act, reflected in section 1, is the protection of the Sami culture and particularly of traditional Sami economic activities. Section 3, however, reveals that the *ratio legis* of the Act is the notion and extension of State ownership to the wilderness areas of Finnish Lapland. The authors note that the notion of State ownership of these areas has long been fought by Samis. The implication of section 3, in particular, is that all future logging activities in the areas used by them for reindeer husbandry will be matters controlled by different Government authorities. In particular, section 7 of the Act entrusts a Central Forestry Board (metsähallitus) with the task of planning both use and maintenance (*hoito-ja käyttösuunnitelma*) of the wilderness area. While the Ministry for the Environment (ympäristöministeriö) may either approve or disapprove the plans proposed by this Board, it cannot amend them.

2.4 The authors indicate that the area used for herding their reindeers during the winter months is a hitherto unspoiled wilderness area. The border between the municipalities of Sodankylä and Inari nowadays divides this wilderness into two separate herdsmen's committees. Under the Wilderness Act, the largest part of the authors' reindeer breeding area overlaps with the Hammastunturi Wilderness area; other parts do not and may therefore be managed by the Central Forestry Board. Under preliminary plans approved by the Board, only small portions of the authors' breeding area would be off-limits for logging operations, whereas the major part of their areas overlapping with the Hammastunturi Wilderness would be subject to so-called

"environmental forestry", a concept without a precise definition. Furthermore, on the basis of separate decisions by Parliament, the cutting of forests within the Hammastunturi Wilderness would not begin until the approval by the Ministry for the Environment, of a plan for use and maintenance. The Act, however, is said to give the Central Forestry Board the power to start full-scale logging.

2.5 At the time of submission in 1990, the authors contended that large-scale logging activities, as authorized under the Wilderness Act, were imminent in the areas used by them for reindeer breeding. Thus, two road construction projects were started in the authors' herding areas without prior consultation with the authors, and the roads are said to serve no purpose in the maintenance of the authors' traditional way of life. The authors claimed that the roads were intended to facilitate logging activities inside the Hammastunturi Wilderness in 1992 and, in all likelihood, outside the Wilderness as early as the summer of 1991. The road construction had already penetrated a distance of over 6 miles, at a breadth of 60 feet, into the reindeer herding areas used by the authors. Concrete sink rings have been brought on site, which the authors claim underline that the road is to be built for all-season use by heavy trucks.

2.6 The authors reiterate that for the Lappi Herdsmen's Committee, the area in question is an important breeding area, and that they have no use for any roads within the area. For the Lappi Herdsmen's Committee, the area is the last remaining natural wilderness area; for the Sallivaara Herdsmen's Committee, the area forms one third of its best winter herding areas and is essential for the survival of reindeers in extreme climatic conditions. As to the disposal of slaughtered reindeers, the authors note that slaughtering takes place at places specifically designed for that purpose, located close to main roads running outside the herding area. The Sallivaara Herdsmen's Committee already possesses a modern slaughter-house, and the Lappi Herdsmen's Committee has plans for a similar one.

2.7 The authors further note that the area used by them for winter herding is geographically a typical watershed highland, located between the Arctic Sea and the Baltic. These lands are surrounded by open marshlands covering at least two thirds of the total area. As in other watershed areas, abundant snow and rainfalls are common. The winter season is approximately one month longer than in other areas. The climate has a direct impact on the area's environment, in particular the trees (birch and spruce), whose growth is slow; the trees in turn encourage the growth of the two types of lichen that constitute the winter diet for reindeers. The authors emphasize that even partial logging would render the area inhospitable for reindeer breeding for at least a century and possibly irrevocably, since the destruction of the trees would lead to an extension of the marsh, with the resulting change of the nutrition balance of the soil. Moreover, logging would merely add to present dangers threatening the trees within the authors' herding area, namely, industrial pollution from the Russian Kola district. In this context, it is submitted that silvicultural methods of logging (that is, environmentally sensitive cutting of forest areas) advocated by the authorities for some parts of the wilderness area used by the authors would cause possibly irreversible damage to reindeer herding, as the age structure of the forest and the conditions for the lichen growth would change.

2.8 With respect to the requirement of exhaustion of domestic remedies, the authors contend that the Finnish legal system does not provide for remedies to challenge the constitutionality or validity of an Act adopted by Parliament. As to the possibility of an appeal to the Supreme Administrative Tribunal against any future administrative decisions based on the Wilderness Act, the authors point out that the Finnish legal doctrine on administrative law has been applied very restrictively in accepting legal standing on grounds other than ownership. Thus, it is claimed that there are no domestic remedies which the authors might pursue in respect of a violation of article 27 of the Covenant.

The complaint

3.1 The authors submit that the passage of the Wilderness Act jeopardizes the future of reindeer herding in general and of their livelihood in particular, as reindeer farming is their primary source of income. Furthermore, since the Act would authorize logging within areas used by the authors for reindeer husbandry, its passage is said to constitute a serious interference with their rights under article 27 of the Covenant, in particular the right to enjoy their own culture. In this context, the authors refer to the Views of the Human Rights Committee in cases Nos. 197/1985 and 167/1984, as well as to ILO Convention No. 169 concerning indigenous and tribal people in independent countries.

3.2 The authors add that over the past decades, traditional methods used for reindeer breeding have decreased in importance and have been partly replaced by "fencing" and artificial feeding, which the authors submit are alien to them. Additional factors enabling an assessment of the irreparable damage to which wilderness areas in Finland are exposed include the development of an industry producing forest harvesting machinery and a road network for wood transport. These factors are said to affect deeply the enjoyment by the authors of their traditional economic and cultural rights.

3.3 Fearing that the Central Forestry Board would approve the continuation of road construction or

logging by the summer of 1991, or at the latest by early 1992, around the road under construction and therefore within the confines of their herding areas, the authors requested the adoption of interim measures of protection, pursuant to rule 86 of the Committee's rules of procedure.

The State party's observations

4.1 In its submission under rule 91 of the rules of procedure, the State party does not raise objections to the admissibility of the communication under article 5, paragraph 2 (b), of the Optional Protocol, and concedes that in the present situation there are no domestic remedies which the authors should still pursue.

4.2 The State party indicated that for the Hammastunturi Wilderness, plans for maintenance and use currently in preparation in the Ministry of the Environment would not be finalized and approved until the spring of 1992; nor are there any logging projects under way in the residual area designated by the authors, which does not overlap with the Hammastunturi Wilderness. North of the Wilderness, however, minor "silvicultural felling" (to study the effect of logging on the environment) began in 1990 and would be stopped by the end of the spring of 1991. According to the Central Forestry Board, this particular forest does not overlap with the area designated in the communication. The State party added that south of the wilderness, the gravelling of an existing roadbed would proceed in the summer of 1991, following the entry into force of the Wilderness Act.

4.3 The State party contends that the communication is inadmissible under article 3 of the Optional Protocol, as incompatible with the provisions of the Covenant. In particular, it argues that the plans of the Central Forestry Board for silvicultural logging in the residual area outside the Hammastunturi Wilderness are not related to the passage of the Wilderness Act, because the latter only applies to areas specifically designated as such. The authority of the Central Forestry Board to approve logging activities in areas other than those designated as protected wilderness is not derived from the Wilderness Act. Accordingly, the State party denies that there is a causal link between the measures of protection requested by the authors and the object of the communication itself, which only concerns enactment and implementation of the Wilderness Act.

4.4 The State party further contends that the envisaged forestry operations, consisting merely of "silvicultural logging" and construction of roads for that purpose, will not render the areas used by the authors irreparably inhospitable for reindeer husbandry. On the contrary, the State party expects them to contribute to the natural development of the forests. In this connection, it points to a report prepared for the Ministry for Agriculture and Forestry by a professor of the University of Joensuu, who supports the view that timber production, reindeer husbandry, collection of mushrooms and berries and other economic activities may sustainably coexist and thrive in the environment of Finnish Lapland. This report states that no single forest or land use can, on its own, fulfil the income and welfare needs of the population; forest management of the whole area, and particularly Northern Lapland, must accordingly be implemented pursuant to schemes of multiple use and "strict sustainability".

4.5 The State party submits that the authors cannot be considered "victims" of a violation of the Covenant, and that their communication should be declared inadmissible on that account. In this context, the State party contends that the *ratio legis* of the Wilderness Act is the very opposite from that identified by the authors: its intention was to upgrade and enhance the protection of the Sami culture and traditional nature-based means of livelihood. Secondly, the State party submits that the authors have failed to demonstrate how their concerns about "irreparable damage" purportedly resulting from logging in the area designated by them translate into actual violations of their rights; they are merely afraid of what might occur in the future. While they might legitimately fear for the future of the Sami culture, the "desired feeling of certainty is not, as such, protected under the Covenant. There must be a concrete executive decision or measure taken under the Wilderness Act", before anyone may claim to be the victim of a violation of his Covenant rights.

4.6 The State party further argues that passage of the Wilderness Act must be seen as an improvement rather than a setback for protection of the rights protected by article 27. If the authors are dissatisfied with the amount of land protected as wilderness, they overlook the fact that the Wilderness Act is based on a philosophy of coexistence between reindeer herding and forest economy. This is not only an old tradition in Finnish Lapland but also a practical necessity, as unemployment figures are exceptionally high in Finnish Lapland. The Act embodies a legislative compromise trying to balance opposite interests in a fair and democratic manner. While the Government fully took into account the requirements of article 27 of the Covenant, it could not ignore the economic and social rights of that part of the population whose subsistence depends on logging activities: "one cannot do without compromises in a democratic society, even if they fail to satisfy all the parties concerned".

4.7 Finally, the State party notes that the Covenant has been incorporated into domestic law,

and that, accordingly, article 27 is directly applicable before the Finnish authorities and judicial instances. Thus, if, in the future, the Ministry of the Environment were to approve a plan for forest maintenance and care which would indeed endanger the subsistence of Sami culture and thus violate article 27, the victims of such a violation could submit a complaint to the Supreme Administrative Court.

Admissibility considerations

5.1 During its forty-second session, in July 1991, the Committee considered the admissibility of the communication. It noted that the State party had raised no objection with regard to the admissibility of the communication under article 5, paragraph 2 (b), of the Optional Protocol. It further took note of the State party's claim that the authors could not claim to be victims of a violation of the Covenant within the meaning of article 1 of the Optional Protocol. The Committee reaffirmed that individuals can only claim to be victims within the meaning of article 1 if they are actually affected, although it is a matter of degree as to how concretely this requirement should be taken.

5.2 Inasmuch as the authors claimed to be victims of a violation of article 27, both in respect of expected logging and road construction activities within the Hammastunturi Wilderness and ongoing road construction activities in the residual area located outside the Wilderness, the Committee observed that the communication related to both areas, whereas parts of the State party's observations could be read in the sense that the communication only related to the Hammastunturi Wilderness.

5.3 The Committee distinguished between the authors' claim to be victims of a violation of the Covenant in respect of road construction and logging inside the Hammastunturi Wilderness and such measures outside the Wilderness, including road construction and logging in the residual area south of the Wilderness. In respect of the former areas, the authors had merely expressed the fear that plans under preparation by the Central Forestry Board might adversely affect their rights under article 27 in the future. This, in the Committee's opinion, did not make the authors victims within the meaning of article 1 of the Optional Protocol, as they were not actually affected by an administrative measure implementing the Wilderness Act. Therefore, this aspect of the communication was deemed inadmissible under article 1 of the Optional Protocol.

5.4 In respect of the residual area, the Committee observed that the continuation of road construction into it could be causally linked to the entry into force of the Wilderness Act. In the Committee's opinion, the authors had sufficiently substantiated, for purposes of admissibility, that this road construction could produce effects adverse to the enjoyment and practice of their rights under article 27.

5.5 On 9 July 1991, accordingly, the Committee declared the communication admissible in so far as it appeared to raise issues under article 27 of the Covenant.

5.6 The Committee also requested the State party to "adopt such measures, as appropriate, to prevent irreparable damage to the authors".

The State party's request for review of the admissibility decision and the authors' reply

6.1 In its submission under article 4, paragraph 2, dated 10 February 1992, the State party notes that the Committee's acceptance, in the decision of 9 July 1991, of a causal link between the Wilderness Act and any measures taken outside the Hammastunturi Wilderness has changed the substance of the communication and introduced elements in respect of which the State party did not provide any admissibility information. It reiterates that in applying the Wilderness Act, Finnish authorities must take into consideration article 27 of the Covenant, "which, in the hierarchy of laws, is on the same level as ordinary laws". Samis who claim that their Covenant rights were violated by the application of the Act may appeal to the Supreme Administrative Court in respect of the plan for maintenance and care of the Wilderness area approved by the Ministry of the Environment.

6.2 In respect of the activities outside the Hammastunturi Wilderness (the "residual area"), the State party submits that article 27 would entitle the authors to take action against the State or the Central Forestry Board before the Finnish courts. Grounds for such a legal action would be concrete measures taken by the State, such as road construction, which in the authors' opinion infringe upon their rights under article 27. A decision at first instance could be appealed to the Court of Appeal, and from there, subject to certain conditions, to the Supreme Court. The provincial government could be requested to grant provisional remedies; if this authority does not grant such a remedy, its decision may be appealed to the Court of Appeal and, subject to a re-trial permit, to the Supreme Court.

6.3 The State party adds that the fact that actions of this type have not yet been brought before the domestic courts does not mean that local remedies do not exist but merely that provisions such as article 27 have not been invoked until recently. Notwithstanding, the decisions of the higher courts and the awards of the Parliamentary Ombudsman in the recent past suggest that the impact of international human rights treaties is significantly on the increase. While the authors do not own the

contested area, the application of article 27 gives them legal standing as representatives of a national minority, irrespective of ownership. The State party concludes that the communication should be deemed inadmissible in respect of measures taken outside the Hammastunturi Wilderness on the basis of article 5, paragraph 2 (b), of the Optional Protocol.

6.4 Subsidiarily, the State party reaffirms that current road construction activities in the "residual areas" do not infringe upon the authors' rights under article 27. It observes that the authors do not specify that the construction has caused real damage to reindeer husbandry. In this context, it observes that:

> "the concept of culture in the sense of article 27 provides for a certain degree of protection of the traditional means of livelihood for national minorities and can be deemed to cover livelihood and other conditions in so far as they are essential for the culture and necessary for its survival. The Sami culture is closely linked with traditional reindeer husbandry. For the purposes of ... article 27 ... it must be established, however, in addition to the aforementioned question of what degree of interference the article [protects] against, whether the minority practices its livelihood in the traditional manner intended in the article".

As Sami reindeer husbandry has evolved over time, the link with the natural economy of old Sami tradition has been blurred; reindeer husbandry is increasingly practised with help of modern technology, for example, snow scooters and modern slaughterhouses. Thus, modern reindeer husbandry managed by herdsmen's committees leaves little room for individual, self-employed, herdsmen.

6.5 The State party further denies that prospective logging in areas outside the Wilderness will infringe upon the authors' rights under article 27: "there is no negative link between the entry into force of the Wilderness Act and logging by the Central Forestry Board outside the wilderness area. On the contrary, enactment of the law has a positive impact on logging methods used in the residual areas". The State party explains that under the Act on Reindeer Husbandry, the northernmost State-owned areas are set aside for reindeer herding and shall not be used in ways that impair reindeer husbandry. The Central Forestry Board has decided that highlands (above 300 metres altitude) are subject to the most circumspect forestry. In Upper Lapland, a land and water utilization strategy approved by the Central Forestry Board that emphasizes the principle of multiple use and sustainability of resources applies.

6.6 It is recalled that the area identified in the authors' initial complaint comprises approximately 55,000 hectares (35,000 hectares of the Hammastunturi Wilderness, 1,400 hectares of highlands and 19,000 hectares of conservation forest. Out of this total, only 10,000 hectares, or 18 per cent, are set aside for logging. The State party notes that "logging is extremely cautious and the interests of reindeer husbandry are kept in mind". If one considers that logging is practised with strict consideration for the varied nature of the environment, forestry and land use in the area in question do not cause undue damage to reindeer husbandry. Furthermore, the significant increase in the overall reindeer population in Finnish Lapland over the past 20 years is seen as a "clear indication that logging and reindeer husbandry are quite compatible".

6.7 In respect of the authors' claim that thinning of the forests destroys lichen (*lichenes* and *usnea*) in the winter herding areas, the State party observes that other herdsmen have even requested that such thinning be carried out, as they have discovered that it alters "the ratio of top vegetation to the advantage of lichen and facilitates mobility. The purpose of [such] thinning is, *inter alia*, to sustain the tree population and improve its resistance to airborne pollution." Furthermore, according to the State party, lichen is plentiful in the highland areas where the Central Forestry Board does no logging at all.

6.8 The State party notes that Sami herdsmen own or co-own forests. Ownership is governed by a variety of legislative acts; the most recent, the Reindeer Farm Act and Decree, also applies to Sami herdsmen. According to the State party, the authors own reindeer farms. Thinning of trees or logging of private forests is governed by the Private Forests Act. According to the Association of Herdsmen's Committees, the income derived from logging is essential for securing the herdsmen's livelihood, and, furthermore, forestry jobs are essential to forest workers and those Sami herdsmen who work in the forests apart from breeding reindeer. In the light of the above, the State party reaffirms that planned logging activities in the area identified by the complaints cannot adversely affect the practice of reindeer husbandry, within the meaning of article 27 of the Covenant.

7.1 In their comments, dated 25 March 1992, on the State party's submission, the authors contend that the State party's reference to the availability of remedies on account of the Covenant's status in the Finnish legal system represents a novelty in the Government's argumentation. They submit that this line of argument contrasts with the State party's position in previous Optional Protocol cases and even with that put forth by the Government at the admissibility stage of the case. The authors argue that while it is true that international human rights norms are invoked increasingly before the courts, the authorities would not be in a position to contend that Sami reindeer herdsmen have *locus standi* in respect to plans for maintenance and use of wilderness areas, or in respect of road construction projects in state-owned forests. Not only is there no case law in this

respect, but Finnish courts have been reluctant to accept standing of any others than the landowners; the authors cite several judgements in support of their contention.

7.2 Inasmuch as the alleged direct applicability of article 27 of the Covenant is concerned, the authors claim that while this possibility should not theoretically be excluded, there is no legal precedent for the direct application of article 27. The State party therefore wrongly presents a hypothetical possibility as a judicial interpretation. The authors reaffirm that no available and effective remedies exist in relation to road construction and other measures in the "residual area", which consists exclusively of state-owned lands. The Government's reference to the fact that the Covenant is incorporated into the domestic legal system cannot be deemed to prove that the domestic court practice includes even elementary forms of the approach now put forth by the State party, for the first time, to a United Nations human rights treaty body.

7.3 The authors challenge the State party's assessment of the impact of road construction into the area designated in their communication on the enjoyment of their rights under article 27. Firstly, they object to the State party's interpretation of the scope of the provision and argue that if the applicability of article 27 depended solely on whether the minority practices its "livelihood in the traditional manner", the relevance of the rights enshrined in the provision would be rendered nugatory to a large extent. It is submitted that many indigenous peoples in the world have, over time and owing to governmental policies, lost the possibility to enjoy their culture and carry out economic activities in accordance with their traditions. Far from diminishing the obligations of States parties under article 27, such trends should give more impetus to their observance.

7.4 While Finnish Sami have not been able to maintain all traditional methods of reindeer herding, their practice still is a distinct Sami form of reindeer herding, carried out in community with other members of the group and under circumstances prescribed by the natural habitat. Snow scooters have not destroyed this form of nomadic reindeer herding. Unlike Sweden and Norway, Finland allows reindeer herding for others than Samis; thus, the southern parts of the country are used by herdsmen's committees, which now largely resort to fencing and to artificial feeding.

7.5 As to the impact of road construction into their herding area, the authors reiterate that it violates article 27 because:

(a) Construction work already causes noise and traffic that has disturbed the reindeer;

(b) The two roads form "open wounds" in the forests with, on the immediate site, all the negative effects of logging;

(c) The roads have changed the pattern of reindeer movements by dividing the wilderness, thereby making it far more difficult to keep the herd together;

(d) Any roads built into the wilderness bring tourists and other traffic, which disturb the animals;

(e) As the Government has failed to provide reasonable justifications for the construction of the roads, their construction violates the authors' rights under article 27, as a mere preparatory stage for logging within their area.

7.6 Concerning the State party's assessment of logging operations in the areas designated by the communication, the authors observe that although the area in question is a small part of the Sami areas as a whole, logging within that area would re-start a process that lasted for centuries and brought about a gradual disintegration of the traditional Sami way of life. In this context, it is noted that the area in question remains one of the most productive wilderness areas used for reindeer herding in Finnish Lapland.

7.7 Still in the context of planned logging operations, the authors submit the reports of two experts, according to which: (a) under certain conditions, reindeer are highly dependent on lichens growing on trees; (b) lichen growing on the ground are a primary winter forage for reindeer; (c) old forests are superior to young ones as herding areas; and (d) logging negatively affects nature-based methods of reindeer herding.

7.8 The authors insist that the area designated in their communication has remained untouched for centuries, and that it is only in the context of the coming into force of the Wilderness Act that the Central Forestry Board began its plans for logging in the area. They further contend that if it is true, as claimed by the State party, that highlands (above 300 metres) are in practice free of Board activity, then their herding area should remain untouched. However, the two roads built into their area partly run above the 300 metre mark, which shows that such areas are well within the reach of Board activities. In this context, they recall that all of the area delineated in their complaint is either above the 300 metre mark or very close to it; accordingly, they dismiss the State party's claim that only 1,400 hectares of the area are highlands. Furthermore, while the authors have no access to the internal plans for logging in the area drawn up by the Central Forestry Board, they submit that logging of 18 per cent of the total area would indeed affect a major part of its forests.

7.9 As to the alleged compatibility of intensive logging and practising intensive reindeer husbandry, the authors note that this statement only applies to the modern forms of reindeer herding using artificial feeding. The methods used by the authors, however, are traditional, and for that the old forests in the area designated by the communication are essential. The winter of 1991-1992 demonstrated how relatively warm winters may threaten traditional herding methods. As a result of alternating periods with temperatures above and below zero degrees centigrade, the snow was, in many parts of Finnish Lapland, covered by a hard layer of ice that prevented the reindeer from getting their nutrition from the ground. In some areas without old forests carrying lichen on their branches, reindeer have been dying from hunger. In this situation, the herding area designated in the communication has been very valuable to the authors.

7.10 In several submissions made between September 1992 and February 1994, the authors provide further clarifications. By submission of 30 September 1992, they indicate that the logging plans of the Central Forestry Board for the Hammastunturi Wilderness are still in preparation. In a subsequent letter dated 15 February 1993, they indicate that a recent decision of the Supreme Court invalidates the State party's contention that the authors would have *locus standi* before the courts on the basis of claims brought under article 27 of the Covenant. This decision, which quashed a decision of the Court of Appeal granting a Finnish citizen who had been successful before the Human Rights Committee compensation, *d/* holds that the administrative, rather than the ordinary, courts are competent to decide on the issue of the complainant's compensation.

7.11 The authors further indicate that the draft plan for use and maintenance of the Hammastunturi Wilderness was made available to them on 10 February 1993, and a number of them were going to be consulted by the authorities before final confirmation of the plan by the Ministry for the Environment. According to the draft plan, no logging would be carried out in those parts of the Wilderness belonging to the area specified in the communication and to the herding areas of the Sallivaara Herdsmen's Committee. The same is not, however, true for the respective areas of the Lappi Herdsmen's Committee; under the draft plan, logging would be carried out in an area of 10 square kilometres (called Peuravaarat) situated in the southernmost part of the Hammastunturi Wilderness and within the area specified in the original communication.

7.12 In submissions of 19 October 1993 and 19 February 1994, the authors note that negotiations on and preparation of a plan for use and maintenance of the Wilderness still have not been completed, and that the Central Forestry Board still has not made a final recommendation to the Ministry for the Environment. In fact, a delay until 1996 for the finalization of the maintenance plan is expected.

7.13 The authors refer to another logging controversy in another Sami reindeer herding area, where reindeer herdsmen had instituted proceedings against the Government because of planned logging and road construction activities in the Angeli district, and where the Government had argued that claims based on article 27 of the Covenant should be declared inadmissible under domestic law. On 20 August 1993, the Court of First Instance at Inari held that the case was admissible but without merits, ordering the complainants to compensate the Government for its legal expenses. On 15 February 1994, the Court of Appeal of Rovaniemi invited the appellants in this case to attend an oral hearing to take place on 22 March 1994. According to counsel, the Court of Appeal's decision to grant an oral hearing "cannot be taken as proof for the practical applicability of article 27 of the Covenant as basis for court proceedings in Finland, but at least it leaves [this] possibility open".

7.14 In the light of the above, the authors conclude that their situation remains in abeyance at the domestic level.

Post-admissibility considerations

8.1 The Committee has taken note of the State party's information, provided after the decision on admissibility, that the authors may avail themselves of local remedies in respect of road construction activities in the residual area, based on the fact that the Covenant may be invoked as part of domestic law and that claims based on article 27 of the Covenant may be advanced before the Finnish courts. It takes the opportunity to expand on its admissibility findings.

8.2 In their submission of 25 March 1992, the authors concede that some Finnish courts have entertained claims based on article 27 of the Covenant. From the submissions before the Committee it appears that article 27 has seldom been invoked before the local courts or its content guided the *ratio decidendi* of court decisions. However, it is noteworthy, as counsel to the authors acknowledges, that the Finnish judicial authorities have become increasingly aware of the domestic relevance of international human rights standards, including the rights enshrined in the Covenant. This is true, in particular, for the Supreme Administrative Tribunal and increasingly for the Supreme Court and the lower courts.

8.3 In the circumstances, the Committee does not consider that a recent judgement of the Supreme

Administrative Tribunal, which makes no reference to article 27, should be seen as a negative precedent for the adjudication of the authors' own grievances. In the light of the developments referred to in paragraph 8.2 above, the authors' doubts about the courts' readiness to entertain claims based on article 27 of the Covenant do not justify their failure to avail themselves of possibilities of domestic remedies which the State party has plausibly argued are available and effective. The Committee further observes that according to counsel, the decision of the Court of Appeal of Rovaniemi in another comparable case, while not confirming the practical applicability of article 27 before the local courts, at least leaves this possibility open. Thus, the Committee concludes that an administrative action challenging road construction activities in the residual area would not be a priori futile, and that the requirements of article 5, paragraph 2 (b), of the Optional Protocol have not been met.

8.4 The Committee takes note of counsel's comment that a delay until 1996 is expected in the finalization of the plan of the Central Forestry Board for use and maintenance, and understands this as an indication that no further activities in the Hammastunturi Wilderness and the residual area will be undertaken by the State party while the authors may pursue further domestic remedies.

9. The Human Rights Committee therefore *decides*:

(a) That the decision of 9 July 1991 is set aside;

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

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

B. Decisions declaring a communication inadmissible

Communication No. 478/1991

Submitted by: A.P.L.-v.d. M [name deleted] on 27 October 1991 (represented by counsel)
Alleged victim: The author
State party: The Netherlands
Declared inadmissible: 26 July 1993 (forty-eighth session)

Subject matter: Alleged gender-based discrimination in relation to marital status applying to unemployment benefits.

Procedural issues: Standing of the author – Lack of substantiation of claim – Method of application of the Covenant in the domestic legal system.

Substantive issues: Equality before the law

Article of the Covenant: 26

Articles of the Optional Protocol: 1 and 2

1. The author of the communication (dated 22 October 1991) is Mrs. A. P. L.-v. d. M., a Netherlands citizen, residing in Voorhout, 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. She is represented by counsel.

Facts as submitted

2.1 The author, who is married, was employed as a seasonal worker during part of the year as of July 1982. During the intermittent periods of unemployment, she received unemployment benefits by virtue of the *Werkloosheidswet* (WW) (Unemployment Act). Pursuant to the provisions of the Act, the benefit was granted for a maximum period of six months. On 2 March 1984 the author, who was then unemployed, was no longer entitled to WW benefits. She was subsequently re-employed on 25 July 1984.

2.2 After having received benefits under the WW, an unemployed person at that time was entitled to benefits under the *Wet Werkloosheids Voorziening* (WWV) (Unemployment Benefits Act). These benefits amounted to 75 per cent of the last salary, whereas the WW benefits amounted to 80 per cent of the last salary. However, article 13, paragraph 1, subsection 1, of the law provided that married women could only receive WWV benefits if they qualified as breadwinners. A similar requirement did not apply to married men. The author, who did not meet this requirement, therefore did not apply for benefits at that time.

2.3 However, after the State party had abolished the requirement of article 13, paragraph 1, subsection 1, with a retroactive effect to 23 December 1984, the author, on 22 January 1989, applied for benefits under the WWV, for the period of 2 March to 25 July 1984. The author's application was rejected by the municipality of Voorhout, on 8 June 1989, on the ground that the author did not meet the statutory requirements which were applicable at the material time.

2.4 On 19 December 1989, the municipality confirmed its decision. The author then appealed to the *Raad van Beroep* (Board of Appeal) in The Hague, which, by decision of 27 June 1990, rejected her appeal.

2.5 The *Centrale Raad van Beroep* (Central Board of Appeal), the highest instance in social security cases, in its judgement of 5 July 1991, referred to its judgement of 10 May 1989 in the case of Mrs. Cavalcanti Araujo-Jongen, in which it found, as it had done in previous cases, that article 26, read in conjunction with article 2, of the International Covenant on Civil and Political Rights, applied to the granting of social security benefits and similar entitlements and that the explicit exclusion of married women from WWV benefits, except if they meet specific requirements that are not applicable to married men, amounted to discrimination on the ground of sex in relation to marital status. However, the Central Board found no reason to depart from its established jurisprudence that, with regard to the elimination of discrimination in the sphere of national social security legislation, in some situations gradual implementation may be allowed. The Central Board concluded that, in relation to article 13, paragraph 1, subsection 1, of WWV, article 26 of the Covenant had acquired direct effect not before 23 December 1984, the final date

established by the Third Directive of the European Community (EC) for the elimination of discrimination between men and women within the Community. It therefore confirmed the decision of the Board of Appeal to refuse the author benefits under WWV for the period of 2 March to 25 July 1984. With this judgement, all domestic remedies are said to have been exhausted.

2.6 In 1991, further amendments to the WWV abolished the restriction on the retroactive effect of the abolishment of article 13, paragraph 1, subsection 1. As a result, women who had been ineligible in the past to claim WWV benefits because of the breadwinner criterion, can claim these benefits retroactively, provided they satisfy the other requirements of the Act. One of the other requirements is that the applicant must be unemployed on the date of application.

Complaint

3.1 In the author's opinion, the denial of WWV benefits for the period of 2 March to 25 July 1984 amounts to discrimination within the meaning of article 26 of the Covenant.

3.2 The author recalls that the Covenant and the Optional Protocol entered into force for the Netherlands on 11 March 1979, and argues that, accordingly, article 26 acquired direct effect on that date. She further contends that the date of 23 December 1984, as of which the distinction under article 13, paragraph 1, subsection 1, WWV was abolished, is arbitrary, since there is no formal link between the Covenant and the Third EC Directive.

3.3 She also claims that the Central Board of Appeal had not, in earlier judgements, taken a consistent stand with respect to the direct applicability of article 26 of the Covenant. For example, in a case pertaining to the General Disablement Act (AAW), the Central Board decided that article 26 could not be denied direct effect after 1 January 1980.

3.4 The author claims that the Netherlands had, upon ratifying the Covenant, accepted the direct effect of its provisions, pursuant to articles 93 and 94 of the Netherlands Constitution. She further argues that, even if the possibility of gradual elimination of discrimination were permissible under the Covenant, the transitional period of over 12 years between the adoption of the Covenant in 1966 and its entry into force for the Netherlands in 1979, should have been sufficient to enable it to adapt its legislation accordingly. In this context, the author refers to the Views of the Human Rights Committee in communications Nos. 182/1984 (*Zwaan-de Vries v. the Netherlands*) and 172/1984 (*Broeks v. the Netherlands*).

3.5 The author submits that the amendments recently introduced in WWV do not eliminate the discriminatory effect of article 13, paragraph 1, subsection 1, WWV as applied prior to December 1984. The author points out that women can only claim these benefits retroactively if they meet the requirements of all the other provisions of WWV, especially the requirement that they are unemployed at the time of the application for WWV benefits. Thus, women who, like the author, are employed at the time of applying for retroactive benefits, do not fulfil the legislative requirements and are therefore not entitled to a retroactive benefit. According to the author, therefore, the discriminatory effect of said WWV provision has not been completely eliminated.

3.6 The author claims that she suffered financial damage as a result of the application of the discriminatory WWV provisions, in the sense that benefits were denied to her for the period of 2 March to 25 July 1984. She requests the Human Rights Committee to find that article 26 acquired direct effect as from the date on which the Covenant entered into force for the Netherlands, i.e. 11 March 1979; that the denial of benefits on the basis of article 13, paragraph 1, subsection 1, of WWV is discriminatory within the meaning of article 26 of the Covenant; and that WWV benefits should be granted to married women on an equal footing with men as of 11 March 1979, and in her case as of 2 March 1984.

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

4. By submission, dated 2 September 1992, the State party concedes that the author has exhausted all available domestic remedies. The State party, however, argues that the author cannot be considered to be a victim within the meaning of article 1 of the Optional Protocol, since, even if the benefits would be available to married women on an equal footing with men as of 2 March 1984, the author still would not be eligible to these benefits, since she did not fulfil one of the basic requirements in the law, which is applicable to both men and women, that a person applying for benefits be unemployed at the date on which the application is made.

5. In her comments on the State party's submission, the author submits that the date of the application never was at issue in the prior proceedings, which focused on the date of 23 December 1984, in connection with the Third Directive of the European Community. She states that the issue before the Committee is whether article 26 of the Covenant has direct effect for the period preceding 23 December 1984, and not whether she fulfilled the requirement of being unemployed on 22 January 1989, the date of her application for benefits under WWV.

Issues and proceedings before the Committee

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

6.2 The Committee notes that the author claims that the state of the law from March to July 1984, and the application of the law at that time, made her a victim of a violation of the right to equality before the law and equal protection of the law, as set out in article 26 of the Covenant. The Committee further notes that the State party has amended the legislation in question, abolishing with retroactive effect the provision in the law which the author considers discriminatory.

6.3 The Committee considers that, even if the law in question, prior to the enactment of the amendment, were to be considered inconsistent with a provision of the Covenant, the State party, by amending the law retroactively, has corrected the alleged inconsistency of the law with article 26 of the Covenant, thereby remedying the alleged violation. Therefore, the author cannot, at the time of submitting the complaint, claim to be a victim of a violation of the Covenant. The communication is thus inadmissible under article 1 of the Optional Protocol.

6.4 The author further contends that she is a victim of discrimination because the application of the amended law still does not entitle her to benefits for the period of her unemployment from March to July 1984, since she does not fulfil the requirement of being unemployed on the date of application for the benefits. In this connection, the Committee notes that said requirement applies to men and women equally. The Committee refers to its decision in communication No. 212/1986 (*P. P. C. v. the Netherlands*), in which it considered that the scope of article 26 did not extend to differences of results in the application of common rules in the allocation of benefits. In the present case, the Committee finds that the requirement of being unemployed at the time of application as a prerequisite for entitlement to benefits is not discriminatory, and that the author does not, therefore, have a claim under article 2 of the Optional Protocol.

6.5 As regards the author's request that the Committee make a finding that article 26 of the Covenant acquired direct effect in the Netherlands as from 11 March 1979, the date on which the Covenant entered into force for the State party, the Committee observes that the method of application of the Covenant varies among different legal systems. The determination of the question whether and when article 26 has acquired direct effect in the Netherlands is therefore a matter of domestic law and does not come within the competence of the Committee.

7. The Human Rights Committee therefore decides:

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

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

Communication No. 536/1993

Submitted by: Francis Peter Perera on 10 February 1993
Alleged victim: The author
State party: Australia
Declared inadmissible: 28 March 1995 (fifty-third session)

Subject matter: Claim of unfair trial and police discrimination by individual convicted of drug-related offences

Procedural issues: Evaluation of facts and evidence by national court – Inadmissibility *ratione materiae* and *ratione temporis* – Non-exhaustion of domestic remedies

Substantive issues: Right to a fair trial – Discrimination based on racial and national grounds

Articles of the Covenant: 14 (1) (3) (e) and (5) and 26

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

1. The author of the communication is Mr. Francis Peter Perera, a merchant seaman and Australian citizen by naturalization, born in Sri Lanka and currently living at Kangaroo Point, Queensland, Australia. He claims to be the victim of a violation by Australia of articles 14, paragraphs 1, 3 (e) and 5, and 26 of the International Covenant on Civil and Political Rights.

Facts as submitted by the author

2.1 The author was arrested on 11 July 1984, together with one Fred Jensen. He was charged with drug-related offences and later released on bail. On 17 May 1985, he was found guilty on two charges of

supplying heroin and one charge of possession of a sum of money obtained by way of commission of a drug offence. He was sentenced to nine years' imprisonment by the Supreme Court of Queensland. On 21 August 1985, the Court of Criminal Appeal quashed the judgement and ordered a retrial. Upon conclusion of the retrial the author, on 3 March 1986, was found guilty of having possessed and having sold more than 9 grams of heroin to Jensen on 11 July 1984; he was sentenced to eight years' imprisonment. He appealed the judgement on the grounds of misdirection by the judge to the jury, and bias by the judge in the summing-up. The Court of Criminal Appeal dismissed his appeal on 17 June 1986. On 8 May 1987, the High Court of Australia refused the author leave to appeal. On 18 November 1989, the author was released from prison to "home detention" for health reasons; since 17 March 1990 he has been on parole. His parole ended on 18 March 1994.

2.2 At the trial, the prosecution submitted that, early in the morning of 11 July 1984, the author had driven with Jensen in the latter's car; the car had parked next to another car; the author stayed in the car while Jensen went to the other car to sell $11,000 worth of heroin to an undercover police officer. While the sale was proceeding, police arrived and arrested both the author and Jensen. According to the prosecution, the author, when arrested by the police, immediately voluntarily admitted having handed over heroin to Jensen to sell. The author's house was searched by the police and an amount of money was seized; no drugs were found. The prosecution claimed that $3,000 found in the house was marked money used for the buying of heroin from Jensen on 1 July 1984.

2.3 On 15 October 1985, in a separate trial, Jensen was found guilty of four charges of supplying a dangerous drug, two charges of selling a dangerous drug, and one charge of being in possession of money from the sale of a dangerous drug. On each charge, he was sentenced to six years' imprisonment, to run concurrently.

2.4 The author claims to know nothing of the offence he was charged with and stresses that no drugs were found in his possession. He submits that he did not know about Jensen's involvement with drugs. During the trial, he gave sworn evidence to the effect that Jensen used to work as a handyman around his house, and that, on the morning of 11 July 1984, they were travelling in Jensen's car to a piece of land to build a shack for the author. He further stated that he and his wife, at the end of 1983, had given Jensen $4,000 to fix things in the house. They then left for Sri Lanka in November 1983 and returned in February 1984, only to discover that Jensen had not done the work for which he was commissioned. In July 1984, Jensen then paid them back $3,000.

2.5 The author states that the only non-circumstantial evidence against him, on the basis of which he was sentenced, was the evidence given by two policemen that he made admissions regarding his involvement in the sale of heroin on 11 July 1984, first at the roadside, immediately upon his arrest, and later the same morning in the police station. One of the policemen made notes, reflecting the admissions, in his notebook; these notes were not signed by the author.

Complaint

3.1 The author alleges that he did not have a fair trial. He claims that he never made a statement to the police and that the notes which were admitted as evidence during the trial were a fraud. He also claims that the police threatened and hit him and that he was in considerable distress during the interrogations. The author submits that these issues were raised at the trial, but that the judge, after a *voir dire*, admitted the policemen's evidence regarding the statement given by the author.

3.2 The author further claims that, during the trial, he had repeatedly asked his lawyer to call Jensen as a witness, but that he was advised that there was no need for the defence to call him; nor did the prosecution call Jensen as a witness. The author submits that his lawyer did not raise as a ground of appeal the failure to call Jensen as a witness, although the fact that he was not heard allegedly gave rise to a miscarriage of justice. The author claims that the failure to call Jensen as a witness, despite his numerous requests, constitutes a violation of article 14, paragraph 3 (e), of the Covenant. In this context, the author also claims that he later discovered that his privately retained lawyer had been in possession of a statement, made by Jensen on 1 March 1986, which exculpated the author. However, this statement was not brought to the attention of the Court. In the statement Jensen admits having difficulty remembering the events of two years previously, as a result of his then drug addiction; he states, however, that at the time he was doing some work for the author around the house and that the author was not aware that he was selling heroin.

3.3 The author further claims that his right to have his conviction and sentence reviewed by a higher tribunal according to law has been violated, since an appeal under Queensland law can be argued only on points of law and allows no rehearing of facts. This is said to constitute a violation of article 14, paragraph 5.

3.4 The author further claims that he was discriminated against by the police because of his racial and national origin. He claims that he was called racist names by the police officers who arrested him and that their decision to fabricate evidence against him was motivated by reasons of racial discrimination.

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

4.1 The State party, by submission of December 1993, argues that the communication is inadmissible.

4.2 As regards the author's general claim that he did not have a fair trial, the State party argues that this claim has not been sufficiently substantiated. In this connection, the State party contends that the claim lacks precision. The State party points out that the independence of the judiciary and the conditions for a fair trial are guaranteed by the constitution of Queensland and satisfy the criteria set out in article 14 of the Covenant. The State party recalls that the author's first conviction was quashed by the Court of Criminal Appeal, because the Court considered that the judge's instructions to the jury had been unbalanced. The State party argues that the author's retrial was fair and that it is not the Human Rights Committee's function to provide a judicial appeal from or review of decisions of national authorities.

4.3 As regards the author's claim that his right under article 14, paragraph 3 (e), was violated because his lawyer failed to call Jensen as a witness, the State party argues that the author was at no stage hindered by the State party in obtaining the attendance of the witness, but that it was his counsel's decision not to do so. In this context, the State party submits that the police had a signed interview with Mr. Jensen in which he stated that he paid the author in exchange for drugs. Furthermore, the State party submits that the matter was never raised on appeal, and that therefore domestic remedies have not been exhausted. The State party adds that it is not the Government's responsibility to organize the defence of a person accused of having committed a crime.

4.4 As regards the author's claim that his right to review of conviction and sentence was violated, the State party argues that he has failed to substantiate this claim and that, moreover, his claim is incompatible with the provision of article 14, paragraph 5. The State party explains that the primary ground upon which a conviction may be set aside under the Queensland Criminal Code is "miscarriage of justice". It is stated that arbitrary or unfair instructions to the jury and partiality on the part of the trial judge would give rise to a miscarriage of justice. In this context, reference is made to the author's appeal against his first conviction, which was quashed by the Court. The author's appeal against his second conviction, after the retrial, was dismissed. The State party argues that the appellate courts in the author's case did evaluate the facts and evidence placed before the trial courts and reviewed the interpretation of domestic law by those courts, in compliance with article 14, paragraph 5. Finally, the State party refers to the Committee's jurisprudence that "it is generally for the appellate courts of States parties to the Covenant and not for the Committee to evaluate the facts and evidence placed before the courts and to review the interpretation of domestic law by those courts. Similarly, it is for appellate courts and not for the Committee to review specific instructions to the jury by the trial judge, unless it is apparent from the author's submission that the instructions to the jury were clearly arbitrary or tantamount to a denial of justice, or that the judge manifestly violated his obligation of impartiality." Communication No. 331/1988, para. 5.2 (*G.J. v. Trinidad and Tobago*, declared inadmissible on 5 November 1991). The State party submits that the Australian appeal processes comply with the interpretation of article 14, paragraph 5, as expressed by the Committee.

4.5 The State party argues that the author's claim that he was subjected to racial discrimination and beatings by members of the Queensland Police Force is inadmissible. In this context, the State party also notes that the incidents complained of occurred in July 1984. The State party submits that there is no evidence that the police actually engaged in racist behaviour. At the trial, the police denied all allegations to that effect. As regards the author's claim that the police fabricated the evidence against him, the State party notes that this allegation was brought before the courts and that it was rejected; there is no suggestion that this rejection was based on racial discrimination. The State party concludes therefore that the claim that the evidence against the author was fabricated for reasons of racial discrimination is unsubstantiated. The author's complaints about police violence and racist abuse were brought to the attention of the Criminal Justice Commission in 1989, which, on 15 March 1991, decided not to conduct any further investigation. The State party argues, however, that another remedy was available to the author under the federal Racial Discrimination Act 1975. Under the Act, complaints can be made to the Human Rights and Equal Opportunity Commission within 12 months of the alleged unlawful conduct. Since the author failed to avail himself of this remedy, the State party argues that his claim under article 26 is inadmissible for failure to exhaust domestic remedies.

5.1 In his comments on the State party's submission, the author reiterates that he had made explicit requests to his solicitors to have Jensen called as a witness, but that they failed to call him, informing him that Jensen's evidence was not relevant to the defence and that it was up to the prosecution to call him. The author states that, being an immigrant and lacking knowledge of the law, he depended on his lawyer's advice, which proved to be detrimental to his defence. In this context, he submits that, under Australian law, he can enforce

his right to call witnesses only through his solicitor, not independently. According to the author, his solicitor was accredited to the Supreme Court of Queensland. He argues that the State party should take responsibility for the supervision of solicitors accredited to the courts, to see whether they comply with their obligations under the law. The author further contends that the signed interview with Jensen, referred to by the State party, was obtained under the influence of drugs, and that this would have been revealed if he would have been called as a witness, especially because the evidence that the author was not involved in any drug deal was corroborated by other witnesses.

5.2 The author reiterates that the racist attitude of the police, resulting in violence and in fabrication of the evidence against him, led to his conviction for an offence of which he had no knowledge. He submits that the evidence against him was wholly circumstantial, except for the alleged admissions to the police, which were fabricated. He claims that the failure of the judge to rule the admissions inadmissible as evidence constitutes a denial of justice, in violation of article 14, paragraph 1; in this context, he submits that the judge did not admit evidence on behalf of the defence from a solicitor who had visited the author at the police station and who had seen that the author was upset and crying, allegedly as a result of the treatment he received from the policemen. The author also contends that there were inconsistencies in the evidence against him, that some of the prosecution witnesses were not reliable, and that the evidence was insufficient to warrant a conviction. In this context, the author points out that he was acquitted on two other charges, where the evidence was purely circumstantial, and that his conviction on the one charge apparently was based on the evidence that he had admitted his involvement to the policemen upon arrest.

5.3 The author further submits that it is apparent from the trial transcript that he had difficulties understanding the English that was used in court. He claims that, as a result, he misunderstood some of the questions put to him. He claims that his solicitor never informed him that he had the right to have an interpreter and that, moreover, it was the trial judge's duty to ensure that the trial was conducted fairly and, consequently, to call an interpreter as soon as he noticed that the author's English was insufficient.

5.4 The author further notes that one of the appeal judges who heard his appeal after the first trial also participated in the consideration of his appeal after the retrial. He claims that this shows that the Court of Criminal Appeal was not impartial, in violation of article 14, paragraph 1.

5.5 The author maintains that article 14, paragraph 5, was violated in his case, because the Court of Criminal Appeal reViews the conviction and sentence only on the basis of the legal arguments presented by the defendant's counsel and does not undertake a full rehearing of the facts. According to the author, article 14, paragraph 5, requires a full rehearing of the facts. In this context, the author also states that no possibility of direct appeal to the High Court exists, but that one has to request leave to appeal, which was refused by the Court in his case.

5.6 As regards the State party's claim that he has not exhausted domestic remedies with regard to his complaint about police treatment, the author submits that, in fact, he has addressed complaints to the Police Complaints Tribunal, the Human Rights and Equal Opportunity Commission and the Parliamentary Ombudsman, all to no avail.

Issues and proceedings before the Committee

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

6.2 The Committee observes that the author's allegations relate partly to the evaluation of evidence by the court. It recalls that it is generally for the appellate courts of States parties to the Covenant, and not for the Committee, to evaluate the facts and evidence in a particular case, unless it is clear that a denial of justice has occurred or that the court violated its obligation of impartiality. The author's allegations and submissions do not show that the trial against him suffered from such defects. In this respect, therefore, the author's claims do not come within the competence of the Committee. Accordingly, this part of the communication is inadmissible as incompatible with the provisions of the Covenant, under article 3 of the Optional Protocol.

6.3 As regards the author's complaint that Jensen was not called as a witness during the trial, the Committee notes that the author's defence lawyer, who was privately retained, was free to call him but, in the exercise of his professional judgement, chose not to do so. The Committee considers that the State party cannot be held accountable for alleged errors made by a defence lawyer, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice. In the instant case, there is no reason to believe that counsel was not using his best judgement, and this part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.4 With regard to the author's complaint about the review of his conviction, the Committee notes from the judgement of the Court of Criminal Appeal, dated 4 July 1986, that the Court did evaluate the evidence

against the author and the judge's instructions to the jury with regard to the evidence. The Committee observes that article 14, paragraph 5, does not require that a Court of Appeal proceed to a factual retrial, but that a Court conduct an evaluation of the evidence presented at the trial and of the conduct of the trial. This part of the communication is therefore inadmissible as incompatible with the provisions of the Covenant, under article 3 of the Optional Protocol.

6.5 With regard to the author's claim that the appeal against his retrial was unfair, because one of the judges had participated in his prior appeal against the first conviction, the Committee notes that the judge's participation on appeal was not challenged by the defence and that domestic remedies with respect to this matter have thus not been exhausted. This part of the communication is therefore inadmissible.

6.6 As regards the author's claim about the failure to provide him with the services of an interpreter, the Committee notes that this issue was never brought to the attention of the courts, neither during the trial, nor at appeal. This part of the communication is therefore inadmissible for failure to exhaust domestic remedies, under article 5, paragraph 2 (b), of the Optional Protocol.

6.7 In so far as the author complains that the police used violence against him and discriminated against him on the basis of his race, the Committee notes that, to the extent that these allegations do not form part of the author's claim of unfair trial, they cannot be examined because the purported events occurred in July 1986, that is, before the entry into force of the Optional Protocol for Australia on 25 December 1991 and do not have continuing effects which in themselves constitute a violation of the Covenant. This part of the communication is therefore inadmissible *ratione temporis*.

7. The Human Rights Committee therefore decides:

(a) The communication is inadmissible;

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

Communication No. 541/1993

Submitted by: Errol Simms (represented by counsel)
Alleged victim: The author
State party: Jamaica
Declared inadmissible: 3 April 1995 (fifty-third session)

Subject matter: Claim of unfair trial and police beatings by individual under sentence of death – Prolonged detention on death row – Execution of sentence allegedly amounting to cruel, inhuman and degrading treatment

Procedural issues: Evaluation of facts and evidence by domestic tribunals – Lack of substantiation of claim – Inadmissibility *ratione materiae* – Non-exhaustion of domestic remedies

Substantive issues: Right to life – Right to a fair trial – Trial judge's instructions to jury – Inhuman treatment

Articles of the Covenant: 6 (2), 7, 14 (1) (3) (b)

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

1. The author of the communication is Errol Simms, a Jamaican citizen, currently awaiting execution at the St. Catherine District Prison, Jamaica. He claims to be the victim of violations by Jamaica of articles 6, paragraph 2; 7; and 14, paragraphs 1 and 3 (b), of the International Covenant on Civil and Political Rights. He is represented by counsel.

Facts as submitted by the author

2.1 On 17 May 1987, the author was charged with the murder, on 12 April 1987, of one Michael Demercado. He was convicted and sentenced to death in the Kingston Home Circuit Court on 16 November 1988. On 24 September 1990, the Court of Appeal of Jamaica dismissed his appeal. The Judicial Committee of the Privy Council dismissed his petition for special leave to appeal on 6 June 1991. With this, it is submitted, domestic remedies have been exhausted. The murder for which the author stands convicted has been classified as capital murder under the Offences against the Person (Amendment) Act, 1992.

2.2 The case for the prosecution was that, on 12 April 1987, at approximately 3 a.m., the author together with two other men followed one Carmen Hanson, who returned from a party, into her house. They demanded money, threatened her and hit her. In the course of the robbery, Carmen Hanson's son, Owen Wiggan, together with Michael Demercado and another man, arrived at the house and called her. The author and his companions left the house and

were confronted by the three men; Michael Demercado was then shot dead by the author.

2.3 The prosecution's case rested on the identification evidence of Carmen Hanson's common law husband, Tyrone Wiggan, and their son, Owen. Carmen Hanson testified that the assailants had been masked; she could not identify the author.

2.4 Tyrone Wiggan testified that, during the robbery, he was in his bedroom, opposite to the room where his wife was assaulted; the light in the latter room was turned on. He stated that he could observe the author, who was masked, through a one foot space at the bottom of the bedroom door; although the author had his back turned towards him for most of the time, he recognized the author, whom he had known for two or three years, from the slight hunch in his back and from certain other features. He further testified that, when the author left the room, he was able to see him from the front for two seconds.

2.5 Owen Wiggan testified that he faced the author, whom he knew since childhood, from a distance of 10 feet, for about three minutes. He stated that he was able to recognize the author as the street light in front of the house illuminated the entrance where the three men were standing, and that he saw the author firing at Michael Demercado. He further stated that he had seen the author earlier that evening at the party, where he had been involved in an argument with the deceased.

2.6 The defence was based on alibi. The author gave sworn evidence in which he denied having been at the party and testified that he had been at home with his girlfriend, going to bed at 8 p.m. and awaking at 6 a.m. the following morning. This evidence was corroborated by his girlfriend.

Complaint

3.1 Counsel submits that there were serious weaknesses in the identification evidence, namely, that identification occurred at night, that Tyrone Wiggan had a limited opportunity to obtain a front view of the assailant and that he partly identified the author because of his nose and mouth despite the fact that the assailant was masked. Counsel further submits that it appears from Owen Wiggan's statement to the police that he did not identify the author, whereas at the trial he stated to the police that the author was the assailant.

3.2 Counsel notes that the author was not placed on an identification parade; he submits that in a case in which the prosecution relies solely on identification evidence, an identification parade must be held.

3.3 As to the trial, counsel submits that the trial judge failed to direct the jury properly about the dangers of convicting the accused on identification evidence alone. Counsel submits that the judge's misdirections on the issue of identification constituted the main ground of appeal and that the Court of Appeal, having found no fault with them, dismissed the appeal. Similarly, the petition for special leave to appeal to the Judicial Committee of the Privy Council was based on the issue of identification. As to the refusal to give leave to appeal, counsel argues that, in view of the fact that the Privy Council limits the hearing of appeals in criminal cases to cases where, in its opinion, some matter of constitutional importance has arisen or where a "substantial injustice" has occurred, its jurisdiction is far more restricted than that of the Human Rights Committee.

3.4 It is submitted that during the preliminary inquiry the author was represented by a privately retained lawyer, who only took a short statement from him. The lawyer resigned, because he was not satisfied with the fees he was paid, while the proceedings in the Gun Court were still pending. The author was then assigned a legal aid lawyer. The author alleges that he first met with his lawyer just before the trial started, and complains that the lawyer did not adequately represent him, which, according to the author, is due to the fact that legal aid lawyers are paid "little or no money". As to the appeal, it is submitted that the author probably had no choice as to his lawyer, nor the opportunity to communicate with him prior to the hearing. In this context, it is submitted that counsel for the appeal informed counsel in London that he could not recall when he had visited the author and for how long he had spoken to him, and that he was paid the "princely sum of about 3 pounds to argue the appeal".

3.5 It is argued that the facts mentioned above constitute a violation of article 14, paragraphs 1 and 3 (b), of the Covenant. In view of the above, it is also submitted that the imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have been violated constitutes a violation of article 6, paragraph 2, of the Covenant.

3.6 The author claims that he was beaten by the police upon his arrest, in violation of articles 7 and 10, paragraph 1, of the Covenant.

3.7 Counsel argues that in view of the fact that the author was sentenced to death on 16 November 1988, the execution of the sentence at this point in time would amount to cruel, inhuman and degrading treatment, in violation of article 7 of the Covenant. Counsel asserts that the time spent on death row already constitutes such cruel, inhuman and degrading treatment. To support this claim, counsel refers to a report on the conditions in St. Catherine District Prison prepared by a non-governmental organization in May 1990.

3.8 It is stated that the matter has not been submitted to any other instance of international investigation or settlement.

State party's observations and counsel's comments thereon

4. The State party, by submission of 5 August 1993, argues that the communication is inadmissible for failure to exhaust domestic remedies. In this context, the State party argues that it is open to the author to seek redress for the alleged violations of his rights by way of constitutional motion.

5. In his comments, counsel submits that, although a constitutional remedy exists in theory, it is unavailable to the author in practice, because of his lack of funds and the State party's failure to provide legal aid for constitutional motions.

Issues and proceedings before the Committee

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

6.2 The Committee notes that part of the author's allegations relate to the evaluation of evidence and to the instructions given by the judge to the jury. The Committee refers to its prior jurisprudence and reiterates that it is generally for the appellate courts of States parties to the Covenant to evaluate facts and evidence in a particular case. Similarly, it is not for the Committee to review specific instructions to the jury by the trial judge, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice. The material before the Committee does not show that the trial judge's instructions or the conduct of the trial suffered from such defects. Accordingly, this part of the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

6.3 The author has further claimed that he had not sufficient time to prepare his defence, in violation of article 14, paragraph 3 (b), of the Covenant. The Committee notes that the lawyer who represented the author at his trial has stated that, in fact, he did have sufficient time to prepare the defence and to call witnesses. With regard to the appeal, the Committee notes that the appeal judgement shows that the author was represented by counsel who argued the grounds for the appeal and that the author and his present counsel have not specified their complaint. In these circumstances the Committee considers that the allegation has not been substantiated, for purposes of admissibility. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.4 As regards the author's claim that he was beaten by the police upon arrest, the Committee notes that this claim was never brought to the attention of the Jamaican authorities, neither in the author's sworn evidence at the trial, nor on appeal, or in any other way. The Committee refers to its standard jurisprudence that an author should show reasonable diligence in the pursuit of available domestic remedies. This part of the communication is therefore inadmissible for failure to exhaust domestic remedies.

6.5 The Committee next turns to the author's claim that his prolonged detention on death row amounts to a violation of article 7 of the Covenant. Although some national courts of last resort have held that prolonged detention on death row for a period of five years or more violates their constitutions or laws, the jurisprudence of this Committee remains that detention for any specific period would not be a violation of article 7 of the Covenant in the absence of some further compelling circumstances. The Committee observes that the author has not substantiated, for purposes of admissibility, any specific circumstances of his case that would raise an issue under article 7 of the Covenant. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible;

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

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

Communication No. 309/1998

Submitted by: Carlos Orihuela Valenzuela
Alleged victim: The author and his family
State party: Peru
Declared admissible: 22 March 1991 (forty-first session)
Date of adoption of Views: 14 July 1993 (forty-eighth session)

Subject matter: Claim of arbitrary denial of severance pay and harassment of individual dismissed from job allegedly for political reasons

Procedural issues: State party's failure to submit information on admissibility and merits – Ineffective and unreasonably prolonged remedies – Lack of substantiation of claim – Standing of the author's sons

Substantive issues: Equal protection before the law – Ill-treatment

Articles of the Covenant: 10, 17 and 26

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

1. The author of the communication dated 29 June 1988 is Carlos Orihuela Valenzuela, a Peruvian citizen residing at Lima, Peru. He claims to be a victim of a violation by the Government of Peru of his human rights but does not invoke any articles of the International Covenant on Civil and Political Rights.

Facts as submitted by the author

2.1 The author, a member of the Peruvian bar (*Colegio de Abogados*) and a civil servant for 26 years, was named counsel for the Chamber of Deputies in 1982 and served in the Peruvian Human Rights Commission for five years. Following the change of government in Peru in 1985, he was dismissed from his post at the Chamber of Deputies without any administrative proceedings. The author states that he has six school-age children and that he is not receiving the civil servant's pension to which he claimed to be entitled.

2.2 With regard to the requirement of exhaustion of domestic remedies, the author states that he has unsuccessfully tried all administrative and judicial remedies. He alleges that the proceedings have been frustrated for political reasons and have been unduly prolonged. On 7 November 1985 he petitioned for the reconsideration of his dismissal (*recurso de reconsideración*) but he alleges that, on the express order of a senior deputy, his petition was not processed. On 10 April 1986, he renewed his request by way of a complaint (*queja*), which was similarly not processed by the authorities. On 8 May 1986, he lodged an action (*denuncia*) before the President of the Chamber of Deputies, again without any response. On 11 June 1986, he addressed a request to the Chamber of Deputies based on Law 24514 and Legislative Decree No. 276, again without any response. On 23 June 1986, he presented an appeal (*recurso de apelación*) to the President of the Chamber of Deputies, which was similarly ignored.

2.3 On 2 July 1986, he had recourse to the Civil Service Tribunal (*Tribunal del Servicio Civil en Apelación*), but three months later the Chamber of Deputies addressed a memorandum to the Tribunal ordering it to respect its resolution dismissing the author, invoking article 177 of the Peruvian Constitution. This last administrative instance allegedly complied with the order of the Chamber of Deputies and terminated its investigation of the case.

2.4 On 5 September 1986, the author filed an action for reinstatement in the civil service with a court of first instance in Lima, which, on 23 July 1987, decided against him. On appeal, the matter was taken up by the Superior Court of Lima (*Segunda Sala Civil de la Corte Superior de Lima*), which, on 21 March 1988, requested the Civil Service Tribunal to forward the author's dossier. The Civil Service Tribunal did not comply with the request of the Superior Court and, by order of 29 December 1988, the Superior Court dismissed the appeal.

2.5 An action against the Chamber of Deputies concerning the author's rights to severance pay (*pensíon de cesantía*) has been pending before the Supreme Court (*Segunda Sala de la Corte Suprema*) since 1 February 1989. In October 1989 the competent organ of the Chamber of Deputies resolved to grant him severance pay corresponding to his 26 years of civil service. The President of the Chamber, however, never signed the resolution and to this date no pension has been paid.

2.6 He further alleges that members of his family have been subjected to ill-treatment and humiliation, in particular that in 1989 his 22-year-old son Carlos was arbitrarily detained by the police and subjected to beatings, that he was given a shower in his clothes at the Lince police station, as a consequence of which he became ill and had to be hospitalized in the bronchio-pulmonary section of a clinic and that his other son Lorenzo was subjected to arbitrary arrest and detention on two occasions; moreover, that as part of the general harassment against the Orihuela family, his son Carlos has been barred from participating in the entrance examinations to the university. He has denounced these abuses to the competent prosecuting authorities (*Fiscalía Penal de Turno*), without redress.

Complaint and relief sought

3. The author alleges that he and his family have been subjected to defamation and discrimination because of their political opposition to the Government of the then President Alan García of the American Popular Revolutionary Alliance party, and that all attempts to obtain redress have been met by a politically motivated denial of justice. In particular, he claims that his sons have been subjected to arbitrary arrest and ill-treatment, and that he was unjustly dismissed from the civil service and denied a fair hearing in the courts, that he is being debarred from reinstatement in any post in the civil service, that he received no severance pay upon dismissal after 26 years of service, and that his honour and reputation have been unjustly attacked. He seeks, *inter alia*, reinstatement in his post and compensation for the unjust dismissal.

Admissibility considerations

4.1 On 21 November 1988, the State party was requested to furnish information on the question of admissibility of the communication, including details of effective domestic remedies. The State party was also requested to furnish the Committee with copies of all relevant administrative and judicial orders and decisions in the case, in so far as they had not already been submitted by the author, and to inform the Committee of the status of the action pending before the Superior Court of Lima (*Segunda Sala de la Corte Superior de Lima*). No submission from the State party on the question of admissibility was received, in spite of a reminder sent on 14 August 1989.

4.2 During its forty-first session, the Committee considered the admissibility of the communication. It ascertained, as it is required to do under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter was not being examined under another procedure of international investigation or settlement. With regard to article 5, paragraph 2 (b), of the Optional Protocol, the Committee was unable to conclude, on the basis of the information before it, that there were effective remedies available to the author which he could or should have pursued. Moreover, the application of existing remedies had been unreasonably prolonged within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

4.3 With regard to the author's allegations relating to an arbitrary denial of redress for the dismissal from his post as counsel for the Chamber of Deputies, as well as his claim to have been subjected to unfair judicial proceedings and judicial bias, the Committee found that these allegations had not been substantiated, for purposes of admissibility.

4.4 The Committee found that the author's other allegations, in particular those related to the arbitrary denial of severance pay as well as those related to the harassment of his family, notably his two sons, had been substantiated, for purposes of admissibility, and should be considered on the merits.

5. On 22 March 1991, the Human Rights Committee declared the communication admissible inasmuch as it might raise issues under articles 10, 17 and 26 of the Covenant. The Committee again requested the State party to forward copies of any relevant orders or decisions in the author's case, and to clarify the relationship between the Chamber of Deputies and the Civil Service Tribunal and other courts.

Examination of the merits

6.1 In spite of reminders sent to the State party on 9 January and 26 August 1992, only a submission concerning domestic remedies was received, but no submission on the merits of the case. The Committee notes with concern the lack of any cooperation on the part of the State party in respect of the substance of the author's allegations. It is implicit in article 4, paragraph 2, of the Optional Protocol that a State party to the Covenant must investigate in good faith all the allegations of violations of the Covenant made against it and its authorities, and 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.

6.2 As to the alleged violation of article 10, paragraph 1, of the Covenant, in respect of the author's children, the Committee notes that the material before it indicates that the author's two adult sons have been subjected to ill-treatment during detention, including beatings. The author's adult sons, however, are not co-authors of the present communication and therefore the Committee makes no finding in regard to a violation of their rights.

6.3 The Committee notes that these allegations of ill-treatment against members of the author's family have not been contested by the State party. However, the author's allegations do not provide sufficient substantiation so as to justify a finding of a violation of article 17 of the Covenant.

6.4 The Committee has noted the author's claim that he has not been treated equally before the Peruvian courts in connection with his pension claims. The State party has not refuted his allegation that the courts' inaction, the delays in the proceedings and the continued failure to implement the resolution of October 1989 concerning his severance pay are politically motivated. The Committee concludes, on the basis of the material before it, that the denial of severance pay to a long-standing civil servant who is dismissed by the Government constitutes, in the circumstances of this case, a violation of article 26 and that Mr. Orihuela Valenzuela did not benefit "without any discrimination [from] equal protection of the law". Therefore, the Committee finds that there has been a violation of article 26 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 reveal a violation of article 26 of the Covenant.

8. The Committee is of the view that Mr. Carlos Orihuela Valenzuela is entitled, under article 2, paragraph 3 (a), of the Covenant, to an effective remedy, including a fair and non-discriminatory examination of his claims, appropriate compensation and such severance pay as he would be entitled to under Peruvian law. The State party is under an obligation to take measures to ensure that similar violations do not occur in the future.

9. 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.

Communication No. 314/1988

Submitted by: Peter Chiiko Bwalya on 30 March 1988
Alleged victim: The author
State party: Zambia
Declared admissible: 21 March 1991 (forty-first session)
Date of adoption of Views: 14 July 1993 (fifty-eighth session)

Subject matter: Detention and intimidation of leader of a political opposition party – Restrictions on right to take part in the conduct of public affairs

Procedural issues: State party's failure to comment on admissibility – Sufficiency of State party's reply under article 4 (2) – Exhaustion of domestic remedies

Substantive issues: Threats to personal security – Arbitrary detention – Freedom of movement – Freedom of expression – Right to take part in public affairs – Discrimination based on political opinion

Articles of the Covenant: 7, 9, 10, 12, 19, 25 and 26

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

1. The author of the communication is Peter Chiiko Bwalya, a Zambian citizen born in 1961 and currently chairman of the People's Redemption Organization, a political party in Zambia. He claims to be a victim of violations of the International Covenant on Civil and Political Rights by Zambia.

Facts as submitted by the author

2.1 In 1983, at the age of 22, the author ran for a parliamentary seat in the Constituency of Chifubu, Zambia. He states that the authorities prevented him from properly preparing his candidacy and from participating in the electoral campaign. The authorities' action apparently helped to increase his popularity among the poorer strata of the local population, as the author was committed to changing the Government's policy towards, in particular, the homeless and the unemployed. He claims that in

retaliation for the propagation of his opinions and his activism, the authorities subjected him to threats and intimidation, and that in January 1986 he was dismissed from his employment. The Ndola City Council subsequently expelled him and his family from their home, while the payment of his father's pension was suspended indefinitely.

2.2 Because of the harassment and hardship to which he and his family were being subjected, the author emigrated to Namibia, where other Zambian citizens had settled. Upon his return to Zambia, however, he was arrested and placed in custody; the author's account in this respect is unclear and the date of his return to Zambia remains unspecified.

2.3 The author notes that by September 1988 he had been detained for 31 months, on charges of belonging to the People's Redemption Organization – an association considered illegal under the terms of the country's one-party Constitution – and for having conspired to overthrow the Government of the then President Kenneth Kaunda. On an unspecified subsequent date, he was released; again, the circumstances of his release remain unknown. At an unspecified later date, Mr. Bwalya returned to Zambia.

2.4 On 25 March 1990, the author sought the Committee's direct intercession in connection with alleged discrimination, denial of employment and refusal of a passport. By letter of 5 July 1990, the author's wife indicated that her husband had been rearrested on 1 July 1990 and taken to the Central Police Station in Ndola, where he was reportedly kept for two days. Subsequently, he was transferred to Kansenshi prison in Ndola; the author's wife claims that she was not informed of the reasons for her husband's arrest and detention.

2.5 With respect to the requirement of exhaustion of domestic remedies, the author notes that he instituted proceedings against the authorities after his initial arrest. He notes that the district tribunal reviewing his case confirmed, on 17 August 1987, that he was no danger to national security but that, notwithstanding the court's finding, he remained in custody. A further approach to the Supreme Court met with no success.

Complaint

3.1 In his initial submissions, the author invokes a large number of provisions of the Covenant, without substantiating his allegations. In subsequent letters, he confines his claims to alleged violations of articles 1, 2, 3, 9, 10, 12, 25 and 26 of the Covenant.

3.2 The author contends that, since he never participated in any conspiracy to overthrow the Government of President Kaunda, his arrests were arbitrary and his detentions unlawful, and that he is entitled to adequate compensation from the State party. He submits that following his release from the first period of detention he continued to be harassed and intimidated by the authorities; he claims that he denounced these practices.

3.3 The author states that, as a political activist and former prisoner of conscience, he has been placed under strict surveillance by the authorities, and that he continues to be subjected to restrictions on his freedom of movement. He claims that he has been denied a passport as well as any means of making a decent living.

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 During its forty-first session, the Committee considered the admissibility of the communication. It noted with concern the absence of cooperation from the State party which, in spite of four reminders addressed to it, had failed to comment on the admissibility of the communication. It further noted that the author's claim that the Supreme Court had dismissed his appeal had remained uncontested. In the circumstances, the Committee concluded that the requirements of article 5, paragraph 2 (b), of the Optional Protocol had been met.

4.3 As to the claims relating to articles 7 and 10 of the Covenant, the Committee considered that the author had failed to substantiate his claim, for purposes of admissibility, that he had been subjected to treatment in violation of these provisions. Accordingly, the Committee found this part of the communication inadmissible under article 2 of the Optional Protocol.

4.4 With respect to the author's claims that he: (a) had been subjected to arbitrary arrest and unlawful detention; (b) had been denied the right to liberty of movement and arbitrarily denied a passport; (c) had been denied the right to take part in the conduct of public affairs; and (d) had been discriminated against on account of political opinion, the Committee considered that they had been substantiated, for purposes of admissibility. Furthermore, the Committee was of the opinion that, although articles 9, paragraph 2, and 19 had not been invoked, the facts as submitted might raise issues under these provisions.

4.5 On 21 March 1991, the Committee declared the communication admissible in so far as it appeared to raise issues under articles 9, 12, 19, 25 and 26 of the Covenant.

5.1 In a submission dated 28 January 1992, the State party indicates that "Mr. Peter Chiiko Bwalya has been released from custody and is a free person now". No information on the substance of the author's allegations, nor copies of his indictment or any judicial orders concerning the author, have been provided by the State party, in spite of reminders addressed to it on 9 January and 21 May 1992.

5.2 In a letter dated 3 March 1992, the author confirms that he was released from detention but requests the Committee to continue consideration of his case. He adds that the change in the Government has not changed the authorities' attitude towards him.

6.1 The Committee has considered the communication in the light of all the information provided by the parties. It notes with concern that, with the exception of a brief note informing the Committee of the author's release, the State party has failed to cooperate on the matter under consideration. It further recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol that a State party examine in good faith all the allegations brought against it, and that it provide the Committee with all the information at its disposal, including all available judicial orders and decisions. The State party has not forwarded to the Committee any such information. 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 issues under article 19, the Committee considers that the uncontested response of the authorities to the attempts of the author to express his opinions freely and to disseminate the political tenets of his party constitute a violation of his rights under article 19.

6.3 The Committee has noted that when the communication was placed before it for consideration, Mr. Bwalya had been detained for a total of 31 months, a claim that has not been contested by the State party. It notes that the author was held solely on charges of belonging to a political party considered illegal under the country's (then) one-party constitution and that on the basis of the information before the Committee, Mr. Bwalya was not brought promptly before a judge or other officer authorized by law to exercise judicial power to determine the lawfulness of his detention. This, in the Committee's opinion, constitutes a violation of the author's right under article 9, paragraph 3, of the Covenant.

6.4 With regard to the right to security of person, the Committee notes that Mr. Bwalya, after being released from detention, has been subjected to continued harassment and intimidation. The State party has not contested these allegations. The first sentence of article 9, paragraph 1, guarantees to everyone the right to liberty and security of person. The Committee has already had the opportunity to explain that this right may be invoked not only in the context of arrest and detention, and that an interpretation of article 9 which would allow a State party to ignore threats to the personal security of non-detained persons within its jurisdiction would render ineffective the guarantees of the Covenant.[1] In the circumstances of the case, the Committee concludes that the State party has violated Mr. Bwalya's right to security of person under article 9, paragraph 1.

6.5 The author has claimed, and the State party has not denied, that he continues to suffer restrictions on his freedom of movement, and that the authorities have refused to issue a passport to him. This, in the Committee's opinion, amounts to a violation of article 12, paragraph 1, of the Covenant.

6.6 As to the alleged violation of article 25 of the Covenant, the Committee notes that the author, a leading figure of a political party in opposition to the former President, has been prevented from participating in a general election campaign as well as from preparing his candidacy for this party. This amounts to an unreasonable restriction on the author's right to "take part in the conduct of public affairs" which the State party has failed to explain or justify. In particular, it has failed to explain the requisite conditions for participation in the elections. Accordingly, it must be assumed that Mr. Bwalya was detained and denied the right to run for a parliamentary seat in the Constituency of Chifubu merely on account of his membership in a political party other than that officially recognized; in this context, the Committee observes that restrictions on political activity outside the only recognized political party amount to an unreasonable restriction of the right to participate in the conduct of public affairs.

6.7 Finally, on the basis of the information before it, the Committee concludes that the author has been discriminated against in his employment because of his political opinions, contrary to article 26 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 as found by the Committee disclose violations of articles 9, paragraphs 1 and 3, 12, 19, paragraph 1, 25 (a) and 26 of the Covenant.

8. Pursuant to article 2 of the Covenant, the State party is under an obligation to provide Mr. Bwalya with an appropriate remedy. The Committee urges

---

[1] Views on communication No. 195/1985 (*Delgado Páez v. Colombia*), adopted on 12 July 1990, paras. 5.5 and 5.6.

Committee urges the State party to grant appropriate compensation to the author. The State party is under an obligation to ensure that similar violations do not occur in the future.

9. 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.

Communication No. 322/1988

Submitted by: Hugo Rodríguez on 23 July 1988
Alleged victim: The author
State party: Uruguay
Declared admissible: 20 March 1992 (forty-fourth session)
Date of adoption of Views: 19 July 1994 (fifty-first session)

Subject matter: Claim of denial of redress in the form of investigation of abuses – Punishment of those held responsible and compensation to the victims by an individual allegedly tortured by military authorities – Compatibility of amnesty laws with the obligations of States parties under the Covenant

Procedural issues: Denial of domestic remedies by State party – Failure to address the issues of the case – Inadmissibility *ratione materiae*

Substantive issues: Torture and ill-treatment – State party's obligation to investigate violations of the Covenant rights by a previous regime – Right to an effective remedy

Articles of the Covenant: 2 (3) and 7

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

1. The author of the communication is Hugo Rodríguez, a Uruguayan citizen residing in Montevideo. Although he invokes violations by Uruguay of articles 7, 9, 10, 14, 15, 18 and 19 of the International Covenant on Civil and Political Rights, he requests the Human Rights Committee to focus on his allegations under article 7 of the Covenant and on the State party's alleged failure properly to investigate his case, to punish the guilty and to award him appropriate compensation. The author is the husband of Lucía Arzuaga Gilboa, whose communication No. 147/1983 was also considered by the Committee.[1]

The facts as submitted by the author

2.1 In June 1983, the Uruguayan police arrested the author and his wife, together with several other individuals. The author was taken by plainclothes policemen to the headquarters of the secret police (*Dirección Nacional de Información e Inteligencia*), where he allegedly was kept handcuffed for several hours, tied to a chair and with his head hooded. He was allegedly forced to stand naked, still handcuffed, and buckets of cold water were poured over him. The next day, he allegedly was forced to lie naked on a metal bedframe; his arms and legs were tied to the frame and electric charges were applied (*picana eléctrica*) to his eyelids, nose and genitals. Another method of ill-treatment consisted in coiling wire around fingers and genitals and applying electric current to the wire (*magneto*); at the same time, buckets of dirty water were poured over him. Subsequently, he allegedly was suspended by his arms, and electric shocks were applied to his fingers. This treatment continued for a week, after which the author was relocated to another cell; there he remained incomunicado for another week. On 24 June, he was brought before a military judge and indicted on unspecified charges. He remained detained at the "Libertad Prison" until 27 December 1984.

2.2 The author states that during his detention and even thereafter, until the transition from military to civilian rule, no judicial investigation of his case could be initiated. After the re-introduction of constitutional guarantees in March 1985, a formal complaint was filed with the competent authorities. On 27 September 1985, a class action was brought before the Court of First Instance (*Juzgado Letrado de Primera Instancia en lo Penal de 4 Turno*) denouncing the torture, including that suffered by the author, perpetrated on the premises of the secret police. The judicial investigation was not, however, initiated because of a dispute over the court's jurisdiction, as the military insisted that only military courts could legitimately carry out the investigations. At the end of 1986, the Supreme Court of Uruguay held that the civilian courts were competent, but in the meantime, the Parliament had enacted, on

[1] See *Official Records of the General Assembly, Forty-first Session, Supplement No. 40* (A/41/40), annex VIII.B, Views adopted during the twenty-sixth session, on 1 November 1985, in which the Committee held that the facts disclosed violations of articles 7 and 10, paragraph 1, of the Covenant.

22 December 1986, Law No. 15,848, the Limitations Act or Law of Expiry (*Ley de Caducidad*) which effectively provided for the immediate end of judicial investigation into such matters and made impossible the pursuit of this category of crimes committed during the years of military rule.

The complaint

3. The author denounces the acts of torture to which he was subjected as a violation of article 7 of the Covenant and contends that he and others have been denied appropriate redress in the form of investigation of the abuses allegedly committed by the military authorities, punishment of those held responsible and compensation to the victims. In this context, he notes that the State party has systematically instructed judges to apply Law No. 15,848 uniformly and close pending investigations; the President of the Republic himself allegedly advised that this procedure should be applied without exception. The author further contends that the State party cannot, by simple legislative act, violate its international commitments and thus deny justice to all the victims of human rights abuses committed under the previous military regime.

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

4.1 The State party argues that the communication be declared inadmissible on the ground of non-exhaustion of domestic remedies. It rejects the author's contention that his complaints and the judicial proceedings were frustrated by the enactment of Law No. 15,848. First, the enactment of the law did not necessarily result in the immediate suspension of the investigation of allegations of torture and other wrongdoings, and article 3 of the law provides for a procedure of consultation between the Executive and the Judiciary. Secondly, article 4 does not prohibit investigations into situations similar to those invoked by the author, since the provision "authorizes an investigation by the Executive Power to clarify cases in which the disappearance of persons in presumed military or police operations has been denounced". Thirdly, the author could have invoked the unconstitutionality of Law No. 15,848; if his application had been accepted, any judicial investigation into the facts alleged to have occurred would have been reopened.

4.2 The State party further explains that there are other remedies, judicial and non-judicial, which were not exhausted in the case: first, "the only thing which Law No. 15,848 does not permit ... is criminal prosecution of the offenders; it does not leave the victims of the alleged offences without a remedy". Thus, victims of torture may file claims for compensation through appropriate judicial or administrative channels; compensation from the State of Uruguay may, for instance, be claimed in the competent administrative court. The State party notes that many such claims for compensation have been granted, and similar actions are pending before the courts.

4.3 Subsidiarily, it is submitted that Law No. 15,848 is consistent with the State party's international legal obligations. The State party explains that the law "did establish an amnesty of a special kind and subject to certain conditions for military and police personnel alleged to have been engaged in violations of human rights during the period of the previous ... regime .... The object of these legal normative measures was, and still is, to consolidate the institution of democracy and to ensure the social peace necessary for the establishment of a solid foundation of respect of human rights." It is further contended that the legality of acts of clemency decreed by a sovereign State, such as an amnesty or an exemption, may be derived from article 6, paragraph 4, of the Covenant and article 4 of the American Convention on Human Rights. In short, an amnesty or abstention from criminal prosecution should be considered not only as a valid form of legal action but also the most appropriate means of ensuring that situations endangering the respect for human rights do not occur in the future. The State party invokes a judgement of the Inter-American Court of Human Rights in support of its contention.[2]

5.1 Commenting on the State party's submission, the author maintains that Law No. 15,848 does not authorize investigations of instances of torture by the

[2] Judgement of the Inter-American Court of Human Rights in the case of *Velasquez Rodríguez*, given on 29 July 1988. Compare, however, the Advisory Opinion OC-13/93 of 16 July 1993, affirming the competence of the Inter-American Commission on Human Rights to find any norm of the internal law of a State party to be in violation of the latter's obligations under the American Convention on Human Rights. See also resolution No. 22/88 in case No. 9850 concerning Argentina, given on 4 October 1990, and report No. 29/92 of 2 October 1992 concerning the Uruguayan cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375, in which the Commission concluded that "Law 15,848 of December 22, 1986 is incompatible with article XVIII (right to a fair trial) of the American Declaration of the Rights and Duties of Man, and articles 1, 8 and 25 of the American Convention on Human Rights". The Commission further recommended to the Government of Uruguay that it give the applicant victims or their rightful claimants just compensation, and that "it adopt the measures necessary to clarify the facts and identify those responsible for the human rights violations that occurred during the de facto period". (*Annual Report of the Inter-American Commission on Human Rights, 1992-1993*, p. 165).

Executive: its article 4 only applies to the alleged disappearance of individuals.

5.2 With respect to a constitutional challenge of the law, the author points out that other complainants have already challenged Law No. 15,848 and that the Supreme Court has ruled that it is constitutional.

Consideration of and decision on admissibility

6.1 At its forty-fourth session, the Committee considered the admissibility of the communication. The Committee ascertained, as it is required to do under article 5, paragraph 2 (a), of the Optional Protocol, that the matter was not being examined by the Inter-American Commission on Human Rights.

6.2 The Committee further took note of the State party's contention that the author had failed to exhaust available domestic remedies and that civil and administrative, as well as constitutional, remedies remained open to him. It observed that article 5, paragraph 2 (b), of the Optional Protocol required exhaustion of local remedies only to the extent that these are both available and effective; authors are not required to resort to extraordinary remedies or remedies the availability of which is not reasonably evident.

6.3 In the Committee's opinion, a constitutional challenge of Law No. 15,848 fell into the latter category, especially given that the Supreme Court of Uruguay has deemed the law to be constitutional. Similarly, to the extent that the State party indicated the availability of administrative remedies possibly leading to the author's compensation, the author plausibly submitted that the strict application of Law No. 15,848 frustrates any attempt to obtain compensation, as the enforcement of the law bars an official investigation of his allegations. Moreover, the author stated that on 27 September 1985 he and others started an action with the Juzgado Letrado de Primera Instancia en lo Penal, in order to have the alleged abuses investigated. The State party did not explain why no investigations were carried out. In the light of the gravity of the allegations, it was the State party's responsibility to carry out investigations, even if as a result of Law No. 15,848 no penal sanctions could be imposed on persons responsible for torture and ill-treatment of prisoners. The absence of such investigation and of a final report constituted a considerable impediment to the pursuit of civil remedies, e.g. for compensation. In these circumstances, the Committee found that the State party itself had frustrated the exhaustion of domestic remedies and that the author's complaint to the *Juzgado Letrado de Primera Instancia* should be deemed a reasonable effort to comply with the requirements of article 5, paragraph 2 (b).

6.4 To the extent that the author claimed that the enforcement of Law No. 15,848 frustrated his right to see certain former government officials criminally prosecuted, the Committee recalled its prior jurisprudence that the Covenant does not provide a right for an individual to require that the State party criminally prosecute another person.[3] Accordingly, this part of the communication was found to be inadmissible *ratione materiae* as incompatible with the provisions of the Covenant.

7. On 20 March 1992, the Human Rights Committee decided that the communication was admissible in so far as it appeared to raise issues under article 7 of the Covenant.

The State party's observations

8.1 On 3 November 1992 the State party submitted its observations on the Committee's admissibility decision, focusing on the legality of Law No. 15,848 in the light of international law. It considered the Committee's decision to be unfounded, since the State's power to declare amnesty or to bar criminal proceedings are "matters pertaining exclusively to its domestic legal system, which by definition have constitutional precedence".

8.2 The State party emphasizes that Law No. 15,848 on the lapsing of State prosecutions was endorsed in 1989 by referendum, "an exemplary expression of direct democracy on the part of the Uruguayan people". Moreover, by a decision of 2 May 1988, the Supreme Court declared the law to be constitutional. It maintains that the law constituted a sovereign act of clemency that is fully in accord and harmony with the international instruments on human rights.

8.3 It is argued that notions of democracy and reconciliation ought to be taken into account when considering laws on amnesty and on the lapsing of prosecutions. In this context, the State party indicated that other relevant laws were adopted, including Law No. 15,737, adopted on 15 March 1985, which decreed an amnesty for all ordinary political and related military offences committed since 1 January 1962, and which recognized the right of all Uruguayans wishing to return to the country to do so and the right of all public officials dismissed by the military Government to be reinstated in their respective positions. This law expressly excluded from amnesty offences involving inhuman or degrading treatment or the disappearance of persons

[3] See *Official Records of the General Assembly, Forty-fourth Session, Supplement No. 40* (A/44/40), annex XI.B, communication No. 213/1986 (*H. C. M. A. v. the Netherlands*), declared inadmissible on 30 March 1989, para. 11.6; and ibid., *Forty-fifth Session, Supplement No. 40* (A/45/40), annex X.J, communication No. 275/1988 (*S. E. v. Argentina*), declared inadmissible on 26 March 1990, para. 5.5.

under the responsibility of police officers or members of the armed forces. By Law No. 15,783 of 28 November 1985, persons who had been arbitrarily dismissed for political, ideological or trade-union reasons were entitled to reinstatement.

8.4 With regard to the right to judicial safeguards and the obligation to investigate, the State party asserts that Law No. 15,848 in no way restricts the system of judicial remedies established in article 2, paragraph 3, of the Covenant. Pursuant to this law, only the State's right to bring criminal charges lapsed. The law did not eliminate the legal effects of offences in areas outside the sphere of criminal law. Moreover, the State argues, its position is consistent with the judgement of the Inter-American Court of Human Rights in the case of Velasquez Rodríguez that the international protection of human rights should not be confused with criminal justice (para. 174).

8.5 In this connection, the State party contends that "to investigate past events ... is tantamount to reviving the confrontation between persons and groups. This certainly will not contribute to reconciliation, pacification and the strengthening of democratic institutions." Moreover, "the duty to investigate does not appear in the Covenant or any express provision, and there are consequently no rules governing the way this function is to be exercised. Nor is there any indication in the Convention text concerning its precedence or superiority over other duties – such as the duty to punish – nor, of course, concerning any sort of independent legal life detached from the legal and political context within which human rights as a whole come into play ... The State can, subject to the law and in certain circumstances, refrain from making available to the person concerned the means of establishing the truth formally and officially in a criminal court, which is governed by public, not private interest. This, of course, does not prevent or limit the free exercise by such a person of his individual rights, such as the right to information, which in many cases in themselves lead to the discovery of the truth, even if it is not the public authorities themselves that concern themselves with the matter."

8.6 With regard to the author's contention that Law No. 15,848 "frustrates any attempt to obtain compensation, as the enforcement of the law bars an official investigation of his allegations" the State party asserts that there have been many cases in which claims similar to that of the author have succeeded in civil actions and that payment has been obtained.

9. The State party's submission was transmitted to the author for comments on 5 January 1993. In spite of a reminder dated 9 June 1993, no comments were received from the author.

Consideration of the merits

10. The Committee has taken due note of the State party's contention that the Committee's decision on admissibility was not well founded.

11. Even though the State party has not specifically invoked article 93, paragraph 4, of the Committee's rules of procedure, the Committee has ex officio reviewed its decision of 20 March 1992 in the light of the State party's arguments. The Committee reiterates its finding that the criteria of admissibility of the communication were satisfied and holds that there is no reason to set aside the decision.

12.1 With regard to the merits of the communication, the Committee notes that the State party has not disputed the author's allegations that he was subjected to torture by the authorities of the then military regime in Uruguay. Bearing in mind that the author's allegations are substantiated, the Committee finds that the facts as submitted sustain a finding that the military regime in Uruguay violated article 7 of the Covenant. In this context, the Committee notes that, although the Optional Protocol lays down a procedure for the examination of individual communications, the State party has not addressed the issues raised by the author as a victim of torture nor submitted any information concerning an investigation into the author's allegations of torture. Instead, the State party has limited itself to justifying, in general terms, the decision of the Government of Uruguay to adopt an amnesty law.

12.2 As to the appropriate remedy that the author may claim pursuant to article 2, paragraph 3, of the Covenant, the Committee finds that the adoption of Law No. 15,848 and subsequent practice in Uruguay have rendered the realization of the author's right to an adequate remedy extremely difficult.

12.3 The Committee cannot agree with the State party that it has no obligation to investigate violations of Covenant rights by a prior regime, especially when these include crimes as serious as torture. Article 2, paragraph 3 (a) of the Covenant clearly stipulates that each State party undertakes "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity". In this context, the Committee refers to its general comment No. 20 (44) on article 7,[4] which provides that allegations of torture must be fully investigated by the State:

[4] Adopted at the Committee's forty-fourth session (1992); see *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40* (A/47/40), annex VI.A.

> "Article 7 should be read in conjunction with article 2, paragraph 3 .... The right to lodge complaints against maltreatment prohibited by article 7 must be recognized in the domestic law. Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective ....
>
> "The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible."

The State party has suggested that the author may still conduct private investigations into his torture. The Committee finds that the responsibility for investigations falls under the State party's obligation to grant an effective remedy. Having examined the specific circumstances of this case, the Committee finds that the author has not had an effective remedy.

12.4 The Committee moreover reaffirms its position that amnesties for gross violations of human rights and legislation such as Law No. 15,848, *Ley de Caducidad de la Pretensión Punitiva del Estado*, are incompatible with the obligations of the State party under the Covenant. The Committee notes with deep concern that the adoption of this law effectively excludes in a number of cases the possibility of investigation into past human rights abuses and thereby prevents the State party from discharging its responsibility to provide effective remedies to the victims of those abuses. Moreover, the Committee is concerned that, in adopting this law, the State party has contributed to an atmosphere of impunity which may undermine the democratic order and give rise to further grave human rights violations.[5]

13. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 7, in connection with article 2, paragraph 3, of the Covenant.

14. The Committee is of the view that Mr. Hugo Rodríguez is entitled, under article 2, paragraph 3 (a), of the Covenant, to an effective remedy. It urges the State party to take effective measures (a) to carry out an official investigation into the author's allegations of torture, in order to identify the persons responsible for torture and ill-treatment and to enable the author to seek civil redress; (b) to grant appropriate compensation to Mr. Rodríguez; and (c) to ensure that similar violations do not occur in the future.

15. 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.

---

[5] See the comments of the Committee on Uruguay's third periodic report under article 40 of the Covenant, adopted on 8 April 1993, *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40* (A/48/48), chap. III.

Communication No. 328/1988

Submitted by: Myriam Zelaya Dunaway and Juan Zelaya, later joined by their brother, the alleged victim, on 20 July 1988
Alleged victim: Roberto Zelaya Blanco
State party: Nicaragua
Declared admissible: 29 March 1992 (forty-fourth session)
Date of adoption of Views: 18 October 1995 (fifty-first session)

Subject matter: Unlawful and arbitrary arrest and detention on account of criticism of Sandinista regime – Ill-treatment of author

Procedural issues: Ex officio review of admissibility decision – Sufficiency of State party's reply under article 4 (2) – Examination by other instance of international investigation or settlement – Exhaustion of domestic remedies – Adoption of Views without merits submission by State party

Substantive issues: Torture and ill-treatment – Arbitrary detention – Compulsory self-incrimination – Interference with correspondence of prisoner – Confiscation of property – Right to compensation – State party's duty to investigate allegations

Articles of the Covenant: 7, 9 (1), 10 (1), 14 (3) (g), 17 and 26

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

1. The authors of the initial communication are Myriam Zelaya Dunaway and Juan Zelaya, citizens of the United States of America and of Nicaraguan origin, currently residing in the United States. They submit the communication on behalf and upon the request of their brother, Roberto Zelaya Blanco, a Nicaraguan citizen born in 1935, at the time of submission of the communication detained at the prison of Tipitapa, Nicaragua. The authors allege that their brother has been a victim of violations by Nicaragua of articles 7, 9, 10, 14 and 17 of the International Covenant on Civil and Political Rights. In March 1989, Roberto Zelaya was released from detention on the basis of a governmental pardon, and on 19 June 1992 he confirmed the contents of the communication and joined his sister and brother as co-author. He now resides in the United States together with his wife and son.

The facts as submitted by the authors

2.1 Roberto Zelaya Blanco, an engineer and university professor, was arrested without a warrant on 20 July 1979, the day after the assumption of power by the Sandinista Government. He was tried by a Peoples' Tribunal (Tribunal Especial Primero), on account of his outspoken criticism of the Marxist orientation of the Sandinistas. On 23 February 1980, he was sentenced to 30 years' imprisonment. The Tribunal Especial Primero de Apelación confirmed the sentence on 14 March 1980 without an appeal hearing.

2.2 With respect to the issue of exhaustion of domestic remedies, the authors state that because of the political situation in Nicaragua, they were for a long time unable to identify Nicaraguan lawyers willing to take up their brother's case. Only at the beginning of 1989 did Roberto Zelaya inform his family that a lawyer, J. E. P. B., had indicated his readiness to represent him.

2.3 It is submitted that several organizations, including the Inter-American Commission on Human Rights, Amnesty International, the International Commission of Jurists and the International Committee of the Red Cross (Nicaraguan Section), were apprised of Mr. Zelaya's fate and visited him in prison. The authors add that they addressed many written complaints about their brother's fate to various Nicaraguan authorities, including President Daniel Ortega and the prison management, but that they did not receive any reply.

2.4 Upon his release in March 1989, Mr. Zelaya was allegedly threatened by a prison guard, "Comandante Pedro", with the words "Be very careful. If you dare write or speak against the Sandinistas, you will regret it."

The complaint

3.1 The authors submit that there was no wrongdoing or criminal activity on the part of their brother, and that the accusations formulated against him by the Sandinistas (*apología del delito; instigación para delinquir*) were purely political. It is claimed that Roberto Zelaya was detained arbitrarily from July 1979 to March 1989, that he was denied a fair hearing before an independent and impartial tribunal, that he was tortured and was subjected to pseudo-medical and pharmacological experiments, to inhuman treatment and death threats while in prison, and that the correspondence between Roberto Zelaya and his family was systematically interfered with by the prison authorities.

3.2 The authors submit that their brother's health, already precarious, deteriorated as a result of his detention. They submit that asthma attacks were treated experimentally with cortisone and other drugs. Finally, other inmates and a prison warder A. V. C. are said to have made death threats against Mr. Zelaya on numerous occasions.

The State party's information and the authors' comments thereon

4.1 The State party indicates that Roberto Zelaya Blanco was released from detention pursuant to a presidential pardon of 17 March 1989 (*Decreto de Indulto No. 044*).

4.2 The authors submit that their brother is currently receiving specialized medical treatment for the ailments developed or aggravated during 10 years of detention, *inter alia*, asthma and chronic hepatitis. They add that the treatment requires frequent and prolonged hospitalization.

The Committee's decision on admissibility

5.1 The Committee ascertained, as it is required to do under article 5, paragraph 2 (a), of the Optional Protocol, that the case was not under examination by another instance of international investigation or settlement. The general investigation, by regional and intergovernmental human rights organizations, of situations affecting a number of individuals, including the author of a communication under the Optional Protocol, does not constitute the "same matter" within the meaning of article 5, paragraph 2 (a).

5.2 The Committee interpreted the State party's general submission that Mr. Zelaya Blanco had been released from detention as implying that he had been offered an appropriate remedy. However, the Committee reiterated its position that 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 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, as well as remedies still available, to victims of alleged violations of their rights. The State party did not forward such information. On the basis of the information before it, the Committee concluded that there are no further effective remedies available to Roberto Zelaya in the circumstances of his case.

5.3 The Committee observed that the authorities of any State party to the Covenant are under an obligation to investigate alleged human rights violations and to make available appropriate judicial remedies and compensation to victims of such violations, even if they are attributable to a previous administration.

5.4 The Committee considered that the authors' allegations had been sufficiently substantiated, for purposes of admissibility, and that they raised issues under articles 7, 9, 10, 14 and 17 of the Covenant.

5.5 On 20 March 1992, the Human Rights Committee decided that the communication was admissible inasmuch as it appeared to raise issues under articles 7, 9, 10, 14 and 17 of the Covenant.

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

6.1 On 27 July 1992, the State party submitted that the new Government had embarked on a process of national reconciliation, without revanchism. At the same time, Nicaragua's independent judiciary now exercises an eminent role in protecting human rights. Since Mr. Zelaya enjoys all civil and political rights in Nicaragua, he is at liberty to demand compensation or any other remedy he may consider appropriate.

6.2 On 5 October 1992, Roberto Zelaya Blanco responded that he could not expect to receive any compensation from ad hoc tribunals in Nicaragua, heirs of the Tribunales Especiales de Justicia, which had convicted him and others without due process. In particular, he disputes the State party's submission that the Nicaraguan judiciary is now independent, because many judges, including those sitting in the Supreme Court, are political appointees of the former Sandinista Government. Moreover, he contends that if the new government were committed to impartial justice, it would have prosecuted *motu proprio* those responsible for crimes, corruption and other abuses during the years of the Sandinista administration. He further questions the commitment to human rights of the Government of Violeta Barrios de Chamorro, since she herself, as member of the then Sandinista Government (*miembro de la Junta de Gobierno de Reconstrucción Nacional*), had signed Decree No. 185 of 29 November 1979, which established the Tribunales Especiales de Justicia, which depended directly on the executive (*poder ejecutivo*) and prosecuted many former civil servants for the so-called crime of conspiracy (*delito de asociación para delinquir*) merely because they had been civil servants during the Somoza administration.

6.3 With regard to the confiscation of his property, the author invokes article 17 of the Universal Declaration of Human Rights, which protects the right to property, and points out that the confiscation decrees of the Sandinista Government had been signed by many of the current members of the Government, including the new President, Mrs. Violeta Barrios de Chamorro, in particular Decree No. 38 of 8 August 1979, which provided for the expropriation of former civil servants of the Somoza administration, including the medical doctors and dentists in the service of the Somoza family. The author lists three pieces of real property which he had owned and which were confiscated by the Sandinista Government and subsequently sold to third parties. The author alleges that the new Government is applying dilatory tactics to frustrate the restitution of such property, and rendering the process so complicated that claimants eventually abandon their claims because of the expense involved in attempting to recuperate their property. The author concludes that what was confiscated by way of administrative measures ought to be returned to the rightful owners also by administrative decree. The author further alleges discrimination in that the confiscated property of persons who were United States citizens before 19 July 1979 has been returned, whereas the property formerly owned by Nicaraguan citizens can only be recovered through onerous litigation.

6.4 With regard to his detention, the author claims that it was unlawful and arbitrary and that he was denied due process by the revolutionary tribunals. He encloses excerpts from the Amnesty International report entitled *Nicaragua: Derechos Humanos 1986-1989*, which specifically refers to its own investigation of the Zelaya case. The report concluded:

> "After examining the judgment and interviewing the prisoner in November 1987, Amnesty International arrived at the conclusion that there was no evidence that could prove the criminal charges against him: no victim had been identified in relation to the accusation of murder, and as to the other charges, the victim had been only referred to as 'the people of Nicaragua'. It would seem that the conviction was predicated on Mr. Zelaya Blanco's open anti-Sandinista position in the pre-revolutionary period and on his various journalistic publications ..."[1]

[1] Amnesty International, *Nicaragua: Derechos Humanos 1986-1989* (London, November 1989), pp. 13-4.

6.5 The author further describes the torture and ill-treatment to which he was allegedly subjected. On 11 October 1979, he and other detainees were taken out of their cells by mercenaries of Argentinian nationality, Che Walter and Che Manuel. At 9 a.m. they were taken to an office where they were beaten. In particular, he claims that he was handcuffed and hanged with a chain from the roof of the office. He was allegedly asked to sign a confession concerning the assassination of Pedro Joaquin Chamorro, the husband of the current President of Nicaragua. The text of the confession was read out to him by D. M. R., the legal counsel to the Police Commander. He categorically refused to sign any such statement, in spite of threats. At 1 p.m., the interrogators returned with one of the most notorious torturers of the Dirección General de Seguridad del Estado, but he continued to refuse to sign any confession, whereupon Che Manuel, J. M. S. and R. C. G. proceeded to administer beatings all over his body until 7 p.m. At 11 p.m., the chains were removed, and he fell to the floor, where he was kicked by the same interrogators. He was then driven out of town, where he and 15 other prisoners were to be executed. Someone read out the death sentences ordered by the Junta de Gobierno de Reconstrucción Nacional. Whereas the other 15 were killed, he was not. Although he does not remember clearly what happened, it appears that he passed out and only regained consciousness sometime after the shooting, when he was lying on the ground and still handcuffed. At 2 a.m. on 12 October 1979, he was taken to Managua to the offices of the Dirección General de Seguridad del Estado, where he was received by "Compañero Ernesto", who removed his handcuffs. At 6.30 a.m., he was taken to a house that had been used as a dormitory of the former Oficina de Seguridad Nacional and interrogated there by "Comandante Pedro", whose real name was R. B., who also took his Bulova wristwatch, his wedding ring and his wallet containing 400 cordobas. He names five witnesses who saw him arrive at the offices of the Dicrección General de Seguridad del Estado. At around noon Comandante Pedro, together with J. R. (Compañero Patricio) and H. I. (Capitán Santiago), came to pick him up, handcuffed and took him to a room where he was again chained, partially suspended from the ceiling. He was told that the academic and administrative cadres of the University of Nicaragua were full of agents of the CIA and that he should endorse a declaration prepared for his signature, denouncing, *inter alia*, some of his University colleagues, Professors E. A. C., F. C. G., J. C. V. R. and A. F. V. When he refused to sign the declaration, because he never had any contact or relationship with the CIA, he was beaten by Comandante Pedro, Compañero Patricio and Capitán Santiago. He was then left in peace for a few weeks, but on 7 November 1979 he was again handcuffed, blindfolded and taken by Comandante Pedro to a place where two truckloads of prisoners were being assembled. He was forced to board one of the trucks and was driven out of town, where the prisoners were made to climb down and walk to a spot where they were ordered to kneel; approximately 30 of them were shot with a bullet to the back of the head. The surviving 10 were taken elsewhere. He was told not to speak of what he had witnessed because his wife and son would be made to suffer for it.

6.6 On 26 November 1979, the author and 23 other prisoners were taken to a new prison establishment near the international airport of Managua, the Centro de Rehabilitación Social y Política, under Comandante V. J. G., who allegedly personally assassinated several guards of the former Somoza Government.

6.7 On 7 December, after two months of incomunicado detention, he was allowed to be visited by his wife. He learned from her that their home had been ransacked on 12 October by forces of the Dirección General de Seguridad del Estado, which beat up his then pregnant wife, causing a miscarriage, and stole jewels and other items of personal property.

6.8 On 26 March 1980 at 11 p.m., he was transferred, together with some 29 other political prisoners, to the Carcel Modelo, which was more like a concentration camp where the inmates had been so undernourished, he claims, that they looked like figures from Buchenwald. Because of the torture and the fear of being summarily executed, the prisoners appeared traumatized. Moreover, family visits were not allowed, nor was the sending of food packages. Responsible for the abuses were F. F. A., F. L. A., S. A. G. and J. I. G. C. Principal responsibility, however, lay on J. M. A., the Director of the Penitentiary system, under whose orders allegedly more than 100 political prisoners were shot.

6.9 The author claims that these crimes and abuses have not been investigated by the new Government of Nicaragua.

6.10 In a further submission of 29 March 1993, the author refers to a book by Dr. Carlos Humberto Canales Altamirano, *Injusticia Sandinista. Carcel y Servicio*, in which his case is frequently mentioned, in particular the subhuman prison conditions leading to his infection with hepatitis and the aggravation of his chronic asthma attacks and the responsibility of the prison doctor J.A.B. for these conditions.

7. The author's submissions were transmitted to the State party on 5 January 1993 and 26 August 1993. In its observations of 16 July 1993, the State party does not enter the merits of the case but merely refers to article 5, paragraph 2 (b), of the Optional Protocol, indicating that the author has not availed

himself of local remedies to solicit the return of his property and compensation for his imprisonment.

8.1 In a further submission dated 6 September 1993, the author comments on the State party's observations, referring to Decree No. 185 of 29 November 1979, pursuant to which the judgments of the Tribunales Especiales de Justicia were not subject to appeal or cassation. Thus, the exhaustion of local remedies was completed with the handing down of the 30-year sentence against him by the revolutionary tribunal. The author's release from imprisonment after 10 years of deprivation and abuse does not close the book on the violation of his rights under the International Covenant on Civil and Political Rights.

8.2 With regard to the issue of impunity, the author points out that the State party has not initiated any prosecution against named torturers of the prior regime and that these named persons are living in Nicaragua with perfect impunity, although their crimes have been denounced and documented. The author further alleges that the State party has failed to initiate investigation of these cases.

8.3 On 16 June 1994, the State party reiterated its position that the author has not exhausted domestic remedies as required by article 5, paragraph 2 (b), of the Optional Protocol. No submissions on the merits of the author's allegations were made.

8.4 With regard to the author's allegations that the ad hoc tribunals in Nicaragua are not impartial, the State party states that the Government has no power to intervene in their deliberations or decisions.

8.5 The State party affirms that human rights are today respected in Nicaragua and refers to the fact that the 1993 session of the Organization of American States and the ninth Interamerican Indigenous Congress were held in Nicaragua, thus manifesting that the international community recognizes Nicaragua's democratic legal order.

Examination of the merits

9.1 The Committee has taken due note of the State party's submission that the author has failed to exhaust domestic remedies, since he can now address his complaints to the competent courts of the present Government of Nicaragua.

9.2 Even though the State party has not specifically invoked article 93, paragraph 4, of the Committee's rules of procedure, the Committee has *ex officio* reviewed its decision of 20 March 1992 in the light of the State party's arguments. The Committee welcomes the State party's readiness to examine the author's complaints and considers that such examination could be seen as a remedy under article 2, paragraph 3, of the Covenant. However, for purposes of article 5, paragraph 2 (b), of the Optional Protocol, the Committee considers that the author, who was arrested in 1979 and spent 10 years in detention, cannot, at this stage, be required to engage the Nicaraguan courts of the present administration before his case can be examined under the Optional Protocol. In this context, the Committee recalls that the communication was submitted to the Committee in 1988, at a time when domestic remedies were not available or not effective. Even if domestic remedies may now be available, the application of such remedies would entail an unreasonable prolongation of the author's quest to be vindicated for his detention and alleged ill-treatment; the Committee concludes that the Optional Protocol does not require the author, in the circumstances of his case, to further engage the Nicaraguan courts. Moreover, the Committee reiterates its finding that the criteria of admissibility under the Optional Protocol were satisfied at the time of submission of the communication and that there is no reason to set aside the Committee's decision of 20 March 1992.

9.3 The Committee has considered the communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol. The Committee regrets the absence of any submission by the State party concerning the substance of the matter under consideration. Pursuant to article 4, paragraph 2, of the Optional Protocol, a State party should investigate in good faith all the allegations of violations of the Covenant made against it and make available to the Committee all the information at its disposal. In the absence of any State party submission on the merits of the case, due weight must be given to the author's allegations, to the extent that they have been substantiated.

10.1 With regard to the author's allegation concerning the confiscation of his property, the Committee recalls that the Covenant does not protect the right of property, as such. However, an issue under the Covenant may arise if a confiscation or expropriation is based on discriminatory grounds prohibited in article 26 of the Covenant. Although the author has stated that his property was confiscated as a consequence of his belonging to a category of persons whose political Views were contrary to those of the Sandinista Government, and in a fashion that could be termed discriminatory, the Committee does not have sufficient facts before it to enable it to make a finding on this point.

10.2 In its prior jurisprudence the Committee has found that interference within a prisoner's correspondence may constitute a violation of article 17 of the Covenant. However, in the instant case the Committee lacks sufficient information to

make a finding concerning a violation of the author's right to privacy under this provision.

10.3 With regard to the author's allegations that he was subjected to arbitrary detention, the Committee notes that the State party has not disputed the author's description of the reasons for his detention, i.e. his political opinions contrary to those of the Sandinista Government. The Committee has also taken note of the many annexes to the author's submissions, including the relevant report from the Nicaraguan Departamento de Seguridad del Estado and the evaluation of the case by Amnesty International. In the light of all the information before it, the Committee finds that the author's arrest and detention violated article 9, paragraph 1, of the Covenant.

10.4 As to the author's allegations that he was denied a fair trial, the Committee finds that the proceedings before the Tribunales Especiales de Justicia did not offer the guarantees of a fair trial provided for in article 14 of the Covenant. In particular, the Committee observes that the author's allegation that he was repeatedly put under duress to sign a confession against himself, in contravention of article 14, paragraph 3 (g), has not been contested by the State party.

10.5 With regard to the author's allegations of having been subjected to torture and ill-treatment, the Committee observes that the author's submissions are very detailed and that he mentions the names of the officers who ordered, participated in or were ultimately responsible for the ill-treatment. Moreover, the author has named numerous witnesses of the alleged mistreatment. In the circumstances and bearing in mind that the State party has not disputed the author's allegations, the Committee finds that the information before it sustains a finding that the author was a victim of a violation of articles 7 and 10, paragraph 1, of the Covenant.

10.6 The Committee considers violations of articles 7 and 10, paragraph 1, of the Covenant to be extremely serious, and requiring prompt investigation by States parties to the Covenant. Inthis context, the Committee refers to its general comment No. 20 (44) on article 7,[2] which reads in part:

> "Article 7 should be read in conjunction with article 2, paragraph 3 ... The right to lodge complaints against maltreatment prohibited by article 7 must be recognized in the domestic law. Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective ...
>
> "... States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible."

In this respect, the State party has indicated that the author may institute actions before the Nicaraguan courts. Notwithstanding the possible viability of this avenue of redress, the Committee finds that the responsibility for investigations falls under the State party's obligation to grant an effective remedy.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose violations of articles 7, 9, paragraph 1, 10, paragraph 1, and 14, paragraph 3 (g), of the Covenant.

12. The Committee is of the view that Mr. Roberto Zelaya Blanco is entitled, under article 2, paragraph 3 (a), of the Covenant to an effective remedy. It urges the State party to take effective measures (a) to grant appropriate compensation to Mr. Zelaya for the violations suffered, also pursuant to article 9, paragraph 5, of the Covenant; (b) to carry out an official investigation into the author's allegations of torture and ill-treatment during his detention; and (c) to ensure that similar violations do not occur in the future.

13. 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.

---

[2] Adopted at the Committee's forty-fourth session, in 1992; see *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40* (A/47/40), annex VI.A, paras. 14 and 15.

Communication No. 373/1989

Submitted by: Lennon Stephens on 20 July 1989 (represented by counsel)
Alleged victim: The author
State party: Jamaica
Declared admissible: 12 October 1994 (fifty-second session)
Date of adoption of Views: 18 October 1995 (fifty-fifth session)

Subject matter: Prolonged judicial proceedings and detention on death row as alleged violation of article 7 of Covenant – Alleged delay for the author's presentation before a judge or other officer authorized to exercise judicial power – Alleged delay between trial and appeal in a capital case

Procedural issues: Interim measures of protection – Court's evaluation of facts and evidence – Instructions to jury by trial judge – Legal aid – Exhaustion of domestic remedies

Substantive issues: Pre-trial detention – Right to a fair trial – Detention on death row – Inhuman treatment

Articles of the Covenant: 7, 9 (2) (4), 10 (1) and 14 (3) (c) (5)

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

1. The author of the communication (initial submission dated 20 July 1989 and subsequent correspondence) is Lennon Stephens, a Jamaican citizen sentenced to death in 1984, currently serving a sentence of life imprisonment at the Rehabilitation Centre in Kingston, Jamaica. He resubmits his complaint which had earlier, on 26 July 1988, been declared inadmissible on the ground of non-exhaustion of domestic remedies, since the author had not then sought leave to appeal to the Judicial Committee of the Privy Council. On 6 March 1989, the Judicial Committee dismissed the author's petition for special leave to appeal. The author now claims to be a victim of violations by Jamaica of articles 7, 9, paragraphs 2 to 4, 10, paragraph 1, and 14, paragraphs 3 (c) and 5, of the Covenant. He is represented by counsel.

The facts as submitted by the author

2.1 The author is accused of having murdered one George Lawrence in the Parish of Westmoreland, at approximately 11 a.m. on 22 February 1983. The victim's body was never recovered. The prosecution relied on the evidence of three witnesses, which had been working together with, or in the vicinity of, the author on the property of one Mr. Williston at Charlemont, Westmoreland. Thus, witness Linford Richardson testified that he saw the author and the deceased "wrestling" when the gun was discharged. The same witness said that he saw the author wrap the body in tarpaulin and carry it away. A second witness, Sylvester Stone, testified that he heard an explosion, ran outside and saw the author standing "over a man" who was lying on the ground. The third witness, a contractor, stated that he had seen the author running after "a man" (whom he did not identify), that the author caught up with this man, upon which both stopped. The witness testified that the author then took something from his pocket and gestured with it in the direction of the other man, upon which there was an explosion and the other man dropped to the ground.

2.2 The author contended, in a sworn statement during the trial, that on the day in question, he was working on the property of Mr. Williston when the deceased approached him with something shaped like a gun under his waist and asked to see Mr. Williston. The author challenged Mr. Lawrence, in the belief that the latter intended to harm Mr. Williston, whereupon the deceased went for the gun. The author wrestled with the deceased, and during the fight, the gun went off and the deceased fell to the ground. The author went home, told his mother what had happened and then surrendered himself to the police.

2.3 After surrendering to the police on 22 February 1983, the author was detained. It is submitted that the investigating officer, Detective Inspector Ben Lashley, only cautioned him on 2 March 1983, that is eight days later, telling him that "he was conducting investigations into a case of murder", and that it was alleged "that he shot one George Lawrence".

2.4 The author was subsequently accused of murder and tried in the Westmoreland Circuit Court on 21 and 22 February 1984. He was found guilty as charged and sentenced to death on 22 February 1984. His appeal was dismissed by the Court of Appeal on 4 February 1987, nearly three years later. As stated before, the Judicial of the Privy Council dismissed the author's petition for special leave to appeal on 6 March 1989.

2.5 As to the course of the trial, the author contends that the trial judge failed to direct the jury

properly on the issue of self-defence, although he had indicated that he would do so. He further indicates that one of the prosecution witness was the deceased's uncle, who had had previous serious but unspecified differences with the author.

2.6 Throughout trial and appeal, the author was represented by legal aid attorneys. A London law firm represented him *pro bono* before the Judicial Committee of the Privy Council.

2.7 The author contends that he has exhausted domestic remedies. He notes that while he could theoretically still file a constitutional motion, this remedy is not in reality available to him, as he is destitute and no legal aid is made available by the State party for the purpose of constitutional motions.

The complaint

3.1 Counsel submits that Mr. Stephens is a victim of a violation of articles 7 and 10, paragraph 1, on account of his detention, during 7 years and 10 months, on death row. In this context, he notes that between conviction in February 1984 and his classification as a non-capital offender,[1] the author was confined to death row under deplorable conditions, constantly facing the prospect of imminent execution. Counsel notes that such a prolonged period of detention under conditions of constant anxiety and "agony of suspense" amounts to cruel and inhuman treatment within the meaning of article 7. Reference is made to the judgment of the Judicial Committee of the Privy Council in the case of *Pratt and Morgan*, in which the complainants' prolonged detention on death row was held to be contrary to Section 17 (1) of the Jamaican Constitution.[2]

3.2 Counsel further claims a violation of article 10, paragraph 1, of the Covenant, on account of the bad conditions of detention the author was and remains subjected to. He does so by reference to two reports from two non-governmental organizations on prison conditions in Jamaica (May 1990) and on deaths and ill-treatment of prisoners at St. Catherine District Prison (where the author was detained until December 1992). These reports complain about gross overcrowding, total lack of sanitation and medical or dental care, inadequate food in terms of nutrition, quantity and quality, and lengthy cellular confinement.

3.3 It is submitted that the circumstances of the author's pre-trial detention amount to a violation of article 9, paragraphs 2 to 4. Thus, the trial transcript reveals that the author was detained on 22 February 1983 but only "cautioned" eight days later (2 March 1983). This situation, it is submitted, is contrary to article 9, paragraph 2, which requires that a general description of the reasons for the arrest must be given when it occurs, and that subsequently, the specific legal reasons must be provided. It is claimed that in view of the eight day delay between arrest and "cautioning", the author was not "promptly informed of any charges against him".

3.4 The above situation is also said to amount to a violation of article 9, paragraph 3: as Mr. Stephens was only charged eight days after being detained, he was not "promptly" brought before a judicial officer within the meaning of this provision. Reference is made to a number of Views adopted by the Committee,[3] with individual opinion of Bertil Wennergren, and 277/1988 (*Terán Jijón v. Ecuador*). Consequently, his rights under article 9, paragraph 4, were also violated, as he was not afforded in due course the opportunity to obtain, on his own initiative, a decision on the lawfulness of his detention by a court of law.

3.5 It is submitted that a delay of almost three years (35½ months) between conviction and appeal amounts to a violation of article 14, paragraphs 3 (c) and 5, of the Covenant. Counsel concedes that the reasons for this delay remain unclear, despite many attempts by his law firm and the Jamaica Council for Human Rights to contact the author's lawyer for the trial and to ascertain the reasons for the delay. He emphasizes, however, that Mr. Stephens did nothing to cause, or contribute to, this delay between his conviction and the hearing of the appeal. The same delay is also said to constitute a violation of article 14, paragraph 1, by reference to the Committee's Views in *Muñoz v. Peru*,[4] where it was held that "the concept of a fair hearing necessarily entails that justice be rendered without undue delay".

3.6 Finally, counsel submits that the author has been subjected to ill-treatment by prison warders of St. Catherine District Prison, in violation of articles 7 and 10, paragraph 1, of the Covenant. Thus, in the course of 1991, a warder allegedly hit the author over his head until he lost consciousness, and the author had to be taken to hospital. In a questionnaire filled out by the author for the Jamaica Council for Human Rights, he notes that "he still has problems with his right eye as a result". The Office of the Parliamentary Ombudsman was contacted

[1] Under the Offences against the Person (Amendment) Act of 1992.

[2] Privy Council Appeal No. 10 of 2 November 1993.

[3] See Views adopted in cases Nos. 253/1987 (*Paul Kelly v. Jamaica).*

[4] Communication No. 203/1986, adopted on 4 November 1988, paragraph 11.3.

about the matter, and his office, in a letter dated 21 September 1993 addressed to counsel, replied that the issue "would receive the most prompt attention". However, no further action had been taken by the Ombudsman as of the spring of 1994. Counsel argues that the author has exhausted available domestic remedies in respect of this complaint, as the lack of replies from the Ombudsman and other bodies in Jamaica has made it virtually impossible to pursue the complaint further.

The State party's information on the admissibility of the communication and author's comments thereon

4.1 On 15 September 1989, the communication was transmitted to the State party under rule 86 of the rules of procedure; the State party was requested not to execute the author while his case was pending before the Committee. The State party was further informed that additional clarifications were being sought from the author and his counsel. Some limited clarifications from the author were received in 1990 and 1991. During the 45th Committee's 45th session, it was decided to transmit the communication to the State party under rule 91 of the rules of procedure, seeking information and observations about the admissibility of the case. The request under rule 86 was reiterated. Both requests were transmitted to the State party on 5 September 1992.

4.2 In a submission dated 27 April 1993, the State party regrets "that in the absence of a communication setting out the facts on which the author's complaints are based, as well as the articles of the Covenant which are alleged to have been violated, it will not be possible to prepare a response for the Committee". This submission crossed with a reminder sent to the State party by the Committee on 6 May 1993; on 28 July 1993, the State forwarded an additional submission.

4.3 In the latter submission, the State party notes that "it appears that the author is complaining of breaches of articles 7 and 10 of the Covenant". In the State party's opinion, this complaint is inadmissible on the ground of non-exhaustion of domestic remedies. Thus, the author retains the right to seek constitutional redress for the alleged violation of his rights, by way of constitutional motion. Furthermore, the author would be entitled "to bring a civil action for damages for assault in relation to any injuries he allegedly sustained as a result of ill-treatment during his incarceration. This is another remedy to be exhausted before the communication is eligible for consideration by the Committee".

5.1 In his comments on the State party submissions, dated 17 March 1994, counsel puts forward several new claims, which are detailed in paragraphs 3.1 and 3.3 to 3.5 above. In particular, he submits that a constitutional motion would not be an available and effective remedy in the circumstances of the author's case, as Mr. Stephens is penniless and no legal aid is made available for constitutional motions.

5.2 Counsel's comments were transmitted, together with all the enclosures, to the State party on 5 May 1994, with a further request for comments and observations on counsel's submission. No further submission had been received from the State party as of 30 September 1994.

The Committee's admissibility decision

6.1 During the 52nd session, the Human Rights Committee considered the admissibility of the communication. It noted the State party's criticism referred to in paragraph 4.2 above but recalled that, under the Optional Protocol procedure, it was not necessary for an individual, who claims to be a victim of a violation of any of the rights set forth in the Covenant, explicitly to invoke the articles of the Covenant. It was clearly apparent from the material transmitted to the State party that the author complained about issues related to his conditions of detention and his right to a fair trial.

6.2 The Committee noted that part of the author's allegations related to the instructions given by the judge to the jury with regard to the evaluation of evidence and the question of whether self-defence arose in the case. It reaffirmed that it is in principle for the appellate courts of States parties to review specific instructions to the jury by the judge, unless it is clear that said instructions were arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality. The material before the Committee did not show that the Judge's instructions to the jury in the case suffered from such defects; in particular, the issue of self-defence *was* put to the jury in some detail. This part of the communication was therefore deemed inadmissible under article 3 of the Optional Protocol.

6.3 Concerning the claims under articles 7 and 10 related to the prison conditions in general, the Committee first noted that counsel had addressed the issue of prison conditions by merely by reference to two reports from non-governmental organizations on prison conditions in Jamaica, without addressing Mr. Stephens' personal situation on death row or at the Rehabilitation Centre in Kingston. It is further not apparent that these complaints had ever been brought to the attention of the competent Jamaican authorities. Accordingly, these claims were inadmissible under article 5, paragraph 2 (b), of the Protocol.

6.4 The Committee noted counsel's contention that the eight years and 10 months which Mr. Stephens spent on death row amounted to a

violation of article 7 of the Covenant. While this issue had not been placed before the Jamaican courts by way of constitutional motions, it was uncontested that no legal aid was made available for this purpose, and that the author was dependent on legal aid. In the circumstances, the Committee did not consider a constitutional motion to be an effective remedy in respect of this claim.

6.5 With respect of the claim of the author's ill-treatment on death row during 1991, the Committee noted the State party's claim that the case was inadmissible because of the author's failure to file a constitutional motion under Section 25 of the Jamaican Constitution. It recalled that the author and his counsel *did* attempt to have the alleged ill-treatment of Mr. Stephens investigated, in particular by the Office of the Parliamentary Ombudsman, but without result as of early 1994. It further recalled that the Supreme (Constitutional) Court of Jamaica had, in recent cases, allowed applications for constitutional redress in respect of breaches of fundamental rights, after the criminal appeals in these cases were dismissed. It however also recalls that the State party had repeatedly indicated that no legal aid was available for constitutional motions; as a result, the Committee concluded that, in the absence of legal aid, it was not precluded by article 5, paragraph 2 (b), from considering this aspect of the case.

6.6 Similar considerations applied to the author's claim under article 9, paragraphs 2 to 4, and 14, paragraphs 3 (c) and 5. While it was possible in theory for the author to file a constitutional motion, he was effectively barred from doing so in the absence of legal aid. *Mutatis mutandis*, the considerations in paragraph 6.4 above applied.

6.7 On 12 October 1994, the Committee declared the communication admissible in so far as it appeared to raise issues under articles 7, 9, paragraphs 2 to 4, 10, paragraph 1, and 14, paragraphs 3 (c) and 5, of the Covenant.

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

7.1 In a submission dated 27 January 1995, the State party challenges counsel's reliance on the judgment of the Judicial Committee of the Privy Council in the case of *Pratt & Morgan v. Attorney General of Jamaica* in respect of his argument under article 7 of the Covenant (length of detention on death row). By reference to the Committee's own Views of 5 April 1989 in this case where it had been held that delay by itself was not enough to constitute a breach of article 7 of the Covenant,[5] the State party contends that the Privy Council's judgment in *Pratt & Morgan* does not remove the necessity of determining on a case-by-case basis whether detention on death row for more than five years violates article 7. In the author's case, his failure to exhaust domestic remedies expeditiously to a large extent resulted in the delay in the execution of the capital sentence against him, prior to re-classification of his conviction to non-capital murder.

7.2 As to the alleged violation of article 9, paragraphs 2 to 4, the State party argues that the circumstances of the author's arrest and detention (i.e. that he gave himself up to the police "in respect of `the murder of Mr. Lawrence") were such as to make him fully aware of the reasons for arrest and detention. In the circumstances, and given the difficulties the police experienced in locating the body of the deceased, the period of time the author spent in police custody (eight days) must be deemed reasonable. For the State party, the fact that the author surrendered himself to the police reinforces this point.

7.3 The State party contends that there is no substantiation in support of the author's claim of a violation of article 14, paragraphs 3 (c) and 5. In particular, there is said to be no evidence that the cause for the delay was attributable to an act or omission on the part of the judicial authorities of Jamaica.

7.4 As to the alleged ill-treatment of Mr. Stephens on death row during 1991, the State party observes, in a submission of 13 March 1995, that there was no violation of articles 7 and 10 (1) since the injuries suffered by the author resulted from the "use of reasonable force by a warder to restrain the applicant who had attacked the warder." Such use of reasonable force, the State party maintains, does not constitute a breach of articles 7 and 10 (1). It adds that the warder in question had to seek medical treatment himself as a result of the author's attack on him.

8.1 In his comments, counsel reaffirms that Mr. Stephens was subjected to inhuman and degrading treatment by virtue of his confinement, for eight years and 10 months, to death row. He points in particular to the length of the delay and conditions on death row, and submits that an execution that would have taken place more than five years after conviction "would undoubtedly result in pain and suffering", which is precisely why the Judicial Committee recommended commutation to life imprisonment to all death row inmates in Jamaica incarcerated for five years or more.

8.2 Counsel dismisses as irrelevant that some of the delays in execution of the sentence may have been attributable to Mr. Stephens and adduces the Privy Council's own argument in *Pratt & Morgan*, where it

[5] CCPR/C/35/D/210/1986 & 225/1987, *Pratt and Morgan v. Jamaica,* Views adopted 5 April 1989, para. 13.6.

is held that "[i]f the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delays and not the prisoner who takes advantage of it".

8.3 Counsel reiterates that his client was detained for eight days "presumably incommunicado" without being told that he was being charged for murder. He refers to the Committee's General Comment on article 9, where it is noted that delays under article 9 (3) must not exceed a few days, and that pre-trial detention should be an exception. He further observes that a requirement to give reasons on arrest has been imposed under common law and is now laid down in Section 28 of the Police and Criminal Evidence Act of 1984. While he accepts that Mr. Stephens voluntarily went with his mother to Montego Bay Police Station to "report the incident of the death of George Lawrence", he does not accept that it was reasonable in the circumstances to detain the author for eight days without charge.

8.4 In this context, he contends that article 9 (2) imposes (a) the obligation to give reasons at the time of the arrest and (b) the obligation to inform the person arrested "promptly" of any charges against him. On 22 February 1983, the only information the author was given was that he was under detention "until the police obtained more information". This, it is submitted, does not satisfy the requirements of article 9 (2).

8.5 As to the alleged violation of article 9 (3), counsel refers to the Committee's jurisprudence which emphasizes that delays between arrest and presentation to a judicial officer should not exceed a few days.[6] He also points out that in an individual opinion appended to one of these Views by Committee member B. Wennergren, it was submitted that the word "promptly" does not permit of a delay of more than two or three days.[7]

8.6 Finally, counsel argues that article 9 (4) entitles *any* person subject to arrest or detention to challenge the lawfulness of his/her detention before a court without delay. He refutes the State party's argument that there was no denial of Mr. Stephens' right to do so by the judicial authorities, but rather a failure on the part of the author himself to exercise the right to apply for writ of *habeas corpus*.

8.7 In a further submission dated 21 April 1995, counsel contends that without providing the evidence of an official report into the incident involving beatings of the author by a warder in 1991, the State party cannot dismiss the author's claim that he was subjected to inhuman and degrading treatment. He argues that the State party's reliance on the use of "reasonable force" to restrain the applicant who had attacked a warder is misleading, as both article 3 of the U.N. Code of Conduct for Law Enforcement Officials and the Correctional Rules of Jamaica prescribe behaviour which promotes the rehabilitation and humane treatment of detainees, which implies that force may be used only when "strictly necessary".

8.8 Counsel refers to a report prepared in 1983 by the Parliamentary Ombudsman of Jamaica, in which he observed that Jamaican prison rules were systematically broken and that there were "merciless and unjustifiable beatings" of inmates by prison warders. Furthermore, the Jamaica Council for Human Rights is said to have been inundated with cases of abuse of prisoners since it was created in 1968. In addition, counsel points out that several prisoners have died following clashes between warders and inmates; the circumstances of the deaths of inmates often remain unclear and suspicious. Other prisoners are said to be targeted for abuse simply because they were witnesses to beatings and killings by prison warders. Four such incidents occurred on 28 May 1990 (death of three inmates as a result of injuries inflicted by prison staff), on 30 June 1991 (four inmates killed by other inmates, who reportedly had been paid by prison warders), on 4 May 1993 and on 31 October 1993 (four inmates shot dead in their cells).

8.9 It is submitted that in the light of this history of violence in the death row section of St. Catherine District Prison, the State party has in no way shown that the author was *not* a victim of violations of articles 7 and 10 (1) in the course of 1991. By reference to rule 173 of the Correctional Rules of Jamaica and Rule 36 of the UN Standard Minimum Rules for the Treatment of Prisoners, which deal with internal complaints procedures, counsel submits that prisoners in Jamaica do not receive adequate redress from the prisons' internal complaints procedures. Some of them may be subjected to retaliatory measures if they testify against warders who have committee abuses. He reiterates that he has never been able to obtain a copy of the investigation into the beatings of Mr. Stephens, and continues to question that the warder who injured his client used "no more force that [was] necessary" (Rule 90 of the Correctional Rules of Jamaica).

Examination of the merits

9.1 The Human Rights Committee has examined the present communication in the light of all the information made available to it by the parties, as it

---

[6] See Views on communication No. 253/1987, *Paul Kelly v. Jamaica*, adopted on 8 April 1991, paragraph 5.8; communication No. 277/1988, *Terán Jijón v. Ecuador*, Views adopted on 26 March 1992, paragraph 5.3.

[7] Individual opinion of Committee member Bertil Wennergren to Views in *Kelly v. Jamaica*.

is required to do under article 5, paragraph 1, of the Optional Protocol, and bases its Views on the following findings.

9.2 The Committee has noted the author's contention that his rights under articles 7 and 10 (1) have been violated because of the beatings he was subjected to on death row by a prison warder. It observes that while the author's allegation in this respect has remained somewhat vague, the State party itself concedes that the author suffered injuries as a result of use of force by warders; the author has specified that these injuries were to his head, and that he continues to have problems with his right eye as a sequel. The Committee considers that the State party has failed to justify, in a manner sufficiently substantiated, that the injuries sustained by the author were the result of the use of "reasonable force" by a warder. It further reiterates that the State party is under an obligation to investigate, as expeditiously and thoroughly as possible, incidents of alleged ill-treatment of inmates. On the basis of the information before the Committee, it appears that the author's complaint to the Ombudsman was acknowledged but neither investigated thoroughly nor expeditiously. In the circumstances of the case, the Committee concludes that the author was treated in a way contrary to articles 7 and 10, paragraph 1, of the Covenant.

9.3 The Committee has noted counsel's argument that the eight years and 10 months Mr. Stephens spent on death row amounted to inhuman and degrading treatment within the meaning of article 7. It is fully aware of the *ratio decidendi* of the judgment of the Judicial Committee of the Privy Council of 2 November 1993 in the case of *Pratt and Morgan*, which has been adduced by counsel, and has taken note of the State party's reply in this respect.

9.4 In the absence of special circumstances, none of which are discernible in the present case, the Committee reaffirms its jurisprudence that prolonged judicial proceedings do not *per se* constitute cruel, inhuman and degrading treatment, and that, in capital cases, even prolonged periods of detention on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment.[8] In the instant case, a little over five years passed between the author's conviction and the dismissal of his petition for special leave to appeal by the Judicial Committee; he spent another three years and nine months on death row before his sentence was commuted to life imprisonment under the Offences against the Person (Amendment) Act of 1992. Since the author was, at that time, still availing himself of remedies, the Committee does not consider that this delay constituted a violation of article 7 of the Covenant.

9.5 The author has alleged a violation of article 9 (2), because he was not informed of the reasons for his arrest promptly. However, it is uncontested that Mr. Stephens was fully aware of the reasons for which he was detained, as he had surrendered himself to the police. The Committee further does not consider that the nature of the charges against the author were not conveyed "promptly" to him. The trial transcript reveals that the police officer in charge of the investigation, a detective inspector from the parish of Westmoreland, cautioned Mr. Stephens as soon as possible after learning that the latter was kept in custody at the Montego Bay Police Station (pp. 54-55 of trial transcript). In the circumstances, the Committee finds no violation of article 9, paragraph 2.

9.6 As to the alleged violation of article 9 (3), it remains unclear on which exact day the author was brought before a judge or other officer authorized to exercise judicial power. In any event, on the basis of the material available to the Committee, this could only have been *after* 2 March 1983, i.e. more than eight days after Mr. Stephens was taken into custody. While the meaning of the term "promptly" in article 9 (3) must be determined on a case by case basis, the Committee recalls its General Comment on article 9[9] and its jurisprudence under the Optional Protocol, pursuant to which delays should not exceed a few days. A delay exceeding eight days in the present case cannot be deemed compatible with article 9, paragraph 3.

9.7 With respect to the alleged violation of article 9 (4), it should be noted that the author did not himself apply for *habeas corpus*. He could have, after being informed on 2 March 1983 that he was suspected of having murdered Mr. Lawrence, requested a prompt decision on the lawfulness of his detention. There is no evidence that he or his legal representative did do so. It cannot, therefore, be concluded that Mr. Stephens was denied the opportunity to have the lawfulness of his detention reviewed in court without delay.

9.8 Finally, the author has alleged a violation of article 14, paragraphs 3 (c) and (5), on account of the delay between his trial and his appeal. In this context, the Committee notes that during the preparation of the author's petition for special leave to appeal to the Judicial Committee of the Privy Council by a London

[8] See Views on communications Nos. 270/1988 and 271/1988, *Barrett and Sutcliffe v. Jamaica*, adopted on 30 March 1992, paragraph 8.4.

[9] General Comment 8 [16] of 27 July 1982, paragraph 2.

lawyer, Mr. Stephens' legal aid representative for the trial was requested repeatedly but unsuccessfully to explain the delays between trial and the hearing of the appeal in December 1986. While a delay of almost two years and 10 months between trial and appeal in a capital case is regrettable and a matter of concern, the Committee cannot, on the basis of the material before it, conclude that this delay was primarily attributable to the State party, rather than to the author.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal a violation by Jamaica of articles 7, 9, paragraph 3, and 10, paragraph 1, of the Covenant.

11. The Committee is of the view that Mr. Stephens is entitled, under article 2, paragraph 3 (a), of the Covenant, to an appropriate remedy, including compensation and further consideration of his case by the State party's Parole Board.

12. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

Communication No. 386/1989

Submitted by: Famara Koné on 5 December 1989
Alleged victim: The author
State party: Senegal
Declared admissible: 5 November 1991 (forty-third session)
Date of adoption of Views: 21 October 1994 (fifty-second session)*

Subject matter: Alleged violations of the author's rights on account of his political activism

Procedural issues: Inadmissibility *ratione materiae* – Non-exhaustion of domestic remedies – Failure to substantiate allegations

Substantive issues: Arbitrary arrest and detention – Ill-treatment during pre-trial detention – Denial of freedom of expression

Articles of the Covenant: 7, 9, 19

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

1. The author of the communication is Famara Koné, a Senegalese citizen born in 1952 and registered resident of Dakar, currently domiciled in Ouagadougou, Burkina Faso. He claims to be a victim of violations of his human rights by Senegal but does not specifically invoke his rights under the International Covenant on Civil and Political Rights.

The facts as submitted by the author

2.1 The author submits that in 1978, he joined the "Movement for Justice in Africa" (*Mouvement pour la Justice en Afrique*), whose aim is to assist the oppressed in Africa. On 15 January 1982, he was arrested in Gambia by Senegalese soldiers, allegedly for protesting against the intervention of Senegalese troops in Gambia after an attempted coup on 30 July 1981. He was transferred to Senegal, where he was detained for over four years, pending his trial, until his provisional release on 9 May 1986.

2.2 Mr. Koné claims, without giving details, that he was subjected to torture by investigating officers during one week of interrogation; he indicates that, since his release, he has been in need of medical supervision as a result. He further notes that despite his persistent requests to the regional representative(s) of the U.N. High Commissioner for Refugees, he was denied refugee status both in Gambia and Benin (1988), as well as in the Ivory Coast (1989) and apparently now in Burkina Faso (1992).

2.3 The author states that, after presidential elections in Senegal on 28 February 1988, he was re-arrested and detained for several weeks, without charges. He was released on 18 April 1988 by decision of the regional court of Dakar (*Tribunal régional*). He contends that, after participating in a political campaign in Guinea-Bissau directed against Senegal, he was once again arrested when he sought to enter Senegal on 6 July 1990. He was detained for six days, during which he claims to have been once again tortured by the security police, which tried to force him to sign a statement admitting attacks on State security and cooperating with the intelligence services of another State.

2.4 According to the author, his family in Dakar is being persecuted by the Senegalese authorities. On 6 June 1990, the regional court of Dakar confirmed an eviction order served by the departmental court (*Tribunal départemental*) of Dakar on 12 February 1990. As a result, the author and his family had to leave the house in which they had resided for the past forty years. The decision was taken at the request of the new owner, who had bought the property from the heirs of the author's grandfather in 1986. The author and his father challenged the validity of the act of sale and reaffirmed their right to the property. The municipal authorities of Dakar, however, granted a lease contract to the new owner on the basis of the act of sale, thereby confirming – without valid grounds in the author's opinion – the latter's right to the property.

2.5 As to the requirement of exhaustion of domestic remedies, the author affirms, without giving details, that as an opponent to the government, it is not possible for him to lodge a complaint against the State party's authorities. In this context, he claims that he has been threatened on several occasions by the security police.

The complaint

3. Although the author does not invoke any of the articles of the International Covenant on Civil and Political Rights, it appears from the context of his submissions that he claims violations of articles 7, 9 and 19.

The State party's information and observations

4.1 The State party contends that the author is not a victim of political persecution and has not been prevented from expressing his opinions, but that he is merely a person rebellious to *any* type of authority.

4.2 Concerning the author's allegation of torture and ill-treatment, the State party indicates that torture constitutes a punishable offence under the Senegalese Criminal Code, which provides for various penalties for acts of torture and ill-treatment, increasing in severity to correspond with the gravity of the physical consequences of the torture. Other provisions of the Criminal Code provide for an increase of the punishment if the offence is committed by an official or civil servant in the exercise of his functions. Pursuant to article 76 of the Code of Criminal Procedure, the author could have and should have submitted a complaint to the competent judicial authorities against the police officers held responsible for his treatment. The State party further points out that Mr. Koné had the possibility, forty-eight hours after his apprehension, to be examined by a doctor, at his own request or that of his family, under article 56, paragraph 2, of the Code of Criminal Procedure.

4.3 Concerning the author's allegation of arbitrary detention in 1982, the State party points out that Mr. Koné was remanded by order of an examining magistrate. As this order was issued by an officer authorized by law to exercise judicial power, his provisional detention cannot be characterized as illegal or arbitrary. Furthermore, articles 334 and 337 of the Penal Code criminalize acts of arbitrary arrest and detention. After his provisional release (*élargissement*) on 9 May 1986, Mr. Koné could have seized the competent judicial authorities under article 76 of the Code of Criminal Procedure.

4.4 With regard to the allegations pertaining to the eviction order, the State party observes that the judgment which confirmed the order (i.e. the judgment of the *Tribunal régional*) could have been appealed further to the Supreme Court, pursuant to article 3 of Decree No. 60-17 of 3 September 1960, concerning the rules of procedure of the Supreme Court) and article 324 of the Code of Civil Procedure. Furthermore, as the Senegalese courts have not yet ruled on the substance of the matter, i.e. the title to the property, the author could have requested the civil court to rule on the substance.

The Committee's admissibility decision

5.1 During its 43rd session, the Committee considered the admissibility of the communication. It noted that the author's claim concerning the eviction from his family home related primarily to alleged violations of his right to property, which is not protected by the Covenant. Since the Committee is only competent to consider allegations of violations of any of the rights protected under the Covenant, the author's claim in respect of this issue was deemed inadmissible under article 3 of the Optional Protocol.

5.2 Concerning the claim that the author had been tortured and ill-treated by the security police, the Committee noted that the author had failed to take steps to exhaust domestic remedies since he allegedly could not file complaints against Senegalese authorities as a political opponent. It considered, however, that domestic remedies against acts of torture could not be deemed *a priori* ineffective and, accordingly, that the author was not absolved from making a reasonable effort to exhaust them. This part of the communication was therefore declared inadmissible under article 5, paragraph 2 (b), of the Protocol.

5.3 As to the allegations relating to articles 9 and 19, the Committee noted that the State party had failed to provide information on the charges against

Mr. Koné, nor on the applicable law governing his detention from 1982 to 1986, from February to April 1988 and in July 1990, nor sufficient information on effective remedies available to him. It further observed that the State party's explanation that the period of detention 1982-1986 could not be deemed arbitrary simply because the detention order was issued by judicial authority did not answer the question whether the detention was or was not contrary to article 9. In the circumstances, the Committee could not conclude that there were effective remedies available to the author and considered the requirements of article 5, paragraph 2 (b), of the Optional Protocol to have been met in this respect.

5.4 On 5 November 1991, therefore, the Committee declared the communication admissible in so far as it appeared to raise issues under articles 9 and 19 of the Covenant. The State party was requested, in particular, to explain the circumstances under which the author was detained from 1982 to 1986, in 1988 and in 1990, indicating the charges against him and the applicable legislation, and to forward to the Committee copies of the detention order(s) issued by the examining magistrates and of the decision of the Tribunal régional of Dakar of 18 April 1988.

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

6.1 In its submission on the merits, the State party provides the information requested by the Committee. As to the period of detention 1982-1986, it observes that the author was detained pursuant to a detention order (*mandat de dépôt*) issued by the Senior Examining Magistrate of Dakar, after having been formally charged with acts threatening national security. This was duly recorded under No. 406/82 in the register of complaints of the prosecutor's office of Dakar as well as under registry number 7/82 at the office of the examining magistrate. The acts attributed to the author are an offence under Section 80 (Chapter I) of the Senegalese Penal Code.

6.2 The procedure governing provisional custody is governed by article 139 of the Code of Criminal Procedure, which provides for the issuance of a detention order upon request of the Department of Public Prosecutions. Paragraph 2 of this article stipulates that a request for release on bail must be rejected if the public prosecutor's office files a written objection to the request. Notwithstanding, a request for release on bail may at any moment be formulated by the accused or his representative. The magistrate is obliged to rule, by reasoned decision (*par ordonnance spécialement motivée*) within five days of the receipt of the request. If the magistrate does not decide within the deadline, the accused may directly appeal to the competent chamber of the Tribunal Correctionnel (article 129, paragraph 5); and if the request for release on bail is rejected, the accused may appeal in accordance with the provisions of article 180 of the Code of Criminal Procedure.

6.3 Upon concluding his investigations in the case, the examining magistrate concluded that the charges against Mr. Koné were substantiated and accordingly, ordered his case to be tried by the criminal court of Dakar. However, in the light of the author's character and previous documented behaviour, the magistrate considered it appropriate to request a mental status examination and, pending its results, ordered the author's provisional release on 9 May 1986, by judgment No. 1898. The judicial procedure never led a judgment on the merits, as the author fell under the provisions of Amnesty Law No. 88-01 of 4 June 1988.

6.4 In its additional comments on the merits, dated 25 February 1994, the Senegalese Government recounts the circumstances under which the author was held in detention between 1982 and 1986. It states that after his arrest, Mr. Koné was brought before an examining magistrate who, applying the provisions of article 101 of the Code of Criminal Procedure, informed him, by way of an indictment, of the charges entered against him, advised him of his right to choose counsel from among the lawyers listed in the Roster, and placed him under a detention order on 28 January 1982. At the conclusion of a legitimate preliminary investigation, he was committed for trial by the examining magistrate, pursuant to a committal order dated 10 September 1983. The State party specifies that the author "never formulated a request for release throughout the investigation of his case", as authorized by articles 129 and 130 of the Code of Criminal Procedure. The State party concludes that "no expression of any intention to obstruct his provisional release can be deduced from these proceedings".

6.5 The State party stresses that after he was committed to the competent court, the author received a notice to appear before the court on 10 December 1983; the case was not, however, heard on that date; a series of postponements followed. The State party adds that the author "did not file a request for provisional release until mid-May 1986, a request which was granted pursuant to an interlocutory judgment rendered on 9 May 1986".

6.6 With regard to the purpose of Amnesty Law No. 88-01 of 4 June 1988, which was applied to the author, the State party points out that the law does not apply only to the Casamance events, even though it was passed in the context of efforts to contain them. It adds that "the detention period of the person concerned coincided with a period of serious

disturbances of national public order caused by the Casamance events, and the State Security Court, the only court of special jurisdiction in Senegal, had to deal with the cases of 286 detainees between December 1982 and 1986", when that Court consisted only of a president, two judges, one government commissioner, and an examining magistrate.

6.7 The State party notes furthermore that, although under the terms of article 9, paragraph 3, of the Covenant, pre-trial detention should not be the rule, it may nevertheless constitute an exception, especially during periods of serious unrest, and given that the accused, committed for trial and summoned to appear on a fixed date, had never expressed a wish of any kind to be granted provisional release. It concludes that the preliminary investigation and inquiry were conducted in an entirely legitimate manner, in accordance with the applicable legal provisions and with the provisions of article 9 of the Covenant.

6.8 In further submissions dated 4 and 11 July 1994, the State party justifies the length of the author's pre-trial detention between 1982 and May 1986 with the complexity of the factual and legal situation. It notes that the author was a member of several revolutionary groups of Marxist and Maoist inspiration, which had conspired to overthrow several governments in Western Africa, including in Guinea Bissau, Gambia and Senegal. To this effect, the author had frequently travelled to the countries neighbouring Senegal, where he visited other members of this revolutionary network or foreign government representatives. It also observes that it suspected the author of having participated in an unsuccessful coup attempt in Gambia in December 1981, and that he had sought to destabilize the then Government of Sekou Touré in Guinea. In the light of these international ramifications, the State party claims, the judicial investigations in the case were particularly complex and protracted, as they necessitated formal requests for judicial cooperation with other sovereign states.

6.9 In a final submission dated 2 September 1994, the State party reiterates that the detention of Mr. Koné was made necessary because of well-founded suspicions that his activities were endangering the State party's internal security. After his release on bail, the State party observes, no judicial instance in Senegal has ever been seized by Mr. Koné with a request to determine the lawfulness of his detention between January 1982 and May 1986. Given the author's "passivity" in pursuing remedies which were available to him, the State party concludes that the author's claims are inadmissible on the basis of non-exhaustion of domestic remedies.

6.10 Concerning the author's detention in 1988, the State party affirms that Mr. Koné's detention did not last two months but only six days. He was arrested and placed in custody on 12 April 1988, upon orders of the Public Prosecutor of Dakar, and charged with offences against the Law on States of Emergencies (Law 69-26 of 22 April 1969, Decree No. 69-667 of 10 June 1969 and No. 88-229 of 29 February 1988, Ministerial Decree No. 33364/M.INT of 22 March 1988). He was tried, together with eight other individuals, by a Standing Court (*Tribunal des Flagrants Délits*), which, by judgment No. 1891 of 18 April 1988, ordered his release.

6.11 The State party observes that the author has neither been re-arrested nor been the target of judicial investigations or procedures since his release in April 1988. If he had been arrested or detained, there would have been a duty, under articles 55 and 69 of the Code of Criminal Procedure, to immediately notify the Office of the Public Prosecution. No such notification was ever received. Furthermore, had the author been detained arbitrarily in 1990, he could, upon release, have immediately filed a complaint against those held responsible for his detention; no complaint was ever received in this context.

6.12 The State party concludes that there is no evidence of a violation of any provisions of the Covenant by the Senegalese judicial authorities.

7.1 In his comments, the author seeks to refute the accuracy of the State party's information and chronology. Thus, he claims that he was first requested on 2 September 1983 to appear before the Tribunal Correctionnel on 1 December 1983. On this occasion, the president of the court requested further information (*complément d'information*) and postponed the trial to an unspecified subsequent date. On the same occasion and not in the spring of 1986, as indicated by the State party, a mental status examination was ordered by the court. The author forwards a copy of a medical certificate signed by a psychiatrist of a Dakar hospital, and which confirms that a mental status examination was carried out on the author on 25 January 1985; it concluded that Mr. Koné suffered from pathological disorder (pathologie psychiatrique) and needed continued medical supervision ("pathologie ... à traiter sérieusement").

7.2 The author reiterates that he was tried on 1 December 1983 by the Tribunal Correctionnel, that the court adjourned to consider its findings until 15 December 1983, and that his family was present in the courtroom. According to him, that version can be corroborated by the prison log.

7.3 As for the State party's argument that he never filed a request for provisional release, the author simply notes that he had protested his arbitrary

detention to several members of the judiciary visiting the prison where he was held, and that not until 1986 did a member of the staff of the Government Procurator's office and the prison's social services suggest that he request provisional release.

7.4 The author affirms that his arrest in January 1982 was the result of manoeuvres orchestrated by the Senegalese ambassador in Gambia, who had been angered by the author's leading role, between 1978 and 1981, in several demonstrations, which had *inter alia* caused damage to the building of the Senegalese Embassy in Banjul. The author, in a letter dated 10 August 1992, admits to having broken windows in the building of the Senegalese Embassy in Banjul..

7.5 Concerning the period of detention in 1988, the author recalls that he was arrested "around 2 March 1988" together with several other individuals and questioned about the violent incidents that had accompanied the general elections of February 1988. He was released "around 20 March 1988", after having addressed a letter to President A. Diouf about his allegedly arbitrary detention. On 6 April 1988, he was re-arrested, and after six days spent in a police lock-up, indicted on 12 April 1988. On 18 April 1988, he was released by decision of the Tribunal Régional of Dakar The decision simply orders the release of the author and eight other co-accused, but is not motivated.

7.6 The author reaffirms that he was placed once more in custody in 1990; he claims that he was arrested at the border and transferred to Dakar, where he was detained by agents of the Ministry of the Interior. He was booked and made to sign a statement (*procès-verbal*) on 12 July 1990, which accused him *inter alia* of offences against State security. He ignores why he was released on the same day.

7.7 Finally, the author affirms that he was once more apprehended on 20 July 1992 and detained for several hours. He was allegedly questioned in relation with a manifestation that had taken place in a popular quarter of Dakar. The Government apparently suspects him of sympathizing with the separatist Movement of Casamance's Democratic Forces (*Mouvement des Forces Démocratiques de la Casamance* – MFDC) in the South of the country, where separatists have clashed violently with government forces. The author denies any involvement with the MFDC and claims that as a result of constant surveillance by the State party's police and security services, he suffers from nervous disorders.

7.8 The author concludes that the State party's submissions are misleading and tendentious, and affirms that these submissions seek to cover serious and persistent human rights violations in Senegal.

Examination of the merits

8.1 The Human Rights Committee has examined the communication in the light of all the information provided by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

8.2 The Committee notes that the author does not question the legal nature of the charges against him, as described in the State party's submission under article 4, paragraph 2, of the Optional Protocol – he does however reject in general terms the factual accuracy of part of the State party's observations, while some of his statements contain blanket accusations of bad faith on the part of the State party. Conversely, the State party's submission does not address issues under article 19 other than by affirming that the author is adverse to any type of authority, and confines itself to the chronology of administrative and judicial proceedings in the case. In the circumstances, the Committee has examined whether such information as has been submitted is corroborated by any of the parties' submissions.

8.3 As to the claims of violations of article 9, the Committee notes that, in respect of the author's detention from 1982 to 1986 and in the spring of 1988, the State party has provided detailed information about the charges against the author, their legal qualification, the procedural requirements under the Senegalese Code of Criminal Procedure, and the legal remedies available to the author to challenge his detention. The records reveal that these charges were not based, as claimed by the author, on his political activities or upon his expressing opinions hostile to the Senegalese government. In the circumstances, it cannot be concluded that the author's arrest and detention were arbitrary or not based "on such grounds and in accordance with such procedure as are established by law". However, there are issues concerning the length of the author's detention, which are considered below (paragraphs 8.6 to 8.8).

8.4 As to the author's alleged detention in 1990, the Committee has taken note of the State party's argument that its records do not reveal that Mr. Koné was again arrested or detained after April 1988. As the author has not corroborated his claim by further information, and given that the copies of the medical reports he refers to in support of his claim of ill-treatment pre-date the alleged date of his arrest (6 July 1990), the Committee concludes that the claim of a violation of article 9 in relation to the events in July 1990 has not been sufficiently corroborated.

8.5 Similarly, the State party has denied that the author was arrested for the expression of his political opinions or because of his political affiliations, and the author has failed to adduce material to buttress his claim to this effect. Nothing in the material before the Committee supports the claim that the

author was arrested or detained on account of his participation in demonstrations against the regime of President Diouf, or because of his presumed support for the Movement of Casamance's Democratic Forces. On the basis of the material before it, the Committee is of the opinion that there has been no violation of article 19.

8.6 The Committee notes that the author was first arrested on 15 January 1982 and released on 9 May 1986; the length of his detention, four years and almost four months, is uncontested. It transpires from the State party's submission that no trial date was set throughout this period, and that the author was released *provisionally*, pending trial. The Committee recalls that under article 9, paragraph 3, anyone arrested or detained on a criminal charge shall be brought promptly before a judge ... and shall be entitled to trial within a reasonable time or to release. What constitutes "reasonable time" within the meaning of article 9, paragraph 3, must be assessed on a case-by-case basis.

8.7 A delay of four years and four months during which the author was kept in custody (considerably more taking into account that the author's guilt or innocence had not yet been determined at the time of his provisional release on 9 May 1986) cannot be deemed compatible with article 9, paragraph 3, in the absence of special circumstances justifying such delay, such as that there were, or had been, impediments to the investigations attributable to the accused or to his representative. No such circumstances are discernible in the present case. Accordingly, the author's detention was incompatible with article 9, paragraph 3. This conclusion is supported by the fact that the charges against the author in 1982 and in 1988 were identical, whereas the duration of the judicial process on each occasion differed considerably.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal a violation of article 9, paragraph 3, of the Covenant.

10. The Committee is of the view that Mr. Famara Koné is entitled, under article 2, paragraph 3 (a), of the Covenant, to a remedy, including appropriate compensation. The State party is under an obligation to ensure that similar violations do not occur in the future.

11. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to its Views.

---

* Pursuant to rule 85 of the Committee's rules of procedure, Mr. Birame Ndiaye did not participate in the adoption of the Committee's Views.

Communication No. 400/1990

Submitted by: Darwinia Rosa Mónaco de Gallicchio, on her behalf and on behalf of her granddaughter Ximena Vicario on 2 April 1990 (represented by counsel)
Alleged victim: The author and her granddaughter
State party: Argentina
Declared admissible: 8 July 1992 (forty-fifth session)
Date of adoption of Views: 3 April 1995 (fifty-third session)

Subject matter: Rights of the grandparent and child in case of abduction following the enforced disappearance of parents (guardianship, representation in proceedings, legal identity)

Procedural issues: Effective remedies – Lack of substantiation of claim – Continuing effects of violations committed prior to the entry into force of the Covenant and the Optional Protocol

Substantive issues: Right to family life and privacy – Protection of children – Prolonged judicial proceedings

Articles of the Covenant: 2, 3, 7, 8, 9, 14, 16, 17, 23, 24 and 26

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

1. The author of the communication is Darwinia Rosa Mónaco de Gallicchio, an Argentine citizen born in 1925, currently residing in Buenos Aires. She presents the communication on her own behalf and on behalf of her granddaughter, Ximena Vicario, born in Argentina on 12 May 1976 and 14 years of age at the time of submission of the communication. She claims that they are victims of violations by

Argentina of articles 2, 3, 7, 8, 9, 14, 16, 17, 23, 24 and 26 of the International Covenant on Civil and Political Rights. She is represented by counsel. The Covenant and the Optional Protocol entered into force for Argentina on 8 November 1986.

Facts as submitted by the author

2.1 On 5 February 1977, Ximena Vicario's mother was taken with the then nine-month-old child to the Headquarters of the Federal Police (Departamento Central de la Policía Federal) in Buenos Aires. Her father was apprehended in the city of Rosario on the following day. The parents subsequently disappeared, and although the National Commission on Disappeared Persons investigated their case after December 1983, their whereabouts were never established. Investigations initiated by the author herself finally led, in 1984, to locating Ximena Vicario, who was then residing in the home of a nurse, S.S., who claimed to have been taking care of the child after her birth. Genetic blood tests (*histocompatibilidad*) revealed that the child was, with a probability of 99.82 per cent, the author's granddaughter.

2.2 In the light of the above, the prosecutor ordered the preventive detention of S.S., on the ground that she was suspected of having committed the offences of concealing the whereabouts of a minor (*ocultamiento de menor*) and forgery of documents, in violation of articles 5, 12, 293 and 146 of the Argentine Criminal Code.

2.3 On 2 January 1989, the author was granted "provisional" guardianship of the child; S.S., however, immediately applied for visiting rights, which were granted by order of the Supreme Court on 5 September 1989. In this decision, the Supreme Court also held that the author had no standing in the proceedings about the child's guardianship since, under article 19 of Law 10.903, only the parents and the legal guardian have standing and may directly participate in the proceedings.

2.4 On 23 September 1989 the author, basing herself on psychiatric reports concerning the effects of the visits of S.S. on Ximena Vicario, requested the court to rule that such visits should be discontinued. Her action was dismissed on account of lack of standing. On appeal, this decision was upheld on 29 December 1989 by the Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal of Buenos Aires. With this, the author submits, available and effective domestic remedies have been exhausted. She adds that it would be possible to file further appeals in civil proceedings, but submits that these would be unjustifiably prolonged, to the extent that Ximena Vicario might well reach the age of legal competence by the time of a final decision. Furthermore, until such time as legal proceedings in the case are completed, her granddaughter must continue to bear the name given to her by S.S.

Complaint

3.1 The author claims that the judicial decisions in the case violate article 14 (bis) of the Argentine Constitution, which guarantees the protection of the family, as well as articles 23 and 24 of the Covenant. It is further submitted that S.S.'s regular visits to the child entail some form of "psycho-affective" involuntary servitude in violation of article 15 of the Argentine Constitution and article 8 of the Covenant. The fact that the author is denied standing in the guardianship proceedings is deemed to constitute a violation of the principle of equality before the law, as guaranteed by article 16 of the Argentine Constitution and articles 14 and 26 of the Covenant.

3.2 The author also claims a violation of the rights of her granddaughter, who she contends is subjected to what may be termed psychological torture, in violation of article 7 of the Covenant, every time she is visited by S.S. Another alleged breach of the Covenant concerns article 16, under which every person has the right to recognition as a person before the law, with the right to an identity, a name and a family: that Ximena Vicario must continue to bear the name given to her by S.S. until legal proceedings are completed is said to constitute a violation of her right to an identity. Moreover, the uncertainty about her legal identity has prevented her from obtaining a passport under her real name.

3.3 The author submits that the forced acceptance of visits from S.S. violates her granddaughter's rights under article 17, which should protect Ximena Vicario from arbitrary interference with her privacy. Moreover, the author contends that her own right to privacy is violated by the visits of S.S., and by her exclusion from the judicial proceedings over the guardianship of Ximena Vicario. Article 23, which protects the integrity of the family and of children, allegedly is violated in that Ximena Vicario is constantly exposed to, and maintained in, an ambiguous psychological situation.

State party's observations and author's comments

4.1 The State party, after recapitulating the chronology of events, concedes that with the dismissal of the author's appeal on 29 December 1989, the author has, in principle, complied with the requirements of article 5, paragraph 2 (b), of the Optional Protocol. Nevertheless, it draws attention to the inherent "provisional character" of judicial decisions in adoption and guardianship proceedings; such decisions may be, and frequently are, questioned either through the appearance of new circumstances and facts or the re-evaluation of

circumstances by the competent authorities seized of the matter.

4.2 In the author's case, the State party notes, new factual and legal circumstances have come to light which will require further judicial proceedings and decisions; the latter in turn may provide the author with an effective remedy. Thus, a complaint was filed on 13 February 1990 in the Federal Court of First Instance by the Federal Prosecutor charged with the investigation of the cases of the children of disappeared persons; the case was registered under case file A-56/90. On 16 September 1990, the Prosecutor submitted a report from a professor of juvenile clinical psychology of the University of Buenos Aires, which addressed the impact of the visits from S.S. on the mental health of Ximena Vicario; the report recommended that the visiting rights regime should be reviewed.

4.3 The State party further indicates that before the civil courts in the province of Buenos Aires (Juzgado en lo Civil No. 10 del Departamento Judicial de Morón) an action initiated by the author had been pending, with a view to declaring the adoption of Ximena Vicario by S.S. invalid. On 9 August 1991, the Juzgado en lo Civil No. 10 held that Ximena Vicario's adoption and her birth inscription as R.P.S. were invalid. The decision is on appeal before the Supreme Court of the province of Buenos Aires.

4.4 Finally, the State party notes that criminal proceedings against S.S. remain pending, for the alleged offences of falsification of documents and kidnapping of a minor. A final decision in this matter has not been taken.

4.5 The State party concludes that, in the light of the provisional nature of decisions in guardianship proceedings, it is important to await the outcome of the various civil and criminal actions pending in the author's case and that of Ximena Vicario, as this may modify the author's and Ximena Vicario's situation. Accordingly, the State party requests the Committee to decide that it would be inappropriate to adjudicate the matter under consideration at this time.

4.6 In respect of the alleged violations of the Argentine Constitution, the State party affirms that it is beyond the Committee's competence to evaluate the compatibility of judicial decisions with domestic law, and that this part of the communication should be declared inadmissible.

5.1 In her comments, the author contends that no new circumstances have arisen that would justify a modification of her initial claims submitted to the Committee. Thus, her granddaughter continues to receive regular visits from S.S., and the civil and criminal proceedings against the latter have not shown any notable progress. The author points out that by the spring of 1991, the criminal proceedings in case A-62/84 had been pending for over six years at first instance; as any judgement could be appealed to the Court of Appeal and the Supreme Court, the author surmises that Ximena Vicario would reach legal age (18 years) without a final solution to her, and the author's, plight. Therefore, the judicial process should be deemed to have been "unreasonably prolonged".

5.2 The author contends that the Supreme Court's decision denying her standing in the judicial proceedings binds all other Argentine tribunals and therefore extends the violations suffered by her to all grandparents and parents of disappeared children in Argentina. In support of her contention, she cites a recent judgement of the Court of Appeal of La Plata, concerning a case similar to hers. These judgements, in her opinion, have nothing "provisional" about them. In fact, the psychological state of Ximena Vicario is said to have deteriorated to such an extent that, on an unspecified date, a judge denied S.S. the month of summer vacation with Ximena Vicario she had requested; however, the judge authorized S.S. to spend a week with Ximena Vicario in April 1991. The author concludes that she should be deemed to have complied with the admissibility criteria of the Optional Protocol.

Committee's decision on admissibility

6.1 During its forty-fifth session the Committee considered the admissibility of the communication. The Committee took note of the State party's observations, according to which several judicial actions which potentially might provide the author with a satisfactory remedy were pending. It noted, however, that the author had availed herself of domestic appeals procedures, including an appeal to the Supreme Court of Argentina, and that her appeals had been unsuccessful. In the circumstances, the author was not required, for purposes of article 5, paragraph 2 (b), of the Optional Protocol, to re-petition the Argentine courts if new circumstances arose in the dispute over the guardianship of Ximena Vicario.

6.2 In respect of the author's claims under articles 2, 3, 7, 8 and 14, the Committee found that the author had failed to substantiate her claims, for purposes of admissibility.

7. On 8 July 1992 the Human Rights Committee decided that the communication was admissible in so far as it might raise issues under articles 16, 17, 23, 24 and 26 of the Covenant.

Author's and State party's further submissions on the merits

8.1 By note verbale of 7 September 1992, the State party forwarded the text of the decision

adopted on 11 August 1992 by the Cámara de Apelación en lo Civil y Comercial Sala II del Departamento Judicial de Morón, according to which the nullity of Ximena Vicario's adoption was affirmed.

8.2 By note verbale of 6 July 1994 the State party informed the Committee that S.S. had appealed the nullity of the adoption before the Supreme Court of the Province of Buenos Aires and that Ximena Vicario had been heard by the court.

8.3 With regard to the visiting rights initially granted to S.S. in 1989, the State party indicates that these were terminated in 1991, in conformity with the express wishes of Ximena Vicario, then a minor.

8.4 With regard to the guardianship of Ximena Vicario, which had been granted to her grandmother on 29 December 1988, the Buenos Aires Juzgado Nacional de Primera Instancia en lo Criminal y Correccional terminated the regime by decision of 15 June 1994, bearing in mind that Ms. Vicario had reached the age of 18 years.

8.5 In 1993 the Federal Court issued Ximena Vicario identity papers under that name.

8.6 As to the criminal proceedings against S.S., an appeal is currently pending.

8.7 In the light of the above, the State party contends that the facts of the case do not reveal any violation of articles 16, 17, 23, 24 or 26 of the Covenant.

9.1 In her submission of 10 February 1993, the author expressed her concern over the appeal lodged by S.S. against the nullity of the adoption and contends that this uncertainty constitutes a considerable burden to herself and to Ximena Vicario.

9.2 In her submission of 3 February 1995, the author states that the Supreme Court of the Province of Buenos Aires has issued a final judgement confirming the nullity of the adoption.

Examination of the merits

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

10.2 With regard to an alleged violation of article 16 of the Covenant, the Committee finds that the facts before it do not sustain a finding that the State party has denied Ximena Vicario recognition as a person before the law. In fact, the courts of the State party have endeavoured to establish her identity and issued her identity papers accordingly.

10.3 As to Darwinia Rosa Mónaco de Gallicchio's claim that her right to recognition as a person before the law was violated, the Committee notes that, although her standing to represent her granddaughter in the proceedings about the child's guardianship was denied in 1989, the courts did recognize her standing to represent her granddaughter in a number of proceedings, including her suit to declare the nullity of the adoption, and that she was granted guardianship over Ximena Vicario. While these circumstances do not raise an issue under article 16 of the Covenant, the initial denial of Mrs. Mónaco's standing effectively left Ximena Vicario without adequate representation, thereby depriving her of the protection to which she was entitled as a minor. Taken together with the circumstances mentioned in paragraph 10.5 below, the denial of Mrs. Mónaco's standing constituted a violation of article 24 of the Covenant.

10.4 As to Ximena Vicario's and her grandmother's right to privacy, it is evident that the abduction of Ximena Vicario, the falsification of her birth certificate and her adoption by S.S. entailed numerous acts of arbitrary and unlawful interference with their privacy and family life, in violation of article 17 of the Covenant. The same acts also constituted violations of article 23, paragraph 1, and article 24, paragraphs 1 and 2, of the Covenant. These acts, however, occurred prior to the entry into force of the Covenant and of the Optional Protocol for Argentina on 8 November 1986, See the Committee's decision on admissibility concerning communication No. 275/1988, *S.E. v. Argentina*, declared inadmissible *ratione temporis* on 26 March 1990, para. 5.3. and the Committee is not in a position *ratione temporis* to emit a decision in their respect. The Committee could, however, make a finding of a violation of the Covenant if the continuing effects of those violations were found themselves to constitute violations of the Covenant. The Committee notes that the grave violations of the Covenant committed by the military regime of Argentina in this case have been the subject of numerous proceedings before the courts of the State party, which have ultimately vindicated the right to privacy and family life of both Ximena Vicario and her grandmother. As to the visiting rights initially granted to S.S., the Committee observes that the competent courts of Argentina first endeavoured to determine the facts and balance the human interests of the persons involved and that in connection with those investigations a number of measures were adopted to give redress to Ximena Vicario and her grandmother, including the termination of the regime of visiting rights accorded to S.S, following the recommendations of psychologists and Ximena Vicario's own wishes. Nevertheless, these outcomes appear to have been delayed by the initial denial of

standing of Mrs. Mónaco to challenge the visitation order.

10.5 While the Committee appreciates the seriousness with which the Argentine courts endeavoured to redress the wrongs done to Ms. Vicario and her grandmother, it observes that the duration of the various judicial proceedings extended for over 10 years, and that some of the proceedings have not yet been completed. The Committee notes that in the meantime Ms. Vicario, who was 7 years of age when found, reached the age of maturity (18 years) in 1994, and that it was not until 1993 that her legal identity as Ximena Vicario was officially recognized. In the specific circumstances of this case, the Committee finds that the protection of children stipulated in article 24 of the Covenant required the State party to take affirmative action to grant Ms. Vicario prompt and effective relief from her predicament. In this context, the Committee recalls its General Comment on article 24, General Comment No. 17, adopted at the thirty-fifth session of the Committee, in 1989. in which it stressed that every child has a right to special measures of protection because of his/her status as a minor; those special measures are additional to the measures that States are required to take under article 2 to ensure that everyone enjoys the rights provided for in the Covenant. Bearing in mind the suffering already endured by Ms. Vicario, who lost both of her parents under tragic circumstances imputable to the State party, the Committee finds that the special measures required under article 24, paragraph 1, of the Covenant were not expeditiously applied by Argentina, and that the failure to recognize the standing of Mrs. Mónaco in the guardianship and visitation proceedings and the delay in legally establishing Ms. Vicario's real name and issuing identity papers also entailed a violation of article 24, paragraph 2, of the Covenant, which is designed to promote recognition of the child's legal personality.

10.6 As to an alleged violation of article 26 of the Covenant, the Committee concludes that the facts before it do not provide sufficient basis for a finding that either Ms. Vicario or her grandmother were victims of prohibited discrimination.

11.1 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts which have been placed before it reveal a violation by Argentina of article 24, paragraphs 1 and 2, of the Covenant.

11.2 In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author and her granddaughter with an effective remedy, including compensation from the State for the undue delay of the proceedings and resulting suffering to which they were subjected. Furthermore, the State party is under an obligation to ensure that similar violations do not occur in the future.

11.3 Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views.

12. With reference to the violations of the Covenant which occurred prior to 8 November 1986, the Committee encourages the State party to persevere in its efforts to investigate the disappearance of children, determine their true identity, issue to them identity papers and passports under their real names, and grant appropriate redress to them and their families in an expeditious manner.

Communication No. 402/1990

Submitted by: Henricus Antonius Godefriedus Maria Brinkhof (represented by counsel) on 11 April 1990
Alleged victim: The author
State party: The Netherlands
Declared admissible: 25 March 1992 (forty-fourth session)
Date of adoption of Views: 27 July 1993 (forty-eighth session)

Subject matter: Exemption of Jehovah's Witnesses from military and alternative service – Alleged discrimination of conscientious objectors

Procedural issues: Lack of substantiation of claim – Inadmissibility *ratione materiae* – Exhaustion of domestic remedies

Substantive issues: Differential treatment – Reasonable and objective criteria – Recommendation to review relevant domestic regulations and practice (*obiter dictum*)

Articles of the Covenant: 14 (1), 26

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

1. The author of the communication is Henricus A. G. M. Brinkhof, a citizen of the Netherlands, born on 1 January 1962, residing at Erichem, the Netherlands. He is a conscientious objector to both military service and substitute civilian service and claims to be the victim of a violation by the Government of the Netherlands of articles 6, 7, 8, 14, 18 and 26 of the International Covenant on Civil and Political Rights. He is represented by counsel.

Facts as submitted by the author

2.1 The author did not report for his military service on a specified day. He was arrested and brought to the military barracks, where he refused to obey orders to accept a military uniform and equipment on the ground that he objected to military service and substitute public service as a consequence of his pacifist convictions. On 21 May 1987, he was found guilty of violating articles 23 and 114 of the Military Penal Code (*Wetboek van Militair Strafrecht*) and article 27 of the Penal Code (*Wetboek van Strafrecht*) by the Arnhem Military Court (*Arrondissementskrijgsraad*) and sentenced to six months' imprisonment and dismissal from military service.

2.2 Both the author and the Public Prosecutor appealed to the Supreme Military Court (*Hoog Militair Gerechtshof*) which, on 26 August 1987, found the author guilty of violating articles 23 and 114 of the Military Penal Code and sentenced him to 12 months' imprisonment and dismissal from military service. On 17 May 1988, the Supreme Court (*Hoge Raad*) rejected the author's appeal.

Complaint

3.1 The author contends that whereas article 114 of the Military Penal Code, on which his conviction was based, applies to disobedient soldiers, it does not apply to conscientious objectors, as they cannot be considered to be soldiers. He claims, therefore, that his refusal to obey military orders was not punishable by law.

3.2 The Supreme Military Court rejected the author's argument and, noting that article 114 of the Military Penal Code did not differentiate between conscientious objections and other objections to military service, considered article 114 applicable.

3.3 The author also alleges a violation of article 26 of the Covenant, on the grounds that while conscientious objectors may be prosecuted under the Military Penal Code, Jehovah's Witnesses may not.

3.4 The Supreme Military Court dismissed this argument, stating that Jehovah's Witnesses, unlike conscientious objectors, are not required to do military service, and thus cannot commit offences under the Military Penal Code. The Supreme Military Court further considered that it was not competent to examine the draft policy of the Netherlands Government.

3.5 The author further alleges that the proceedings before the courts suffered from various procedural defects, notably that the courts did not correctly apply international law.

3.6 The author's defence was based on the argument that by performing military service, he would become an accessory to the commission of crimes against peace and the crime of genocide, as he would be forced to participate in the preparation for the use of nuclear weapons. In this context, the author regards the strategies of the North Atlantic Treaty Organization (NATO) as well as the military-operational plans based on them, which envisage resort to nuclear weapons in armed conflict, as a conspiracy to commit a crime against peace and/or the crime of genocide.

3.7 According to the author, if the NATO strategy is meant to be a credible deterrent, it must imply that political and military leaders are prepared to use nuclear weapons in armed conflict. The author states that the use of nuclear weapons is unlawful.

3.8 The Supreme Military Court rejected the author's line of defence. It held that the question of the author's participation in a conspiracy to commit genocide or a crime against peace did not arise, as the international rules and principles invoked by the author do, in the view of the Court, not concern the issue of the deployment of nuclear weapons and likewise the conspiracy does not occur, since the NATO doctrine does not automatically imply use without further consultations.

3.9 The author further alleges that the Supreme Military Court was not impartial within the meaning of article 14, paragraph 1, of the Covenant. He explains that the majority of the members of the Supreme Military Court were high-ranking members of the armed forces who, given their professional background, could not be expected to hand down an impartial verdict. Furthermore, the civilian members of the Supreme Military Court had served in the highest ranks of the armed forces during their professional careers.

3.10 The author also invoked the defence of *force majeure*, because, as a conscientious objector to any

form of violence, he could not act in any other way than he did. By prosecuting him, the State party has violated his right to freedom of conscience.

3.11 The Supreme Military Court rejected this defence by referring to the Act on Conscientious Objection to Military Service, under which the author could have applied for substitute civilian service. According to the author, however, his conscience prevents him from filing a request under the Act on Conscientious Objection to Military Service.

3.12 Finally, the author alleges another violation of article 26 of the Covenant, on the ground that the Military Penal Code, unlike the Penal Code, makes no provisions for an appeal against the summons. According to the author, it is inconceivable that civilians who become soldiers should be discriminated *vis-à-vis* other civilians.

State party's observations and author's clarifications

4.1 The State party notes that a State's right to require its citizens to perform military service, or substitute service in the case of conscientious objectors whose grounds for objection are recognized by the State, is, as such, not contested. Reference is made to article 8, paragraph 3 (c) (ii), of the Covenant.

4.2 The State party states that Jehovah's Witnesses have been exempted from military service since 1974. Amendments to the Conscription Act, which are being prepared in order to make provision for the hearing of "total objectors", continue to provide for the exemption of Jehovah's Witnesses. In the view of the Government, membership of Jehovah's Witnesses constitutes strong evidence that the objections to military service are based on genuine religious convictions. Therefore, they automatically qualify for exemption. However, this does not exclude the possibility for other individuals to invoke the Act on Conscientious Objection to Military Service.

4.3 The Government takes the view that the independence and impartiality of the Supreme Military Court in the Netherlands is guaranteed by the following procedures and provisions:

(a) The president and the member jurist of the Supreme Military Court are judges in the Court of Appeal (*Gerechtshof*) in The Hague, and remain president and member jurist as long as they are members of the Court of Appeal;

(b) The military members of the Supreme Military Court are appointed by the Crown. They are discharged after reaching 70 years of age;

(c) The military members of the Supreme Military Court do not hold any function in the military hierarchy. Their salaries are paid by the Ministry of Justice;

(d) The president and the members of the Supreme Military Court have to take an oath before they take up their appointment. They swear or vow to act in a fair and impartial way;

(e) The president and the members of the Supreme Military Court do not owe any obedience nor are they accountable to any one regarding their decisions;

(f) As a rule the sessions of the Supreme Military Court are public.

4.4 The State party points out that national and international judgements have confirmed the impartiality and independence of the military courts in the Netherlands. Reference is made to the *Engel Case* of the European Court of Human Rights[1] and to the judgement of the Supreme Court of the Netherlands of 17 May 1988.

4.5 With regard to the exhaustion of domestic remedies, the State party claims that the Act on Conscientious Objection to Military Service (*Wet Gewetensbezwaren Militaire Dienst*) is an effective remedy to insuperable objections to military service. The State party contends that as the author has not invoked the Act, he has thus failed to exhaust domestic remedies.

4.6 With regard to the alleged violation concerning the absence of a right to appeal against the initial summons, the Government refers to the decision on admissibility by the Human Rights Committee in respect of communications Nos. 267/1987 and 245/1987, which raised the same issue. The Government therefore submits that this part of the present communication should be deemed inadmissible.

4.7 The State party contends that the other elements of the applicant's communication are unsubstantiated. It concludes that the author has no claim under article 2 of the Optional Protocol and that his communication should accordingly be declared inadmissible.

5.1 In his reply to the State party's observations the author claims that the Conscientious Objection Act has a limited scope and that it may be invoked only by conscripts who meet the requirements of section 2 of the Act. The author rejects the assertion that section 2 is sufficiently broad to cover the objections maintained by "total objectors" to conscription and substitute civilian service. He argues that the question is not whether the author

[1] *Publications of the European Court of Human Rights, Series A*: *Judgements and Decisions*, vol. 22, p. 37, para. 89.

should have invoked the Conscientious Objection Act, but whether the State party has the right to force the author to become an accomplice to a crime against peace by requiring him to do military service.

5.2 With regard to the exhaustion of domestic remedies, the author explains that he was convicted by the court of first instance and that his appeals to the Supreme Military Court and the Supreme Court of the Netherlands were rejected. He argues, therefore, that the requirement to exhaust domestic remedies has been fully complied with.

5.3 With regard to the State party's proposed amendments to the Conscription Act, the author claims that they are to be withdrawn.

5.4 The author contends that the State party cannot claim that the European Court of Human Rights has confirmed the impartiality and independence of the Netherlands court martial procedure (Military Court).

Committee's decision on admissibility

6.1 During its forty-fourth session the Committee considered the admissibility of the communication. It considered that, since the author had been convicted for his refusal to obey military orders and his appeal against his conviction had been dismissed by the Supreme Court of the Netherlands, the communication met the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

6.2 The Committee considered that the author's contention that the Court had misinterpreted the law and wrongly convicted him, as well as his claims under articles 6 and 7 were inadmissible under article 3 of the Optional Protocol. As regards the author's claim that his rights under article 26 of the Covenant were violated since the Military Penal Code, unlike the Penal Code, made no provisions for an appeal against the summons, the Committee referred to its jurisprudence in case Nos. 245/1987 and 267/1987,[2] and considered that the scope of article 26 could not be extended to cover situations such as the one encountered by the author; this part of the communication was therefore declared inadmissible under article 2 of the Optional Protocol.

6.3 The Committee decided that the author's allegation regarding the differentiation in treatment between Jehovah's Witnesses and conscientious objectors to military and substitute service in general should be examined on the merits.

6.4 The Committee considered that the author's other claims were not substantiated, for purposes of admissibility, and therefore inadmissible under article 2 of the Optional Protocol.

6.5 Accordingly, on 25 March 1992, the Committee declared the communication admissible in so far as the differentiation in treatment between Jehovah's Witnesses and conscientious objectors in general might raise issues under article 26 of the Covenant.

State party's submission on the merits and author's comments

7.1 In its submission, dated 20 November 1992, the State party argues that the distinction between Jehovah's Witnesses and other conscientious objectors to military service is based on objective and reasonable criteria.

7.2 The State party explains that, according to the relevant legal regulations, postponement of initial training can be granted in specific cases where special circumstances exist. A Jehovah's Witness who is eligible for military service is as a rule granted postponement of initial training if his community provides the assurance that he is a baptized member. The State party submits that this postponement is withdrawn if the community informs the Ministry of Defence that the individual concerned no longer is a full member of the community. If the grounds for granting postponement continue to apply, his eligibility for military service will expire when the individual reaches the age of 35.

7.3 To explain the special treatment for Jehovah's Witnesses, the State party states that baptized members form a closed group of people who are obliged, on penalty of expulsion, to observe strict rules of behaviour, applicable to many aspects of their daily life and subject to strict informal social control. According to the State party, one of these rules prohibits the participation in any kind of military or substitute service, while another obliges members to be permanently available for the purpose of spreading the faith.

7.4 The State party concludes that the different treatment of Jehovah's Witnesses does not constitute discrimination against the author, since it is based on reasonable and objective criteria. In this connection, it refers to the case law of the European Commission on Human Rights.[3] The State party moreover argues that the author has not substantiated that he is in a situation comparable to that of Jehovah's Witnesses.

[2] *R. T. Z. v. the Netherlands*, declared inadmissible on 5 November 1987, and *M. J. G. v. the Netherlands*, declared inadmissible on 24 March 1988.

[3] European Commission on Human Rights, case No. 10410/83, *Norenius v. Sweden*, decision of 11 October 1984, and case No. 14215/88, *Brinkhof v. the Netherlands*, decision of 13 December 1989.

8. In his comments, dated 25 January 1993, on the State party's submission, the author argues that, while the State party accepts membership of Jehovah's Witnesses as sufficient evidence that their objection to military and substitute service is sincere, it does not recognize the unsurmountable objections of other persons which are based on equally strong and genuine convictions. The author argues that the State party, by exempting Jehovah's Witnesses from military and substitute service, protects them against punishment by their own organization, while it sends other total objectors to prison. He further argues that the preparedness of total objectors to go to prison constitutes sufficient evidence of the sincerity of their objections and contends that the differentiation in treatment between Jehovah's Witnesses and other conscientious objectors amounts to discrimination under article 26 of the Covenant.

Examination of merits

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

9.2 The issue before the Committee is whether the differentiation in treatment as regards exemption from military service between Jehovah's Witnesses and other conscientious objectors amounts to prohibited discrimination under article 26 of the Covenant. The Committee has noted the State party's argument that the differentiation is based on reasonable and objective criteria, since Jehovah's Witnesses form a closely-knit social group with strict rules of behaviour, membership of which is said to constitute strong evidence that the objections to military and substitute service are based on genuine religious convictions. The Committee notes that there is no legal possibility for other conscientious objectors to be exempted from the service altogether; they are required to do substitute service; when they refuse to do this for reasons of conscience, they are prosecuted and, if convicted, sentenced to imprisonment.

9.3 The Committee considers that the exemption of only one group of conscientious objectors and the inapplicability of exemption for all others cannot be considered reasonable. In this context, the Committee refers to its General Comment on article 18 and emphasizes that, when a right of conscientious objection to military service is recognized by a State party, no differentiation shall be made among conscientious objectors on the basis of the nature of their particular beliefs. However, in the instant case, the Committee considers that the author has not shown that his convictions as a pacifist are incompatible with the system of substitute service in the Netherlands or that the privileged treatment accorded to Jehovah's Witnesses adversely affected his rights as a conscientious objector against military service. The Committee therefore finds that Mr. Brinkhof is not a victim of a violation of article 26 of the Covenant.

9.4 The Committee, however, is of the opinion that the State party should give equal treatment to all persons holding equally strong objections to military and substitute service, and it recommends that the State party review its relevant regulations and practice with a view to removing any discrimination in this respect.

Communication No. 412/1990

Submitted by: Auli Kivenmaa on 7 March 1990 (represented by counsel)
Alleged victim: The author
State party: Finland
Declared admissible: 20 March 1992 (forty-fourth session)
Date of adoption of Views: 31 March 1994 (fiftieth session)*

Subject matter: Prosecution of individual for organizing public assembly without prior notification to authorities

Procedural issues: State party's failure to make submission on admissibility – Ineffective remedies

Substantive issues: Freedom of expression – Right to freedom of assembly – Retroactive application of criminal law

Articles of the Covenant: 15, 19 and 21

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

1. The author of the communication is Ms. Auli Kivenmaa, a Finnish citizen and Secretary-General of the Social Democratic Youth Organization. She claims to be a victim of a violation by Finland of articles 15 and 19, and alternatively of article 21, of the International Covenant on Civil and Political Rights. She is represented by counsel.

The facts as submitted by the author

2.1 On 3 September 1987, on the occasion of a visit of a foreign head of State and his meeting with the President of Finland, the author and about 25 members of her organization, amid a larger crowd, gathered across from the Presidential Palace, where the leaders were meeting, distributed leaflets and raised a banner critical of the human rights record of the visiting head of State. The police immediately took the banner down and asked who was responsible. The author identified herself and was subsequently charged with violating the Act on Public Meetings by holding a "public meeting" without prior notification.

2.2 The above-mentioned Act on Public Meetings has not been amended since 1921, nor upon entry into force of the Covenant. Section 12 (1) of the Act makes it a punishable offence to call a public meeting without notification to the police at least six hours before the meeting. The requirement of prior notification applies only to public meetings in the open air (sect. 3). A meeting is not public if only those with personal invitations can attend (sect. 1 (2)).

2.3 Although the author argued that she did not organize a public meeting, but only demonstrated her criticism of the alleged human rights violations by the visiting head of State, the City Court, on 27 January 1988, found her guilty of the charge and fined her 438 markkaa. The Court was of the opinion that the group of 25 persons had, through their behaviour, been distinguishable from the crowd and could therefore be regarded as a public meeting. It did not address the author's defence that her conviction would be in violation of the Covenant.

2.4 The Court of Appeal, on 19 September 1989, upheld the City Court's decision, while arguing, *inter alia*, that the Act on Public Meetings, "in the absence of other legal provisions" was applicable also in the case of demonstrations; that the entry into force of the Covenant had not repealed or amended said Act; that the Covenant allowed restrictions of the freedom of expression and of assembly, provided by law; and that the requirement of prior notification was justified in the case because the "demonstration" was organized against a visiting head of State.

2.5 On 21 February 1990, the Supreme Court denied leave to appeal, without further motivation.

The complaint

3. The author denies that what took place was a public meeting within the meaning of the Act on Public Meetings. Rather, she characterizes the incident as an exercise of her right to freedom of expression, which is regulated in Finland by the Freedom of the Press Act and does not require prior notification. She contends that her conviction was, therefore, in violation of article 19 of the Covenant. She alleges that the way in which the courts found her actions to come within the scope of the Act on Public Meetings constitutes *ex analogia* reasoning and is, therefore, insufficient to justify the restriction of her right to freedom of expression as being "provided by law" within the meaning of article 19, paragraph 3. Moreover, she contends that such an application of the Act to the circumstances of the events in question amounts to a violation of article 15 of the Covenant (*nullum crimen sine lege, nulla poena sine lege*), since there is no law making it a crime to hold a political demonstration. The author further argues that, even if the event could be interpreted as an exercise of the freedom of assembly, she still was not under obligation to notify the police, as the demonstration did not take the form of a public meeting, nor a public march, as defined by the said Act.

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

4.1 By submission of 21 December 1990, the State party concedes that, with regard to the author's complaint against her conviction, all available domestic remedies have been exhausted.

4.2 As to the issue of whether or not the relevant provision of the Act on Public Meetings was applicable in the author's case, the State party submits that it is a question of evidence. The State party points out that the author does not contend that said provision conflicts with the Covenant, only that its specific application in her case violated the Covenant.

5. In her comments on the State party's submission, the author reiterates that not only convictions based on the retroactive application of criminal laws, but also those on analogous application of criminal law, violate article 15 of the Covenant.

The Committee's decision on admissibility

6.1 During its forty-fourth session, the Committee considered the admissibility of the communication. It observed that domestic remedies had been exhausted and that the same matter was not being examined under another procedure of international investigation or settlement.

6.2 On 20 March 1992, the Committee declared the communication admissible in so far as it might raise issues under articles 15, 19 and 21 of the Covenant. In its decision, the Committee requested the State party to clarify whether there was any discrimination between those who cheered and those who protested against the visiting head of State and,

in particular, whether any other groups or subgroups in the larger crowd who were welcoming the visiting head of State also distributed leaflets or displayed banners, whether they gave prior notification to the police pursuant to the Act on Public Meetings, and, if not, whether they were similarly prosecuted.

State party's submission on the merits and author's comments thereon

7.1 The State party, by submission of 14 December 1992, refers to the questions put to it by the Committee and states that on 3 September 1987, there was only a small crowd of people assembled in front of the Presidential Palace; besides the author's group, there were journalists and some curious passers-by. Except for the author and her friends, no other group or subgroup which could be characterized as demonstrators, distributing leaflets or displaying banners, was present. No other groups had given prior notification to the police of their intent to hold a public meeting.

7.2 The State party recalls that article 19 of the Covenant gives everyone the right to hold opinions without interference and the right to freedom of expression, but that, under paragraph 3 of the provision, the exercise of these rights may be subject to certain restrictions as are provided by law and are necessary for respect of the rights and reputations of others, or for the protection of national security or of public order (*ordre public*), or of public health and morals. The State party also recalls that the Constitution of Finland protects every citizen's freedom of speech and freedom to publish, and that the exercise of these freedoms is regulated by law, in accordance with the Constitution. The State party submits that, although the wording of the Constitution concentrates on freedom of the press, it has been interpreted broadly so as to encompass freedom of expression as protected by article 19 of the Covenant. In this context, the State party emphasizes that the right to freedom of expression does not depend on the mode of expression or on the contents of the message thus expressed.

7.3 The State party submits that the right to freedom of expression may be restricted by the authorities, as long as these restrictions do not affect the heart of the right. With regard to the present case, the State party argues that the author's freedom of expression has not been restricted. She was allowed freely to express her opinions, for instance by circulating leaflets, and the police did not, after having received information about the organizer of the public meeting, hinder the author and her group from continuing their activities. The State party therefore denies that the Act on Public Meetings was applied *ex analogia* to restrict the right to freedom of expression.

7.4 In this context, the State party argues that a demonstration necessarily entails the expression of an opinion, but, by its specific character, is to be regarded as an exercise of the right of peaceful assembly. In this connection, the State party argues that article 21 of the Covenant must be seen as *lex specialis* in relation to article 19 and that therefore the expression of an opinion in the context of a demonstration must be considered under article 21, and not under article 19 of the Covenant.

7.5 The State party agrees with the author that in principle article 15 of the Covenant also prohibits *ex analogia* application of a law to the disadvantage of a person charged with an offence. It argues, however, that in the present case the author was not convicted of expressing her opinion, but merely of her failure to give prior notification of a demonstration, as is required by article 3 of the Act on Public Meetings.

7.6 With regard to the author's allegation that she is a victim of a violation of article 21 of the Covenant, the State party recalls that article 21 allows restrictions on the exercise of the right to peaceful assembly. In Finland, the Act on Public Meetings guarantees the right to assemble peacefully in public, while ensuring public order and safety and preventing abuse of the right of assembly. Under the Act, public assembly is understood to be the coming together of more than one person for a lawful purpose in a public place that others than those invited also have access to. The State party submits that, in the established interpretation of the Act, the Act also applies to demonstrations arranged as public meetings or street processions. Article 3 of the Act requires prior notification to the police, at least six hours before the beginning of any public meeting at a public place in the open air. The notification must include information on the time and place of the meeting as well as on its organizer. Article 12, paragraph 1, of the Act makes it a punishable offence to call a public meeting without prior notification to the police. The State party emphasizes that the Act does not apply to a peaceful demonstration by only one person.

7.7 The State party explains that the provisions of the Act have been generally interpreted as also applying to public meetings which take the form of demonstrations. In this connection, the State party refers to decisions of the Parliamentary Ombudsman, according to which a prior notification to the police should be made if the demonstration is arranged at a public place in the open air and if other persons than those who have personally been invited are able to participate. The State party submits that the prior notification requirement enables the police to take the necessary measures to make it possible for the meeting to take place, for instance by regulating the flow of traffic, and further to protect the group in

their exercise of the right to freedom of assembly. In this context, the State party contends that, when a foreign head of State is involved, it is of utmost practical importance that the police be notified prior to the event.

7.8 The State party argues that the right of public assembly is not restricted by the requirement of a prior notification to the police. In this connection, it refers to jurisprudence of the European Court of Human Rights. The State party emphasizes that the prior notification is necessary to guarantee the peacefulness of the public meeting.

7.9 As regards the specific circumstances of the present case, the State party is of the opinion that the actual behaviour of the author and her friends amounted to a public meeting within the meaning of article 1 of the Act on Public Meetings. In this context, the State party submits that, although the word "demonstration" is not expressly named in the Act on Public Meetings, this does not signify that demonstrations are outside the scope of application of the Act. In this connection, the State party refers to general principles of legal interpretation. Furthermore, it notes that article 21 of the Covenant does not specifically refer to "demonstrations" as a mode of assembly either. Finally, the State party argues that the requirement of prior notification is in conformity with article 21, second sentence. In this context, the State party submits that the requirement is prescribed by law, and that it is necessary in a democratic society in the interests of legitimate purposes, especially in the interest of public order.

8.1 The author, by submission of 28 April 1993, challenges the State party's description of the facts and refers to the Court records in her case. According to these records, witnesses testified that approximately one hundred persons were present on the square, among whom were persons welcoming the foreign head of State and waving miniature flags; no action was taken by the police against them, but the police removed the banner displayed by the author and her friends. According to the author, this indicates that the police interfered with her and her friends' demonstration because of the contents of the opinion expressed, in violation of article 19 of the Covenant.

8.2 The author further challenges the State party's contention that the police did not hinder the author and her group in the expression of their opinion. She emphasizes that the entrance of the foreign head of State into the Presidential Palace was a momentary event, and that the measures by the police (taking away the banner immediately after it was erected and questioning the author) dramatically decreased the possibilities for the author to express her opinion effectively.

8.3 As regards the alleged violation of article 15 of the Covenant, the author refers to her earlier submissions and maintains that applying *ex analogia* the Act on Public Meetings to a demonstration such as the one organized by the author is in violation of article 15 of the Covenant. In this context, the author submits that the State party's argument that article 21 of the Covenant does not include a reference to demonstrations either is irrelevant, since article 15 only prohibits analogous interpretation to the disadvantage of an accused in criminal procedures.

8.4 The author challenges the State party's contention that it should have been evident to the author that she was under obligation to notify the police of the demonstration. The author argues that this was only firmly established by the Court's decision in her own case, and that the general interpretation to which the State party refers is insufficient as basis for her conviction. The author finally submits that the description of a public meeting, within the meaning of article 1 of the Act, used by the State party is unacceptably broad and would cover almost any outdoor discussion between at least three persons.

8.5 In conclusion, the author states that she does not contest that restrictions on the exercise of the right of peaceful assembly may be justified, and that prior notification of public meetings is a legitimate form of such restrictions. However, the author does challenge the concrete application of the Act on Public Meetings in her case. She contends that this outdated, vague and ambiguous statute was used as the legal basis for police interference with her expressing concern about the human rights situation in the country of the visiting head of State. She claims that this interference was not in conformity with the law nor necessary in a democratic society within the meaning of article 21 of the Covenant. In this connection, it is again stressed that by taking away the banner, the police interfered with the most effective method for the author to express her opinion.

Examination of the merits

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

9.2 The Committee finds that a requirement to notify the police of an intended demonstration in a public place six hours before its commencement may be compatible with the permitted limitations laid down in article 21 of the Covenant. In the circumstances of this specific case, it is evident from the information provided by the parties that the

gathering of several individuals at the site of the welcoming ceremonies for a foreign head of State on an official visit, publicly announced in advance by the State party authorities, cannot be regarded as a demonstration. In so far as the State party contends that displaying a banner turns their presence into a demonstration, the Committee notes that any restrictions upon the right to assemble must fall within the limitation provisions of article 21. A requirement to pre-notify a demonstration would normally be for reasons of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. Consequently, the application of Finnish legislation on demonstrations to such a gathering cannot be considered as an application of a restriction permitted by article 21 of the Covenant.

9.3 The right for an individual to express his political opinions, including obviously his opinions on the question of human rights, forms part of the freedom of expression guaranteed by article 19 of the Covenant. In this particular case, the author of the communication exercised this right by raising a banner. It is true that article 19 authorizes the restriction by the law of freedom of expression in certain circumstances. However, in this specific case, the State party has neither referred to a law allowing this freedom to be restricted nor established how the restriction applied to Ms. Kivenmaa was necessary to safeguard the rights and national imperatives set forth in article 19, paragraphs 2 (a) and (b) of the Covenant.

9.4 The Committee notes that while claims under article 15 have been made, no issues under this provision arise in the present case.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 19 and 21 of the Covenant.

11. Pursuant to article 2 of the Covenant, the State party is under an obligation to provide Ms. Auli Kivenmaa with an appropriate remedy and to adopt such measures as may be necessary to ensure that similar violations do not occur in the future.

12. 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.

---

* The text of an individual opinion submitted by Mr Kurt Herndl is appended. Section 1 (1) provides that the purpose of a "meeting" is to discuss public matters and to make decisions on them. Section 10 of the Act extends the requirement of prior notification to public ceremonial processions and marches.

APPENDIX

Individual opinion (dissenting) submitted by Mr. Kurt Herndl pursuant to rule 94, paragraph 3, of the rules of procedure of the Committee on Human Rights

1. While I did (and do) agree with the Committee's decision of 20 March 1992 to declare the present communication admissible inasmuch as the facts reported might raise issues under articles 15, 19 and 21 of the Covenant, I am regrettably unable to go along with the Committee's substantive decision that in the present case Finland has violated articles 19 and 21. The reason for this is that I do not share at all the Committee's legal assessment of the facts.

A. *The question of a possible violation of article 21*

2.1 The Committee's finding that by applying the 1907 Act on Public Meetings (hereinafter called the 1907 Act) to the author – and ultimately imposing a fine on her in accordance with section 12 of the Act – Finland has breached article 21 of the Covenant, is based on an erroneous appreciation of the facts and, even more so, on an erroneous view of what constitutes a "peaceful assembly" in the sense of article 21.

2.2 In the first sentence of paragraph 9.2 of its Views the Committee rightly observes that "a requirement to notify the police of an intended demonstration in a public place six hours before its commencement may be compatible with the permitted limitations laid down in article 21 of the Covenant". A mere requirement, as contained in the 1907 Act, to notify the authorities of a public meeting several hours before it starts, is obviously in line with article 21 of the Covenant which provides for the possibility of legitimate restrictions on the exercise of the right to peaceful assembly "in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others". The 1907 Act certainly falls in this category. This is, by the way, admitted by the author herself, who asserts that she does not contest that restrictions on the exercise of the right to peaceful assembly may be justified and that prior notification of public meetings is a legitimate form of such restrictions (see para. 8.5 of the Views). In her last communication she explicitly states that she is not challenging the validity of the 1907 Act *in abstracto* either.

2.3 The legal issue therefore centres on the question of whether the author's actions – the fact that she "and about 25 members of her organization, amid a larger crowd, gathered ..., distributed leaflets and raised a banner" (see para. 2.1 of the Views) – ought or ought not to be qualified as a "public meeting" in the sense of the 1907 Act or, for that matter, as a "peaceful assembly" in the sense of article 21 of the Covenant.

2.4 In that respect, the Committee observes in paragraph 9.2 (second sentence) of its Views that "it is evident from the information provided by the parties that the gathering of several individuals at the site of the welcoming ceremonies for a foreign head of State on an official visit, publicly announced in advance by the State

party authorities, cannot be regarded as a demonstration". I am, much to my regret, not able to follow this reasoning.

2.5 It is not contested by the author that she and a group of people of her organization summoned by her, went to the Presidential Palace explicitly for the purpose of distributing leaflets and raising a banner and thus to publicly denounce the presence, in Finland, of a foreign head of State whose human rights record they criticized. If this does not constitute a demonstration, indeed a public gathering within the scope of article 21 of the Covenant, what else would constitute a "peaceful assembly" in that sense, and, accordingly, a "public meeting" in the sense of the 1907 Act?

2.6 In his commentary on article 21 of the Covenant, Manfred Nowak states the following:

> "The term 'assembly' (*réunion*) is not defined but rather presumed in the Covenant. Therefore, it must be interpreted in conformity with the customary, generally accepted meaning in national legal systems, taking into account the object and purpose of this traditional human right. It is beyond doubt that not every assembly of individuals requires special protection. Rather, only intentional, temporary gatherings of several persons for a specific purpose are afforded the protection of freedom of assembly."[a]

2.7 This is exactly the case with the author's manifestation in front of the Presidential Palace. The decisive element for the determination of an "assembly" – as opposed to a more or less accidental gathering (e.g. people waiting for a bus, listening to a band, etc.) – obviously is the intention and the purpose of the individuals who come together. The author is estopped from arguing that she and her group were bystanders like the other crowd, which was apparently attracted by the appearance of a foreign head of State visiting the President of Finland. She and her group admittedly joined the event to make a political demonstration. This was the sole purpose of their appearing before the Presidential Palace. The State party, therefore, rightly stated, that this was "conceptually" a demonstration.

2.8 Nor can I follow the Committee's argument in paragraph 9.2 (fourth and fifth sentences) where an attempt is made to create a link between the purpose (and thus the legality) of the restrictive legislation as such and its application in a concrete case. To say that "a requirement to pre-notify a demonstration would normally be for reasons of national security", etc., and then to continue "consequently, the application of the Finnish legislation on demonstrations to such a gathering cannot be considered as an application of a restriction permitted by article 21 of the Covenant" is, to say at least, contradictory.

2.9 If the restricting legislation as such – in the present matter the 1907 Act on Public Meetings – is considered as being within the limits of article 21 (a fact not contested by the author and recognized by the Committee) the relevant law must obviously be applied in a uniform manner to all cases falling under its scope. In other words, if the 1907 Act and the obligation therein contained to notify any "public meeting" prior to its commencement, is a valid restriction on the exercise of the right to assembly, permitted under article 21 of the Covenant, then its formal application cannot be considered as a violation of the Covenant, whatever the actual reasons (in the mind of the authorities) for demanding the notification.

2.10 The Finnish authorities, therefore, did not violate article 21 of the Covenant by insisting that the author address an appropriate notification to the authorities prior to her demonstrating in front of the Presidential Palace and by fining her subsequently for not having made such a notification. In objective terms, it would have been easy for the author to comply with the requirement of a simple notification. No reason has ever been induced by her for not doing so, except for her arguing *ex post facto* that she was not required to notify because her action did not fall under the 1907 Act. She seems to have deliberately chosen to disregard the provisions of the Act, and accordingly had to bear the consequences, i.e. the imposition of a fine.

B. *The question of a possible violation of article 19*

3.1 In paragraph 9.3 of its Views the Committee emphasizes that the author exercised her right to freedom of expression by waiving a banner. As the banner was removed by the police, the Committee concludes that this violated article 19.

3.2 Surely, one will have to place the removal of the banner in the context of the whole event. The author and her group "demonstrate", they distribute leaflets, they waive a banner. The police intervenes in order to establish the identity of the person leading the demonstration (i.e. the "convener" of a public meeting under the 1907 Act). The banner is "taken down" by the police (see para. 2.1 of the Views). However, the demonstration is allowed to continue. The author herself and her group go on to distribute their leaflets and presumably give vent in public to their opinion concerning the visiting head of State. There is no further intervention by the police. Hence, the "taking down" of the banner is the only fact to be retained in view of a possible violation of article 19.

3.3 The Committee has opted for a very simple *façon de voir*: take away the banner and you necessarily violate the right to freedom of expression. This view does not take into account the intimate and somewhat complex relationship between articles 19 and 21 and, for that matter, also article 18 of the Covenant.

3.4 The right of peaceful assembly would seem to be just one facet of the more general right to freedom of expression. In that regard John P. Humphrey in his analysis of political and related rights states as follows: "There would hardly be freedom of assembly in any real sense without freedom of expression; assembly is indeed a form of expression".[b]

---

[a] Manfred Nowak, *United Nations Covenant on Civil and Political Rights, CCPR Commentary* (Kehl-Strasbourg-Arlington, Engel Publisher, 1993), p. 373.

[b] John P. Humphrey, "Political and Related Rights", in *Human Rights in International Law, Legal and Policy Issues*, Theodor Meron ed. (Oxford, Clarendon Press, 1984), vol. I, p. 188.

3.5 If, therefore, there are in force in any given State party, legal norms on the right to assembly which are in conformity with article 21 of the Covenant, including restrictions of that right which are permitted under that article, such legislation will apply to a public meeting or peaceful assembly rather than legislation on the exercise of freedom of expression. In that sense, the observation by the Government of Finland that article 21 must be seen as *lex specialis* in relation to article 19 (see para. 7.4 of the Views) is correct. In that regard, I should like to refer to the relevant portion of the Government's submission which reads as follows: "... this means that article 19 is to be regarded, in any case, as a *lex generalis* in relation to article 21 (*lex specialis*), thus excluding the need for separate consideration under the former article". It is regrettable that the Committee, in its Views, did not address this legal problem, but contented itself with the somewhat oversimplified statement that just by removing the displayed banner, the Government violated the author's right to freedom of expression. Would the Committee still have found a violation of article 19 if it had found no violation of article 21? Hardly.

C. *The question of a possible violation of article 15*

4.1 Although the Committee, in its admissibility decision of 20 March 1992, clearly retained article 15 among the articles which might have been violated by the Government of Finland, it completely failed to address the issue of article 15 in its final Views. This is all the more surprising as the author in all her submissions, including her last rejoinder, had again and again emphasized that her being fined by the Helsinki City Court (on the basis of section 12 of the 1907 Act) was tantamount to a retroactive application, by analogy, of criminal law. While this argument may be considered on the surface as rather subtle, it is contradicted by the facts of the case.

4.2 The author was convicted not for having expressed her political opinions in a specific way but merely for her undisputed omission "to give the prior notification required by section 3 of the Act on Public Meetings for arranging a certain kind of a public meeting, in her case a demonstration" (as submitted by the State party). Even on the assumption, that applying the 1907 Act with regard to the author's actions was erroneous, which, in turn, might have infringed on the author's rights under article 21 of the Covenant, her conviction on the basis of that same Act surely cannot be qualified as a "retroactive" application of criminal law, forbidden by article 15 (*nullum crimen, nulla poena sine lege*). Perhaps the Committee thought the argument too far-fetched and unreasonable. In any event, the Committee should have included in its final Views a statement to the effect that in the present case Finland has not violated article 15.

Communication No. 418/1990

Submitted by: C. H. J. Cavalcanti Araujo-Jongen (represented by counsel) on 16 August 1990
Alleged victim: The author
State party: The Netherlands
Declared admissible: 20 March 1992 (forty-fourth session)
Date of adoption of Views: 7 April 1994 (forty-ninth session)

Subject matter: Alleged sex-based discrimination in award of unemployment benefits under the Dutch social system

Procedural issues: None.

Substantive issues: Equal protection of the law – Entitlement to unemployment benefits – Retroactive amendment of legislation – Indirect discrimination – Domestic application of the Covenant

Articles of the Covenant: 26

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

1. The author of the communication is Mrs C. H. J.Cavalcanti Araujo-Jongen, a Dutch citizen, residing in Diemen, 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. She is represented by counsel.

The facts as submitted by the author

2.1 The author was born in 1939 and is married to Mr. Cavalcanti Araujo. From September 1979 to January 1983, she was employed as a part-time secretary for 20 hours a week. As of 1 February 1983, she was unemployed. In virtue of the Unemployment Act she was granted unemployment benefits. In conformity with the provisions of the Act, the benefits were granted for the maximum period of six months (until 1 August 1983). The author subsequently found new employment, as of 24 April 1984.

2.2 Having received benefits under the Unemployment Act for the maximum period, the author, as an unemployed person in 1983-1984, contends that she was entitled to benefits under the Unemployment Benefits Act, for a maximum period of two years. These benefits amounted to 75 per cent of the last salary, whereas benefits under the Unemployment Act amounted to 80 per cent of the last salary.

2.3 The author, on 11 December 1986, applied for benefits under the Unemployment Benefits Act to the Municipality of Leusden, her then place of residence. Her application was rejected on 8 April 1987 on the grounds that as a married woman who did not qualify as a breadwinner, she did not meet the requirements of the Act. The rejection was based on article 13, paragraph 1, subsection 1 of the Unemployment Benefits Act, which did not apply to married men.

2.4 On 2 July 1987, the Municipality confirmed its earlier decision. The author subsequently appealed to the Board of Appeal at Utrecht, which, by decision of 22 February 1988, declared her appeal to be well-founded; the decision of 8 April 1987 was set aside.

2.5 The Municipality then appealed to the Central Board of Appeal, which, by judgement of 10 May 1989, confirmed the Municipality's earlier decisions and set aside the Board of Appeal's decision. The author claims she has exhausted all available domestic remedies.

The complaint

3.1 In the author's opinion, the denial of benefits under the Unemployment Benefits Act amounts to discrimination within the meaning of article 26 of the Covenant. She refers to the Views of the Human Rights Committee regarding communications No. 172/1984 (*Broeks v. the Netherlands*) and No. 182/1984 (*Zwaan-de Vries v. the Netherlands*).

3.2 In its judgement of 10 May 1989, the Central Board of Appeal concedes, as in earlier judgements, that article 26 in conjunction with article 2 of the International Covenant on Civil and Political Rights applies also to the granting of social security benefits and similar entitlements. The Central Board further observed that the explicit exclusion of married women, unless they meet specific requirements that are not applicable to married men, implies direct discrimination on the ground of sex in relation to (marital) status. However, the Central Board held that "as far as the elimination of discrimination in the sphere of national social security legislation is concerned, in some situations there is room for a gradual implementation with regard to the moment at which unequal treatment ... cannot be considered acceptable any longer, as well as in view of the question of when, in such a case, the moment has come at which article 26 of the Covenant in relation to national legislation cannot be denied direct applicability any longer". The Central Board concluded in relation to the provision in the Unemployment Benefits Act that article 26 of the Covenant could not be denied direct applicability after 23 December 1984, the time-limit established by the Third Directive of the European Economic Community (EEC) regarding the elimination of discrimination between men and women within the Community.

3.3 The author notes that the Covenant entered into force for the Netherlands on 11 March 1979, and that, accordingly, article 26 was directly applicable as of that date. She contends that the date of 23 December 1984 was chosen arbitrarily, as there is no formal link between the Covenant and the Third EEC Directive. The Central Board had not, in earlier judgements, taken a consistent view with regard to the direct applicability of article 26. In a case relating to the General Disablement Act, for instance, the Central Board decided that article 26 could not be denied direct applicability after 1 January 1980.

3.4 The author submits that the Netherlands had, when ratifying the Covenant, accepted the direct applicability of its provisions, in accordance with articles 93 and 94 of the Constitution. Furthermore, even if a gradual elimination of discrimination were permissible under the Covenant, the transitional period of almost 13 years between the adoption of the Covenant in 1966 and its entry into force for the Netherlands in 1979, was sufficient to enable it to adapt its legislation accordingly.

3.5 The author claims she suffered damage as a result of the application of the discriminatory provisions in the Unemployment Benefits Act, in that benefits were refused to her for the period of 1 August 1983 to 24 April 1984. She contends that these benefits should be granted to women equally as to men as of 11 March 1979 (the date the Covenant entered into force for the Netherlands), in her case as of 1 August 1983, notwithstanding measures adopted by the Government to grant married women WWV benefits equally after 23 December 1984.

The Committee's decision on admissibility

4.1 During its forty-fourth session, the Committee considered the admissibility of the communication. It noted that the State party, by submission of 11 December 1990, raised no objections against admissibility and conceded that the author had exhausted available domestic remedies.

4.2 On 20 March 1992, the Committee declared the communication admissible inasmuch as it might raise issues under article 26 of the Covenant.

State party's submission on the merits and author's comments

5.1 By submission of 8 December 1992, the State party argues that the author's communication is unsubstantiated, since the facts of the case do not reveal a violation of article 26 of the Covenant.

5.2 The State party submits that article 13, paragraph 1, subsection 1 of the Unemployment

Benefits Act, on which the rejection of the unemployment benefit of the author was based, was abrogated by law of 24 April 1985. In this law, however, it was laid down that the law which was in force to that date – including the controversial article 13, paragraph 1, subsection 1 – remained applicable in respect of married women who had become unemployed before 23 December 1984. As these transitionary provisions were much criticized, they were abolished by Act of 6 June 1991. As a result, women who had been ineligible in the past to claim benefits under the Unemployment Benefits Act because of the breadwinner criterion, can claim these benefits retroactively, provided they satisfy the other requirements of the Act. One of the other requirements is that the applicant be unemployed on the date of application.

5.3 The State party therefore contends that if the author had been unemployed on the date of application for benefits under the Unemployment Benefits Act, she would be eligible for retroactive benefits on the basis of her unemployed status as from 1 February 1983. However, since the author had found other employment as of April 1984, she could not claim retroactive benefits under the Unemployment Benefits Act. The State party emphasizes that since the amendment of the law on 6 June 1991, the obstacle to the author's eligibility for a benefit is not the breadwinner criterion, but her failure to satisfy the other requirements under the law that apply to all, men and women alike.

5.4 The State party submits that by amending the law in this respect, it has complied with the principle of equality before the law as laid down in article 26 of the Covenant.

5.5 Moreover, the State party reiterates the observations it made in connection with communications Nos. 172/1984 [1] and 182/1984.[2] It emphasizes that the intent of the breadwinner criterion in the Unemployment Benefits Act was not to discriminate between married men and married women, but rather to reflect a fact of life, namely, that men generally were breadwinners, whereas women were not. The State party argues therefore that the law did not violate article 26 of the Covenant, since objective and reasonable grounds existed at the time to justify the differentiation in treatment between married men and married women.

5.6 Furthermore, the State party argues that the implementation of equal rights in national legislation depends on the nature of the subject-matter to which the principle of equality must be applied. The State party contends that in the field of social security, differentiation is necessary to bring about social justice. The incorporation of the breadwinner criterion in WWV should be seen in this light, as its object was to limit the eligibility of the benefit to those who were breadwinners. In this context, the State party refers to the individual opinion [3] appended to the Committee's Views in communication No. 395/1990,[4] which states that "article 26 of the Covenant should not be interpreted as requiring absolute equality or non-discrimination in [the field of social security] at all times; instead it should be seen as a general undertaking on the part of States parties to the Covenant to review regularly their legislation in order to ensure that it corresponds to the changing needs of society".

5.7 In this connection, the State party submits that it regularly adjusts its social security legislation to accommodate shifts in the prevailing social climate and/or structure, as it has done in the Unemployment Benefits Act. The State party concludes that by amending the Act in 1991, it has complied with its obligations under article 26 and article 2, paragraphs 1 and 2, of the Covenant.

6.1 By submission of 8 March 1993, counsel stresses that the central issue in the communication is whether article 26 of the Covenant had acquired direct effect before 23 December 1984, more specifically on 1 August 1983. She argues that the explicit exclusion of married women from benefits under the Unemployment Benefits Act constituted discrimi-nation on the grounds of sex in relation to marital status. Counsel argues that, even if objective and reasonable grounds existed to justify the differentiation in treatment between married men and married women at the time of the enactment of the provision, conditions in society no longer supported such differentiation in August 1983.

6.2 Counsel submits that, under the amended law, it is still not possible for the author, who has found new employment, to claim the benefits she was denied before. In this connection, she points out that the author failed to apply for a benefit during the period of her unemployment because the law at that time did not grant her any right to a benefit under the Unemployment Benefits Act. The author applied for a benefit after the breadwinner requirement for women was dropped as from 23 December 1984, but

---

[1] *Official Records of the General Assembly, Forty-second Session, Supplement No. 40* (A/42/40), annex VIII.B, *Broeks v. the Netherlands*, Views adopted on 9 April 1987.

[2] Ibid., Annex VIII.D, *Zwaan-de Vries v. the Netherlands*, Views adopted on 9 April 1987.

[3] Appended by Messrs. Nisuke Ando, Kurt Herndl and Birame Ndiaye.

[4] *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40* (A/47/70), Annex IX.P, *Sprenger v. the Netherlands*, Views adopted on 31 March 1992.

had by then found new employment. She therefore argues that the discriminatory effect of the said provision of the Act is not abolished for her, but still continues.

6.3 Counsel refers to the Committee's Views in communications Nos. 172/1984 [5] and 182/1984 [6] and argues that even if a transitional period is acceptable to bring the law in compliance with the Covenant, the length of that period, from the entry into force of the Covenant (11 March 1979) to the amendment of the law (6 June 1991), is unreasonable. Counsel therefore maintains that article 26 of the Covenant has been violated in the author's case by the refusal of the State party to grant her a benefit under the Unemployment Benefits Act for the period of her unemployment, from 1 August 1983 to 24 April 1984.

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 questions before the Committee are whether the author is a victim of a violation of article 26 of the Covenant (a) because the state and application of the law in August 1983 did not entitle her to benefits under the Unemployment Benefits Act, and (b) because the present application of the amended law still does not entitle her to benefits for the period of her unemployment from 1 August 1983 to 24 April 1984. In this connection, the author has also requested the Committee to find that the Covenant acquired direct effect in the Netherlands as from 11 March 1979, or in any event as from 1 August 1983.

7.3 The Committee recalls its earlier jurisprudence and observes that, although a State is not required under the Covenant to adopt social security legislation, if it does, such legislation must comply with article 26 of the Covenant.

7.4 The Committee observes that even if the law in force in 1983 was not consistent with the requirements of article 26 of the Covenant, that deficiency was corrected upon the retroactive amendment of the law on 6 June 1991. The Committee notes that the author argues that the amended law still indirectly discriminates against her because it requires applicants to be unemployed at the time of application, and that this requirement effectively bars her from retroactive access to benefits. The Committee finds that the requirement of being unemployed at the time of application for benefits is, as such, reasonable and objective, in view of the purposes of the legislation in question, namely to provide assistance to persons who are unemployed. The Committee therefore concludes that the facts before it do not reveal a violation of article 26 of the Covenant.

7.5 As regards the author's request that the Committee make a finding that article 26 of the Covenant acquired direct effect in the Netherlands as from 11 March 1979, the date on which the Covenant entered into force for the State party, or in any event as from 1 August 1983, the Committee observes that the method of incorporation of the Covenant in national legislation and practice varies among different legal systems. The determination of the question whether and when article 26 has acquired direct effect in the Netherlands is therefore a matter of domestic law and does not come within the competence of the Committee.

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.

---

[5] See footnote 1.

[6] See footnote 2.

Communication No. 428/1990

Submitted by: Yvonne M'Boissona on 14 November 1990
Alleged victim: Her brother, François Bozize
State party: Central African Republic
Declared admissible: 8 July 1992 (forty-fifth session)
Date of adoption of Views: 7 April 1994 (fiftieth session)

Subject matter: Alleged denial of the rights of a political opponent during arrest and detention and alleged violation of the right to be tried within a reasonable time

Procedural issues: State party's failure to make submission on admissibility and merits – Lack of substantiation of claim(s)

Substantive issues: Right to a fair trial – Ill-treatment and torture – Treatment during imprisonment – Liberty and security of the person

Articles of the Covenant: 7, 9, 10, 14 (1) (3) and 19

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

1. The author of the communication is Yvonne M'Boissona, a citizen of the Central African Republic residing at Stains, France. She submits the communication on behalf of her brother, François Bozize, currently detained at a penitentiary at Bangui, Central African Republic. She claims that her brother is a victim of violations of his human rights by the authorities of the Central African Republic, but does not invoke any provisions of the International Covenant on Civil and Political Rights.

The facts as submitted by the author

2.1 The author states that her brother was a high-level military officer of the armed forces of the Central African Republic. On 3 March 1982, he instigated a *coup d'état*; after its failure, he went into exile in Benin. On 24 July 1989, the author's brother was arrested at a hotel in Cotonou, Benin, together with 11 other citizens of the Central African Republic; all were presumed members of the political opposition, the Central African Movement of National Liberation (Mouvement centrafricain de libération nationale). On 31 August 1989, Mr. Bozize and the other opposition activists were repatriated by force, allegedly with the help of a Central African Republic military commando allowed to operate within Benin; this "extradition" is said to have been negotiated between the Governments of Benin and the Central African Republic. The forced repatriation occurred without a formal extradition request having been issued by the Government of the Central African Republic.

2.2 Upon his return to Bangui, Mr. Bozize was imprisoned at Camp Roux, where he allegedly suffered serious maltreatment and beatings. The author claims that her brother was not allowed access to a lawyer of his own choosing, nor to a member of his family. Allegedly, not even a doctor was allowed to see him to provide basic medical care. Furthermore, the sanitary conditions of the prison are said to be deplorable and the food allegedly consists of rotten meat mixed with sand; as a result, the weight of Mr. Bozize dropped to 40 kilograms by the summer of 1990.

2.3 During the night of 10 to 11 July 1990, the prison authorities of Camp Roux reportedly stage-managed a power failure in the sector of town where the prison is located, purportedly to incite Mr. Bozize to attempt an escape. As this practice is said to be common and invariably results in the death of the would-be escapee, Mr. Bozize did not leave his cell. The author contends that in the course of the night, her brother was brutally beaten for several hours and severely injured. This version of the events was confirmed by Mr. Bozize's lawyer, Maître Thiangaye, who was able to visit his client on 26 October 1990 and who noticed numerous traces of beatings and ascertained that Mr. Bozize had two broken ribs. The lawyer also reported that Mr. Bozize was kept shackled, that his reading material had been confiscated and that the prison guards only allowed him out of his cell twice a week. Allegedly, this treatment is known to, and condoned by, President Kolingba and the Ministers of Defence and of the Interior.

2.4 The authorities of the Central African Republic consistently maintain that Mr. Bozize indeed attempted to escape from the prison and that he sustained injuries in the process. This is denied by the author, who points to her brother's weak physical condition in the summer of 1990 and argues that he could not possibly have climbed over the three-metre-high prison wall.

2.5 Mr. Bozize's wife, who currently resides in France, has requested the good offices of the French authorities. By a letter of 29 October 1990, the President of the National Assembly informed her that the French foreign service had ascertained that Mr. Bozize was alive and that he had been transferred to the Kassai prison at Bangui.

2.6 As to the issue of exhaustion of domestic remedies, it is submitted that criminal proceedings against Mr. Bozize were to have been opened on 28 February 1991, allegedly in order to profit from the momentary absence, owing to a trip abroad, of his lawyer. However, the trial was postponed for "technical reasons". Since then, the trial has apparently been postponed on other occasions. Mrs Bozize complains that in the months following his arrest, her husband was denied access to counsel; later, the family retained the services of a lawyer to defend him. The lawyer, however, was denied authorization to visit his client; the lawyer allegedly also suffered restrictions of his freedom of movement on account of his client.

The complaint

3. It is submitted that the events described above constitute violations of Mr. Bozize's rights under the Covenant. Although the author does not specifically invoke any provisions of the Covenant, it transpires from the context of her submissions that her claims relate primarily to articles 7, 9, 10, 14 and 19 of the Covenant.

The Committee's decision on admissibility

4.1 During its forty-fifth session, in July 1992, the Committee considered the admissibility of the communication. It noted with concern that in spite of two reminders addressed to the State party, in July and September 1991, no information or observations on the admissibility of the communication had been received from the State party. In the circumstances, the Committee found that it was not precluded from considering the communication under article 5, paragraph 2 (b), of the Optional Protocol.

4.2 On 8 July 1992, the Committee declared the communication admissible in so far as it appeared to raise issues under articles 7; 9; 10; 14, paragraphs 1 and 3; and 19 of the Covenant.

Examination of the merits

5.1 The State party did not provide any information in respect of the substance of the author's allegations, in spite of two reminders addressed to it in June 1993 and February 1994. The Committee notes with regret and great concern the absence of cooperation on the part of the State party in respect of both the admissibility and the substance of the author's allegations. It is implicit in article 4, paragraph 2, of the Optional Protocol and in rule 91 of the Committee's rules of procedure that a State party to the Covenant must investigate in good faith all the allegations of violations of the Covenant made against it and its authorities and furnish the Committee with the information available to it. In the circumstances, due weight must be given to the author's allegations, to the extent that they have been substantiated.

5.2 The Committee decides to base its Views on the following facts, which have not been contested by the State party. Mr. François Bozize was arrested on 24 July 1989 and was taken to the military camp at Roux, Bangui, on 31 August 1989. There, he was subjected to maltreatment and was held incommunicado until 26 October 1990, when his lawyer was able to visit him. During the night of 10 to 11 July 1990, he was beaten and sustained serious injuries, which was confirmed by his lawyer. Moreover, while detained in the Camp at Roux, he was held under conditions which did not respect the inherent dignity of the human person. After his arrest, Mr. Bozize was not brought promptly before a judge or other officer authorized by law to exercise judicial power, was denied access to counsel and was not, in due time, afforded the opportunity to obtain a decision by a court on the lawfulness of his arrest and detention. The Committee finds that the above amount to violations by the State party of articles 7, 9, and 10 in the case.

5.3 The Committee notes that although Mr. Bozize has not yet been tried, his right to a fair trial has been violated; in particular, his right to be tried within a "reasonable time" under article 14, paragraph 3 (c), has not been respected, as he does not appear to have been tried at first instance after over four years of detention.

5.4 In respect of a possible violation of article 19 of the Covenant, the Committee notes that this claim has remained unsubstantiated. The Committee therefore makes no finding of a violation in this respect.

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 7, 9, 10 and 14, paragraph 3 (c), of the Covenant.

7. The Committee is of the view that Mr. François Bozize is entitled, under article 2, paragraph 3 (a), of the Covenant, to an effective remedy, including his release and appropriate compensation for the treatment suffered. The State party should investigate the events complained of and bring to justice those held responsible for the author's treatment; it further is under an obligation to take effective measures to ensure that similar violations do not occur in the future.

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

Communication No. 441/1990

Submitted by: Robert Casanovas on 27 December 1990
Alleged victim: The author
State party: France
Declared admissible: 7 December 1993 (forty-eighth session)
Date of adoption of Views: 15 July 1994 (fifty-first session)

Subject matter: Delay in administrative court proceedings in respect of complaint about dismissal from public service

Procedural issues: French reservation to article 5 (2) (a) of the Optional Protocol – Prior consideration of case by European Commission on Human Rights – Admissibility *ratione materiae*

Substantive issues: Concept of "suit at law" – Fair hearing – Duration of court proceedings

Articles of the Covenant: 2 (3) (a) and (b) and 14 (1)

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

1. The author of the communication is Robert Casanovas, a French citizen residing in Nancy. He claims to be the victim of a violation by France of articles 2, paragraph 3 (a) and (b), and 14, paragraph 1, of the International Covenant on Civil and Political Rights.

The facts as submitted by the author

2.1 The author is a former employee of the fire brigade *sapeurs-pompiers* of Nancy. On 1 September 1987, he was appointed head of the Centre de Secours Principal of Nancy. On 20 July 1988, he was dismissed for alleged incompetence, by decision of the regional and departmental authorities. The author appealed to the Administrative Tribunal (Tribunal Administratif) of Nancy, which quashed the decision on 20 December 1988. Mr. Casanovas was reinstated in his post by decision of 25 January 1989.

2.2 The city administration, however, initiated new proceedings against the author which resulted, on 23 March 1989, in a second decision terminating his employment. The author challenged this decision before the Administrative Tribunal of Nancy on 30 March 1989. On 19 October 1989, the President of the Tribunal ordered the closure of the preliminary inquiry. By a letter of 20 November 1989, Mr. Casanovas requested the President of the Tribunal to put his case on the court agenda at as early a date as possible; this request was repeated on 28 December 1989. By a letter dated 11 January 1990, the President informed him that the matter was not considered urgent and that, since no special circumstances prevailed, it would be registered in chronological order, which implied that the case would not be heard either in 1990 or in 1991.

2.3 On 23 January and again on 2 February 1990, the author notified the Court that he considered such a delay to constitute a breach of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and, accordingly, requested the inscription of his case on the court calendar, pursuant to articles 506 and 507 of the French Code of Civil Procedure. Again, he received no reply and therefore asked the Tribunal, on 13 February 1990, to acknowledge receipt of his earlier submissions. On 15 March 1990, the Court informed him that he was not being discriminated against, but that the delays encountered were the result of a backlog in the handling of earlier cases dating back to 1986; in the circumstances, it was impossible to examine the case at an earlier date.

2.4 On 21 March 1990, the author once again requested the President of the Administrative Tribunal to hear the case. The request was reiterated on 5 June 1990, but refused by the President of the Court on 11 June 1990.

2.5 On 20 July 1990, Mr. Casanovas appealed to the European Commission of Human Rights, invoking article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. By decision of 3 October 1990, the Commission declared his communication inadmissible, considering that the Convention does not cover procedures governing the dismissal of civil servants from employment.

2.6 As to the requirement of exhaustion of domestic remedies, the author submits that he cannot appeal to any other French judicial instance, unless and until the Administrative Tribunal of Nancy has adjudicated his case. He therefore submits that he should be deemed to have complied with the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

The complaint

3.1 The author submits that the State party has failed to provide him with an "effective remedy",

since the delay in having his case adjudicated would be at least three years. The author claims that this delay is manifestly unreasonable and cannot be justified by the work backlog of the Administrative Tribunal. The author argues that it is incomprehensible that the Administrative Tribunal was able to adjudicate his first case (concerning the 1988 dismissal) within five months, whereas it apparently will take several years to adjudicate his second petition.

3.2 The author further claims that States parties to the Covenant have the duty to provide their tribunals with the necessary means to render justice effectively and expeditiously. According to the author, this is not the case if at least three years pass before a case can be heard at first instance. The author claims that in case of appeal to the Administrative Court of Appeal (*Cour administrative d'appel*), and subsequently to the Council of State (*Conseil d'Etat*), a delay of about 10 years could be expected.

3.3 The author further submits that a case which concerns the dismissal of a civil servant is by nature an urgent matter; in this context, he submits that he has not received any salary since 23 March 1989. He claims that a decision reached after three years, even if favourable, would be ineffective. The author moreover argues that, since the Chairman of the Administrative Tribunal has discretionary power to put cases on the roll, he could have granted the author's request, taking into account the particular nature of the case.

The State party's information and observations with regard to the admissibility of the communication

4.1 The State party argues that the communication is inadmissible, on account of the reservation made by the Government of France upon the deposit of the instrument of ratification of the Optional Protocol to the International Covenant on Civil and Political Rights, with respect to article 5, paragraph 2 (a), that the Human Rights Committee "shall not have the competence to consider a communication from an individual if the same matter is being examined or has already been examined under another procedure of international investigation or settlement".

4.2 The State party submits that this reservation is applicable to the present case because the author of the communication has already submitted a complaint to the European Commission of Human Rights, which declared it inadmissible. The State party argues that the fact that the European Commission has not decided on the merits does not preclude the application of the reservation, as the case concerns the same individual, the same facts and the same claim. In this context, the State party refers to the Committee's decision with regard to communication No. 168/1984,[1] where the Committee held that the phrase "'the same matter' refers, with regard to identical parties, to the complaints advanced and facts adduced in support of them".

4.3 The State party further submits that the communication is inadmissible as incompatible *ratione materiae* with the Covenant. The State party argues that article 14, paragraph 1, of the Covenant is not applicable, since the procedure before the Administrative Tribunal does not involve "rights and obligations in a suit at law". In this context, the State party refers to the decision of the European Commission of Human Rights, which held that the European Convention for the Protection of Human Rights and Fundamental Freedoms does not cover procedures governing the dismissal from employment of civil servants, and points out that the text on which the European Commission based its decision is identical to the text of article 14, paragraph 1, of the Covenant. Moreover, unlike article 6, paragraph 1, of the European Convention, article 14, paragraph 1, of the Covenant does not contain any provision on the right to a judicial decision within a reasonable time.

4.4 The State party further argues that article 2, paragraph 3, of the Covenant, which guarantees an effective remedy to any person whose rights or freedoms as recognized in the Covenant are violated, has not been breached, since the procedure before the Administrative Tribunal can be considered an effective remedy. According to the State party, this is shown by the decision of the Administrative Tribunal, which quashed the author's dismissal in December 1988.

The Committee's decision on admissibility

5.1 At its forty-eighth session, the Committee considered the admissibility of the communication. It noted the State party's contention that the communication was inadmissible because of the reservation made by the State party to article 5, paragraph 2, of the Optional Protocol. The Committee observed that the European Commission had declared the author's application inadmissible as incompatible *ratione materiae* with the European Convention. The Committee considered that, since the rights of the European Convention differed in substance and with regard to their implementation procedures from the rights set forth in the Covenant,

[1] *Official Records of the General Assembly, Fortieth Session, Supplement No. 40* (A/40/40), annex XIX, *V. Ø. v. Norway*, declared inadmissible on 17 July 1985, para. 4.4.

a matter that had been declared inadmissible *ratione materiae* had not, in the meaning of the reservation, been "considered" in such a way that the Committee was precluded from examining it.

5.2 The Committee recalled that the concept of "suit at law" under article 14, paragraph 1, was based on the nature of the right in question rather than on the status of one of the parties. The Committee considered that a procedure concerning a dismissal from employment constituted the determination of rights and obligations in a suit at law, within the meaning of article 14, paragraph 1, of the Covenant. Accordingly, on 7 July 1993, the Committee declared the communication admissible.

Information received after the decision on admissibility

6.1 By a letter dated 17 June 1994, the author informs the Committee that the Administrative Tribunal of Nancy, on 20 December 1991, ruled in his favour and that he was reinstated in his post. He adds, however, that the city administration, on 17 December 1992, has again unilaterally terminated his employment and that this decision now is again before the administrative tribunals. He further submits that the continuing conflict with the administration and the long delays before the Tribunal have resulted in feelings of anguish and depression, as a result of which his health has seriously deteriorated.

6.2 No information or observations have been forwarded by the State party, despite a reminder sent on 3 May 1994. The Committee notes with regret the absence of cooperation from the State party, and recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol, that a State party should make available to the Committee all the information at its disposal. In the circumstances, due weight must be given to the author's allegations, to the extent that they have been substantiated.

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 notes that the issue before it is whether the duration of the proceedings before the Administrative Tribunal of Nancy concerning the author's second dismissal of 23 March 1989 violated the author's right to a fair hearing within the meaning of article 14, paragraph 1, of the Covenant.

7.3 The Committee recalls that the right to a fair hearing under article 14, paragraph 1, entails a number of requirements, including the condition that the procedure before the courts must be conducted expeditiously.[2] The Committee notes that in the instant case, the author, on 30 March 1989, initiated proceedings against his dismissal before the Administrative Tribunal of Nancy and that the Tribunal, after having concluded the preliminary inquiry on 19 October 1989, rendered its judgement in the case on 20 December 1991.

7.4 The Committee notes that the author obtained a favourable decision from the Administrative Tribunal of Nancy and that he was reinstated in his post. Bearing in mind the fact that the Tribunal did consider whether the author's case should have priority over other cases, the Committee finds that the period of time that has elapsed from the submission of the complaint of irregular dismissal to the decision of reinstatement does not constitute a violation of article 14, paragraph 1, of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a violation of any of the provisions of the Covenant.

---

[2] See *Official Records of the General Assembly, Forty-fourth Session, Supplement No. 40* (A/44/40), annex X.E, communication No. 207/1986 (*Yves Morael v. France*), Views adopted on 28 July 1989, para. 9.3.

Communication No. 449/1991

Submitted by: Barbarín Mojica on 22 July 1990
Alleged victim: His son, Rafael Mojica
State party: Dominican Republic
Declared admissible: 18 March 1993 (forty-seventh session)
Date of adoption of Views: 15 July 1994 (fifty-first session)

Subject matter: Complaint by a father relating to the disappearance of his son, a trade union activist, following death threats from military officers – Related State party's obligations

Procedural issues: State party's failure to make submission on admissibility and merits – Ineffective remedies – Lack of substantiation of claim

Substantive issues: Right to life – Torture and ill-treatment – Liberty and security of the person

Articles of the Covenant: 6, 7, 9 (1) and 10 (1)

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

1. The author of the communication is Barbarín Mojica, a citizen of the Dominican Republic and labour leader residing in Santo Domingo, Dominican Republic. He submits the communication on behalf of his son Rafael Mojica, a Dominican citizen born in 1959, who disappeared in May 1990. The author claims violations by the State party of articles 6, 7, 9, paragraph 1, and 10, paragraph 1, of the Covenant in respect of his son.

The facts as submitted by the author

2.1 The author is a well-known labour leader. His son, Rafael Mojica, a dock worker in the port of Santo Domingo, was last seen by his family in the evening of 5 May 1990. Between 8 p.m. and 1 a.m., he was seen by others at the restaurant "El Aplauso" in the neighbourhood of the Arrimo Portuario union, with which he was associated. Witnesses affirm that he then boarded a taxi in which other, unidentified, men were travelling.

2.2 The author contends that during the weeks prior to his son's disappearance, Rafael Mojica had received death threats from some military officers of the Dirección de Bienes Nacionales, in particular from Captain Manuel de Jesus Morel and two of the latter's assistants, known under their sobriquets of "Martin" and "Brinquito". They allegedly threatened him because of his presumed communist inclinations.

2.3 On 31 May 1990, the author and his family and friends requested the opening of an investigation into the disappearance of Rafael Mojica. The Dominican representative of the American Association of Jurists wrote a letter to this effect to President Balaguer; apparently, the author did not receive a reply. One month after Rafael Mojica's disappearance, two decapitated and mutilated bodies were found in another part of the capital, close to the industrial zone of Haina and the beach of Haina. Fearing that one of the bodies might be that of his son, the author requested an autopsy, which was performed on 22 June 1990. While the autopsy could not establish the identity of the victims, it was certain that Rafael Mojica was not one of them, as his skin, unlike that of the victims, was dark ("no se trata del Sr. Rafael Mojica Melenciano, ya que éste según sus familiares es de tez oscura"). On 6 July 1990, the Office of the Procurator General released a copy of the autopsy report to the author.

2.4 On 16 July 1990, the author, through a lawyer, requested the Principal Public Prosecutor in Santo Domingo to investigate the presumed involvement of Captain Morel and his assistants in the disappearance of his son. The author does not specify whether the request received any follow-up between 23 July 1990, the date of the communication to the Human Rights Committee, and the beginning of 1994.

2.5 The author contends that under the law of the Dominican Republic, no specific remedies are available in cases of enforced or involuntary disappearances of persons.

The complaint

3. It is submitted that the above facts reveal violations by the State party of articles 6, 7, 9, paragraph 1, and 10, paragraph 1, of the Covenant.

The Committee's decision on admissibility

4.1 During its forty-seventh session, the Committee considered the admissibility of the communication. It noted with concern the absence of cooperation on the part of the State party and observed that the author's contention that there were no effective domestic remedies to exhaust for cases of disappearances of individuals had remained uncontested. In the circumstances, the Committee was

satisfied that the requirements of article 5, paragraph 2 (b), of the Optional Protocol had been met.

4.2 As to the author's claim under article 10, paragraph 1, of the Covenant, the Committee considered that it had not been substantiated and that it related to what might hypothetically have happened to Rafael Mojica after his disappearance on 5 May 1990; the Committee thus concluded that in this respect, the author had no claim under article 2 of the Optional Protocol.

4.3 Concerning the author's claims under articles 6, 7 and 9, paragraph 1, the Committee considered them to be substantiated, for purposes of admissibility. On 18 March 1993, therefore, the Committee declared the communication admissible in so far as it appeared to raise issues under articles 6, 7 and 9 of the Covenant. The State party was requested, in particular, to provide information about the results of the investigation into Mr. Mojica's disappearance and to forward copies of all relevant documentation in the case.

Examination of the merits

5.1 The State party's deadline under article 4, paragraph 2, of the Optional Protocol expired on 10 November 1993. No submission on the merits has been received from the State party, in spite of a reminder addressed to it on 2 May 1994.

5.2 The Committee has noted with regret and concern the absence of cooperation on the part of the State party in respect of both the admissibility and the merits of the communication. It is implicit in article 4, paragraph 2, of the Optional Protocol and in rule 91 of the rules of procedure that a State party should investigate thoroughly, in good faith and within the imparted deadlines, all the allegations of violations of the Covenant made against it and make available to the Committee all the information at its disposal. This the State party has failed to do. Accordingly, due weight must be given to the author's allegations, to the extent that they have been substantiated.

5.3 The author has alleged a violation of article 9, paragraph 1, of the Covenant. Although there is no evidence that Rafael Mojica was actually arrested or detained on or after 5 May 1990, the Committee recalls that under the terms of the decision on admissibility, the State party was requested to clarify these issues; it has not done so. The Committee further notes the allegation that Rafael Mojica had received death threats from some military officers of the Dirección de Bienes Nacionales in the weeks prior to his disappearance; this information, again, has not been refuted by the State party.

5.4 The first sentence of article 9, paragraph 1, guarantees to everyone the right to liberty and security of person. In its prior jurisprudence, the Committee has held that this right may be invoked not only in the context of arrest and detention, and that an interpretation which would allow States parties to tolerate, condone or ignore threats made by persons in authority to the personal liberty and security of non-detained individuals within the State party's jurisdiction would render ineffective the guarantees of the Covenant.[1] In the circumstances of the case, the Committee concludes that the State party has failed to ensure Rafael Mojica's right to liberty and security of the person, in violation of article 9, paragraph 1, of the Covenant.

5.5 In respect of the alleged violation of article 6, paragraph 1, the Committee recalls its general comment 6 (16) on article 6, in which it is stated, *inter alia*, that States parties should take specific and effective measures to prevent the disappearance of individuals and establish effective facilities and procedures to investigate thoroughly, by an appropriate impartial body, cases of missing and disappeared persons in circumstances that may involve a violation of the right to life.

5.6 The Committee observes that the State party has not denied that Rafael Mojica (a) has in fact disappeared and remains unaccounted for since the evening of 5 May 1990, and (b) that his disappearance was caused by individuals belonging to the Government's security forces. In the circumstances, the Committee finds that the right to life enshrined in article 6 has not been effectively protected by the Dominican Republic, especially considering that this is a case where the victim's life had previously been threatened by military officers.

5.7 The circumstances surrounding Rafael Mojica's disappearance, including the threats made against him, give rise to a strong inference that he was tortured or subjected to cruel and inhuman treatment. Nothing has been submitted to the Committee by the State party to dispel or counter this inference. Aware of the nature of enforced or involuntary disappearances in many countries, the Committee feels confident in concluding that the disappearance of persons is inseparably linked to treatment that amounts to a violation of article 7.

---

[1] See *Official Records of the General Assembly, Forty-sixth Session, Supplement No. 40* (A/46/40), annex IX.D, communication No. 195/1985 (*Delgado Páez v. Colombia*), Views adopted on 12 July 1990, paras. 5.5 and 5.6; ibid., *Forty-eighth Session, Supplement No. 40* (A/48/40), annex XII.I, communication No. 314/1988 (*Bwalya v. Zambia*), Views adopted on 14 July 1993, para. 6.4; and annex IX.BB below, communication No. 468/1991 (*Oló Bahamonde v. Equatorial Guinea*), Views adopted on 20 October 1993, para. 9.2.

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 found by the Committee reveal a violation by the State party of articles 6, paragraph 1; 7; and 9, paragraph 1, of the Covenant.

7. Under article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy. The Committee urges the State party to investigate thoroughly the disappearance of Rafael Mojica, to bring to justice those responsible for his disappearance and to pay appropriate compensation to his family.

8. The Committee would wish to receive from the State party, within 90 days, information about the measures taken in response to its Views.

Communication No. 453/1991

Submitted by: A.R. Coeriel and M.A.R. Aurik (represented by counsel) on 14 January 1991
Alleged victim: The authors
State party: The Netherlands
Declared admissible: 8 July 1993 (forty-eighth session)
Date of adoption of Views: 31 October 1994 (fifty-second session)*

Subject matter: Refusal to change authors' surnames to Hindu names

Procedural issues: Lack of substantiation of claim – Inadmissibility *ratione personae* – Exhaustion of domestic remedies

Substantive issues: Arbitrary or unlawful interference with one's privacy – Permissible restrictions on freedom of religion

Articles of the Covenant: 17 and 18

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

1. The authors of the communication are A.R. Coeriel and M.A.R. Aurik, two Dutch citizens residing in Roermond, the Netherlands. They claim to be victims of a violation by the Netherlands of articles 17 and 18 of the International Covenant on Civil and Political Rights.

The facts as submitted by the authors

2.1 The authors have adopted the Hindu religion and state that they want to study for Hindu priests ('pandits') in India. They requested the Roermond District Court (*Arrondissements Rechtbank*) to change their first names into Hindu names, in accordance with the requirements of their religion. This request was granted by the Court on 6 November 1986.

2.2 Subsequently, the authors requested the Minister of Justice to have their surnames changed into Hindu names. They claimed that for individuals wishing to study and practice the Hindu religion and to become Hindu priests, it is mandatory to adopt Hindu names. By decisions of 2 August and 14 December 1988 respectively, the Minister of Justice rejected the authors' request, on the ground that their cases did not meet the requirements set out in the 'Guidelines for the change of surname' (*Richtlijnen voor geslachtsnaamwijziging* 1976). The decision further stipulated that a positive decision would have been justified only by exceptional circumstances, which were not present in the authors' cases. The Minister considered that the authors' current surnames did not constitute an obstacle to undertake studies for the Hindu priesthood, since the authors would be able to adopt the religious names given to them by their Guru upon completion of their studies, if they so wished.

2.3 The authors appealed the Minister's decision to the Council of State (*Raad van State*), the highest administrative tribunal in the Netherlands and claimed *inter alia* that the refusal to allow them to change their names violated their freedom of religion. On 17 October 1990, the Council dismissed the authors' appeals. It considered that the authors had not shown that their interests were such that it justified the changing of surnames where the law did not provide for it. In the opinion of the Council, it was not shown that the authors' surnames needed to be legally changed to give them the chance to become Hindu priests; in this connection, the Council noted that the authors were free to use their Hindu surnames in public social life.

2.4 On 6 February 1991, the authors submitted a complaint to the European Commission of Human Rights. On 2 July 1992, the European Commission declared the authors' complaint under articles 9 and 14 of the Convention inadmissible as manifestly ill-founded, as they had not established that their religious studies would be impeded by the refusal to modify their surnames.

The complaint

3. The authors claim that the refusal of the Dutch authorities to have their current surnames changed prevents them from furthering their studies for the Hindu priesthood and therefore violates article 18 of the Covenant. They also claim that said refusal constitutes unlawful or arbitrary interference with their privacy.

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

4.1 By submission of 7 July 1991, the State party replies to the Committee's request under rule 91 of the rules of procedure to provide observations relevant to the question of the admissibility of the communication in so far as it might raise issues under articles 17 and 18 of the Covenant.

4.2 The State party submits that Dutch law allows the change of surnames for adults in special circumstances, namely when the current surname is indecent or ridiculous, so common that it has lost its distinctive character or, in cases of Dutch citizens who have acquired Dutch nationality by naturalization, not Dutch-sounding. The State party submits that outside these categories, change of surname is only allowed in exceptional cases, where the refusal would threaten the applicant's mental or physical well-being.

4.3 With regard to Dutch citizens belonging to cultural or religious minority groups, principles have been formulated for the change of surname. One of these principles states that a surname may not be changed if the requested new name would carry with it cultural, religious or social connotations.

4.4 The State party submits that the authors in the present case have been Dutch citizens since birth and grew up in a Dutch cultural environment. Since the authors' request to change their surnames had certain aspects comparable to those of religious minorities, the Minister of Justice formally sought an opinion from the Minister of Internal Affairs. This opinion was unfavourable to the authors, as the new names requested by them were perceived as having religious connotations.

4.5 The State party states that the authors are free to carry any name they wish in public social life, as long as they do not carry a name that belongs to someone else without the latter's permission. The State party submits that it respects the authors' religious convictions and that they are free to manifest their religion. The State party further contends that the fact that the authors allegedly are prevented from following further religious studies in India because of their Dutch names, cannot be attributed to the Dutch government, but is the consequence of requirements imposed by Indian Hindu leaders.

4.6 As regards the authors' claim under article 17 of the Covenant, the State party contends that the authors have not exhausted domestic remedies in this respect, since they did not argue before the Dutch authorities that the refusal to have their surnames changed constituted an unlawful or arbitrary interference with their privacy.

4.7 In conclusion, the State party argues that the communication is inadmissible as being incompatible with the provisions of the Covenant. It further argues that the authors have failed to advance a claim within the meaning of article 2 of the Optional Protocol.

5.1 In their reply to the State party's submission, the authors emphasize that it is mandatory to have a Hindu surname when one wants to study for the Hindu priesthood and that no exceptions to this rule are made. In this connection, they submit that if the surname is not legally changed and appears on official identification documents, they cannot become legally ordained priests. In support of their argument, the authors submit declarations made by two pandits in England and by the Swami in New Delhi.

5.2 One of the authors, Mr. Coeriel, further submits that, although a Dutch citizen by birth, he grew up in Curaçao, the United States of America and India, and is of Hindu origin, which should have been taken into account by the State party when deciding on his request to have his surname changed.

5.3 The authors maintain that their right to freedom of religion has been violated, because as a consequence of the State party's refusal to have their surnames changed, they are now prevented from continuing their study for the Hindu priesthood. In this context, they also claim that the State party's rejection of their request constitutes an arbitrary and unlawful interference with their privacy.

The Committee's admissibility decision

6.1 During its 48th session, the Committee considered the admissibility of the communication. With regard to the authors' claim under article 18 of the Covenant, the Committee considered that the regulation of surnames and the change thereof was eminently a matter of public order and restrictions were therefore permissible under paragraph 3 of article 18. The Committee, moreover, considered that the State party could not be held accountable for restrictions placed upon the exercise of religious offices by religious leaders in another country. This aspect of the communication was therefore declared inadmissible.

6.2 The Committee considered that the question whether article 17 of the Covenant protects the right to choose and change one's own name and, if so, whether the State party's refusal to have the authors' surnames changed was arbitrary should be dealt with on the merits. It considered that the authors had fulfilled the requirement under article 5, paragraph 2 (b), of the Optional Protocol, noting that they had appealed the matter to the highest administrative tribunal and that no other remedies remained. On 8 July 1993, the Committee therefore declared the communication admissible in so far as it might raise issues under article 17 of the Covenant.

The State party's submission on the merits and the authors' comments thereon

7.1 The State party, by submission of 24 February 1994, argues that article 17 of the Covenant does not protect the right to choose and change one's surname. It refers to the *travaux préparatoires*, in which no indication can be found that article 17 should be given such a broad interpretation, but on the basis of which it appears that States should be given considerable freedom to determine how the principles of article 17 should be applied. The State party also refers to the Committee's General Comment on article 17, in which it is stated that the protection of privacy is necessarily relative. Finally, the State party refers to the Committee's prior jurisprudence [1] and submits that, whenever the intervention of authorities was legitimate according to domestic legislation, the Committee has only found a violation of article 17 when the intervention was also in violation of another provision of the Covenant.

7.2 Subsidiarily, the State party argues that the refusal to grant the authors a formal change of surname was neither unlawful nor arbitrary. The State party refers to its submission on admissibility and submits that the decision was taken in accordance with the relevant Guidelines, which were published in the Government Gazette of 9 May 1990 and based on the provisions of the Civil Code. The decision not to grant the authors a change of surname was thus pursuant to domestic legislation and regulations.

7.3 As to a possible arbitrariness of the decision, the State party observes that the regulations referred to in the previous paragraph were issued precisely to prevent arbitrariness and to maintain the necessary stability in this field. The State party contends that it would create unnecessary uncertainty and confusion, in both a social and administrative sense, if a formal change of name could be effected too easily. In this connection, the State party invokes an obligation to protect the interests of others. The State party submits that in the present case, the authors failed to meet the criteria that would allow a change in their surname and that they wished to adopt names which have a special significance in Indian society. "Granting a request of this kind would therefore be at odds with the policy of the Netherlands Government of refraining from any action that could be construed as interference with the internal affairs of other cultures". The State party concludes that, taking into account all interests involved, it cannot be said that the decision not to grant the change of name was arbitrary.

8. In their comments on the State party's submission, the authors contest the State party's view that article 17 does not protect their right to choose and change their own surnames. They argue that the rejection of their request to have their surnames changed, deeply affects their private life, since it prevents them from practising as Hindu-priests. They claim that the State party should have provided in its legislation for the change of name in situations similar to that of the authors, and that the State party should have taken into account the consequences of the rejection of their request.

9.1 During its 51st session, the Committee began its examination of the merits of the communication and decided to request clarifications from the State party with respect to the regulations governing the change of names. The State party, by submission of 3 October 1994, explains that the Dutch Civil Code provides that anyone desiring a change of surname can file a request with the Minister of Justice. The Code does not specify in what cases such a request should be granted. The ministerial policy has been that a change of surname can only be allowed in exceptional cases. In principle, a person should keep the name which (s)he acquires at birth, in order to maintain legal and social stability.

9.2 To prevent arbitrariness, the policy with respect to the change of surname has been made public by issuing 'Guidelines for the change of surname'. The State party recalls that the guidelines indicate that a change of surname will be granted when the current surname is indecent or ridiculous, so common that it has lost its distinctive character, or not Dutch-sounding. In exceptional cases, the change of surname can be authorized outside these categories, for instance in cases where the denial of the change of surname would threaten the applicant's mental or physical well-being. A change of surname could also be allowed if it would be unreasonable to refuse the request, taking into account the interests

[1] See the Committee's Views with regard to communications No. 35/1978 (*Aumeeruddy-Cziffra v. Mauritius*, Views adopted on 9 April 1981) and No. 74/1980 (*Estrella v. Uruguay*, Views adopted on 29 March 1983).

of both the applicant and the State. The State party emphasizes that a restrictive policy with regard to the change of surname is necessary in order to maintain stability in society.

9.3 The Guidelines also contain rules for the new name which an applicant will carry after a change of surname has been allowed. In principle, a new name should resemble the old name as much as possible. If a completely new name is chosen, it should be a name which is not yet in use, which sounds Dutch and which does not give rise to undesirable associations (for instance, a person would not be allowed to choose a surname which would falsely give the impression that he belongs to the nobility). As regards foreign surnames, the Government's policy is that it does not wish to interfere with the law of names in other countries, nor does it wish to appear to interfere with cultural affairs of another country. This means that the new name must not give the false impression that the person carrying the name belongs to a certain cultural, religious or social group. In this sense, the policy with regard to foreign names is similar to the policy with regard to Dutch names.

9.4 The State party submits that the applicant's request is heard by the Minister of Justice, who then adopts his decision in the matter. If the decision is negative, the applicant can appeal to the independent judiciary. All decisions are being taken in accordance to the policy as laid down in the Guidelines. This policy is departed from in rare cases only, in order to prevent arbitrariness.

9.5 As regards the present case, the State party explains that the authors' request for a change of surname was refused, because it was found that no reasons existed to allow an exceptional change of surname outside the criteria laid down in the Guidelines. In this context, the State party argues that it has not been established that the authors cannot follow the desired religious education without a change of surname. Moreover, the State party argues that, even if a change of surname would be required, this condition is primarily a consequence of rules established by the Hindu-religion, and not a consequence of the application of the Dutch law of names. The State party also indicates that the desired names would identify the authors as members of a specific group in Indian society, and are therefore contrary to the policy that a new name should not give rise to cultural, religious or social associations. According to the State party, the names also conflict with the policy that new names should be Dutch-sounding.

Examination of the merits

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

10.2 The first issue to be determined by the Committee is whether article 17 of the Covenant protects the right to choose and change one's own name. The Committee observes that article 17 provides, *inter alia*, that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence. The Committee considers that the notion of privacy refers to the sphere of a person's life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone. The Committee is of the view that a person's surname constitutes an important component of one's identity and that the protection against arbitrary or unlawful interference with one's privacy includes the protection against arbitrary or unlawful interference with the right to choose and change one's own name. For instance, if a State were to compel all foreigners to change their surnames, this would constitute interference in contravention of article 17. The question arises whether the refusal of the authorities to recognize a change of surname is also beyond the threshold of permissible interference within the meaning of article 17.

10.3 The Committee now proceeds to examine whether in the circumstances of the present case the State party's dismissal of the authors' request to have their surnames changed amounted to arbitrary or unlawful interference with their privacy. It notes that the State party's decision was based on the law and regulations in force in the Netherlands, and that the interference can therefore not be regarded as unlawful. It remains to be considered whether it is arbitrary.

10.4 The Committee notes that the circumstances in which a change of surname will be recognised are defined narrowly in the Guidelines and that the exercise of discretion in other cases is restricted to exceptional cases. The Committee recalls its General Comment on article 17, in which it observed that the notion of arbitrariness "is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances". Thus, the request to have one's change of name recognised can only be refused on grounds that are reasonable in the specific circumstances of the case.

10.5 In the present case, the authors' request for recognition of the change of their first names to Hindu names in order to pursue their religious studies had been granted in 1986. The State party based its refusal of the request also to change their surnames on the grounds that the authors had not

shown that the changes sought were essential to pursue their studies, that the names had religious connotations and that they were not 'Dutch sounding'. The Committee finds the grounds for so limiting the authors' rights under article 17 not to be reasonable. In the circumstances of the instant case the refusal of the authors' request was therefore arbitrary within the meaning of article 17, paragraph 1, of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 17 of the Covenant.

12. Pursuant to article 2 of the Covenant, the State party is under an obligation to provide Mr. Aurik and Mr. Coeriel with an appropriate remedy and to adopt such measures as may be necessary to ensure that similar violations do not occur in the future.

13. 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.

---

* The text of individual opinions from Messrs N Ando and K. Herndl is appended to the Views.

APPENDIX

Individual Opinions concerning the Committee's Views

1. INDIVIDUAL OPINION BY MR. NISUKE ANDO (DISSENTING)

I do not share the State party's contention that, in examining a request to change one's family name, elements such as the name's "religious connotations" or "non-Dutch sounding" intonation should be taken into consideration. However, I am unable to concur with the Committee's Views on this case for the following three reasons:

(1) Despite the authors' allegation that the requested change of the authors' family name is an essential condition for them to practice as Hindu priest, the State party argues that it has not been established that the authors cannot follow the desired religious education without the change of surname (see paragraph 9.5), and apparently, on the basis of that argument, the authors' claim has been rejected by the European Commission of Human Rights. Since the Committee is not in the possession of any information other than the authors' allegation for the purpose of ascertaining the relevant facts, I cannot conclude that the change of their family names is an essential condition for them to practice as Hindu priests.

(2) Article 18 of the Covenant protects the right to freedom of religion and article 17 guarantees everyone's right to the protection of the law against "arbitrary or unlawful interference with his privacy". However, in my opinion, it may be doubted whether the right to the protection of one's privacy combined with the freedom of religion automatically entails "the right to change one's family name". Surnames carry important social and legal functions to ascertain one's identity for various purposes such as social security, insurance, license, marriage, inheritance, election and voting, passport, tax, police and public records, and so on. In fact, the Committee recognizes that "the regulation of surnames and the change thereof was essentially a matter of public order and restrictions were therefore permissible under paragraph 3 of article 18" (see paragraph 6.1). Moreover, it is not impossible to argue that the request to change one's family name is a form of manifestation of one's religion, which is subject to the restrictions enumerated in paragraph 3 of article 18.

(3) I do not consider that a family name belongs to an individual person *alone*, whose privacy is protected under article 17. In the Western society a family name may be regarded only as an element to ascertain one's identity, thus replaceable with other means of identification such as a number or a cipher. However, in other parts of the world, names have a variety of social, historical and cultural implications, and people do attach certain values to their names. This is particularly true with family names. Thus, if a member of a family changes his or her family name, it is likely to affect other members of the family as well as values attached thereto. Therefore, it is difficult for me to conclude that the family name of a person belongs to the exclusive sphere of privacy which is protected under article 17.

Nisuke Ando

2. INDIVIDUAL OPINION BY MR. KURT HERNDL (DISSENTING)

I regret that I am unable to concur in the Committee's finding that by refusing to grant the authors a change of surname, the Dutch authorities breached article 17 of the Covenant.

(a) *The States party's action seen from the general content and scope of article 17*

Article 17 is one of the more enigmatic provisions of the Covenant. In particular, the term "privacy" would seem to be open to interpretation. What does privacy really mean?

In his essay on "Global protection of Human Rights – Civil Rights" Lillich calls privacy "a concept to date so amorphous as to preclude its acceptance into customary international law".[1] He adds, however, that in determining the meaning of privacy *stricto sensu* limited

---

[1] Richard B. Lillich, Civil Rights, in: Human Rights in International Law, Legal and Policy Issues, ed. Th. Meron (1984), p. 148.

help can be obtained from European Convention practice. And there he mentions that i.a. "the use of name" was suggested as being part of the concept of privacy. This is, by the way, a quote taken from Jacobs, who with reference to the similar provision of the European Convention (article 8) asserts that "the organs of the Convention have not developed the concept of privacy".[2]

What is true for the European Convention is equally true for the Covenant. In his commentary on the Covenant Nowak states that article 17 was the subject of virtually no debate during its drafting and that the case law on individual communications is of no assistance in ascertaining the exact meaning of the word.[3]

It is therefore not without reason that the State party argues that article 17 would not necessarily cover the right to change one's surname (see para. 7.1 of the Views).

The Committee itself has not really clarified the notion of privacy either in its General Comment on article 17 where it actually refrains from defining that notion. In its General Comment the Committee attempts to define all the other terms used in article 17 such as "family", "home", "unlawful" and "arbitrary". It further refers to the protection of personal "honour" and "reputation" also mentioned in article 17, but it leaves open the definition of the main right enshrined in that article, i.e. the right to "privacy". While it is true that the Committee, in its General Comment, refers in various instances to "private life" and gives examples of cases in which States must refrain from interfering with specific aspects of private life, the question whether the *name* of a person is indeed protected by article 17 and, in particular, whether in addition there is a right *to change one's name*, is not brought up at all in the General Comment.

I raise the above issues to demonstrate that the Committee is not really on safe legal ground in interpretating article 17 as it does in the present decision. I do, however, concur with the view that one's name is an important part of one's identity, the protection of which is central to article 17. Nowak is therefore correct in saying that privacy protects the special, individual qualities of human existence and a person's identity. Identity obviously includes one's name.[4]

What is, therefore, protected by article 17, is an individual's name and not necessarily the individual's desire *to change his/her name* at whim. The Committee recognizes this, albeit indirectly, in its own decision. The example it refers to in order to illustrate a possible case of State interference with individuals' rights under article 17 in contravention of that article is : "... if a State were to compel all foreigners to change their surnames.... " (see para. 10.2 of the Views). This view is correct, but obviously cannot have a bearing on a case where a State – for reasons of generally applied public policy and in order to protect the existing name of individuals – *refuses* to allow *a change of name* requested by an individual.

Nevertheless, it can be argued that it would be appropriate to assume that the term "privacy" inasmuch as it covers, for the purpose of appropriate protection, an individual's name as part of his/her identity, also covers the right to *change* that name. In that regard one must have a closer look at the "Guidelines for the change of surname" published in the Netherlands Government Gazette in 1990 and applied in the Netherlands as common policy. The Dutch policy is, as a matter of principle, based on the premise that a person should keep the name which he/she acquires at birth in order to maintain legal and social stability (see para. 9.1, last sentence, of the Views). As such, this policy can hardly be seen as violating article 17. On the contrary, it is protective of acquired rights, such as the right to a certain name, and would seem to be very much in line with the precepts of article 17.

A change of name, according to the Guidelines, will be granted when the current name is a) indecent, b) ridiculous, c) so common that it has lost its distinctive character and d) not Dutch sounding. *None* of these grounds was invoked by the authors when they asked for authorization to change their surnames.

In accordance with the Guidelines a change of name can also be granted "in exceptional cases", for instance "in cases where the denial of the change of surname would threaten the applicant's mental or physical well-being" or "in cases where the denial would be unreasonable, taking into account the interests of both the applicant and the State" (see para. 9.2 of the Views). As the authors apparently could not show such "exceptional circumstances" in the course of the proceedings before the national authorities, their request was denied. Their assertion that they needed the name-change to become Hindu priests was apparently not substantiated (see the reasoning given by the Council of State in its decision of 17 October 1990, para. 2.3, last sentence, of the Views; see also the inadmissibility decision of the European Commission of Human Rights of 2 July 1992, where the European Commission held that the authors had not established that their religious studies would be impeded by the refusal to modify their surnames; para. 2.4, last sentence, of the Views). Nor can requirements imposed by Indian Hindu leaders be attributed to the Dutch authorities, as confirmed by the Committee in the present case in the framework of its decision on admissibility. There it examined the present communication under the angle of article 18 of the Covenant and came to the conclusion that "a State party to the Covenant cannot be held accountable for restrictions placed upon the exercise of religious offices by religious leaders in another country" (see para. 6.1 of the Views).

The request for a change of name was, therefore, legitimately turned down as the authors could not show the Dutch authorities "exceptional circumstances" as required by law. The refusal cannot be seen as a violation of article 17. To hold otherwise would be tantamount to recognizing that an individual has an almost absolute right to have his/her name changed on request and at whim. For such a view, in my opinion, one can find no basis in the Covenant.

---

[2] Francis G. Jacobs, The European Convention on Human Rights (1975), p. 126.

[3] Nowak, CCPR Commentary (1993), p. 294, section 15.

[4] Nowak, loc. cit., p. 294, section 17.

(b) *The State party's action seen from the viewpoint of the criteria for permissible State interference in rights protected by article 17*

On the assumption that there exists a right of the individual to change his/her name, the question of the extent to which "interference" with that right is still permissible, has to be examined (and is, indeed, addressed by the Committee in the present Views).

What then are the criteria laid down for (State) interference? They are two and only two. Article 17 prohibits *arbitrary* or *unlawful* interference with one's privacy.

It is obvious that the decision of the Dutch authorities not to grant a change of name cannot *per se* be regarded as constituting "arbitrary or unlawful" interference with the authors' rights under article 17. The decision is based on the law applicable in the Netherlands. Hence it is not *unlawful*. The Committee itself says so (see para. 10.3 of the Views). The conditions under which a change of name will be authorized in the Netherlands are laid down in generally applicable and published "Guidelines for the change of surname" which, in themselves, are not manifestly arbitrary. These Guidelines have been applied in the present case, and there is no indication that they were applied in a discriminatory fashion. Hence it is equally difficult to call the decision *arbitrary*. The Committee does so, however, "in the circumstances of the present case" (see para. 10.5 of the Views). To arrive at that finding the Committee introduces a new notion – that of "reasonableness". It finds "the grounds for limiting the authors' rights under article 17 *not to be reasonable*" (see para. 10.5 of the Views).

The Committee thus attempts to expand the scope of article 17 by adding an element which is not part of that article. The only argument the Committee can adduce in this context is a simple reference (renvoi) to its own General Comment on article 17 where it stated that "even interference provided by law ... *should be*, in any event, *reasonable* in the particular circumstances". It is difficult for me to go along with this argumentation and to base on such argumentation a finding that a State party violated this specific provision of the Covenant.

Kurt Herndl

Communication No. 455/1991

Submitted by: Allan Singer on 30 January 1991
Alleged victim: The author
State party: Canada
Declared admissible: 8 April 1993 (forty-seventh session)
Date of adoption of Views: 26 July 1994 (fifty-first session)

Subject matter: Language-based discrimination in outdoor commercial advertising

Procedural issues: Standing of the author – Ineffective remedies

Substantive issues: Right to freedom of opinion and expression – Non-discrimination

Articles of the Covenant: 19, 26 and 27

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

1. The author of the communication is Allan Singer, a Canadian citizen born in 1913 and a resident of Montreal, Canada. He claims to be a victim of language discrimination by Canada, in violation of the International Covenant on Civil and Political Rights, without however specifically invoking article 26 thereof.

The facts as presented by the author

2.1 The author runs a stationery and printing business in Montreal. His clientele is predominantly, but not exclusively, anglophone. Starting in 1978, the author received numerous summons from the Quebec authorities, requesting him to replace commercial advertisements in English outside his store by advertisements in French. The author appealed against all these summons before the local courts and contended that the Charter of the French Language (Bill No. 101) discriminated against him because it restricted the use of English for commercial purposes; in particular, section 58 of Bill No. 101 prohibited the posting of commercial signs in English outside the author's store. In October 1978, the Court of Sessions of Montreal found against him. The Superior Court of Quebec, Montreal, did likewise on 26 March 1982, and so did the Court of Appeal of Quebec in December 1986.

2.2 The author then took his case to the Supreme Court of Canada, which, on 15 December 1988, decided that an obligation to use French only in outdoor advertising was unconstitutional and struck down several provisions of the Quebec Charter of the French Language (*Charte de la langue française*). The Quebec legislature, however, passed another legislative measure, Bill No. 178, on 22 December 1988, the express *ratio legis* of which was to override the judgement handed down by the Supreme Court of Canada one week earlier. With this, the author contends, he has exhausted available remedies.

The complaint

3. The author contends that Bill No. 101, as amended by Bill No. 178, is discriminatory, in that it restricts the use of English to indoor advertising and places businesses that carry out their activities in English in a disadvantageous position *vis-à-vis* French businesses.

Legislative provisions

4.1 The relevant original provisions of the Charter of the French Language (Bill No. 101, S.Q. 1977, C 5) have been modified several times. In essence, however, they have remained substantially the same. In 1977, section 58 read as follows:

> "Except as may be provided in this Act or the regulations of the Office de la langue française, signs and posters and commercial advertising shall be solely in the official language."

4.2 The original wording of section 58 was replaced in 1983 by section 1 of the Act to Amend the Charter of the French Language (S.Q. 1983, C-56), which read:

> "58. Public signs and posters and commercial advertising shall be solely in the official language.
>
> "Notwithstanding the foregoing, in the cases and under the conditions or circumstances prescribed by regulation of the Office de la langue française, public signs and posters and commercial advertising may be both in French and another language or solely in another language ..."

4.3 The initial language legislation was struck down by the Supreme Court in *La Chaussure Brown's Inc. et al. v. the Attorney General of Quebec (1989) 90 N.R 84*. Following this, section 58 of the Charter was amended by section 1 of Bill No. 178. While certain modifications were made relating to signs and posters inside business premises, the compulsory use of French in signs and posters outside remained.

4.4 Section 58 of the Charter, as modified in 1989 by section 1 of Bill No. 178, read:

> "58. Public signs and posters and commercial advertising, outside or intended for the public outside, shall be solely in French. Similarly, public signs and posters and commercial advertising shall be solely in French,
>
> "1. Inside commercial centres and their access ways, except inside the establishments located there;
>
> "2. Inside any public means of transport and its access ways;
>
> "3. Inside the establishments of business firms contemplated in section 136;
>
> "4. Inside the establishments of business firms employing fewer than fifty but more than five persons, where such firms share, with two or more other business firms, the use of a trademark, a firm name or an appellation by which they are known to the public.
>
> "The Government may, however, by regulation, prescribe the terms and conditions according to which public signs and posters and public advertising may be both in French and in another language, under the conditions set forth in the second paragraph of section 58.1, inside the establishments of business firms contemplated in subparagraphs 3 and 4 of the second paragraph.
>
> "The Government may, in such regulation, establish categories of business firms, prescribe terms and conditions which vary according to the category and reinforce the conditions set forth in the second paragraph of section 58.1".

4.5 Section 6 of Bill No. 178 modified section 68 of the Charter, which read:

> "68. Except as otherwise provided in this section, only the French version of a firm name may be used in Quebec. A firm name may be accompanied with a version in another language for use outside Quebec. That version may be used together with the French version of the firm name in the inscriptions referred to in section 51, if the products in question are offered both in and outside Quebec.
>
> "In printed documents, and in the documents contemplated in section 57 if they are both in French and in another language, a version of the French firm name in another language may be used in conjunction with the French firm name.
>
> "When texts or documents are drawn up in a language other than French, the firm name may appear in the other language without its French version.
>
> "On public signs and posters and in commercial advertising,
>
> "1. A firm name may be accompanied with a version in another language, if they are both in French and in another language;
>
> "2. A firm name may appear solely in its version in another language, if they are solely in a language other than French."

4.6 Section 10 of Bill No. 178 contained a so-called "notwithstanding" clause, which provided that:

> "The provisions of section 58 and of the first paragraph of section 68, brought into effect under sections 1 and 6 respectively of the present bill, shall operate irrespective of the provisions of section 2, paragraph (b), and section 15 of the Constitutional Act of 1982 ... and shall apply notwithstanding articles 3 and 10 of the Charter of Human Rights and Freedoms."

4.7 Another "notwithstanding" provision is incorporated into section 33 of the Canadian Charter of Human Rights and Freedoms, which reads:

"1. Parliament or the legislature of a province may expressly declare in an act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

"2. An act or a provision of an act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

"3. A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

"4. Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

"5. Subsection (3) applies in respect of a re-enactment made under subsection (4)."

The State party's information and observations

5.1 The communication was transmitted to the State party under rule 91 of the Committee's rules of procedure on 5 August 1991. In its submission of 6 March 1992 (which also related to communications Nos. 359/1989 and 385/1989[1]), the State party noted that a number of litigants had challenged the validity of Bill No. 178 before the Quebec courts, and that hearings on the issue before the Court of Quebec were held on 14 January 1992. The proceedings continued, and lawyers for the provincial government of Quebec were scheduled to present the point of view of Quebec on 23 and 24 March 1992.

5.2 The State party contended that Quebec's Code of Civil Procedure entitles the author to apply for a declaratory judgement that Bill No. 178 is invalid, and that this option is open to him regardless of whether criminal charges have been instituted against him or not. It argued that consistent with the well-established principle that effective domestic remedies must be exhausted before the jurisdiction of an international body is engaged, Canadian courts should have an opportunity to rule on the validity of Bill No. 178, before the issue is considered by the Human Rights Committee.

5.3 The State party further argued that the "notwithstanding" clause in section 33 of the Canadian Charter of Rights and Freedoms is compatible with Canada's obligations under the Covenant, in particular with article 4 and with the obligation, under article 2, to provide its citizens with Judicial remedies. It explained that, firstly, extraordinary conditions limit the use of section 33. Secondly, section 33 is said to reflect a balance between the roles of elected representatives and courts in interpreting rights:

> "A system in which the judiciary is given full and final say on all issues of rights adversely impacts on a key tenet of democracy – that is, participation of citizens in a forum of elected and publicly accountable legislatures on questions of social and political justice ... The 'notwithstanding' clause provides a limited legislative counterweight in a system which otherwise gives judges final say over rights issues".

5.4 Lastly, the Government affirmed that the existence of section 33 *per se* is not contrary to article 4 of the Covenant, and that the invocation of section 33 does not necessarily amount to an impermissible derogation under the Covenant: "Canada's obligation is to ensure that section 33 is never invoked in circumstances which are contrary to international law. The Supreme Court of Canada has itself stated that 'Canada's international human rights obligations should [govern] ... the interpretation of the content of the rights guaranteed by the Charter'". Thus, a legislative override could never be invoked to permit acts clearly prohibited by international law. Accordingly, the legislative override in section 33 was said to be compatible with the Covenant.

5.5 The State party therefore requested the Committee to declare the communication inadmissible.

6.1 In his comments, the author contended that his case is against Bill No. 101 and not against Bill No. 178, and that it is based upon the State party's perceived violations of the provisions of the Constitution Act of Canada 1867, and not on the Constitution Act of 1982. He argued that any challenge of the contested legislation would be futile, in the light of the decision of the government of Quebec to override the Supreme Court's judgement of 15 December 1988 by enactment of Bill No. 178 a week later.

6.2 The author claimed that the "notwithstanding" clause of section 33 of the Canadian Charter of Rights and Freedoms does not apply to this case, as he had been charged for violating the Charter of the French Language in 1978, before section 33 took effect. In this context, he argued that no Canadian Government can abrogate or supplant freedoms that were in existence before the Charter came into being, and that under the Canadian tradition of civil liberties, rights may be extended but cannot be curtailed.

6.3 Finally, the author asserted that the "notwithstanding" clause of section 33 is a negation of the rights enshrined in the Charter, as it allows (provincial) legislatures to "attack minorities and suspend their rights for a period of five years".

[1] *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40* (A/48/40), annex XII.P, communications Nos. 359/1989 (*Ballantyne and Davidson v. Canada*) and 385/1989 (*McIntyre v. Canada*), Views adopted on 31 March 1993 at the Committee's forty-seventh session.

The Committee's decision on admissibility

7.1 During its forty-seventh session and after the Committee had adopted its Views in respect of communications Nos. 359/1989 and 385/1989,[2] in which similar issues were raised, the Committee considered the admissibility of the communication. It disagreed with the State party's contention that there were still effective remedies available to the author. In this context, it noted that in spite of repeated legislative changes protecting the *visage linguistique* of Quebec, and despite the fact that some of the relevant statutory provisions had been declared unconstitutional successively by the Superior, Appeal and Supreme Courts, the only effect of this had been the replacement of these provisions by ones that are the same in substance as those they replaced, but reinforced by the "notwithstanding" clause of section 10 of Bill No. 178.

7.2 As to whether a declaratory judgement declaring Bill No. 178 invalid would provide the author with an effective remedy, the Committee noted that such a judgment would leave the Charter of the French Language operative and intact, and that the legislature of Quebec could still override any such judgement by replacing the provisions struck down by others substantially the same and by invoking the "notwithstanding" clause of the Charter of Rights and Freedoms.

7.3 The Committee considered that the author had made a reasonable effort to substantiate his allegations, for purposes of admissibility. Although the author had specifically challenged only Bill No. 101, which was amended by Bill No. 178 in 1988, the Committee found that it was not precluded from examining the compatibility of both laws with the Covenant, as the central issue, language-based discrimination in commercial outdoor advertising, remained the same.

7.4 On 8 April 1993, therefore, the Committee declared the communication admissible.

State party's further information and observations on the admissibility and on the merits of the communication, and the author's comments thereon

8.1 Under cover of a note dated 4 May 1994, the State party forwards a submission from the government of Quebec, dated 21 February 1994, in which it submits that the author claims before the Committee violations of rights enjoyed by his company "Allan Singer Limited". It notes that under article 1 of the Optional Protocol to the Covenant and paragraph (a) of rule 90 of the Committee's rules of procedure, only individuals may submit a communication to the Human Rights Committee. With reference to the Committee's jurisprudence,[3] the government of Quebec submits that a company incorporated under Quebec legislation has no standing before the Committee.

8.2 With regard to the author's claim under article 26 of the Covenant, reference is made to the Committee's findings in communications Nos. 359/1989 (*Ballantyne/Davidson v. Canada*) and 385/1989 (*McIntyre v. Canada*); the Committee concluded that sections 1 and 6 of Bill No. 178 were compatible with article 26 of the Covenant.

9.1 The government of Quebec further refers to the information provided pursuant to the Committee's request for relevant measures taken in connection with the Committee's Views in communications Nos. 359/1989 and 385/1989. It points out that sections 58 and 68 of the Charter of the French Language, on which the present communication is based, have been amended by Bill No. 86, entitled *Act to Amend the Charter of the French Language* (*Loi modifiant la Charte de la langue française*) (L.Q. 1993, c.40; projet de loi 86), which was adopted on 18 June 1993 and entered into force on 22 December 1993. Section 58 of the Charter of the French Language, as modified by section 18 of Bill No. 86, now reads:

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

9.2 The Quebec *Regulations on the Language of Commerce and Business* (*Réglement sur la langue du commerce et des affaires*) entered into force on 22 December 1993; the exceptions mentioned in the third paragraph of section 58 are spelled out in sections 15 to 25 of the Regulations. It is submitted that only in two well-defined situations, the commercial advertising of a firm must be exclusively in French. Furthermore, sections 17 to 21 cover situations in which public signs and posters and commercial advertising may be displayed both in French and in another language provided that

[2] See note 1.

[3] Ibid., *Forty-fourth Session, Supplement No. 40* (A/44/40), annex XI.M, communication No. 361/1989 (*A publication and printing company v. Trinidad and Tobago*), declared inadmissible on 14 July 1989, at the Committee's thirty-sixth session, para. 3.2.

French appears at least as prominently. Finally, sections 22 to 25 provide for situations in which public signs and commercial advertising may be exclusively in a language other than French.

9.3 Section 68 of the Charter of the French Language, as modified by section 22 of Bill No. 86, now reads:

> "68. A firm name may be accompanied with a version in a language other than French provided that, when it is used, the French version of the firm name appears at least as prominently.
>
> "However, in public signs and posters and commercial advertising, the use of a version of a firm name in a language other than French is permitted to the extent that the other language may be used in such signs and posters or in such advertising pursuant to section 58 and the regulations enacted under that section.
>
> "In addition, in texts or documents drafted only in a language other than French, a firm name may appear in the other language only."

9.4 The Quebec authorities point out that under the current Act and the corresponding Regulations, public signs and posters and commercial advertising may be displayed either in French or either both in French and another language. They further submit that, contrary to the situation that prevailed under the previous legislation, sections 58 and 68 of the Charter of the French Language, as modified by Bill No. 86, are not protected by a derogation clause, and their constitutional validity may thus be challenged before the domestic courts. From the above, the authorities deduce that the issues raised by Mr. Singer have become moot, and that his case should therefore be dismissed.

10.1 In his reply dated 9 June 1994, the author submits that the question of whether he or his company have been the victim of violations of Covenant rights is irrelevant. He explains that for many years, he was the main shareholder, with over 90 per cent of the shares, and that two members of his family held the remaining shares.

10.2 With regard to Bill No. 178 and Bill No. 86, the author points out that they were both adopted after the Supreme Court of Canada had heard his case in December 1988 and had struck down several provisions of the Charter of the French Language; he argues that the Quebec legislature can repeal Bill No. 86 and reimpose Bill No. 178 at any time.

Review of admissibility and examination of the merits

11.1 The Committee has taken note of the parties' comments, made subsequent to the decision on admissibility, in respect of the admissibility and the merits of the communication.

11.2 The State party has contended that the author is claiming violations of rights of his company, and that a company has no standing under article 1 of the Optional Protocol. The Committee notes that the Covenant rights that are at issue in the present communication, and in particular the right of freedom of expression, are by their nature inalienably linked to the person. The author has the freedom to impart information concerning his business in the language of his choice. The Committee therefore considers that the author himself, and not only his company, has been personally affected by the contested provisions of Bills Nos. 101 and 178.

11.3 The Committee appreciates the State party's information on the measures taken in respect of the Committee's Views in communications Nos. 359/1989 and 385/1989. It does not, however, share the State party's opinion that since the law in question has been amended and now provides for the possibility to use either French or both French and another language in outdoor advertising, Mr. Singer's claims have become moot. The Committee notes that the court proceedings referred to in the case were based on the Charter of the French Language in its version then in force (Bill No. 101). The Committee further notes that after the Supreme Court of Canada had, in 1988, found in Mr. Singer's favour, the contested provisions of Bill No. 101 were amended by those of Bill No. 178. Notwithstanding, the use of French in outdoor advertising remained compulsory. This situation was the basis of Mr. Singer's complaint to the Committee. That Bill No. 178 was amended by Bill No. 86 after the Committee adopted its Views on communications Nos. 359/1989 and 385/1989 does not retroactively render his communication inadmissible.

11.4 In the light of the above, the Committee sees no reason to review its decision on admissibility of 8 April 1993.

12.1 As to the merits of the case, the Committee notes that its observations on communications Nos. 359/1989 (*Ballantyne/Davidson v. Canada*) and 385/1989 (*McIntyre v. Canada*) apply, *mutatis mutandis*, to the case of Mr. Singer.

12.2 Concerning the question of whether section 58 of Bill No. 101, as amended by Bill No. 178, section 1, violated Mr. Singer's right, under article 19 of the Covenant, to freedom of expression, the Committee, having concluded that a State party to the Covenant may choose one or more official languages, but that it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one's choice, finds that there has been a violation of article 19, paragraph 2. In the light of this finding, the Committee need not address any issues that may arise under article 26.

13. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal a violation of article 19, paragraph 2, of the Covenant.

14. The Committee notes that the contested provisions of the Quebec Charter of the French Language were amended by Bill No. 86 in June 1993, and that under the current legislation Mr. Singer has the right, albeit under specified conditions and with two exceptions, to display commercial advertisements outside his store in English. The Committee observes that it has not been called upon to consider whether the Charter of the French Language in its current version is compatible with the provisions of the Covenant. In the circumstances, it concludes that the State party has provided Mr. Singer with an effective remedy.

Communication No. 456/1991

Submitted by: Ismet Celepli (represented by counsel) on 17 February 1991
Alleged victim: The author
State party: Sweden
Declared admissible: 19 March 1993 (forty-seventh session)
Date of adoption of Views: 18 July 1994 (fifty-first session)

Subject matter: Alien subjected to regime of residence restrictions instead of execution of expulsion order

Procedural issues: Lack of substantiation of claim – Inadmissibility *ratione materiae*

Substantive issues: Freedom of movement – Restrictions on freedom of movement based on considerations of national security

Articles of the Covenant: 7, 9, 12, 13 and 17

Articles of the Optional Protocol: 2 and 3

1. The author of the communication (dated 17 February 1991) is Ismet Celepli, a Turkish citizen of Kurdish origin living in Sweden. He claims to be the victim of violations of his human rights by Sweden. He is represented by counsel.

The facts as submitted by the author

2.1 In 1975, the author arrived in Sweden, fleeing political persecution in Turkey; he obtained permission to stay in Sweden but was not granted refugee status. Following the murder of a former member of the Workers' Party of Kurdistan in June 1984 at Uppsala, suspicions of the author's involvement in terrorist activities arose. On 18 September 1984, the author was arrested and taken into custody under the Aliens Act; he was not charged with any offence. On 10 December 1984, an expulsion order against him and eight other Kurds was issued pursuant to sections 30 and 47 of the Swedish Aliens Act. The expulsion order was not, however, enforced, as it was believed that the Kurds could be exposed to political persecution in Turkey in the event of their return. Instead, the Swedish authorities prescribed limitations and conditions concerning the Kurds' place of residence.

2.2 Under these restrictions, the author was confined to his home municipality (Västerhaninge, a town of 10,000 inhabitants 25 kilometres south of Stockholm) and had to report to the police three times a week; he could not leave or change his town of residence nor change employment without prior permission from the police.

2.3 Under Swedish law, there exists no right to appeal against a decision to expel a suspected terrorist or to impose restrictions on his freedom of movement. The restrictions of the author's freedom of movement were alleviated in August 1989 and the obligation to report to the police was reduced to once a week. On 5 September 1991, the expulsion order was revoked; the restrictions on his liberty of movement and the reporting obligations were abolished.

The complaint

3.1 It is submitted that the Government reached its decision to expel the author after an inquiry by the Municipal Court of Stockholm, which allegedly obtained its information mainly from the Swedish security police. The author claims that the hearing before the Court, which took place in camera, was more like an interrogation than an investigation. A request for information about the basis of the suspicions against the nine Kurds was refused on grounds of national security. The author, who states that he was never involved in terrorist activities, claims that he was subjected to a regime of residence restrictions, although the grounds for this measure were not disclosed to him, and although he

was not given an opportunity to prove his innocence and to defend himself before an independent and impartial tribunal. Moreover, he claims that he was not afforded the right to a review of the Government's decision. He emphasizes that he was never charged with a crime.

3.2 The author further alleges that he and his family have been harassed by the Swedish security police, and that they have been isolated and discriminated against in their municipality because the Government and the media have labelled them as terrorists. The author also states that his health has deteriorated and that he suffers from a "post-traumatic stress disorder" owing to his experiences with the Swedish authorities.

3.3 Although the author does not invoke any specific articles of the Covenant, it appears from his submission that he claims to be a victim of a violation by Sweden of articles 7, 9, 12, 13 and 17 of the International Covenant on Civil and Political Rights.

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

4.1 By a submission dated 7 October 1991, the State party argues that the communication is inadmissible on the grounds of non-substantiation and incompatibility with the provisions of the Covenant.

4.2 The State party submits that the restrictions placed upon the author were in conformity with the 1980 Aliens Act, article 48 (1) of which read: "Where it is required for reasons of national security, the Government may expel an alien or prescribe restrictions and conditions regarding his place of residence, change of domicile and employment, as well as duty to report". In July 1989, this Act was replaced by the 1989 Aliens Act. According to a recent amendment to this Act, the possibility to prescribe an alien's place of residence no longer exists. The State party emphasizes that the measures against aliens suspected of belonging to terrorist organizations were introduced in 1973 as a reaction to increased terrorist activities in Sweden; they were only applied in exceptional cases, where there were substantial grounds to fear that the person in question played an active role in planning or executing terrorist activities.

4.3 The State party submits that on 31 August 1989, a decision was taken to allow the author to stay within the boundaries of the whole county of Stockholm; his obligation to report to the police was reduced to once a week. On 5 September 1991, the expulsion order against the author was revoked.

4.4 The State party argues that a right to asylum is not protected by the Covenant and refers to the Committee's decision with regard to communication No. 236/1987.[1]

4.5 The State party argues that article 9 of the Covenant, which protects the right to liberty and security of the person, prohibits unlawful arrest and detention, but does not apply to mere restrictions on liberty of movement, which are covered by article 12. The State party argues that the restrictions on his freedom of movement were not so severe that his situation could be characterized as a deprivation of liberty within the meaning of article 9 of the Covenant. Moreover, the author was free to leave Sweden to go to another country of his choice. The State party therefore contends that this part of the communication is not substantiated and should be declared inadmissible.

4.6 With regard to the author's claim that he is a victim of a violation of article 12 of the Covenant, the State party submits that the freedom of movement protected by this article is subject to the condition that the individual is "lawfully within the territory of a State". The State party contends that the author's stay in Sweden, after the decision was taken to expel him on 10 December 1984, was only lawful within the boundaries of the Haninge municipality and later, after 31 August 1989, within the boundaries of the county of Stockholm. The State party argues that the author's claim under article 12 is incompatible with the provisions of the Covenant, since the author can only be regarded as having been lawfully in the country to the extent that he complied with the restrictions imposed upon him.

4.7 Moreover, the State party invokes article 12, paragraph 3, which provides that restrictions may be imposed upon the enjoyment of rights under article 12, if they are provided by law and necessary for the protection of national security and public order, as in the present case. The State party argues therefore that these restrictions are compatible with article 12, paragraph 3, and that the author's claim is unsubstantiated within the meaning of article 2 of the Optional Protocol. In this connection, the State party refers to the Committee's decision declaring communication No. 296/1988 inadmissible.[2]

4.8 With regard to article 13 of the Covenant, the State party argues that the decision to expel the author was reached in accordance with the relevant domestic law. In this context, the State party refers

---

[1] *Official Records of the General Assembly, Forty-third Session, Supplement No. 40* (A/43/40), annex VIII.F, *V.M.R.B. v. Canada*, declared inadmissible on 18 July 1988.

[2] Ibid., *Forty-fourth Session, Supplement No. 40* (A/44/40), annex XI.G, *J.R.C. v. Costa Rica*, declared inadmissible on 30 March 1989.

to the Committee's decision in communication No. 58/1979,[3] where the Committee considered that the interpretation of domestic law was essentially a matter for the courts and authorities of the State party concerned. The State party contends that in the present case, compelling reasons of national security required that exceptions be made with regard to the right to review of the decision. According to the State party, the communication is therefore unsubstantiated with respect to article 13 and should be declared inadmissible under article 2 of the Optional Protocol.

4.9 The State party forwards a copy of the text of the decision of the European Commission of Human Rights in a similar case,[4] which was declared inadmissible as manifestly ill-founded and incompatible *ratione materiae*.

5.1 In his comments on the State party's submission, the author reiterates that he was never accused of having committed any crime and that the State party's decision to declare him a potential terrorist was solely based upon information from the SAPO.

5.2 As regards the revoking of the expulsion order and the abolition of the restrictions, the author points out that the State party has not yet recognized that he was no potential terrorist. In this context, he states that the SAPO has provided information about him to Interpol. He claims that this means, in practice, that he can never leave Sweden without fearing for his safety.

5.3 With regard to the State party's arguments that the restrictions on his freedom of movement cannot be considered to be so severe as to constitute a deprivation of liberty, the author argues that a residence restriction can be considered a deprivation of liberty when it is of considerable duration or when it has serious consequences. He claims that his condition, being under residence restriction for nearly seven years and having to report to the police three times a week for five years, was so severe as to amount to a deprivation of liberty, within the meaning of article 9 of the Covenant.

5.4 The author further submits that although he has not been charged with any criminal offence, the effects of the treatment he was subjected to were such as to make him a criminal in the eyes of the public and amounted to harsh punishment for an offence with which he has not been charged and against which he has not been able to defend himself.

5.5 The author further claims that the residence restriction imposed upon him amounted to inhuman treatment prohibited by article 7 of the Covenant. He supports this claim by referring to the opinion of Mr. Pär Borgå, a Swedish doctor working for the Centre for Tortured Refugees, where the author received treatment. In this connection, the author refers to alleged harassment by the police.

The Committee's decision on admissibility

6.1 During its forty-seventh session, the Committee considered the admissibility of the communication. It observed that the same matter was not being or had not been examined under another procedure of international investigation or settlement. The Committee considered that the author had not substantiated, for purposes of admissibility, his claim under articles 7 and 17 of the Covenant, and that his claims under articles 9 and 13 of the Covenant were incompatible with these provisions.

6.2 On 19 March 1993, the Committee declared the communication admissible in so far as it might raise issues under article 12 of the Covenant.

The State party's submission on the merits and the author's comments thereon

7.1 The State party, by submission of 9 November 1993, argues that Mr. Celepli was not lawfully within the territory of Sweden after an expulsion order had been issued against him on 10 December 1984. The State party submits that whether a person is lawfully within the territory of the State or not is determined according to national law. It explains that the expulsion order could not be enforced for humanitarian reasons, but that in principle the decision was taken that the author should not be allowed to stay in Sweden. The State party refers to its submission on admissibility and reiterates that the author's stay in Sweden after 10 December 1984 was only lawful under the condition that it did not extend beyond the borders of first the Haninge community and, later, the borders of the county of Stockholm.

7.2 The State party further submits that, if the author would have left Sweden at any time after 10 December 1984, he would not have been allowed to return. The State party argues that the issuing of the expulsion order made the author's stay unlawful, even though the order was not enforced. In this connection, the State party argues that if the order had been enforced, the author would have been outside the country, as a consequence of which no issue under article 12 could arise.

7.3 As regards the second issue identified by the Committee of whether a person's freedom of

---

[3] Ibid., *Thirty-sixth Session, Supplement No. 40* (A/36/40), annex XVIII, *Anna Maroufidou v. Sweden*, Views adopted on 9 April 1981.

[4] Application No. 13344/87, *Ulusoy v. Sweden*, declared inadmissible on 3 July 1989.

movement may lawfully be restricted for reasons of national security without allowing appeal against such decision, the State party notes that article 12 does not contain a right to appeal against a decision restricting a person's liberty of movement.

7.4 In the present case, the State party submits that, although the author did not have a possibility of a formal appeal against the decision, the decision was in fact open to review. In this context, the State party recalls that the author was sentenced on several occasions for not complying with the restriction order and argues that in order to convict a person and sentence him, the court has to examine whether the restrictions were imposed in accordance with domestic law and assess whether they were imposed on reasonable grounds. The State party furthermore indicates that, according to domestic law, the expulsion order, on which the restriction order was based, had to be reconsidered by the Government whenever there was cause to do so. In this context, the State party emphasizes that the restrictions on the author's freedom of movement were reviewed several times, resulting in their complete abolishment on 11 October 1990.

7.5 The State party further invokes compelling reasons of national security, which made it necessary to restrict the author's freedom of movement without providing a possibility of appeal and refers in this context to article 13 of the Covenant, which allows an exception, when compelling reasons of national security so require, to the provision that a decision of expulsion be subjected to review. It concludes, taking into account that it in fact did review the restrictions on the author's freedom of movement several times, that article 12 has not been violated in Mr. Celepli's case.

8. In his comments, dated 30 December 1993, the author emphasizes that if the State party had grounds to suspect him of criminal or terrorist activities, it should have charged him and brought him to trial. He claims that he never was a member of the Workers' Party of Kurdistan, that the restrictions were placed upon him for internal political reasons and that he never was given the opportunity to challenge the reasons underlying the restriction order.

Examination of the merits

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

9.2 The Committee notes that the author's expulsion was ordered on 10 December 1984, but that this order was not enforced and that the author was allowed to stay in Sweden, subject to restrictions on his freedom of movement. The Committee is of the view that following the expulsion order, the author was lawfully in the territory of Sweden, for purposes of article 12, paragraph 1, of the Covenant, only under the restrictions placed upon him by the State party. Moreover, bearing in mind that the State party has invoked reasons of national security to justify the restrictions on the author's freedom of movement, the Committee finds that the restrictions to which the author was subjected were compatible with those allowed pursuant to article 12, paragraph 3, of the Covenant. In this connection, the Committee also notes that the State party *motu proprio* reviewed said restrictions and ultimately lifted them.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a violation by the State party of any of the articles of the Covenant.

Communication No. 458/1991

Submitted by: Albert Womah Mukong on 26 February 1991 (represented by counsel)
Alleged victim: The author
State party: Cameroon
Declared admissible: 8 July 1992 (forty-fifth session)
Date of adoption of Views: 21 July 1994 (fifty-first session)

Subject matter: Persecution and harassment of journalist for political activities by State party's authorities

Procedural issues: Exhaustion of effective remedies – Burden of proof

Substantive issues: Conditions of detention – Incommunicado detention – Torture and ill-treatment – Right to a fair trial – Permissible restrictions on freedom of opinion and expression – Liberty and security of the person – Freedom of movement

Articles of the Covenant: 7, 9, 12 (4), 14 (1) (3), 19

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

1. The author of the communication is Albert Womah Mukong, a citizen of Cameroon born in 1933. He claims to be a victim of violations by Cameroon of articles 7; 9, paragraphs 1 to 5; 12, paragraph 4; 14, paragraphs 1 and 3; and 19 of the International Covenant on Civil and Political Rights. He is represented by counsel. The Optional Protocol entered into force for Cameroon on 27 September 1984.

The facts as submitted by the author

2.1 The author is a journalist, writer and long-time opponent of the one-party system in Cameroon. He has frequently and publicly advocated the introduction of multi-party democracy and has worked towards the establishment of a new political party in his country. He contends that some of the books that he has written were either banned or prohibited from circulation. In the summer of 1990, he left Cameroon, and in October 1990 applied for asylum in the United Kingdom of Great Britain and Northern Ireland. In December 1990, his wife left Cameroon for Nigeria with her two youngest children.

2.2 On 16 June 1988, the author was arrested, after an interview given to a correspondent of the British Broadcasting Corporation (BBC), in which he had criticized both the President of Cameroon and the Government. He claims that in detention, he was not only interrogated about this interview but also subjected to cruel and inhuman treatment. He indicates that from 18 June to 12 July, he was continuously held in a cell, at the First Police District of Yaoundé, measuring approximately 25 square metres, together with 25 to 30 other detainees. The cell did not have sanitary facilities. As the authorities refused to feed him initially, the author was without food for several days, until his friends and family managed to locate him.

2.3 From 13 July to 10 August 1988, Mr. Mukong was detained in a cell at the headquarters of the *Police Judiciaire* in Yaoundé, together with common criminals. He claims that he was not allowed to keep his clothes, and that he was forced to sleep on a concrete floor. Within two weeks of detention under these conditions, he fell ill with a chest infection (bronchitis). Thereafter, he was allowed to wear his clothes and to use old cartons as a sleeping mat.

2.4 On 5 May 1989, the author was released, but on 26 February 1990, he was again arrested, following a meeting on 23 January 1990 during which several people, including the author, had (publicly) discussed ways and means of introducing multi-party democracy in Cameroon.

2.5 Between 26 February and 23 March 1990, Mr. Mukong was detained at the Mbope Camp of the Brigade mobile mixte in Douala, where he allegedly was not allowed to see either his lawyer, his wife or his friends. He claims that he was subjected to intimidation and mental torture, in that he was threatened that he would be taken to the torture chamber or shot, should any unrest among the population develop. He took these threats seriously, as two of his opposition colleagues, who were detained with him, had in fact been tortured. On one day, he allegedly was locked in his cell for twenty-four hours, suffering from the heat (temperatures above 40°C). On another day, he allegedly was beaten by a prison warder when he refused to eat.

2.6 The author contends that there is no effective remedy for him to exhaust, and that he should be deemed to have complied with the requirements of article 5, paragraph 2 (b), of the Optional Protocol. In respect of his arrests in 1988 and 1990, he claims that although Ordinance 62/OF/18 of 12 March 1962, under which he was charged with "intoxication of national and international public opinion", was abrogated by Law 090/046 of 19 December 1990, the fact remains that at the time of his arrest, the peaceful public expression of his opinions was considered a crime. The author adds that there is no procedure under domestic law by which one could challenge a law as being incompatible with international human rights standards; fundamental human rights are only guaranteed in the preamble to the country's Constitution, and the preambular paragraphs are not enforceable. The fact that the Ordinance of 1962 was abrogated in 1990 did not provide the author with relief, since it did not mean that he could challenge his detention during his imprisonment and, as it was not made retroactive, it did not mean that he could seek compensation for unlawful detention.

2.7 The author further submits that the examining judge of the tribunal of Bafoussam found him guilty as charged and, by order of 25 January 1989, placed him under military jurisdiction. He explains that under domestic law, this examining magistrate does not decide on either guilt or innocence of an accused, but merely on whether sufficient evidence exists to justify an extension of the detention and to place him under military jurisdiction; the placement under military jurisdiction allegedly could not be challenged.

2.8 It is noted that the author's lawyer twice applied to the High Court of Cameroon for writs of habeas corpus. Both were rejected on the ground that the case was before a military tribunal and that no writ of habeas corpus lies against charges to be

determined by a military tribunal. The author submits that if it was not possible to challenge his detention by writ of habeas corpus, then other, theoretically existing, remedies were not in fact available to him.

2.9 As to remedies against cruel, inhuman and degrading treatment and torture, the author notes that the Prosecutor (*Ministère Public*) may only prosecute a civil claim for cruel, inhuman and degrading treatment on behalf of a person who is the accused in a pending criminal matter. Under section 5 of Ordinance 72/5 of 26 August 1972, a Military Tribunal cannot entertain a civil action separately from a criminal action for which it has been declared competent. Only the Minister of Defense or the examining magistrate can seize the military tribunal with a civil action; civilians cannot do so. Finally, the author cites from and endorses the conclusions of a recent Amnesty International report, according to which the organization "knows of no cases in recent years where torture allegations have been the subject of official inquiry in Cameroon. The authorities also appear to have blocked civil actions for damages lodged before the courts by former detainees ...". He concludes that the pursuit of domestic remedies would be ineffective and that, if he were to initiate such proceedings, he would be subjected to further harassment.

The complaint

3.1 The author alleges a violation of article 7 of the Covenant on account of the treatment he was subjected to between 18 June and 10 August 1988, and during his detention at the Mbope Camp.

3.2 The author further alleges a violation of article 9, as he was not served a warrant for his arrest on 16 June 1988. Charges were not brought until almost two months later. Moreover, the military tribunal designated to handle his case postponed the hearing of the case on several occasions until, on 5 May 1989, it announced that it had been ordered by the Head of State to withdraw the charges and release the author. Again, the arrest on 26 February 1990 occurred without a warrant being served. On this occasion, charges were not filed until one month later.

3.3 It is further submitted that the State party authorities violated article 14, paragraphs 1 and 3, in that the author was not given any details of the charges against him; neither was he given time to prepare his defence adequately. The author claims that the court – a military tribunal – was neither independent nor impartial, as it was clearly subject to the influence of high-level government officials. In particular, as the judges were military officers, they were subject to the authority of the President of Cameroon, himself the Commander-in-Chief of the armed forces.

3.4 The author notes that his arrests on 16 June 1988 and 26 February 1990 were linked to his activities as an advocate of multi-party democracy, and claims that these were Government attempts designed to suppress any opposition activities, in violation of article 19 of the Covenant. This also applies to the Government's ban, in 1985, of a book written by the author (*Prisoner without a Crime*), in which he described his detention in local jails from 1970 to 1976.

3.5 Finally, it is submitted that article 12, paragraph 4, was violated, as the author is now prevented from returning to his country. He has been warned that if he were to return to Cameroon, the authorities would immediately re-arrest him. This reportedly is attributable to the fact that in October 1990, the author delivered a petition to the Secretary-General of the United Nations, seeking his good offices to persuade the State party's authorities to observe and respect General Assembly document A/C.4/L.685 of 18 April 1961 entitled "The question of the future of the Trust Territory of the Cameroons under United Kingdom Administration".

The State party's information and observations

4.1 The State party recapitulates the facts leading to the author's apprehension. According to it, the interview given by the author to the BBC on 23 April 1988 was full of half truths and untruths, such as the allegation that the country's economic crisis was largely attributable to the Cameroonians themselves, as well as allusions to widespread corruption and embezzlement of funds at the highest levels of Government which had remained unpunished. The author was arrested after the airing of this interview because, in the State party's opinion, he could not substantiate his declarations. They were qualified by the State party as "intoxication of national and international public opinion" and thus as subversive within the meaning of Ordinance No. 62/OF/18 of 12 March 1962. Upon order of the Assistant Minister of Defence of 5 January 1989, the author was charged with subversion by the examining magistrate of the military tribunal of Bafoussam. On 4 May 1989, the Assistant Minister decreed the closure of the investigations against the author; he was notified of this decision on 5 May 1989.

4.2 The State party contends that in respect of his allegations under article 7, the author failed to initiate judicial proceedings against those held responsible for his treatment. In this connection, it observes that he could have:

(a) Denounced the treatment of which he was a victim to the competent Ministry, which should then have investigated the allegations;

(b) Filed a civil action with the Magistrate responsible for judicial investigation and information;

(c) Directly filed a complaint with the competent tribunal against those held to be responsible for the acts;

(d) Charged the responsible officers of having abused their official function, pursuant to article 140 of the Criminal Code;

(e) Invoked articles 275 and 290 of the Criminal Code, which provide protection against attacks on the physical integrity of the person;

(f) Invoked articles 291 and 308 of the same Code, which provide protection against attacks on the liberty and security of persons;

(g) Petitioned the Administrative Chamber of the Supreme Court under article 9 of Ordinance 72/6 of 26 August 1972, as amended by Law 75/16 of 8 December 1975 and Law 76/28 of 14 December 1976, if he considered himself to be a victim of an administrative wrong.

4.3 In respect of the legal basis for the arrest of Mr. Mukong in 1988 and 1990, the State party notes that Ordinance 62/OF/18 was abrogated by Law No. 090/046 of 19 December 1990.

The Committee's decision on admissibility

5.1 During its forty-fifth session, the Committee considered the admissibility of the communication. It took note of the State party's contention that the author had not availed himself of judicial remedies in respect of claims of ill-treatment and of inhuman and degrading treatment in detention. The Committee observed, however, that the State party had merely listed *in abstracto* the existence of several remedies without relating them to the circumstances of the case, and without showing how they might provide effective redress in the circumstances of the case. This applied in particular to the period of detention from 26 February to 23 March 1990, when the author was allegedly held incommunicado and subjected to threats. The Committee concluded that in the circumstances, it could not be held against the author if he did not petition the courts after his release and that, in the absence of further information from the State party, there was no further effective domestic remedy to exhaust.

5.2 As to the author's claims under articles 9, 14 and 19, the Committee notes that the simple abrogation of a law considered incompatible with the provisions of the Covenant – i.e. Ordinance 62/OF/18 of 12 March 1962 – did not constitute an effective remedy for any violations of an individual's rights which had previously occurred under the abrogated law. As the State party had not shown the existence of other remedies in respect of these claims, the Committee considered them to be admissible.

5.3 On 8 July 1992, therefore, the Committee declared the communication admissible, reserving however the right to review its decision pursuant to rule 93, paragraph 4, of the rules of procedure, in respect of the author's claim under article 7.

The State party's request for review of admissibility and observations on the merits, and the author's comments thereon

6.1 In its submission under article 4, paragraph 2, of the Optional Protocol, the State party argues that the reasons for declaring the communication admissible are no longer valid and accordingly requests the Committee to review its decision on admissibility.

6.2 After once again questioning the correctness of the author's version of the facts, it addresses the author's claims. As to the alleged violation of article 7 on account of the conditions of the author's detention, it notes that article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment stipulates that the term "torture" does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions. It adds that the situation and comfort in the country's prisons must be linked to the state of economic and social development of Cameroon.

6.3 The State party categorically denies that Mr. Mukong was, at any time during his detention in June 1988 or in February/March 1990, subjected to torture or cruel, inhuman or degrading treatment. It submits that the burden of proof for his allegations lies with the author, and that his reference to Amnesty International reports about instances of torture in Cameroonian prisons cannot constitute acceptable proof. The State party includes a report of an investigation into the author's allegations carried out by the National Centre for Studies and Research which concludes that the prison authorities in Douala actually sought to improve the prison conditions after the arrest of the author and a number of co-defendants, and that the "excessive heat" in the author's cell (above 40°C) is simply the result of the climatic conditions in Douala during the month of February.

6.4 The State party reiterates that the author has failed to exhaust available remedies, as required under article 5, paragraph 2 (b), of the Optional Protocol and article 41 (c) of the Covenant. It takes issue with the Committee's jurisprudence that domestic remedies must not only be available but also effective. It further dismisses the author's contention as reflected in paragraph 2.9 above and refers in this context to section 8 (2) of

Ordinance 72/5 of 26 August 1972, as modified by Law No. 74/4 of 16 July 1974. This provision stipulates that the military tribunal is seized directly either upon request of the Ministry of Defence, upon request of the examining magistrate (*ordonnance de renvoi du juge d'instruction*), or by decision of the Court of Appeal. The State party argues that the modalities of appealing to this jurisdiction of exceptional nature demonstrate that its function is purely repressive. This does not rule out, however, the possibility for an individual to appear before the tribunal as an intervenor ("n'exclut point la constitution de partie civile") (art. 17 of Ordinance 72/5). In any event, it remains possible to file civil actions for damages before the ordinary tribunals.

6.5 The State party further rejects as incorrect the author's endorsement of the conclusions of a report published by Amnesty International (referred to in paragraph 2.9) and submits that this document reveals total ignorance of the judicial system of Cameroon and in particular of domestic criminal procedure, which allows the victim [of ill-treatment] to have the person responsible for his treatment prosecuted and indicted before the competent courts, even against the advice of the office of the public prosecutor. The State party further refers to several court decisions, which in its opinion demonstrate that, far from being suppressed by the authorities, claims for damages are entertained by the local courts, and that the claimants in or the parties to such proceedings do not have to fear harassment as a result, as claimed by Mr. Mukong.

6.6 The State party argues that the author's arrest(s) in June 1988 and February 1990 cannot be qualified as arbitrary because they were linked to his activities, considered illegal, as an opposition activist. It denies that the author was not given a fair trial, or that his freedom of expression or of opinion have been violated.

6.7 In this context, the State party argues that the arrest of the author was for activities and forms of expression that are covered by the limitation clause of article 19, paragraph 3, of the Covenant. It contends that the exercise of the right to freedom of expression must take into account the political context and situation prevailing in a country at any point in time. Since the independence and reunification of Cameroon, the country's history has been a constant battle to strengthen national unity, first at the level of the francophone and anglophone communities and thereafter at the level of the more than 200 ethnic groups and tribes that comprise the Cameroonian nation.

6.8 The State party rejects the author's contention (see para. 2.6 above) that there is no way of challenging laws considered incompatible with international human rights conventions. It first asserts that there are no laws which are incompatible with human rights principles; if there were, there would, under domestic laws, be several remedies against such laws. In this context, the State party refers to articles 20 and 27 of the Constitution of Cameroon, which lay down the principle that draft legislation incompatible with fundamental human rights principles would be repudiated by Parliament or by the Supreme Court. Furthermore, article 9 of Law 72/6 of 26 August 1972 governing the organization and functions of the Supreme Court stipulates that the Supreme Court is competent to adjudicate all disputes of a public law character brought against the State. The State party refers to a judgement handed down by the Supreme Court against the Government in April 1991 which concerned violations of the rights of the defence; this judgement confirms, in the State party's opinion, that remedies against legislative texts deemed incompatible with internationally accepted human rights standards are available and effective.

6.9 As to the allegations under articles 9 and 14, the State party submits that the examining magistrate who referred the author's case to a military tribunal in January 1989 did not exceed his competence and merely examined whether the evidence against the author justified his indictment. Concerning the author's allegation that he was not notified of the reasons for his arrest and that no warrant was served on him, the State party affirms that article 8 (2) of Law 72/5 of 26 August 1972, which governs this issue, was applied correctly.

6.10 In this context, it affirms that pursuant to the decision of the examining magistrate to refer the case to the military tribunal the author was not served with an arrest warrant but rather was remanded in custody ("l'auteur n'a pas fait l'objet d'un mandat d'arrêt mais plutôt d'un mandat de dépôt"). The decision of 25 January 1989 was duly notified to him. This decision, according to the State party, duly records all the charges against the author and the reasons for his arrest. Therefore, the notification of this decision to the author was compatible with the provisions of article 9 of the Covenant. Concerning the repeated postponements of the hearing of the case until 5 May 1989, the State party contends that they must be attributed to the author's requests for a competent legal representative, charged with his defence. The delays must therefore be attributed to Mr. Mukong. In respect of the second arrest (February 1990), the author was not served with an arrest warrant, but rather with a direct summons at the request of the Minister for Defense. There was therefore no arrest warrant to notify him of ("n'avait pas fait l'objet d'un mandat d'arrêt mais plutôt d'une citation directe à la requête du Ministre chargé de la Défense. Il n'y avait donc pas mandat d'arrêt à lui notifier à cet effet").

6.11 The State party reiterates its arguments detailed in paragraphs 6.9 and 6.10 above in the context of alleged violations of article 14, paragraphs 1 and 3. It further draws attention to the fact that the author himself argued that his acquittal by the military tribunal on 5 April 1990 proved that the judges considered him to be innocent. The State party wonders how, in the circumstances, a tribunal that acquitted the author can be qualified as partial and its judges subject to the influence of high government officials.

6.12 Finally, the State party contends that there is no basis for the author's allegation that he has been denied the right to return to his country (art. 12, para. 4). No law, regulation or decree contains a prohibition in this respect. It is submitted that Mr. Mukong left Cameroon of his own free will and is free to return whenever he wishes to do so.

7.1 In his comments, the author affirms that in respect of claims for compensation for ill-treatment or torture, there are still no appropriate or effective ways to seek redress in the domestic courts. Under the applicable laws, any such action necessitates the authorization of a Government authority, such as the Ministry of Justice or the Ministry of Defence. The author argues that the so-called "liberty laws" entrench arbitrary detention by administrative officers and continue to be used for human rights violations, and the courts cannot entertin actions arising from the application of these laws.

7.2 The author further contends that such treatment as he was subjected to in detention cannot be justified by the legitimacy of the sanction imposed against him, as in the first case (1988), the charges against him were withdrawn at the request of the Assistant Minister of Defence, and in the second case (1990), he was acquitted. He dismisses the State party's contention that conditions of detention are a factor of the underdevelopment of the country, and notes that if this argument were to be accepted, a country could always hide behind the excuse of being poor to justify perpetual human rights violations.

7.3 According to the author, the report of the National Centre for Studies and Research (see para. 6.3 above) is unreliable and "fabricated" and points out that, in fact, the report consists of no more than a written reply to some questions provided by the very individual who had threatened him at the camp in Douala.

7.4 The author indirectly confirms that domestic courts may entertain claims for damages for ill-treatment, but points out that the case referred to by the State party is still pending before the Supreme Court, although the appeal was filed in 1981. He thus questions the effectiveness of this type of remedy and the relevance of the judgments referred to by the State party.

7.5 The author appeals to the Committee to examine closely the so-called "liberty laws" of December 1990, and in particular:

(a) Decree 90-1459 of 8 November 1990 to set up a national commission on human rights and freedoms;

(b) Law 90-47 of 19 December 1990 relating to states of emergency;

(c) Law 90-52 of 19 December 1990 relating to the freedom of mass communication;

(d) Law 90-56 of 19 December 1990 relating to political parties;

(e) Law 90-54 of 19 December 1990 relating to the maintenance of law and order.

The author submits that all these laws fall far short of the requirements of the Universal Declaration of Human Rights and of the International Covenant on Civil and Political Rights.

7.6 The author challenges the State party's contention that he was himself responsible for the delay in the adjudication of his case in 1989. He affirms that he asked only once for a postponement of the hearing and was ready with his defence as of 9 February 1989. From that day onward, his lawyers attended the court sessions, as did observers from the British and American Embassies in Yaoundé. The author emphasizes that he did not request another adjournment.

7.7 Finally, the author observes that he was able to return to his country only as a result of "diplomatic action taken by some big powers interested in human rights". He notes that although he has not been molested openly for past activities, he was again arrested, together with other individuals fighting for multiparty democracy and human rights, on 15 October 1993 in the city of Kom. He claims that he and the others were transported under inhuman conditions to Bamenda, where they were released in the afternoon of 16 October 1993. Finally, the author notes that the ban on his book *Prisoner without a Crime* was lifted, apparently, after his complaint was filed with the Human Rights Committee. The book now circulates freely, but to argue, as is implied in the State party's observations on the merits of his complaint, that it was never banned, does not conform to the truth.

Revision of admissibility and examination of the merits

8.1 The Committee has taken note of the State party's request that the admissibility decision of 8 July 1992 be reviewed pursuant to rule 93,

paragraph 4, of the rules of procedure, as well as of the author's comments thereon. It takes the opportunity to expand on its admissibility findings.

8.2 To the extent that the State party argues that for the purposes of article 5, paragraph 2 (b), of the Optional Protocol, domestic remedies must only be available and not also be effective, the Committee refers to its established jurisprudence, under which remedies which do not provide a reasonable prospect of success need not be exhausted for purposes of the Optional Protocol. It sees no reason to depart from this jurisprudence. Furthermore, it transpires from the State party's submission that the Government's arguments relate primarily to the merits of the author's allegations. If the State party were to contend that because there are no merits in Mr. Mukong's claims, they must also be deemed inadmissible, the Committee would observe that the State party's argument reveals a misconception of the procedure under the Optional Protocol, which distinguishes clearly between formal admissibility requirements and the substance of a complainant's allegations.

8.3 The State party has reiterated that the author still has not sought to avail himself of available remedies in respect of his allegations of ill-treatment. The Committee cannot share the State party's assessment. Firstly, the cases referred to by the State party concern offences different (such as the use of firearms, or abuse of office) from those of which the author complains. Secondly, the effectiveness of remedies against ill-treatment cannot be dissociated from the author's portrayal (uncontested and indeed confirmed by the State party) as a political opposition activist. Thirdly, the Committee notes that since his return, the author has continued to suffer specified forms of harassment on account of his political activities. Finally, it is uncontested that the case which the State party itself considers relevant to the author's situation has been pending before the Supreme Court of Cameroon for over 12 years. In the circumstances, the Committee questions the relevance of the jurisprudence and court decisions invoked by the State party for the author's particular case and concludes that there is no reason to revise the decision on admissibility in as much as the author's claim under article 7 is concerned.

8.4 *Mutatis mutandis*, the considerations in paragraph 8.3 above also apply to remedies in respect of the author's claims under articles 9, 14 and 19. The Committee refers in this context to its concluding comments on the second periodic report of Cameroon, adopted on 7 April 1994.[1]

8.5 On balance, while appreciating the State party's further clarifications about the availability of judicial remedies for the author's claims, the Committee sees no reason to revise its decision on admissibility of 8 July 1992.

9.1 The author has contended that the conditions of his detention in 1988 and 1990 amount to a violation of article 7, in particular because of insalubrious conditions of detention facilities, overcrowding of a cell at the first police district of Yaoundé, deprivation of food and of clothing, and death threats and incommunicado detention at the camp of the brigade mobile mixte at Douala. The State party has replied that the burden of proof for these allegations lies with the author, and that as far as conditions of detention are concerned, they are a factor of the under-development of Cameroon.

9.2 The Committee does not accept the State party's Views. As it has held on previous occasions, the burden of proof cannot rest alone with the author of a communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to the relevant information.[2] Mr. Mukong has provided detailed information about the treatment he was subjected to; in the circumstances, it was incumbent upon the State party to refute the allegations in detail, rather than shifting the burden of proof to the author.

9.3 As to the conditions of detention in general, the Committee observes that certain minimum standards regarding the conditions of detention must be observed regardless of a State party's level of development. These include, in accordance with rules 10, 12, 17, 19 and 20 of the Standard Minimum Rules for the Treatment of Prisoners,[3] minimum floor space and cubic content of air for each prisoner, adequate sanitary facilities, clothing which shall be in no manner degrading or humiliating, provision of a separate bed and provision of food of nutritional value adequate for health and strength. It should be noted that these are minimum requirements which the Committee considers should always be observed, even if economic or budgetary considerations may make compliance with these obligations difficult

[1] See CCPR/C/79/Add.33 (18 April 1994), paras. 21 and 22.

[2] See *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40* (A/37/40), annex X, communication No. 30/1978 (*Bleier v. Uruguay*), Views adopted on 29 March 1982, para. 13.3.

[3] Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council in its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977; see *Human Rights: A Compilation of International Instruments* (United Nations publication, Sales No. 88.XIV.1), chap. G, sect. 30.

It transpires from the file that these requirements were not met during the author's detention in the summer of 1988 and in February/March 1990.

9.4 The Committee further notes that quite apart from the general conditions of detention, the author has been singled out for exceptionally harsh and degrading treatment. Thus, he was kept detained incommunicado, was threatened with torture and death and intimidated, deprived of food, and kept locked in his cell for several days on end without the possibility of recreation. In this context, the Committee recalls its general comment 20 (44) which recommends that States parties should make provision against incommunicado detention and notes that total isolation of a detained or imprisoned person may amount to acts prohibited by article 7.[4] In view of the above, the Committee finds that Mr. Mukong has been subjected to cruel, inhuman and degrading treatment, in violation of article 7 of the Covenant.

9.5 The author has claimed a violation of article 14, although in the first case (1988-1989), the charges against him were withdrawn, and in the second case (1990), he was acquitted. It is implicit in the State party's submission that in the light of these events, it considers the complaint under article 14 moot. The Committee notes that in the first case, it was the Assistant Minister of Defence and thus a government official who ordered the closure of the proceedings against the author on 4 May 1989. In the second case, the author was formally acquitted. However, although there is evidence that government officials intervened in the proceedings in the first case, it cannot be said that the author's rights under article 14 were not respected. Similar considerations apply to the second case. The author has also claimed, and the State party refuted, a violation of article 14, paragraphs 3 (a) and (b). The Committee has carefully examined the material provided provided by the parties and concludes that in the instant case, the author's right to a fair trial has not been violated.

9.6 The author has claimed a violation of his right to freedom of expression and opinion, as he was persecuted for his advocacy of multi-party democracy and the expression of opinions inimical to the Government of the State party. The State party has replied that restrictions on the author's freedom of expression were justified under the terms of article 19, paragraph 3.

9.7 Under article 19, everyone shall have the right to freedom of expression. Any restriction of the freedom of expression pursuant to paragraph 3 of article 19 must cumulatively meet the following conditions: it must be provided for by law, it must address one of the aims enumerated in paragraphs 3 (a) and (b) of article 19 and it must be necessary to achieve the legitimate purpose. The State party has indirectly justified its actions on grounds of national security and/or public order by arguing that the author's right to freedom of expression was exercised without regard to the country's political context and continued struggle for unity. While the State party has indicated that the restrictions on the author's freedom of expression were provided for by law, it must still be determined whether the measures taken against the author were necessary for the safeguard of national security and/or public order. The Committee considers that it was not necessary to safeguard an alleged vulnerable state of national unity by subjecting the author to arrest, continued detention and treatment in violation of article 7. It further considers that the legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights. In this regard, the question of deciding which measures might meet the "necessity" test in such situations does not arise. In the circumstances of the author's case, the Committee concludes that there has been a violation of article 19 of the Covenant.

9.8 The Committee notes that the State party has dismissed the author's claim under article 9 by indicating that he was arrested and detained in application of the rules of criminal procedure, and that the police detention and preliminary enquiries by the examining magistrate were compatible with article 9. It remains however to be determined whether other factors may render an otherwise lawful arrest and lawful detention "arbitrary" within the meaning of article 9. The drafting history of article 9, paragraph 1, confirms that "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law. As the Committee has observed on a previous occasion, this means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances.[5] Remand in custody must further be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime. In the present case, the State party has not shown that any of these factors was present. It has merely contended that the author's

[4] See *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40* (A/47/40), annex VI.A, general comment 20 (44).

[5] Ibid., *Forty-fifth Session, Supplement No. 40* (A/45/40), annex IX.M, communication No. 305/1988 (*Hugo van Alphen v. the Netherlands*), Views adopted on 23 July 1990, para. 5.8.

arrest and detention were clearly justified by reference to article 19, paragraph 3, i.e. permissible restrictions on the author's freedom of expression. In line with the arguments developed in paragraph 9.6 above, the Committee finds that the author's detention in 1988-1989 and 1990 was neither reasonable nor necessary in the circumstances of the case, and thus in violation of article 9, paragraph 1, of the Covenant.

9.9 The author has formulated claims under article 9, paragraphs 2 to 4, to the effect that he was not promptly informed of the reasons for his arrest(s) and the charges against him, that he was not brought promptly before a judge or other officer authorized by law to exercise judicial power, and that he was denied the right to challenge the lawfulness of his detention. The State party has denied these charges by submitting that the author was properly notified of the charges against him and brought to trial as expeditiously as possible (see para. 6.10 above). The Committee notes that the material and evidence before it does not suffice to make a finding in respect of these claims.

9.10 Finally, as to the claim under article 12, paragraph 4, the Committee notes that the author was not forced into exile by the State party's authorities in the summer of 1990, but left the country voluntarily, and that no laws or regulations or State practice prevented him from returning to Cameroon. As the author himself concedes, he was able to return to his country in April 1992; even if it may be that his return was made possible or facilitated by diplomatic intervention, this does not change the Committee's conclusion that there has been no violation of article 12, paragraph 4, in the case.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the opinion that the facts before it reveal violations by Cameroon of articles 7, 9, paragraph 1, and 19 of the Covenant.

11. Under article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Albert W. Mukong with an effective remedy. The Committee urges the State party to grant Mr. Mukong appropriate compensation for the treatment he has been subjected to, to investigate his allegations of ill-treatment in detention, to respect his rights under article 19 of the Covenant and to ensure that similar violations do not occur in the future.

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

Communication No. 469/1991

Submitted by: Charles Chitat Ng (represented by counsel) on 25 September 1991
Alleged victim: The author
State party: Canada
Declared inadmissible: 28 October 1992 (forty-sixth session)
Date of adoption of Views: 5 November 1993 (forty-ninth session)*

Subject matter: Extradition of author by State to another jurisdiction where author faces the death penalty

Procedural issues: Review of admissibility decision – Admissibility *ratione materiae* and *ratione loci* – Non-exhaustion of domestic remedies – Non-compliance with Committee's request for interim measures of protection

Substantive issues: State party's liability for exposure to risk of violation of Covenant rights in another jurisdiction – Right to life – Discretion in the application of an extradition treaty to seek assurances that capital punishment will not be imposed – Torture and inhuman treatment – Method of execution of capital sentence – Foreseeability of violation

Articles of the Covenant: 6, 7, 9, 10, 14 and 26

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

1. The author of the communication is Charles Chitat Ng, a British subject, born on 24 December 1960 in Hong Kong, and a resident of the United States of America, at the time of his submission detained in a penitentiary in Alberta, Canada, and on 26 September 1991 extradited to the United States. He claims to be a victim of a violation of his human rights by Canada because of his extradition. He is represented by counsel.

The facts as submitted by the author

2.1 The author was arrested, charged and convicted in 1985 in Calgary, Alberta, following an attempted store theft and shooting of a security guard. In February 1987, the United States formally requested the author's extradition to stand trial in California on 19 criminal counts, including kidnapping and 12 murders, committed in 1984 and 1985. If convicted, the author could face the death penalty.

2.2 In November 1988, a judge of the Alberta Court of Queen's Bench ordered the author's extradition. In February 1989, the author's habeas corpus application was denied, and on 31 August 1989 the Supreme Court of Canada refused the author leave to appeal.

2.3 Article 6 of the Extradition Treaty between Canada and the United States 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 for certain military offences.

2.4 The power to seek assurances that the death penalty will not be imposed is discretionary and is conferred on the Minister of Justice pursuant to section 25 of the Extradition Act. In October 1989, the Minister of Justice decided not to seek these assurances.

2.5 The author subsequently filed an application for review of the Minister's decision with the Federal Court. On 8 June 1990, the issues in the case were referred to the Supreme Court of Canada, which rendered judgement on 26 September 1991. It found that the author's extradition without assurances as to the imposition of the death penalty did not contravene Canada's constitutional protection for human rights nor the standards of the international community. The author was extradited on the same day.

The complaint

3. The author claims that the decision to extradite him violates articles 6, 7, 9, 10, 14 and 26 of the Covenant. He submits that the execution of the death sentence by gas asphyxiation, as provided for under California statutes, constitutes cruel and inhuman treatment or punishment *per se*, and that the conditions on death row are cruel, inhuman and degrading. He further alleges that the judicial procedures in California, inasmuch as they relate specifically to capital punishment, do not meet basic requirements of justice. In this context, the author alleges that in the United States, racial bias influences the imposition of the death penalty.

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

4.1 The State party submits that the communication is inadmissible *ratione personae*, *loci* and *materiae*.

4.2 It is argued that the author cannot be considered a victim within the meaning of the Optional Protocol, since his allegations are derived from assumptions about possible future events, which may not materialize and which are dependent on the law and actions of the authorities of the United States. The State party refers in this connection to the Committee's Views in communication No. 61/1979,[1] where it was found that the Committee "has only been entrusted with the mandate of examining whether an individual has suffered an actual violation of his rights. It cannot review in the abstract whether national legislation contravenes the Covenant".

4.3 The State party indicates that the author's allegations concern the penal law and judicial system of a country other than Canada. It refers to the Committee's inadmissibility decision in communication No. 217/1986,[2] where the Committee observed that "it can only receive and consider communications in respect of claims that come under the jurisdiction of a State party to the Covenant". The State party submits that the Covenant does not impose responsibility upon a State for eventualities over which it has no jurisdiction.

4.4 Moreover, it is submitted that the communication should be declared inadmissible as incompatible with the provisions of the Covenant, since the Covenant does not provide for a right not to be extradited. In this connection, the State party quotes from the Committee's inadmissibility decision in communication No. 117/1981[3]: "There is no provision of the Covenant making it unlawful for a State party to seek extradition of a person from another country". It further argues that even if extradition could be found to fall within the scope of protection of the Covenant in exceptional circumstances, these circumstances are not present in the instant case.

4.5 The State party further refers to the United Nations Model Treaty on Extradition,[4] which clearly contemplates the possibility of extradition without conditions by providing for discretion in obtaining

---

[1] *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40* (A/37/40), annex XIV, *Leo Hertzberg et al. v. Finland*, Views adopted on 2 April 1982, para. 9.3.

[2] Ibid., *Forty-third Session, Supplement No. 40* (A/43/40), annex IX.C, *H. v. d. P. v. the Netherlands*, declared inadmissible on 8 April 1987, para. 3.2.

[3] Ibid., *Thirty-ninth Session, Supplement No. 40* (A/39/40), annex XIV, *M. A. v. Italy*, declared inadmissible on 10 April 1984, para. 13.4.

[4] See General Assembly resolution 45/116 of 14 December 1990, annex.

assurances regarding the death penalty in the same fashion as is found in article 6 of the Extradition Treaty between Canada and the United States. It concludes that interference with the surrender of a fugitive pursuant to legitimate requests from a treaty partner would defeat the principles and objects of extradition treaties and would entail undesirable consequences for States refusing these legitimate requests. In this context, the State party points out that its long, unprotected border with the United States would make it an attractive haven for fugitives from United States justice. If these fugitives could not be extradited because of the theoretical possibility of the death penalty, they would be effectively irremovable and would have to be allowed to remain in the country, unpunished and posing a threat to the safety and security of the inhabitants.

4.6 The State party finally submits that the author has failed to substantiate his allegations that the treatment he may face in the United States will violate his rights under the Covenant. In this connection, the State party points out that the imposition of the death penalty is not *per se* unlawful under the Covenant. As regards the delay between the imposition and the execution of the death sentence, the State party submits that it is difficult to see how a period of detention during which a convicted prisoner would pursue all avenues of appeal, can be held to constitute a violation of the Covenant.

5.1 In his comments on the State party's submission, counsel submits that the author is and was himself actually and personally affected by the decision of the State party to extradite him and that the communication is therefore admissible *ratione personae*. In this context, he refers to the Committee's Views in communication No. 35/1978,[5] and argues that an individual can claim to be a victim within the meaning of the Optional Protocol if the laws, practices, actions or decisions of a State party raise a real risk of violation of rights set forth in the Covenant.

5.2 Counsel further argues that, since the decision complained of is one made by Canadian authorities while the author was subject to Canadian jurisdiction, the communication is admissible *ratione loci*. In this connection, he refers to the Committee's Views in communication No. 110/1981,[6] where it was held that article 1 of the Covenant was "clearly intended to apply to individuals subject to the jurisdiction of the State party concerned *at the time of the alleged violation* of the Covenant" (emphasis added).

5.3 Counsel finally stresses that the author does not claim a right not to be extradited; he only claims that he should not have been surrendered without assurances that the death penalty would not be imposed. He submits that the communication is therefore compatible with the provisions of the Covenant. He refers in this context to the Committee's Views on communication No. 107/1981,[7] where the Committee found that anguish and stress can give rise to a breach of the Covenant; he submits that this finding is also applicable in the instant case.

The Committee's consideration of and decision on admissibility

6.1 During its forty-sixth session, in October 1992, the Committee considered the admissibility of the communication. It observed that extradition as such is outside the scope of application of the Covenant,[8] but that a State party's obligations in relation to a matter itself outside the scope of the Covenant may still be engaged by reference to other provisions of the Covenant.[9] The Committee noted that the author does not claim that extradition as such violates the Covenant, but rather that the particular circumstances related to the effects of his extradition would raise issues under specific provisions of the Covenant. Accordingly, the Committee found that the communication was thus not excluded *ratione materiae*.

6.2 The Committee considered the contention of the State party that the claim is inadmissible *ratione loci*. Article 2 of the Covenant requires States parties to guarantee the rights of persons within their jurisdiction. If a person is lawfully expelled or extradited, the State party concerned will not generally have responsibility under the Covenant for any violations of that person's rights that may

---

[5] *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40* (A/36/40), annex XIII, *S. Aumeeruddy-Cziffra et al. v. Mauritius*, Views adopted on 9 April 1981, para. 9.2.

[6] Ibid., *Thirty-ninth Session, Supplement No. 40* (A/39/40), annex XI, *Antonio Viana Acosta v. Uruguay*, Views adopted on 29 March 1984, para. 6.

[7] *Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 40* (A/38/40), annex XXII, *Almeida de Quinteros v. Uruguay*, Views adopted on 21 July 1983, para. 14.

[8] Ibid., *Thirty-ninth Session, Supplement No. 40* (A/39/40), annex IV, communication No. 117/1981 (*M. A. v. Italy*), decision adopted on 10 April 1984, para. 13.4.

[9] *Official Records of the General Assembly, Thirty-sixth Session*, *Supplement No. 40* (A/36/40), annex XIII, communication No. 35/1978 (*Aumeeruddy-Cziffra et al. v. Mauritius*), Views adopted on 9 April 1981; and ibid., *Forty-fifth Session, Supplement No. 40* (A/45/40), annex IX.K, communication No. 291/1988 (*Torres v. Finland*), Views adopted on 2 April 1990.

later occur in the other jurisdiction. In that sense, a State party clearly is not required to guarantee the rights of persons within another jurisdiction. However, if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that this person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant. That follows from the fact that a State party's duty under article 2 of the Covenant would be negated by the handing over of a person to another State (whether a State party to the Covenant or not) where treatment contrary to the Covenant is certain or is the very purpose of the handing over. For example, a State party would itself be in violation of the Covenant if it handed over a person to another State in circumstances in which it was foreseeable that torture would take place. The foreseeability of the consequence would mean that there was a present violation by the State party, even though the consequence would not occur until later on.

6.3 The Committee therefore considered itself, in principle, competent to examine whether the State party is in violation of the Covenant by virtue of its decision to extradite the author under the Extradition Treaty of 1976 between Canada and the United States, and the Extradition Act of 1985.

6.4 The Committee observed that pursuant to article 1 of the Optional Protocol, the Committee may only receive and consider communications from individuals subject to the jurisdiction of a State party to the Covenant and to the Optional Protocol "who claim to be victims of a violation by that State party of any of their rights set forth in the Covenant". It considered that in the instant case, only the consideration of the merits of the circumstances under which the extradition procedure and all its effects occurred, would enable the Committee to determine whether the author is a victim within the meaning of article 1 of the Optional Protocol. Accordingly, the Committee found it appropriate to consider this issue, which concerned the admissibility of the communication, together with the examination of the merits of the case.

7. On 28 October 1992, the Human Rights Committee therefore decided to join the question of whether the author was a victim within the meaning of article 1 of the Optional Protocol to the consideration of the merits. The Committee expressed its regret that the State party had not acceded to the Committee's request, under rule 86, to stay extradition of the author.

The State party's further submission on the admissibility and the merits of the communication

8.1 In its submission dated 14 May 1993, the State party elaborates on the extradition process in general, on the Canada-United States extradition relationship and on the specifics of the present case. It also submits comments with respect to the admissibility of the communication, in particular with respect to article 1 of the Optional Protocol.

8.2 The State party recalls that:

> "... extradition exists to contribute to the safety of the citizens and residents of States. Dangerous criminal offenders seeking a safe haven from prosecution or punishment are removed to face justice in the State in which their crimes were committed. Extradition furthers international cooperation in criminal justice matters and strengthens domestic law enforcement. It is meant to be a straightforward and expeditious process. Extradition seeks to balance the rights of fugitives with the need for the protection of the residents of the two States parties to any given extradition treaty. The extradition relationship between Canada and the United States dates back to 1794 ... In 1842, the United States and Great Britain entered into the Ashburton-Webster Treaty, which contained articles governing the mutual surrender of criminals ... This treaty remained in force until the present Canada-United States Extradition Treaty of 1976".

8.3 With regard to the principle *aut dedere aut judicare*, the State party explains that while some States can prosecute persons for crimes committed in other jurisdictions in which their own nationals are either the offender or the victim, other States, such as Canada and certain other States in the common law tradition, cannot.

8.4 Extradition in Canada is governed by the Extradition Act and the terms of the applicable treaty. The Canadian Charter of Rights and Freedoms, which forms part of the constitution of Canada and embodies many of the rights protected by the Covenant, applies. Under Canadian law, extradition is a two-step process. The first involves a hearing at which a judge considers whether a factual and legal basis for extradition exists. The person sought for extradition may submit evidence at the judicial hearing. If the judge is satisfied with the evidence that a legal basis for extradition exists, the fugitive is ordered committed to await surrender to the requesting State. Judicial review of a warrant of committal to await surrender can be sought by means of an application for a writ of habeas corpus in a provincial court. A decision of the judge on the habeas corpus application can be appealed to the provincial court of appeal and then, with leave, to the Supreme Court of Canada. The second step in the extradition process begins following the exhaustion of the appeals in the judicial phase. The Minister of Justice is charged with the responsibility of deciding whether to surrender the person sought for extradition. The fugitive may make written submissions to the Minister, and counsel for the fugitive, with leave, may appear before the Minister to present oral argument. In coming to a

decision on surrender, the Minister considers a complete record of the case from the judicial phase, together with any written and oral submissions from the fugitive, and while the Minister's decision is discretionary, the discretion is circumscribed by law. The decision is based upon a consideration of many factors, including Canada's obligations under the applicable treaty of extradition, facts particular to the person and the nature of the crime for which extradition is sought. In addition, the Minister must consider the terms of the Canadian Charter of Rights and Freedoms and the various instruments, including the Covenant, which outline Canada's international human rights obligations. Finally, a fugitive may seek judicial review of the Minister's decision by a provincial court and appeal a warrant of surrender, with leave, up to the Supreme Court of Canada. In interpreting Canada's human rights obligations under the Canadian Charter, the Supreme Court of Canada is guided by international instruments to which Canada is a party, including the Covenant.

8.5 With regard to surrender in capital cases, the Minister of Justice decides whether or not to request assurances to the effect that the death penalty should not be imposed or carried out on the basis of an examination of the particular facts of each case. The Extradition Treaty between Canada and the United States was not intended to make the seeking of assurances a routine occurrence; rather, assurances had to be sought only in circumstances where the particular facts of the case warrant a special exercise of discretion.

8.6 With regard to the abolition of the death penalty in Canada, the State party notes that:

> "... certain States within the international community, including the United States, continue to impose the death penalty. The Government of Canada does not use extradition as a vehicle for imposing its concepts of criminal law policy on other States. By seeking assurances on a routine basis, in the absence of exceptional circumstances, Canada would be dictating to the requesting State, in this case the United States, how it should punish its criminal law offenders. The Government of Canada contends that this would be an unwarranted interference with the internal affairs of another State. The Government of Canada reserves the right ... to refuse to extradite without assurances. This right is held in reserve for use only where exceptional circumstances exist. In the view of the Government of Canada, it may be that evidence showing that a fugitive would face certain or foreseeable violations of the Covenant would be one example of exceptional circumstances which would warrant the special measure of seeking assurances under article 6. However, the evidence presented by Ng during the extradition process in Canada (which evidence has been submitted by counsel for Ng in this communication) does not support the allegations that the use of the death penalty in the United States generally, or in the State of California in particular, violates the Covenant".

8.7 The State party also refers to article 4 of the United Nations Model Treaty on Extradition, which lists optional, but not mandatory, grounds for refusing extradition:

> "(d) If the offence for which extradition is requested carries the death penalty under the law of the Requesting State, unless the State gives such assurance as the Requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out."

Similarly, article 6 of the Extradition Treaty between Canada and the United States provides that the decision with respect to obtaining assurances regarding the death penalty is discretionary.

8.8 With regard to the link between extradition and the protection of society, the State party submits that Canada and the United States share a 4,800 kilometre unguarded border, that many fugitives from United States justice cross that border into Canada and that in the last 12 years there has been a steadily increasing number of extradition requests from the United States. In 1980, there were 29 such requests; by 1992, the number had increased to 88.

> "Requests involving death penalty cases are a new and growing problem for Canada ... a policy of routinely seeking assurances under article 6 of the Canada-United States Extradition Treaty will encourage even more criminal law offenders, especially those guilty of the most serious crimes, to flee the United States for Canada. Canada does not wish to become a haven for the most wanted and dangerous criminals from the United States. If the Covenant fetters Canada's discretion not to seek assurances, increasing numbers of criminals may come to Canada for the purpose of securing immunity from capital punishment."

9.1 With regard to Mr. Ng's case, the State party recalls that he challenged the warrant of committal to await surrender in accordance with the extradition process outlined above, and that his counsel made written and oral submissions to the Minister to seek assurances that the death penalty would not be imposed. He argued that extradition to face the death penalty would offend his rights under section 7 (comparable to articles 6 and 9 of the Covenant) and section 12 (comparable to article 7 of the Covenant) of the Canadian Charter of Rights and Freedoms. The Supreme Court heard Mr. Ng's case at the same time as the appeal by Mr. Kindler, an American citizen who also faced extradition to the United States on a capital charge,[10] and decided that their

[10] Ibid., *Forty-eighth Session, Supplement No. 40* (A/48/40), annex XII.U, communication No. 470/1991 (*Kindler v. Canada*), Views adopted on 30 July 1993.

extradition without assurances would not violate Canada's human rights obligations.

9.2 With regard to the admissibility of the communication, the State party once more reaffirms that the communication should be declared inadmissible *ratione materiae* because extradition *per se* is beyond the scope of the Covenant. A review of the *travaux préparatoires* reveals that the drafters of the Covenant specifically considered and rejected a proposal to deal with extradition in the Covenant. In the light of the negotiating history of the Covenant, the State party submits that:

> "... a decision to extend the Covenant to extradition treaties or to individual decisions pursuant thereto would stretch the principles governing the interpretation of human rights instruments in unreasonable and unacceptable ways. It would be unreasonable because the principles of interpretation which recognize that human rights instruments are living documents and that human rights evolve over time cannot be employed in the face of express limits to the application of a given document. The absence of extradition from the articles of the Covenant when read with the intention of the drafters must be taken as an express limitation".

9.3 The State party further contends that Mr. Ng has not submitted any evidence that would suggest that he was a victim of any violation in Canada of rights set forth in the Covenant. In this context, the State party notes that the author merely claims that his extradition to the United States was in violation of the Covenant because he faces charges in the United States which may lead to his being sentenced to death if found guilty. The State party submits that it satisfied itself that the foreseeable treatment of Mr. Ng in the United States would not violate his rights under the Covenant.

10.1 On the merits, the State party stresses that Mr. Ng enjoyed a full hearing on all matters concerning his extradition to face the death penalty.

> "If it can be said that the Covenant applies to extradition at all ... an extraditing State could be said to be in violation of the Covenant only where it returned a fugitive to certain or foreseeable treatment or punishment, or to judicial procedures which in themselves would be a violation of the Covenant."

In the present case, the State party submits that since Mr. Ng's trial has not yet begun, it was not reasonably foreseeable that he would be held in conditions of incarceration that would violate rights under the Covenant or that he would in fact be put to death. The State party points out that if convicted and sentenced to death, Mr. Ng is entitled to many avenues of appeal in the United States and that he can petition for clemency. Furthermore, he is entitled to challenge in the courts of the United States the conditions under which he is held while his appeals with respect to the death penalty are outstanding.

10.2 With regard to the imposition of the death penalty in the United States, the State party recalls that article 6 of the Covenant did not abolish capital punishment under international law:

> "In countries which have not abolished the death penalty, the sentence of death may still be imposed for the most serious crimes in accordance with law in force at the time of the commission of the crime, not contrary to the provisions of the Covenant and not contrary to the Convention on the Prevention and Punishment of the Crime of Genocide. The death penalty can only be carried out pursuant to a final judgement rendered by a competent court. It may be that Canada would be in violation of the Covenant if it extradited a person to face the possible imposition of the death penalty where it was reasonably foreseeable that the requesting State would impose the death penalty under circumstances which would violate article 6. That is, it may be that an extraditing State would be violating the Covenant to return a fugitive to a State which imposed the death penalty for other than the most serious crimes, or for actions which are not contrary to a law in force at the time of commission, or which carried out the death penalty in the absence of or contrary to the final judgement of a competent court. Such are not the facts here ... Ng did not place any evidence before the Canadian courts, before the Minister of Justice or before the Committee that would suggest that the United States was acting contrary to the stringent criteria established by article 6 when it sought his extradition from Canada ... The Government of Canada, in the person of the Minister of Justice, was satisfied at the time the order of surrender was issued that if Ng is convicted and executed in the State of California, this will be within the conditions expressly prescribed by article 6 of the Covenant".

10.3 Finally, the State party observes that it is "in a difficult position attempting to defend the criminal justice system of the United States before the Committee. It contends that the Optional Protocol process was never intended to place a State in the position of having to defend the laws or practices of another State before the Committee."

10.4 With respect to the issue of whether the death penalty violates article 7 of the Covenant, the State party submits that:

> "... article 7 cannot be read or interpreted without reference to article 6. The Covenant must be read as a whole and its articles as being in harmony ... It may be that certain forms of execution are contrary to article 7. Torturing a person to death would seem to fall into this category, as torture is a violation of article 7. Other forms of execution may be in violation of the Covenant because they are cruel, inhuman or degrading. However, as the death penalty is permitted within the narrow

parameters set by article 6, it must be that some methods of execution exist which would not violate article 7".

10.5 As to the method of execution, the State party submits that there is no indication that execution by cyanide gas asphyxiation, the chosen method in California, is contrary to the Covenant or to international law. It further submits that no specific circumstances exist in Mr. Ng's case which would lead to a different conclusion concerning the application of this method of execution to him; nor would execution by gas asphyxiation be in violation of the Safeguards guaranteeing protection of the rights of those facing the death penalty, adopted by the Economic and Social Council in its resolution 1984/50 of 25 May 1984.

10.6 Concerning the "death row phenomenon", the State party submits that each case must be examined on its specific facts, including the conditions in the prison in which the prisoner would be held while on death row, the age and mental and physical condition of the prisoner subject to those conditions, the reasonably foreseeable length of time the prisoner would be subject to those conditions, the reasons underlying the length of time and the avenues, if any, for remedying unacceptable conditions. It is submitted that the Minister of Justice and the Canadian courts examined and weighed all the evidence submitted by Mr. Ng as to the conditions of incarceration of persons sentenced to death in California:

> "The Minister of Justice ... was not convinced that the conditions of incarceration in the State of California, considered together with the facts personal to Ng, the element of delay and the continuing access to the courts in the State of California and to the Supreme Court of the United States, would violate Ng's rights under the Canadian Charter of Rights and Freedoms or under the Covenant. The Supreme Court of Canada upheld the Minister's decision in such a way as to make clear that the decision would not subject Ng to a violation of his rights under the Canadian Charter of Rights and Freedoms."

10.7 With respect to the question of the foreseeable length of time Mr. Ng would spend on death row if sentenced to death, the State party stated that:

> "[t]here was no evidence before the Minister or the Canadian courts regarding any intentions of Ng to make full use of all avenues for judicial review in the United States of any potential sentence of death. There was no evidence that either the judicial system in the State of California or the Supreme Court of the United States had serious problems of backlogs or other forms of institutional delay which would likely be a continuing problem when and if Ng is held to await execution."

In this connection, the State party refers to the Committee's jurisprudence that prolonged judicial proceedings do not *per se* constitute cruel, inhuman or degrading treatment even if they can be a source of mental strain for the convicted prisoners.[11] The State party contends that it was not reasonably foreseeable on the basis of the facts presented by Mr. Ng during the extradition process in Canada that any possible period of prolonged detention upon his return to the United States would result in a violation of the Covenant, but that it was more likely that any prolonged detention on death row would be attributable to Mr. Ng pursuing the many avenues for judicial review in the United States.

Author's and counsel's comments on the State party's submission

11.1 With regard to the extradition process in Canada, counsel points out that a fugitive is ordered committed to await surrender when the judge is satisfied that a legal basis for extradition exists. Counsel emphasizes, however, that the extradition hearing is not a trial and the fugitive has no general right to cross-examine witnesses. The extradition judge does not weigh evidence against the fugitive with regard to the charges against him, but essentially determines whether a *prima facie* case exists. Because of this limited competence, no evidence can be called pertaining to the effects of the surrender on the fugitive.

11.2 As regards article 6 of the Extradition Treaty, counsel recalls that when the Treaty was signed in December 1971, the Canadian Criminal Code still provided for capital punishment in cases of murder, so that article 6 could have been invoked by either contracting State. Counsel submits that article 6 does not require assurances to be sought only in particularly "special" death penalty cases. He argues that the provision of the possibility to ask for assurances under article 6 of the Treaty implicitly acknowledges that offences punishable by death are to be dealt with differently, that different values and traditions with regard to the death penalty may be taken into account when deciding upon an extradition request and that an actual demand for assurances will not be perceived by the other party as unwarranted interference with the internal affairs of the requesting State. In particular, article 6 of the Treaty is said to "... allow the requested State ... to

[11] Ibid., *Forty-fourth Session, Supplement No. 40* (A/44/40), annex X.F, communications Nos. 210/1986 and 225/1987 (*Earl Pratt and Ivan Morgan v. Jamaica*), Views adopted on 6 April 1989; and ibid., *Forty-seventh Session, Supplement No. 40* (A/47/40), annex IX.F, communications Nos. 270/1988 and 271/1988 (*Randolph Barrett and Clyde Sutcliffe v. Jamaica*), Views adopted on 30 March 1992.

maintain a consistent position: if the death penalty is rejected within its own borders ... it could negate any responsibility for exposing a fugitive through surrender, to the risk of imposition of that penalty or associated practices and procedures in the other State". It is further submitted that "it is very significant that the existence of the discretion embodied in article 6, in relation to the death penalty, enables the contracting parties to honour both their own domestic constitutions and their international obligations without violating their obligations under the bilateral Extradition Treaty".

11.3 With regard to the link between extradition and the protection of society, counsel notes that the number of requests for extradition by the United States in 1991 was 17, whereas the number in 1992 was 88. He recalls that at the end of 1991, the Extradition Treaty between the United States and Canada was amended to the effect that, *inter alia*, taxation offences became extraditable; ambiguities with regard to the rules of double jeopardy and reciprocity were removed. Counsel contends that the increase in extradition requests may be attributable to these 1991 amendments. In this context, he submits that at the time of the author's surrender, article 6 of the Treaty had been in force for 15 years, during which the Canadian Minister of Justice had been called upon to make no more than three decisions on whether or not to ask for assurances that the death penalty would not be imposed or executed. It is therefore submitted that the State party's fear that routine requests for assurances would lead to a flood of capital defendants is unsubstantiated. Counsel finally argues that it is inconceivable that the United States would have refused article 6 assurances had they been requested in the author's case.

11.4 As regards the extradition proceedings against Mr. Ng, counsel notes that his Federal Court action against the Minister's decision to extradite the author without seeking assurances never was decided upon by the Federal Court, but was referred to the Supreme Court to be decided together with Mr. Kindler's appeal. In this context, counsel notes that the Supreme Court, when deciding that the author's extradition would not violate the Canadian constitution, failed to discuss criminal procedure in California or evidence adduced in relation to the death row phenomenon in California.

11.5 As to the State party's argument that extradition is beyond the scope of the Covenant, counsel argues that the *travaux préparatoires* do not show that the fundamental human rights set forth in the Covenant should never apply to extradition situations:

> "Reluctance to include an express provision on extradition because the Covenant should 'lay down general principles' or because it should lay down 'fundamental human rights and not rights which are corollaries thereof' or because extradition was 'too complicated to be included in a single article' simply does not bespeak an intention to narrow or stultify those 'general principles' or 'fundamental human rights' or evidence a consensus that these general principles should never apply to extradition situations."

11.6 Counsel further argues that already during the extradition proceedings in Canada, the author suffered from anxiety because of the uncertainty of his fate, the possibility of being surrendered to California to face capital charges and the likelihood that he would be "facing an extremely hostile and high security reception by California law enforcement agencies", and that he must therefore be considered a victim within the meaning of article 1 of the Optional Protocol. In this context, the author submits that he was aware "that the California Supreme Court had, since 1990, become perhaps the most rigid court in the country in rejecting appeals from capital defendants".

11.7 The author refers to the Committee's decision of 28 October 1992 and submits that in the circumstances of his case, the very purpose of his extradition without seeking assurances was to foreseeably expose him to the imposition of the death penalty and consequently to the death row phenomenon. In this connection, counsel submits that the author's extradition was sought upon charges which carry the death penalty, and that the prosecution in California never left any doubt that it would indeed seek the death penalty. He quotes the Assistant District Attorney in San Francisco as saying that: "there is sufficient evidence to convict and send Ng to the gas chamber if he is extradited ...".

11.8 In this context, counsel quotes from the judgment of the European Court of Human Rights in the Soering case:

> "In the independent exercise of his discretion, the Commonwealth's attorney has himself decided to seek and persist in seeking the death penalty because the evidence, in his determination, supports such action. If the national authority with responsibility for prosecuting the offence takes such a firm stance, it is hardly open to the court to hold that there are no substantial grounds for believing that the applicant faces a real risk of being sentenced to death and hence experiencing the 'death row phenomenon'."

Counsel submits that, at the time of extradition, it was foreseeable that the author would be sentenced to death in California and therefore be exposed to violations of the Covenant.

11.9 Counsel refers to several resolutions adopted by the General Assembly in which the abolition of

the death penalty was considered desirable.[12] He further refers to Protocol 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and to the Second Optional Protocol to the International Covenant on Civil and Political Rights: "[O]ver the last fifty years there has been a progressive and increasingly rapid evolution away from the death penalty. That evolution has led almost all Western democracies to abandon it". He argues that this development should be taken into account when interpreting the Covenant.

11.10 As to the method of execution in California, cyanide gas asphyxiation, counsel argues that it constitutes inhuman and degrading punishment within the meaning of article 7 of the Covenant. He notes that asphyxiation may take up to 12 minutes, during which condemned persons remain conscious, experience obvious pain and agony, drool and convulse and often soil themselves (reference is made to the execution of Robert F. Harris at San Quentin Prison in April 1992). Counsel further argues that, given the cruel character of this method of execution, a decision of Canada not to extradite without assurances would not constitute a breach of its Treaty obligations with the United States or undue interference with the latter's internal law and practices. Furthermore, counsel notes that cyanide gas execution is the sole method of execution in only three States in the United States (Arizona, Maryland and California), and that there is no evidence to suggest that it is an approved means of carrying out judicially mandated executions elsewhere in the international community.

11.11 As to the death row phenomenon, the author emphasizes that he intends to make full use of all avenues of appeal and review in the United States, and that his intention was clear to the Canadian authorities during the extradition proceedings. As to the delay in criminal proceedings in California, counsel refers to estimates that it would require the Supreme Court of California 16 years to clear the present backlog in hearing capital appeals. The author reiterates that the judgements of the Supreme Court in Canada did not in any detail discuss evidence pertaining to capital procedures in California, conditions on death row at San Quentin Prison or execution by cyanide gas, although he presented evidence relating to these issues to the Court. He refers to his *factum* to the Supreme Court, in which it was stated:

> "At present, there are approximately 280 inmates on death row at San Quentin. The cells in which inmates are housed afford little room for movement. Exercise is virtually impossible. When a condemned inmate approaches within three days of an execution date, he is placed under 24-hour guard in a range of three stripped cells. This can occur numerous times during the review and appeal process ... Opportunity for exercise is very limited in a small and crowded yard. Tension is consistently high and can escalate as execution dates approach. Secondary tension and anguish is experienced by some as appeal and execution dates approach for others. There is little opportunity to relieve tension. Programmes are extremely limited. There are no educational programmes. The prison does little more than warehouse the condemned for years pending execution ... Death row inmates have few visitors and few financial resources, increasing their sense of isolation and hopelessness. Suicides occur and are attributable to the conditions, lack of programmes, extremely inadequate psychiatric and physiological care and the tension, apprehension, depression and despair which permeate death row."

11.12 Finally, the author describes the circumstances of his present custodial regime at Folsom Prison, California, conditions which he submits would be similar if convicted. He submits that whereas the other detainees, all convicted criminals, have a proven track record of prison violence and gang affiliation, he, as a pre-trial detainee, is subjected to far more severe custodial restraints than any of them. Thus, when moving around in the prison, he is always put in full shackles (hand, waist and legs), is forced to keep leg irons on when showering, is not allowed any social interaction with the other detainees; is given less than five hours per week of yard exercise; and is continuously facing hostility from the prison staff, in spite of good behaviour. Mr. Ng adds that unusual and very onerous conditions have been imposed on visits from his lawyers and others working on his case; direct face-to-face conversations with investigators have been made impossible, and conversations with them, conducted over the telephone or through a glass window, may be overheard by prison staff. These restrictions are said to seriously undermine the preparation of his trial defence. Moreover, his appearances in Calaveras County Court are accompanied by exceptional security measures. For example, during every court recess, the author is taken from the courtroom to an adjacent jury room and placed, still shackled, into a three foot by four foot cage, specially built for the case. The author contends that no pre-trial detainee has ever been subjected to such drastic security measures in California.

11.13 The author concludes that the conditions of confinement have taken a heavy toll on him, physically and mentally. He has lost much weight and suffers from sleeplessness, anxiety and other nervous disorders. This situation, he emphasizes, has

[12] General Assembly resolutions 2857 (XXVI) of 20 December 1971, 32/61 of 8 December 1977 and 37/192 of 18 December 1982.

foreclosed "progress toward preparation of a reasonably adequate defence".

Further submission from the author and the State party's reaction thereto

12.1 In an affidavit dated 5 June 1993, signed by Mr. Ng and submitted by his counsel, the author provides detailed information about the conditions of his confinement in Canada between 1985 and his extradition in September 1991. He notes that following his arrest on 6 July 1985, he was kept at the Calgary Remand Center in solitary confinement under a so-called "suicide watch", which meant 24 hour camera supervision and the placement of a guard outside the bars of the cell. He was only allowed one hour of exercise each day in the Center's "mini-yard", on "walk-alone status" and accompanied by two guards. As the extradition process unfolded in Canada, the author was transferred to a prison in Edmonton; he complains about "drastically more severe custodial restrictions" from February 1987 to September 1991, which he links to the constant and escalating media coverage of the case. Prison guards allegedly began to tout him, he was kept in total isolation, and contact with visitors was restricted.

12.2 Throughout the period from 1987 to 1991, the author was kept informed about progress in the extradition process; his lawyers informed him about the "formidable problems" he would face if returned to California for prosecution, as well as about the "increasingly hostile political and judicial climate in California towards capital defendants generally". As a result, he experienced extreme stress, sleeplessness and anxiety, all of which were heightened as the dates of judicial decisions in the extradition process approached.

12.3 Finally, the author complains about the deceptions committed by Canadian prison authorities following the release of the decision of the Canadian Supreme Court on 26 September 1991. Thus, instead of being allowed to contact counsel after the release of the decision and to obtain advice about the availability of any remedies, as agreed between counsel and a prison warden, he claims that he was lured from his cell, in the belief that he would be allowed to contact counsel, and thereafter told that he was being transferred to the custody of United States marshals.

12.4 The State party objects to these new allegations as they "are separate from the complainant's original submission and can only serve to delay consideration of the original communication by the Human Rights Committee". It accordingly requests the Committee not to take these claims into consideration.

Review of admissibility and consideration of merits

13.1 In his initial submission, author's counsel alleged that Mr. Ng was a victim of violations of articles 6, 7, 9, 10, 14 and 26 of the Covenant.

13.2 When the Committee considered the admissibility of the communication during its forty-sixth session and adopted a decision relating thereto (decision of 28 October 1992), it noted that the communication raised complex issues with regard to the compatibility with the Covenant, *ratione materiae*, of extradition to face capital punishment, in particular with regard to the scope of articles 6 and 7 of the Covenant to such situations and their application in the author's case. It noted, however, that questions about the issue of whether the author could be deemed a "victim" within the meaning of article 1 of the Optional Protocol remained, but held that only consideration of the merits of all the circumstances under which the extradition procedure and all its effects occurred, would enable the Committee to determine whether Mr. Ng was indeed a victim within the meaning of article 1. The State party has made extensive new submissions on both admissibility and merits and reaffirmed that the communication is inadmissible because "the evidence shows that Ng is not the victim of any violation in Canada of rights set out in the Covenant". Counsel, in turn, has filed detailed objections to the State party's affirmations.

13.3 In reviewing the question of admissibility, the Committee takes note of the contentions of the State party and of counsel's arguments. It notes that counsel, in submissions made after the decision of 28 October 1992, has introduced entirely new issues which were not raised in the original communication, and which relate to Mr. Ng's conditions of detention in Canadian penitentiaries, the stress to which he was exposed as the extradition process proceeded, and alleged deceptive manoeuvres by Canadian prison authorities.

13.4 These fresh allegations, if corroborated, would raise issues under articles 7 and 10 of the Covenant, and would bring the author within the ambit of article 1 of the Optional Protocol. While the wording of the decision of 28 October 1992 would not have precluded counsel from introducing them at this stage of the procedure, the Committee, in the circumstances of the case, finds that it need not address the new claims, as domestic remedies before the Canadian courts were not exhausted in respect of them. It transpires from the material before the Committee that complaints about the conditions of the author's detention in Canada or about alleged irregularities committed by Canadian prison authorities were not raised either during the committal or the surrender phase of the extradition proceedings. Had it been argued that an effective

remedy for the determination of these claims is no longer available, the Committee finds that it was incumbent upon counsel to raise them before the competent courts, provincial or federal, at the material time. This part of the author's allegations is therefore declared inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

13.5 It remains for the Committee to examine the author's claim that he is a "victim" within the meaning of the Optional Protocol because he was extradited to California on capital charges pending trial, without the assurances provided for in article 6 of the Extradition Treaty between Canada and the United States. In this connection, it is to be recalled that: (a) California had sought the author's extradition on charges which, if proven, carry the death penalty; (b) the United States requested Mr. Ng's extradition on those capital charges; (c) the extradition warrant documents the existence of a *prima facie* case against the author; (d) United States prosecutors involved in the case have stated that they would ask for the death penalty to be imposed; and (e) the State of California, when intervening before the Supreme Court of Canada, did not disavow the prosecutors' position. The Committee considers that these facts raise questions with regard to the scope of articles 6 and 7, in relation to which, on issues of admissibility alone, the Committee's jurisprudence is not dispositive. As indicated in the case of *Kindler v. Canada*,[13] only an examination on the merits of the claims will enable the Committee to pronounce itself on the scope of these articles and to clarify the applicability of the Covenant and Optional Protocol to cases concerning extradition to face the death penalty.

14.1 Before addressing the merits of the communication, the Committee observes that what is at issue is not whether Mr. Ng's rights have been or are likely to be violated by the United States, which is not a State party to the Optional Protocol, but whether by extraditing Mr. Ng to the United States, Canada exposed him to a real risk of a violation of his rights under the Covenant. States parties to the Covenant will also frequently be parties to bilateral treaty obligations, including those under extradition treaties. A State party to the Covenant must ensure that it carries out all its other legal commitments in a manner consistent with the Covenant. The starting-point for consideration of this issue must be the State party's obligation, under article 2, paragraph 1, of the Covenant, namely, to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant. The right to life is the most essential of these rights.

14.2 If a State party extradites a person within its jurisdiction in such circumstances, and if, as a result, there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.

15.1 With regard to a possible violation by Canada of article 6 of the Covenant by its decision to extradite Mr. Ng, two related questions arise:

(a) Did the requirement under article 6, paragraph 1, to protect the right to life prohibit Canada from exposing a person within its jurisdiction to the real risk (i.e. a necessary and foreseeable consequence) of being sentenced to death and losing his life in circumstances incompatible with article 6 of the Covenant as a consequence of extradition to the United States?

(b) Did the fact that Canada had abolished capital punishment except for certain military offences require Canada to refuse extradition or request assurances from the United States, as it was entitled to do under article 6 of the Extradition Treaty, that the death penalty would not be imposed against Mr. Ng?

15.2 Counsel claims that capital punishment must be viewed as a violation of article 6 of the Covenant "in all but the most horrendous cases of heinous crime; it can no longer be accepted as the standard penalty for murder". Counsel, however, does not substantiate this statement or link it to the specific circumstances of the present case. In reviewing the facts submitted by author's counsel and by the State party, the Committee notes that Mr. Ng was convicted of committing murder under aggravating circumstances; this would appear to bring the case within the scope of article 6, paragraph 2, of the Covenant. In this connection the Committee recalls that it is not a "fourth instance" and that it is not within its competence under the Optional Protocol to review sentences of the courts of States. This limitation of competence applies *a fortiori* where the proceedings take place in a State that is not party to the Optional Protocol.

15.3 The Committee notes that article 6, paragraph 1, must be read together with article 6, paragraph 2, which does not prohibit the imposition of the death penalty for the most serious crimes. Canada did not itself charge Mr. Ng with capital offences, but extradited him to the United States, where he faces capital charges and the possible (and foreseeable) imposition of the death penalty. If Mr. Ng had been exposed, through extradition from Canada, to a real risk of a violation of article 6, paragraph 2, in the United States, this would have entailed a violation by Canada of its obligations under article 6, paragraph 1. Among the

[13] See communication No. 470/1991, Views adopted on 30 July 1993, para. 12.3.

requirements of article 6, paragraph 2, is that capital punishment be imposed only for the most serious crimes, under circumstances not contrary to the Covenant and other instruments, and that it be carried out pursuant to a final judgement rendered by a competent court. The Committee notes that Mr. Ng was extradited to stand trial on 19 criminal charges, including 12 counts of murder. If sentenced to death, that sentence, based on the information which the Committee has before it, would be based on a conviction of guilt in respect of very serious crimes. He was over 18 years old when the crimes of which he stands accused were committed. Finally, while the author has claimed before the Supreme Court of Canada and before the Committee that his right to a fair trial would not be guaranteed in the judicial process in California, because of racial bias in the jury selection process and in the imposition of the death penalty, these claims have been advanced in respect of purely hypothetical events. Nothing in the file supports the contention that the author's trial in the Calaveras County Court would not meet the requirements of article 14 of the Covenant.

15.4 Moreover, the Committee observes that Mr. Ng was extradited to the United States after extensive proceedings in the Canadian courts, which reviewed all the charges and the evidence available against the author. In the circumstances, the Committee concludes that Canada's obligations under article 6, paragraph 1, did not require it to refuse Mr. Ng's extradition.

15.5 The Committee notes that Canada has itself, except for certain categories of military offences, abolished capital punishment; it is not, however, a party to the Second Optional Protocol to the Covenant. As to issue (b) in paragraph 15.1 above, namely, whether the fact that Canada has generally abolished capital punishment, taken together with its obligations under the Covenant, required it to refuse extradition or to seek the assurances it was entitled to seek under the Extradition Treaty, the Committee observes that abolition of capital punishment does not release Canada of its obligations under extradition treaties. However, it should be expected that, when exercising a permitted discretion under an extradition treaty (namely, whether or not to seek assurances that the death penalty would not be imposed), a State party, which itself abandoned capital punishment, will give serious consideration to its own chosen policy. The Committee notes, however, that Canada has indicated that the possibility of seeking assurances would normally be exercised where special circumstances existed; in the present case, this possibility was considered and rejected.

15.6 While States must be mindful of their obligation to protect the right to life when exercising their discretion in the application of extradition treaties, the Committee does not find that the terms of article 6 of the Covenant necessarily require Canada to refuse to extradite or to seek assurances. The Committee notes that the extradition of Mr. Ng would have violated Canada's obligations under article 6 of the Covenant if the decision to extradite without assurances had been taken summarily or arbitrarily. The evidence before the Committee reveals, however, that the Minister of Justice reached his decision after hearing extensive arguments in favour of seeking assurances. The Committee further takes note of the reasons advanced by the Minister of Justice in his letter dated 26 October 1989 addressed to Mr. Ng's counsel, in particular, the absence of exceptional circumstances, the availability of due process and of appeal against conviction and the importance of not providing a safe haven for those accused of murder.

15.7 In the light of the above, the Committee concludes that Mr. Ng is not a victim of a violation by Canada of article 6 of the Covenant.

16.1 In determining whether, in a particular case, the imposition of capital punishment constitutes a violation of article 7, the Committee will have regard to the relevant personal factors regarding the author, the specific conditions of detention on death row and whether the proposed method of execution is particularly abhorrent. In the instant case, it is contented that execution by gas asphyxiation is contrary to internationally accepted standards of humane treatment, and that it amounts to treatment in violation of article 7 of the Covenant. The Committee begins by noting that whereas article 6, paragraph 2, allows for the imposition of the death penalty under certain limited circumstances, any method of execution provided for by law must be designed in such a way as to avoid conflict with article 7.

16.2 The Committee is aware that, by definition, every execution of a sentence of death may be considered to constitute cruel and inhuman treatment within the meaning of article 7 of the Covenant; on the other hand, article 6, paragraph 2, permits the imposition of capital punishment for the most serious crimes. None the less, the Committee reaffirms, as it did in its general comment 20 (44) on article 7 of the Covenant that, when imposing capital punishment, the execution of the sentence "must be carried out in such a way as to cause the least possible physical and mental suffering".[14]

16.3 In the present case, the author has provided detailed information that execution by gas asphyxiation

---

[14] *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40* (A/47/40), annex VI.A, General Comment 20 (44), para. 6.

may cause prolonged suffering and agony and does not result in death as swiftly as possible, as asphyxiation by cyanide gas may take over 10 minutes. The State party had the opportunity to refute these allegations on the facts; it has failed to do so. Rather, the State party has confined itself to arguing that in the absence of a norm of international law which expressly prohibits asphyxiation by cyanide gas, "it would be interfering to an unwarranted degree with the internal laws and practices of the United States to refuse to extradite a fugitive to face the possible imposition of the death penalty by cyanide gas asphyxiation".

16.4 In the instant case and on the basis of the information before it, the Committee concludes that execution by gas asphyxiation, should the death penalty be imposed on the author, would not meet the test of "least possible physical and mental suffering", and constitutes cruel and inhuman treatment, in violation of article 7 of the Covenant. Accordingly, Canada, which could reasonably foresee that Mr. Ng, if sentenced to death, would be executed in a way that amounts to a violation of article 7, failed to comply with its obligations under the Covenant, by extraditing Mr. Ng without having sought and received assurances that he would not be executed.

16.5 The Committee need not pronounce itself on the compatibility with article 7 of methods of execution other than that which is at issue in this case.

17. 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 as found by the Committee reveal a violation by Canada of article 7 of the Covenant.

18. The Human Rights Committee requests the State party to make such representations as might still be possible to avoid the imposition of the death penalty and appeals to the State party to ensure that a similar situation does not arise in the future.

---

* The texts of eight individual opinions, submitted by nine Committee members, are appended.

APPENDIX

Individual opinions submitted under rule 94, paragraph 3, of the rules of procedure of the Human Rights Committee

A. Individual opinion submitted by Mr. Fausto Pocar (partly dissenting, partly concurring and elaborating)

I cannot agree with the finding of the Committee that in the present case, there has been no violation of article 6 of the Covenant. The question of whether the fact that Canada had abolished capital punishment except for certain military offences required its authorities to refuse extradition or request assurances from the United States to the effect that the death penalty would not be imposed on Mr. Charles Chitat Ng, must, in my view, receive an affirmative answer.

Regarding the death penalty, it must be recalled that, although article 6 of the Covenant does not prescribe categorically the abolition of capital punishment, it imposes a set of obligations on States parties that have not yet abolished it. As the Committee pointed out in its general comment 6 (16), "the article also refers generally to abolition in terms which strongly suggest that abolition is desirable". Furthermore, the wording of paragraphs 2 and 6 clearly indicates that article 6 tolerates – within certain limits and in view of future abolition – the existence of capital punishment in States parties that have not yet abolished it, but may by no means be interpreted as implying for any State party an authorization to delay its abolition or, *a fortiori*, to enlarge its scope or to introduce or reintroduce it. Accordingly, a State party that has abolished the death penalty is, in my view, under the legal obligation, under article 6 of the Covenant, not to reintroduce it. This obligation must refer both to a direct reintroduction within the State party's jurisdiction, as well as to an indirect one, as is the case when the State acts – through extradition, expulsion or compulsory return – in such a way that an individual within its territory and subject to its jurisdiction may be exposed to capital punishment in another State. I therefore conclude that in the present case there has been a violation of article 6 of the Covenant.

Regarding the claim under article 7, I agree with the Committee that there has been a violation of the Covenant, but on different grounds. I subscribe to the observation of the Committee that "by definition, every execution of a sentence of death may be considered to constitute cruel and inhuman treatment within the meaning of article 7 of the Covenant". Consequently, a violation of the provisions of article 6 that may make such treatment, in certain circumstances, permissible, entails necessarily, and irrespective of the way in which the execution may be carried out, a violation of article 7 of the Covenant. It is for these reasons that I conclude in the present case that there has been a violation of article 7 of the Covenant.

[English original]

B. Individual opinion submitted by Messrs. A. Mavrommatis and W. Sadi (dissenting)

We do not believe that, on the basis of the material before us, execution by gas asphyxiation could constitute cruel and inhuman treatment within the meaning of article 7 of the Covenant. A method of execution such as death by stoning, which is intended to and actually inflicts prolonged pain and suffering, is contrary to article 7.

Every known method of judicial execution in use today, including execution by lethal injection, has come under criticism for causing prolonged pain or the necessity

to have the process repeated. We do not believe that the Committee should look into such details in respect of execution such as whether acute pain of limited duration or less pain of longer duration is preferable and could be a criterion for a finding of violation of the Covenant.

[English original]

C. Individual opinion submitted by Mr. Rajsoomer Lallah (dissenting)

For the reasons I have already given in my separate opinion in the case of *J. J. Kindler v. Canada* (communication No. 470/1991) with regard to the obligations of Canada under the Covenant, I would conclude that there has been a violation of article 6 of the Covenant. If only for that reason alone, article 7 has also, in my opinion, been violated.

Even at this stage, Canada should use its best efforts to provide a remedy by making appropriate representations, so as to ensure that, if convicted and sentenced to death, the author would not be executed.

[English original]

D. Individual opinion submitted by Mr. Bertil Wennergren (partly dissenting, partly concurring)

I do not share the Committee's Views with respect to a non-violation of article 6 of the Covenant, as expressed in paragraphs 15.6 and 15.7 of the Views. On grounds that I have developed in detail in my individual opinion concerning the Committee's Views on communication No.470/1991 (*Joseph Kindler v. Canada*) Canada did, in my view, violate article 6, paragraph 1, of the Covenant by consenting to extradite Mr. Ng to the United States without having secured assurances that he would not, if convicted and sentenced to death, be subjected to the execution of the death sentence.

I do share the Committee's Views, formulated in paragraphs 16.1 to 16.5, that Canada failed to comply with its obligations under the Covenant by extraditing Mr. Ng to the United States, where, if sentenced to death, he would be executed by means of a method that amounts to a violation of article 7. In my view, article 2 of the Covenant obliged Canada not merely to seek assurances that Mr. Ng would not be subjected to the execution of a death sentence but also, if it decided none the less to extradite Mr. Ng without such assurances, as was the case, to at least secure assurances that he would not be subjected to the execution of the death sentence by cyanide gas asphyxiation.

Article 6, paragraph 2, of the Covenant permits courts in countries which have not abolished the death penalty to impose the death sentence on an individual if that individual has been found guilty of a most serious crime, and to carry out the death sentence by execution. This exception from the rule of article 6, paragraph 1, applies only *vis-à-vis* the State party in question, not *vis-à-vis* other States parties to the Covenant. It therefore did not apply to Canada as it concerned an execution to be carried out in the United States.

By definition, every type of deprivation of an individual's life is inhuman. In practice, however, some methods have by common agreement been considered as acceptable methods of execution. Asphyxiation by gas is definitely not to be found among them. There remain, however, divergent opinions on this subject. On 21 April 1992, the Supreme Court of the United States denied an individual a stay of execution by gas asphyxiation in California by a seven-to-two vote. One of the dissenting justices, Justice John Paul Stevens, wrote:

> "The barbaric use of cyanide gas in the Holocaust, the development of cyanide agents as chemical weapons, our contemporary understanding of execution by lethal gas and the development of less cruel methods of execution all demonstrate that execution by cyanide gas is unnecessarily cruel. In light of all we know about the extreme and unnecessary pain inflicted by execution by cyanide gas."

Justice Stevens found that the individual's claim had merit.

In my view, the above summarizes in a very convincing way why gas asphyxiation must be considered as a cruel and unusual punishment that amounts to a violation of article 7. What is more, the State of California, in August 1992, enacted a statute law that enables an individual under sentence of death to choose lethal injection as the method of execution, in lieu of the gas chamber. The statute law went into effect on 1 January 1993. Two executions by lethal gas had taken place during 1992, approximately one year after the extradition of Mr. Ng. By amending its legislation in the way described above, the State of California joined 22 other States in the United States. The purpose of the legislative amendment was not, however, to eliminate an allegedly cruel and unusual punishment, but to forestall last-minute appeals by condemned prisoners who might argue that execution by lethal gas constitutes such punishment. Not that I consider execution by lethal injection acceptable either from a point of view of humanity, but – at least – it does not stand out as an unnecessarily cruel and inhumane method of execution, as does gas asphyxiation. Canada failed to fulfil its obligation to protect Mr. Ng against cruel and inhuman punishment by extraditing him to the United States (the State of California), where he might be subjected to such punishment. And Canada did so without seeking and obtaining assurances of his non-execution by means of the only method of execution that existed in the State of California at the material time of extradition.

[English original]

E. Individual opinion submitted by Mr. Kurt Herndl (dissenting)

1. While I do agree with the Committee's finding that there is no violation of article 6 of the Covenant in the present case, I do not share the majority's findings as to a possible violation of article 7. In fact, I completely disagree with the conclusion that Canada which – as the Committee's majority argue in paragraph 16.4 of the Views – "could reasonably foresee that Mr. Ng, if sentenced to death, would be executed in a way that

amounts to a violation of article 7", has thus "failed to comply with its obligations under the Covenant by extraditing Mr. Ng without having sought and received guarantees that he would not be executed".

2. The following are the reasons for my dissent.

Mr. Ng cannot be regarded as victim in the sense of article 1 of the Optional Protocol

3. The issue of whether Mr. Ng can or cannot be regarded as a victim was left open in the decision on admissibility (decision of 28 October 1992). There the Committee observed that pursuant to article 1 of the Optional Protocol, it may only receive and consider communications from individuals subject to the jurisdiction of a State party to the Covenant and to the Optional Protocol "who claim to be victims of a violation by that State party of any of their rights set forth in the Covenant". In the present case, the Committee concluded that only the consideration on the merits of the circumstances under which the extradition procedure and all its effects occurred, would enable it to determine whether the author was a victim within the meaning of article 1 of the Optional Protocol. Accordingly the Committee decided to join the question of whether the author is a victim to the consideration of the merits. So far so good.

4. In its Views, however, the Committee does no longer address the issue of whether Mr. Ng is a victim. In this connection, the following reasoning has to be made.

5. As to the concept of victim, the Committee has in recent decisions recalled its established jurisprudence, based on the admissibility decision in the case of *E. W. et al. v. the Netherlands* (case No. 429/1990), where the Committee declared the relevant communication inadmissible under the Optional Protocol. In the case mentioned, the Committee held that "for a person to claim to be a victim of a violation of a right protected by the Covenant, he or she must show either that an act or an omission of a State party has already adversely affected his or her enjoyment of such right, or that such an effect is imminent".

6. In the case of *John Kindler v. Canada* (communication No. 470/1991) the Committee has, in its admissibility decision (decision of 31 July 1992), somewhat expanded on the notion of victim by stating that while a State party clearly is not required to guarantee the rights of persons within another jurisdiction, if such a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that this person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant. To illustrate this, the Committee referred to the "handing over of a person to another State ... where treatment contrary to the Covenant is certain or is the very purpose of the handing over" (paragraph 6.4). In the subsequent decision on the merits of the Kindler case (decision of 30 July 1993), the Committee introduced the concept of "real risk". The Committee stated that "if a State party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party may be in violation of the Covenant" (paragraph 13.2).

7. The case of Mr. Ng apparently meets none of these tests; neither can it be argued that torture or cruel, inhuman or degrading treatment or punishment (in the sense of article 7 of the Covenant) in the receiving State is the necessary and foreseeable consequence of Mr. Ng's extradition, nor can it be maintained that there would be a real risk of such treatment.

8. Mr. Ng is charged in California with 19 criminal counts, including kidnapping and 12 murders, committed in 1984 and 1985. However, he has so far not been tried, convicted or sentenced. If he were convicted, he would still have various opportunities to appeal his conviction and sentence through state and federal appeals instances, up to the Supreme Court of the United States. Furthermore, given the nature of the crimes allegedly committed by Mr. Ng it is completely open at this stage whether or not the death penalty will be imposed, as a plea of insanity could be entered and might be successful.

9. In their joint individual opinion on the admissibility of a similar case (not yet made public) several members of the Committee, including myself, have again emphasized that the violation that would affect the author personally in another jurisdiction must be a necessary and foreseeable consequence of the action of the defendant State. As the author in that case had not been tried and, *a fortiori*, had not been found guilty or recommended to the death penalty, the dissenting members of the Committee were of the view that the test had not been met.

10. In view of what is explained in the preceding paragraphs, the same consideration would hold true for the case of Mr. Ng, who thus cannot be regarded as victim in the sense of article 1 of the Optional Protocol.

There are no secured elements to determine that execution by gas asphyxiation would in itself constitute a violation of article 7 of the Covenant

11. The Committee's majority is of the view that judicial execution by gas asphyxiation, should the death penalty be imposed on Mr. Ng, would not meet the test of the "least possible physical and mental suffering", and thus would constitute cruel and inhuman treatment in violation of article 7 of the Covenant (paragraph 16.4). The Committee's majority thus attempts to make a distinction between various methods of execution.

12. The reasons for the assumption that the specific method of execution currently applied in California would not meet the above-mentioned test of the "least possible physical and mental suffering" – this being the only reason given to substantiate the finding of a violation of article 7 – is that "execution by gas asphyxiation may cause prolonged suffering and agony and does not result in death as swiftly as possible, as asphyxiation by cyanide gas may take over 10 minutes" (paragraph 16.3).

13. No scientific or other evidence is quoted in support of this dictum. Rather, the onus of proof is placed on the defendant State, which, in the majority's view, had the opportunity to refute the allegations of the author on the facts, but failed to do so. This view is simply incorrect.

14. As the fact sheets of the case show, the remarks by the Government of Canada on the sub-issue "death penalty as a violation of article 7" total two and a half pages. In

those remarks, the Government of Canada states, *inter alia*, the following:

> "While it may be that some methods of execution would clearly violate the Covenant, it is far from clear from a review of the wording of the Covenant and the comments and jurisprudence of the Committee, what point on the spectrum separates those methods of judicial execution which violate article 7 and those which do not".

15. This argument is in line with the view of Professor Cherif Bassiouni, who, in his analysis of what treatment could constitute "cruel and unusual punishment", comes to the following conclusion:

> "The wide divergence in penological theories and standards of treatment of offenders between countries is such that no uniform standard exists ... the prohibition against cruel and unusual punishment can be said to constitute a general principle of international law because it is so regarded by the legal system of civilized nations, but that alone does not give it a sufficiently defined content bearing on identifiable applications capable of more than general recognition".[1]

16. In its submission, the Government of Canada furthermore stressed that "none of the methods currently in use in the United States is of such a nature as to constitute a violation of the Covenant or any other norm of international law. In particular, there is no indication that cyanide gas asphyxiation, which is the method of judicial execution in the State of California, is contrary to the Covenant or international law". Finally, the Government of Canada stated that it had examined "the method of execution for its possible effect on Ng on facts specified to him" and that it came to the conclusion that "there are no facts with respect to Ng which take him out of the general application outlined". In this context, the Government made explicit reference to the Safeguards Guaranteeing Protection of Those Facing the Death Penalty adopted by the Economic and Social Council in its resolution 1984/50 of 25 May 1984 and endorsed by the General Assembly in resolution 39/118 of 14 December 1984. The Government of Canada has thus clearly taken into account a number of important elements in its assessment of whether the method of execution in California might constitute inhuman or degrading treatment.

17. It is also evident from the foregoing that the defendant State has examined the whole issue in depth and did not deal with it in the cursory manner suggested in paragraph 16.3 of the Committee's Views. The author and his counsel were perfectly aware of this. Already in his letter of 26 October 1989 addressed to the author's counsel, the Minister of Justice of Canada stated as follows:

> "You have argued that the method employed to carry out capital punishment in California is cruel and inhuman, in itself. I have given consideration to this issue. The method used by California has been in place for a number of years and has found acceptance in the courts of the United States".

18. Apart from the above considerations, which in my view demonstrate that there is no agreed or scientifically proven standard to determine that judicial execution by gas asphyxiation is more cruel and inhuman than other methods of judicial execution, the plea of the author's counsel contained in his submission to the Supreme Court of Canada (prior to Ng's extradition) which was made available to the Committee, in favour of "lethal injection" (as opposed to "lethal gas") speaks for itself.

19. The Committee observes in the present Views (paragraph 15.3) – and it has also held in the Kindler case (paragraph 6.4) – that the imposition of the death penalty (although, if I may add my personal view on this matter, capital punishment is in itself regrettable under any point of view and is obviously not in line with fundamental moral and ethic principles prevailing throughout Europe and other parts of the world) is still legally permissible under the Covenant. Logically, therefore, there must be methods of execution that are compatible with the Covenant. Although any judicial execution must be carried out in such a way as to cause the least possible physical and mental suffering (see the Committee's general comment 20 (44) on article 7 of the Covenant), physical and mental suffering will inevitably be one of the consequences of the imposition of the death penalty and its execution. To attempt to establish categories of methods of judicial executions, as long as such methods are not manifestly arbitrary and grossly contrary to the moral values of a democratic society and as long as such methods are based on a uniformly applicable legislation adopted by democratic processes, is futile, as it is futile to attempt to quantify the pain and suffering of any human being subjected to capital punishment. In this connection I should also like to refer to the considerations advanced in paragraph 9 of the joint individual opinion submitted by Mr. Waleed Sadi and myself in the Kindler case (decision of 30 July 1993, appendix).

20. It is therefore only logical that I also agree with the individual opinion expressed by a number of members of the Committee and attached to the present Views. Those members conclude that the Committee should not go into details in respect of executions as to whether acute pain of limited duration or less pain of longer duration is preferable and could be a criterion for the finding of a violation.

21. The Committee's finding that the specific method of judicial execution applied in California is tantamount to cruel and inhuman treatment and that accordingly Canada violated article 7 of the Covenant by extraditing Mr. Ng to the United States, is therefore, in my view, without a proper basis.

In the present case the defendant State, Canada, has done its level best to respect its obligations under the Covenant

22. A final word ought to be said as far as Canada's obligations under the Covenant are concerned.

23. While recent developments in the jurisprudence of international organs entrusted with the responsibility of ensuring that individuals' human rights are fully respected by State authorities, suggest an expansion of their monitoring role (see, for example, the judgment of the European Court of Human Rights in the Soering case,

[1] Cherif Bassiouni, *International Extradition and World Public Order* (Dobbs Ferry, Leyden, 1974), p. 465.

paragraph 85; see also, in this context, the remarks on the expanded notion of "victim", paragraph 6 above), the issue of the extent to which, in the area of extradition, a State party to an international human rights treaty must take into account the situation in a receiving State, still remains an open question. I should, therefore, like to repeat what I stated together with Mr. Waleed Sadi in the joint individual opinion in the Kindler case (decision of 30 July 1993, appendix). The same considerations are applicable in the present case.

24. We observed in paragraph 5 of the joint individual opinion that the allegations of the author concerned hypothetical violations of his rights in the United States (after the legality of the extradition had been tested in Canadian Courts, including the Supreme Court of Canada), and unreasonable responsibility was being placed on Canada by requiring it to defend, explain or justify before the Committee the United States system of administration of justice. I continue to believe that such is indeed unreasonable. Both at the level of the judiciary as well as at the level of administrative proceedings, Canada has given all aspects of Mr. Ng's case the consideration they deserve in the light of its obligations under the Covenant. It has done what can reasonably and in good faith be expected from a State party.

[English original]

F. Individual opinion submitted by Mr. Nisuke Ando (dissenting)

I am unable to concur with the Views of the Committee that "execution by gas asphyxiation ... would not meet the test of 'least possible physical and mental suffering' and constitutes cruel and inhuman [punishment] in violation of article 7 of the Covenant" (paragraph 16.4). In the view of the Committee "the author has provided detailed information that execution by gas asphyxiation may cause prolonged suffering and agony and does not result in death as swiftly as possible, as asphyxiation by cyanide gas may take over 10 minutes" (paragraph 16.3). Thus, the swiftness of death seems to be the very criterion by which the Committee has concluded that execution by gas asphyxiation violates article 7.

In many of the States parties to the Covenant where the death penalty has not been abolished, other methods of execution such as hanging, shooting, electrocution or injection of certain materials are used. Some of them may take a longer time and others shorter than gas asphyxiation, but I wonder if, irrespective of the kind and degree of suffering inflicted on the executed, all those methods that may take over ten minutes are in violation of article 7 and all others that take less are in conformity with it. In other words, I consider that the criteria of permissible suffering under article 7 should not solely depend on the swiftness of death.

The phrase "least possible physical and mental suffering" comes from the Committee's general comment 20 (44) on article 7, which states that the death penalty must be carried out in such a way as to cause the least possible physical and mental suffering. This statement, in fact, implies that there is no method of execution which does not cause any physical or mental suffering and that every method of execution is bound to cause some suffering.

However, I must admit that it is impossible for me to specify which kind of suffering is permitted under article 7 and what degree of suffering is not permitted under the same article. I am totally incapable of indicating any absolute criterion as to the scope of suffering permissible under article 7. What I can say is that article 7 prohibits any method of execution which is intended for prolonging suffering of the executed or causing unnecessary pain to him or her. As I do not believe that gas asphyxiation is so intended, I cannot concur with the Committee's view that execution by gas asphyxiation violates article 7 of the Covenant.

[English original]

G. Individual opinion submitted by Mr. Francisco José Aguilar Urbina (dissenting)

Extradition and the protection afforded by the Covenant

1. In analysing the relationship between the Covenant and extradition, I cannot agree with the Committee that "extradition as such is outside the scope of application of the Covenant" (Views, para. 6.1). I consider that it is remiss – and even dangerous, as far as the full enjoyment of the rights set forth in the Covenant is concerned – to make such a statement. In order to do so, the Committee relies on the pronouncement in the Kindler case to the effect that since "it is clear from the *travaux préparatoires* that it was not intended that article 13 of the Covenant, which provides specific rights relating to the expulsion of aliens lawfully in the territory of a State party, should detract from normal extradition arrangements",[1] extradition would remain outside the scope of the Covenant. In the first place, we have to note that extradition, even though in the broad sense it would amount to expulsion, in a narrow sense would be included within the procedures regulated by article 14 of the Covenant. Although the procedures for ordering the extradition of a person to the requesting State vary from country to country, they can roughly be grouped into three general categories: (a) a purely judicial procedure, (b) an exclusively administrative procedure, or (c) a mixed procedure involving action by the authorities of two branches of the State, the judiciary and the executive. This last procedure is the one followed in Canada. The important point, however, is that the authorities dealing with the extradition proceedings constitute, for this specific case at least, a "tribunal" that applies a procedure which must conform to the provisions of article 14 of the Covenant.

2.1 The fact that the drafters of the International Covenant on Civil and Political Rights did not include extradition in article 13 is quite logical, but on that account alone it cannot be affirmed that their intention was to leave extradition proceedings outside the protection

[1] *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40* (A/48/40), annex XII.U, communication No. 470/1991 (*Joseph Kindler v. Canada*), Views adopted on 30 July 1993, para. 6.6.

afforded by the Covenant. The fact is, rather, that extradition does not fit in with the legal situation defined in article 13. The essential difference lies, in my opinion, in the fact that this rule refers exclusively to the expulsion of "an alien lawfully in the territory of a State party".

2.2 Extradition is a kind of "expulsion" that goes beyond what is contemplated in the rule. Firstly, extradition is a specific procedure, whereas the rule laid down in article 13 is of a general nature; however, article 13 merely stipulates that expulsion must give rise to a decision in accordance with law, and it is even permissible – in cases where there are compelling reasons of national security – for the alien not to be heard by the competent authority or to have his case reviewed. Secondly, whereas expulsion constitutes a unilateral decision by a State, grounded on reasons that lie exclusively within the competence of that State – provided that they do not violate the State's international obligations, such as those under the Covenant – extradition constitutes an act based upon a request by another State. Thirdly, the rule in article 13 relates exclusively to aliens who are in the territory of a State party to the Covenant, whereas extradition may relate both to aliens and to nationals; indeed, on the basis of its discussions, the Committee has considered the practice of expelling nationals (for example, exile) in general (other than under extradition proceedings) to be contrary to article 12.[2] Fourthly, the rule in article 13 relates to persons who are lawfully in the territory of a country. In the case of extradition, the individuals against whom the proceedings are initiated are not necessarily lawfully within the jurisdiction of a country; on the contrary – and especially if it is borne in mind that article 13 leaves the question of the lawfulness of the alien's presence to national law – in a great many instances, persons who are subject to extradition proceedings have entered the territory of the requested State illegally, as in the case of the author of the communication.

3. Although extradition cannot be considered to be a kind of expulsion within the meaning of article 13 of the Covenant, this does not imply that it is excluded from the scope of the Covenant. Extradition must be strictly adapted in all cases to the rules laid down in the Covenant. Thus the extradition proceedings must follow the rules of due process as required by article 14 and, furthermore, their consequences must not entail a violation of any other provision. Therefore, a State cannot allege that extradition is not covered by the Covenant in order to evade the responsibility that would devolve upon it for the possible absence of protection of the possible victim in a foreign jurisdiction.

The extradition of the author to the United States of America

4. In this particular case, Canada extradited the author of the communication to the United States of America, where he was to stand trial on 19 criminal counts, including 12 murders. It will have to be seen – as the Committee stated in its decision on the admissibility of the communication – whether Canada, in granting Mr. Ng's extradition, exposed him, necessarily and foreseeably, to a violation of the Covenant.

5. The same State party argued that "the author cannot be considered a victim within the meaning of the Optional Protocol, since his allegations are derived from assumptions about possible future events, which may not materialize and which are dependent on the law and actions of the authorities of the United States" (Views, para. 4.2). Although it is impossible to predict a future event, it must be understood that whether or not a person is a victim depends on whether that event is foreseeable – or, in other words, on whether, according to common sense, it may happen, in the absence of exceptional events that prevent it from occurring – or necessary – in other words, it will inevitably occur, unless exceptional events prevent it from happening. The Committee itself, in concluding that Canada had violated article 7 (Views, para. 17), found that the author of the communication would necessarily and foreseeably be executed. For that reason, I shall not discuss the issue of foreseeability and necessity except to say that I agree with the Views of the majority.

6. Now, with regard to the exceptional circumstances mentioned by the State party (Views, para. 4.4), the most important aspect is that, according to the assertions of the State party itself, they refer to the application of the death penalty. In my opinion, the vital point is the link between the application of the death penalty and the protection given to the lives of persons within the jurisdiction of the State of Canada. For those persons, the death penalty constitutes, in itself, a special circumstance. For that reason – and in so far as the death penalty can be considered as being necessarily and foreseeably applicable – Canada had a duty to seek assurances that Charles Chitat Ng would not be executed.

7. The problem that arises with the extradition of the author of the communication to the United States without any assurances having been requested is that he was deprived of the enjoyment of his rights under the Covenant. Article 6, paragraph 2, of the Covenant, although it does not prohibit the death penalty, cannot be understood as an unrestricted authorization for it. In the first place, it has to be viewed in the light of paragraph 1, which declares that every human being has the inherent right to life. It is an unconditional right admitting of no exception. In the second place, it constitutes – for those States which have not abolished the death penalty – a limitation on its application, in so far as it may be imposed only for the most serious crimes. For those States which have abolished the death penalty it represents an insurmountable barrier. The spirit of this article is to eliminate the death penalty as a punishment, and the limitations which it imposes are of an absolute nature.

8. In this connection, when Mr. Ng entered Canadian territory he already enjoyed an unrestricted right to life. By extraditing him without having requested assurances that he would not be executed, Canada denied him the protection which he enjoyed and exposed him necessarily and foreseeably to being executed in the opinion of the majority of the Committee, which I share in this regard. Canada has therefore violated article 6 of the Covenant.

[2] In this connection, see the summary records of the Committee's recent discussions regarding Zaire and Burundi, in relation to the expulsion of nationals, and Venezuela in relation to the continuing existence, in criminal law, of exile as a penalty.

9. Further, Canada's misinterpretation of the rule in article 6, paragraph 2, of the International Covenant on Civil and Political Rights raises the question of whether it has also violated article 5, specifically paragraph 2 thereof. The Government of Canada has interpreted article 6, paragraph 2, as authorizing the death penalty. For that reason, it has found that Mr. Charles Chitat Ng's extradition, even though he will necessarily be sentenced to death and will foreseeably be executed, would not be prohibited by the Covenant, since the latter would authorize the application of the death penalty. In making such a misinterpretation of the Covenant, the State party asserts that the extradition of the author of the communication would not be contrary to the Covenant. In this connection, Canada has denied Mr. Charles Chitat Ng a right which he enjoyed under its jurisdiction, adducing that the Covenant would give a lesser protection than internal law – in other words, that the International Covenant on Civil and Political Rights would recognize the right to life in a lesser degree than Canadian legislation. In so far as the misinterpretation of article 6, paragraph 2, has led Canada to consider that the Covenant recognizes the right to life in a lesser degree than its domestic legislation and has used that as a pretext to extradite the author to a jurisdiction where he will certainly be executed, Canada has also violated article 5, paragraph 2, of the Covenant.

10. I have to insist that Canada has misinterpreted article 6, paragraph 2, and that, when it abolished the death penalty, it became impossible for it to apply that penalty directly in its territory, except for the military offences for which it is still in force, or indirectly through the handing over to another State of a person who runs the risk of being executed or who will be executed. Since it abolished the death penalty, Canada has to guarantee the right to life of all persons within its jurisdiction, without any limitation.

11. With regard to the possible violation of article 7 of the Covenant, I do not concur with the Committee's finding that "in the instant case and on the basis of the information before it, the Committee concludes that execution by gas asphyxiation, should the death penalty be imposed on the author, would not meet the test of least possible physical and mental suffering and constitutes cruel and inhuman treatment, in violation of article 7 of the Covenant" (Views, para. 16.4). I cannot agree with the view that the execution of the death penalty constitutes cruel and inhuman treatment only in these circumstances. On the contrary, I consider that the death penalty as such constitutes treatment that is cruel, inhuman and degrading and hence contrary to article 7 of the International Covenant on Civil and Political Rights. Nevertheless, in the present case, it is my view that the consideration of the application of the death penalty is subsumed by the violation of article 6, and I do not find that article 7 of the Covenant has been specifically violated.

12. One final aspect to be dealt with is the way in which Mr. Ng was extradited. No notice was taken of the request made by the Special Rapporteur on New Communications, under rule 86 of the rules of procedure of the Human Rights Committee, that the author should not be extradited while the case was under consideration by the Committee. On ratifying the Optional Protocol, Canada undertook, with the other States parties, to comply with the procedures followed in connection therewith. In extraditing Mr. Ng without taking into account the Special Rapporteur's request, Canada failed to display the good faith which ought to prevail among the parties to the Protocol and the Covenant.

13. Moreover, this fact gives rise to the possibility that there may also have been a violation of article 26 of the Covenant. Canada has given no explanation as to why the extradition was carried out so rapidly once it was known that the author had submitted a communication to the Committee. By its action in failing to observe its obligations to the international community, the State party has prevented the enjoyment of the rights which the author ought to have had as a person under Canadian jurisdiction in relation to the Optional Protocol. In so far as the Optional Protocol forms part of the Canadian legal order, all persons under Canadian jurisdiction enjoy the right to submit communications to the Human Rights Committee so that it may hear their complaints. Since it appears that Mr. Charles Chitat Ng was extradited on account of his nationality,[3] and in so far as he has been denied the possibility of enjoying its protection in accordance with the Optional Protocol, I find that the State party has also violated article 26 of the Covenant.

14. In conclusion, I find Canada to be in violation of articles 5, paragraph 2, 6 and 26 of the International Covenant on Civil and Political Rights.

[Spanish original]

---

[3] The various passages in the reply which refer to the relations between Canada and the United States, the 4,800 kilometres of unguarded frontier between the two countries and the growing number of extradition applications by the United States to Canada should be taken into account. The State party has indicated that United States fugitives cannot be permitted to take the non-extradition of the author in the absence of assurances as an incentive to flee to Canada. In this connection, the arguments of the State party were identical to those put forward in relation to communication No. 470/1991.

H. Individual opinion submitted by Ms. Christine Chanet (dissenting)

As regards the application of article 6 in the present case, I can only repeat the terms of my separate opinion expressed in the case of *John Kindler v. Canada* (communication No. 470/1991).

Consequently, I am unable to accept the statement, in paragraph 16.2 of the decision, that "article 6, paragraph 2, permits the imposition of capital punishment". In my view, the text of the Covenant does not authorize the imposition, or restoration, of capital punishment in those countries which have abolished it; it simply sets conditions with which the State must necessarily comply when capital punishment exists.

Drawing inferences from a de facto situation cannot, in law, be assimilated to an authorization.

As regards article 7, I share the Committee's conclusion that this provision has been violated in the present case.

However, I consider that the Committee engages in questionable discussion when, in paragraph 16.3, it assesses the suffering caused by cyanide gas and takes into consideration the duration of the agony, which it deems unacceptable when it lasts for over 10 minutes.

Should it be concluded, conversely, that the Committee would find no violation of article 7 if the agony lasted nine minutes?

By engaging in this debate, the Committee finds itself obliged to take positions that are scarcely compatible with its role as a body monitoring an international human rights instrument.

A strict interpretation of article 6 along the lines I have set out previously which would exclude any "authorization" to maintain or restore the death penalty, would enable the Committee to avoid this intractable debate on the ways in which the death penalty is carried out in the States parties.

[French original]

Communication No. 470/1991

Submitted by: Joseph Kindler on 25 September 1991 (represented by counsel)
Alleged victim: The author
State party: Canada
Declared inadmissible: 31 July 1992 (forty-fifth session)
Date of adoption of Views: 30 July 1993 (forty-eighth session)*

Subject matter: Extradition of author by State to another jurisdiction where author faces the death penalty

Procedural issues: Non-compliance with the Committee's request for interim measures of protection – Court's evaluation of facts and evidence – Lack of substantiation of claim – Travaux préparatoires

Substantive issues: Right to life – Torture and inhuman treatment – Extradition to face the death penalty

Articles of the Covenant: 2, 6, 7, 9, 10, 13, 14 and 26

Article of the Optional Protocol: 2

1. The author of the communication is Joseph Kindler, a citizen of the United States of America, born in 1961, at the time of his submission detained in a penitentiary in Montreal, Canada, and on 26 September 1991 extradited to the United States. He claims to be a victim of a violation of articles 6, 7, 9, 10, 14 and 26 of the International Covenant on Civil and Political Rights. He is represented by counsel.

Facts as submitted by the author

2.1 In November 1983 the author was convicted in the State of Pennsylvania, United States, of first degree murder and kidnapping; the jury recommended the death sentence. According to the author, this recommendation is binding on the court. In September 1984, prior to sentencing, the author escaped from custody. He was arrested in the province of Quebec in April 1985. In July 1985 the United States requested and in August 1985 the Superior Court of Quebec ordered his extradition.

2.2 Article 6 of the 1976 Extradition Treaty between Canada and the United States 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. On 17 January 1986, after hearing the author's counsel, the Minister of Justice decided not to seek these assurances.

2.4 The author filed an application for review of the Minister's decision with the Federal Court, which dismissed the application in January 1987. The author's appeal to the Court of Appeal was rejected in December 1988. The matter then came before the Supreme Court of Canada, which decided on 26 September 1991 that the extradition of Mr. Kindler would not violate his rights under the Canadian Charter of Human Rights. The author was extradited on the same day.

Complaint

3. The author claims that the decision to extradite him violates articles 6, 7, 9, 14 and 26 of the Covenant. He submits that the death penalty *per se* constitutes cruel and inhuman treatment or punishment, and that conditions on death row are

cruel, inhuman and degrading. He further alleges that the judicial procedures in Pennsylvania, inasmuch as they relate specifically to capital punishment, do not meet basic requirements of justice. In this context, the author, who is white, generally alleges racial bias in the imposition of the death penalty in the United States, without, however, substantiating how this alleged bias would affect him.

State party's observations and author's comments

4.1 The State party recalls that the author illegally entered the territory of Canada, where he was arrested in April 1985. It submits that the communication is inadmissible *ratione personae*, *loci* and *materiae*.

4.2 It is argued that the author cannot be considered a victim within the meaning of the Optional Protocol, since his allegations are derived from assumptions about possible future events, which may not materialize and which are dependent on the law and actions of the authorities of the United States. The State party refers in this connection to the Committee's Views in communication No. 61/1979,[1] where it was found that the Committee "has only been entrusted with the mandate of examining whether an individual has suffered an actual violation of his rights. It cannot review in the abstract whether national legislation contravenes the Covenant".

4.3 The State party indicates that the author's allegations concern the penal law and judicial system of a country other than Canada. It refers to the Committee's inadmissibility decision in communication No. 217/1986,[2] where the Committee observed "that it can only receive and consider communications in respect of claims that come under the jurisdiction of a State party to the Covenant". The State party submits that the Covenant does not impose responsibility upon a State for eventualities over which it has no jurisdiction.

4.4 Moreover, it is submitted that the communication should be declared inadmissible as incompatible with the provisions of the Covenant, since the Covenant does not provide for a right not to be extradited. In this connection, the State party quotes the Committee's inadmissibility decision in communication No. 117/1981:[3] "There is no provision of the Covenant making it unlawful for a State party to seek extradition of a person from another country". It further argues that even if extradition could be found to fall within the scope of protection of the Covenant in exceptional circumstances, these circumstances are not present in the instant case.

4.5 The State party further refers to the United Nations Model Treaty on Extradition,[4] which clearly contemplates the possibility of unconditional surrender by providing for discretion in obtaining assurances regarding the death penalty in the same fashion as is found in article 6 of the Canada-United States Extradition Treaty. It concludes that interference with the surrender of a fugitive pursuant to legitimate requests from a treaty partner would defeat the principles and objects of extradition treaties and would entail undesirable consequences for States refusing these legitimate requests. In this context, the State party points out that its long, unprotected border with the United States would make it an attractive haven for fugitives from United States justice. If these fugitives could not be extradited because of the theoretical possibility of the death penalty, they would be effectively irremovable and would have to be allowed to remain in the country, unpunished and posing a threat to the safety and security of the inhabitants.

4.6 The State party finally submits that the author has failed to substantiate his allegations that the treatment he may face in the United States will violate his rights under the Covenant. In this connection, the State party points out that the imposition of the death penalty is not *per se* unlawful under the Covenant. As regards the delay between the imposition and the execution of the death sentence, the State party submits that it is difficult to see how a period of detention during which a convicted prisoner would pursue all avenues of appeal, can be held to constitute a violation of the Covenant.

5. In his reply to the State party's submission, the author maintains that, since the right to life is at stake, there is no possible argument for leaving extradition outside the Committee's jurisdiction.

Committee's considerations and decision on admissibility

6.1 During its 45th session in July 1992, the Committee considered the admissibility of the communication. It observed that extradition as such is

---

[1] *Leo Herzberg et al. v. Finland*, Views adopted on 2 April 1982, para. 9.3.

[2] *H. v.d.P. v. the Netherlands*, declared inadmissible on 8 April 1987, para. 3.2.

[3] *M. A. v. Italy*, declared inadmissible on 10 April 1984, para. 13.4.

[4] Adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 1990; see General Assembly resolution 45/168 of 14 December 1990.

outside the scope of application of the Covenant,[5] but that a State party's obligations in relation to a matter itself outside the scope of the Covenant may still be engaged by reference to other provisions of the Covenant.[6] The Committee noted that the author does not claim that extradition as such violates the Covenant, but rather that the particular circumstances related to the effects of his extradition would raise issues under specific provisions of the Covenant. Accordingly, the Committee found that the communication was thus not excluded *ratione materiae*.

6.2 The Committee considered the contention of the State party that the claim is inadmissible *ratione loci*. Article 2 of the Covenant requires States parties to guarantee the rights of persons within their jurisdiction. If a person is lawfully expelled or extradited, the State party concerned will not generally have responsibility under the Covenant for any violations of that person's rights that may later occur in the other jurisdiction. In that sense a State party clearly is not required to guarantee the rights of persons within another jurisdiction. However, if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant. That follows from the fact that a State party's duty under article 2 of the Covenant would be negated by the handing over of a person to another State (whether a State party to the Covenant or not) where treatment contrary to the Covenant is certain or is the very purpose of the handing over. For example, a State party would itself be in violation of the Covenant if it handed over a person to another State in circumstances in which it was foreseeable that torture would take place. The foreseeability of the consequence would mean that there was a present violation by the State party, even though the consequence would not occur until later on.

6.3 The Committee therefore considered itself competent to examine whether the State party is in violation of the Covenant by virtue of its decision to extradite the author under the Extradition Treaty of 1976 between the United States and Canada, and the Extradition Act of 1985.

6.4 The Committee observed that the Covenant does not prohibit capital punishment for the most serious crimes provided that certain conditions are met. Article 7 of the Covenant prohibits torture and cruel, inhuman and degrading treatment. In respect of the so-called "death row phenomenon" the Committee recalled its earlier jurisprudence and noted that "prolonged judicial proceedings do not *per se* constitute cruel, inhuman and degrading treatment, even if they can be a source of mental strain for the convicted persons."[7] 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 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 can be necessary to review the sentence. Thus, even prolonged periods of detention under a strict custodial regime on death row could not necessarily be considered to constitute cruel, inhuman and degrading treatment if the convicted person is merely availing himself of appellate remedies.[8] But each case will depend on its own facts.

6.5 The Committee observed further that article 6 provides a limited authorization to States to order capital punishment within their own jurisdiction. It decided to examine on the merits the question whether the scope of the authorization permitted under article 6 extends also to allowing foreseeable loss of life by capital punishment in another State, even one with full procedural guarantees.

6.6 The Committee also found that it is clear from the *travaux préparatoires* that it was not intended that article 13 of the Covenant, which provides specific rights relating to the expulsion of aliens lawfully in the territory of a State party, should detract from normal extradition arrangements. None the less, whether an alien is required to leave the territory through expulsion or extradition, the general guarantees of article 13 in principle apply, as do the requirements of the Covenant as a whole. In this connection the Committee noted that the author, even though he had unlawfully entered the territory of Canada, had ample opportunity to present his arguments against extradition before the Canadian courts, including the Supreme Court of Canada, which considered the facts and the evidence before it and found that the extradition of the author would not violate his rights under Canadian or international law. In this context the Committee reiterated its constant jurisprudence that it is not competent to re-

---

[5] Communication No. 117/1981 (*M. A. v. Italy*), paragraph 13.4.

[6] *Aumeeruddy-Cziffra et al. v. Mauritius* (No. 35/1978, Views adopted on 9 April 1981) and *Torres v. Finland* (No. 291/1988, Views adopted on 2 April 1990).

[7] Views on communications Nos. 210/1986 and 225/1987 (*Earl Pratt and Ivan Morgan v. Jamaica*) adopted on 6 April 1989, para. 13.6.

[8] Views on communications Nos. 270/1988 and 271/1988 (*Randolph Barrett & Clyde Sutcliffe v. Jamaica*), adopted on 30 March 1992, para. 8.4.

evaluate the facts and evidence considered by national courts. What the Committee may do is to verify whether the author was granted all the procedural safeguards provided for in the Covenant. The Committee concluded that a careful study of all the material submitted by the author and by the State party does not reveal arguments that would support a complaint based on the absence of those guarantees during the course of the extradition process.

6.7 The Committee also observed that, in principle, lawful capital punishment under article 6 does not *per se* raise an issue under article 7. The Committee considered whether there are none the less special circumstances that in this particular case still raise an issue under article 7. Canadian law does not provide for the death penalty, except in military cases. Canada may by virtue of article 6 of the Extradition Treaty seek assurances from the other State which retains the death penalty, that a capital sentence shall not be imposed. It may also, under the Treaty, refuse to extradite a person when such an assurance is not received. While the seeking of such assurances and the determination as to whether or not to extradite in their absence is discretionary under the Treaty and Canadian law, these decisions may raise issues under the Covenant. In particular, the Committee considered that it might be relevant to know whether the State party satisfied itself, before deciding not to invoke article 6 of the Treaty, that this would not involve for the author a necessary and foreseeable violation of his rights under the Covenant.

6.8 The Committee also found that the methods employed for judicial execution of a sentence of capital punishment may in a particular case raise issues under article 7.

7. On 31 July 1992 the Committee decided that the communication was admissible inasmuch as it might raise issues under articles 6 and 7 of the Covenant. The Committee further indicated that, in accordance with rule 93, paragraph 4, of its rules of procedure, the State party could request a review of the decision on admissibility at the time of the examination of the merits of the communication. Two Committee members appended a dissenting opinion to the decision on admissibility.[9]

State party's submission on the merits and request for review of admissibility

8.1 In its submissions dated 2 April and 26 May 1993, the State party submits facts on the extradition process in general, on the Canada-United States extradition relationship and on the specifics of the present case. It further requests a review of the Committee's decision on admissibility.

8.2 The State party recalls that "extradition exists to contribute to the safety of the citizens and residents of States. Dangerous criminal offenders seeking a safe haven from prosecution or punishment are removed to face justice in the State in which their crimes were committed. Extradition furthers international cooperation in criminal justice matters and strengthens domestic law enforcement. It is meant to be a straightforward and expeditious process. Extradition seeks to balance the rights of fugitives with the need for the protection of the residents of the two States parties to any given extradition treaty. The extradition relationship between Canada and the United States dates back to 1794 ... In 1842, the United States and Great Britain entered into the Ashburton-Webster Treaty which contained articles governing the mutual surrender of criminals ... this treaty remained in force until the present Canada-United States Extradition Treaty of 1976."

8.3 With regard to the principle *aut dedere aut judicare* the State party explains that while some States can prosecute persons for crimes committed in other jurisdictions in which their own nationals are either the offender or the victim, other States, such as Canada and certain other States in the common law tradition, cannot.

8.4 Extradition in Canada is governed by the Extradition Act and the terms of the applicable treaty. The Canadian Charter of Rights and Freedoms, which forms part of the constitution of Canada and embodies many of the rights protected by the Covenant, applies. Under Canadian law extradition is a two step process, the first involving a hearing at which a judge considers whether a factual and legal basis for extradition exists. The person sought for extradition may submit evidence at the judicial hearing. If the judge is satisfied on the evidence that a legal basis for extradition exists, the fugitive is ordered committed to await surrender to the requesting State. Judicial review of a warrant of committal to await surrender can be sought by means of an application for a writ of *habeas corpus* in a provincial court. A decision of the judge on the *habeas corpus* application can be appealed to the provincial court of appeal and then, with leave, to the Supreme Court of Canada. The second step in the extradition process begins following the exhaustion of the appeals in the judicial phase. The Minister of Justice is charged with the responsibility of deciding whether to surrender the person sought for extradition. The fugitive may make written submissions to the Minister and counsel for the fugitive, with leave, may appear before the Minister to present oral argument. In coming to a decision on surrender, the Minister considers a complete record of the case from the judicial phase, together with any written and oral submissions from the fugitive, and while the Minister's decision is discretionary, the

[9] See appendix under A.

discretion is circumscribed by law. The decision is based upon a consideration of many factors, including Canada's obligations under the applicable treaty of extradition, facts particular to the person and the nature of the crime for which extradition is sought. In addition, the Minister must consider the terms of the Canadian Charter of Rights and Freedoms and the various instruments, including the Covenant, which outline Canada's international human rights obligations. Finally, a fugitive may seek judicial review of the Minister's decision by a provincial court and appeal a warrant of surrender, with leave, up to the Supreme Court of Canada. In interpreting Canada's human rights obligations under the Canadian Charter, the Supreme Court of Canada is guided by international instruments to which Canada is a party, including the Covenant.

8.5 With regard to surrender in death penalty cases, the Minister of Justice decides whether or not to request assurances on the basis of an examination of the particular facts of each case. The Canada-United States Extradition Treaty was not intended to make the seeking of assurances a routine occurrence but only in circumstances where the particular facts of the case warrant a special exercise of discretion.

8.6 With regard to the abolition of the death penalty in Canada, the State party notes that "A substantial number of States within the international community, including the United States, continue to impose the death penalty. The Government of Canada does not use extradition as a vehicle for imposing its concepts of criminal law policy on other States. By seeking assurances on a routine basis, in the absence of exceptional circumstances, Canada would be dictating to the requesting State, in this case the United States, how it should punish its criminal law offenders. The Government of Canada contends that this would be an unwarranted interference with the internal affairs of another State. The Government of Canada reserves the right ... to refuse to extradite without assurances. This right is held in reserve for use only where exceptional circumstances exist. In the view of the Government of Canada, it may be that evidence showing that a fugitive would face certain or foreseeable violations of the Covenant would be one example of exceptional circumstances which would warrant the special measure of seeking assurances under article 6. However, there was no evidence presented by Kindler during the extradition process in Canada and there is no evidence in this communication to support the allegations that the use of the death penalty in the United States generally, or in the State of Pennsylvania in particular, violates the Covenant."

8.7 The State party also refers to article 4 of the United Nations Model Treaty on Extradition, which lists optional, but not mandatory, grounds for refusing extradition: "(d) If the offence for which extradition is requested carries the death penalty under the law of the Requesting State, unless the State gives such assurance as the Requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out." Similarly, article 6 of the Canada-United States Extradition Treaty provides that the decision with respect to obtaining assurances regarding the death penalty is discretionary.

8.8 With regard to the link between extradition and the protection of society, the State party submits that Canada and the United States share a 4,800 kilometre unguarded border, that many fugitives from United States justice cross that border into Canada and that in the last twelve years there has been a steadily increasing number of extradition requests from the United States. In 1980 there were 29 such requests; by 1992 the number had increased to 83. "Requests involving death penalty cases are a new and growing problem for Canada ... a policy of routinely seeking assurances under article 6 of the Canada-United States Extradition Treaty will encourage even more criminal law offenders, especially those guilty of the most serious of crimes, to flee the United States for Canada. Canada does not wish to become a haven for the most wanted and dangerous criminals from the United States. If the Covenant fetters Canada's discretion not to seek assurances, increasing numbers of criminals may come to Canada for the purpose of securing immunity from capital punishment."

9.1 With respect to Mr. Kindler's case, the State party recalls that he challenged the warrant of committal and the warrant of surrender in accordance with the extradition process outlined above, and that his counsel made written and oral submissions to the Minister to seek assurances that the death penalty not be imposed. He argued that extradition to face the death penalty would offend his rights under section 7 (comparable to articles 6 and 9 of the Covenant) and section 12 (comparable to article 7 of the Covenant) of the Canadian Charter of Rights and Freedoms.

9.2 As to the Committee's admissibility decision, the State party reiterates its argument that the communication is inadmissible *ratione materiae* because extradition *per se* is beyond the scope of the Covenant. A review of the *travaux préparatoires* reveals that the drafters of the Covenant specifically considered and rejected a proposal to deal with extradition in the Covenant. In the light of the negotiating history of the Covenant, the State party submits that "a decision to extend the Covenant to extradition treaties or to individual decisions pursuant thereto would stretch the principles governing the interpretation of human rights instruments in unreasonable and unacceptable ways.

It would be unreasonable because the principles of interpretation which recognize that human rights instruments are living documents and that human rights evolve over time cannot be employed in the face of express limits to the application of a given document. The absence of extradition from the articles of the Covenant when read with the intention of the drafters must be taken as an express limitation."

9.3 As to the merits, the State party stresses that Mr. Kindler enjoyed a full hearing on all matters concerning his extradition to face the death penalty. "If it can be said that the Covenant applies to extradition at all ... an extraditing State could be said to be in violation of the Covenant only where it returned a fugitive to certain or foreseeable treatment or punishment, or to judicial procedures which in themselves would be a violation of the Covenant." In the present case, the State party submits that whereas it was reasonably foreseeable that Mr. Kindler would be held in the State of Pennsylvania subject to a sentence of death, it was not reasonably foreseeable that he would in fact be put to death or be held in conditions of incarceration that would violate rights under the Covenant. The State party points out that Mr. Kindler is entitled to many avenues of appeal in the United States and that he can petition for clemency; furthermore, he is entitled to challenge in the courts of the United States the conditions under which he is held while his appeals with respect to the death penalty are outstanding.

9.4 As to the imposition of the death penalty in the United States, the State party recalls that article 6 of the Covenant did not abolish capital punishment under international law. "In countries which have not abolished the death penalty, the sentence of death may still be imposed for the most serious crimes in accordance with law in force at the time of the commission of the crime, not contrary to the provisions of the Covenant and not contrary to the Convention on the Prevention and Punishment of the Crime of Genocide. The death penalty can only be carried out pursuant to a final judgment rendered by a competent court. It may be that Canada would be in violation of the Covenant if it extradited a person to face the possible imposition of the death penalty where it was reasonably foreseeable that the requesting State would impose the death penalty under circumstances which would violate article 6. That is, it may be that an extraditing State would be violating the Covenant to return a fugitive to a State which imposed the death penalty for other than the most serious crimes, or for actions which are not contrary to a law in force at the time of commission, or which carried out the death penalty in the absence of or contrary to the final judgment of a competent court. Such are not the facts here ... Kindler did not place any evidence before the Canadian courts, before the Minister of Justice or before the Committee which would suggest that the United States was acting contrary to the stringent criteria established by article 6 when it sought his extradition from Canada ... The Government of Canada, in the person of the Minister of Justice, was satisfied at the time the order of surrender was issued that if Kindler is executed in the State of Pennsylvania, this will be within the conditions expressly prescribed by article 6 of the Covenant. The Government of Canada remains satisfied that this is so."

9.5 Finally, the State party observes that it is "in a difficult position attempting to defend the criminal justice system of the United States before the Committee. It contends that the Optional Protocol process was never intended to place a State in the position of having to defend the laws or practices of another State before the Committee."

9.6 With respect to the issue whether the death penalty violates article 7 of the Covenant, the State party submits that "article 7 cannot be read or interpreted without reference to article 6. The Covenant must be read as a whole and its articles as being in harmony ... It may be that certain forms of execution are contrary to article 7. Torturing a person to death would seem to fall into this category as torture is a violation of article 7. Other forms of execution may be in violation of the Covenant because they are cruel, inhuman or degrading. However, as the death penalty is permitted within the narrow parameters set by article 6, it must be that some methods of execution exist which would not violate article 7."

9.7 As to the methods of execution, the State party indicates that the method of execution in Pennsylvania is lethal injection, which is the method proposed by those who advocate euthanasia for terminally ill patients. It is thus at the end of the spectrum of methods designed to cause the least pain.

9.8 As to the "death row phenomenon" the State party submits that each case must be examined on its facts, including the conditions in the prison in which the prisoner would be held while on "death row", the age and the mental and physical condition of the prisoner subject to those conditions, the reasonably foreseeable length of time the prisoner would be subject to those conditions, the reasons underlying the length of time and the avenues, if any, for remedying unacceptable conditions. "Mr. Kindler argued before the Minister of Justice and in Canadian courts that conditions on 'death row' in the State of Pennsylvania would amount to a denial of his rights. His evidence consisted of some testimony and academic journal articles on the effect that electrocution, as a method of execution, was alleged to have on the psychological state of prisoners held

on death row. He did not present evidence on the facilities or prison routines in the State of Pennsylvania ... he did not present evidence on his plans to contest the death sentence in the United States and the expected length of time he would be held awaiting a final answer from the courts of the United States. He did not present evidence that he intended to seek a commutation of his sentence. The evidence he did tender was considered by the courts and by the Minister of Justice but was judged insubstantial and therefore insufficient to reverse the premises underlying the extradition relationship in existence between Canada and the United States. The Government of Canada submits that the Minister of Justice and the Canadian courts in the course of the extradition process in Canada, with its two phases of decision-making and avenues for judicial review, examined and weighed all the allegations and facts presented by Kindler. The Minister of Justice, in deciding to surrender Kindler to face the possible imposition of the death penalty, considered all the factors. The Minister was not convinced on the evidence that the conditions of incarceration in the State of Pennsylvania, when considered with the reasons for the delay and the continuing access to the courts in the United States, would violate the rights of Mr. Kindler, either under the Canadian Charter of Rights and Freedoms or under the Covenant. The Canadian Supreme Court upheld the Minister's decision, making it clear that the decision was not seen as subjecting Kindler to a violation of his rights ... The Minister of Justice and the Canadian courts came to the conclusion that Kindler would not be subjected to a violation of rights which can be expressed as 'death row phenomenon'. The Government of Canada contends that the extradition process and its result in the case of Kindler satisfied Canada's obligation in respect of the Covenant on this point."

Comments by author's counsel

10.1 In his comments on the State party's submission, author's counsel argues that whereas article 6 of the Covenant does foresee the possibility of the imposition of the death penalty, article 6, paragraph 2, applies only to countries "which have not abolished the death penalty". Since Canada has abolished capital punishment in non-military law, the principle applies that one cannot do indirectly what one cannot do directly, and that Canada was required to demand guarantees that Mr. Kindler would not be executed and that he would be treated in accordance with article 7 of the Covenant.

10.2 Author's counsel refers to the factum presented to the Canadian Supreme Court on Mr. Kindler's behalf. In said factum, the relevant aspects of Canadian Constitutional and Administrative law are discussed, and the arguments are said to be applicable *mutatis mutandis* to articles 6 and 7 of the Covenant. In paragraphs 38 to 49 of the factum, author's counsel argues that the United States use of the death penalty is not compatible with the standards of the Covenant. He refers to a book by Zimring and Hawkings, *Capital Punishment and the American Agenda* (1986), which argues the absence of any deterrent effect and the essentially vengeance-based motives for the resurgence of capital punishment in the United States. He also quotes extensively from the judgment of the European Court of Justice in the *Soering v. United Kingdom* case. He indicates that while the majority Court declined to find capital punishment *per se* cruel and unusual in every case, it did condemn the death row phenomenon as such. The European Court concluded:

> "For any prisoner condemned to death, some element of delay between imposition and execution of the sentence and the experience of severe stress in conditions necessary for strict incarceration are inevitable. The democratic character of the Virginia legal system in general and the positive features of the Virginia trial, sentencing and appeal procedures in particular are beyond doubt. The Court agrees with the Commission that the machinery of justice to which the applicant would be subject in the United States is in itself neither arbitrary nor unreasonable, but, rather, respects the rule of law and affords not inconsiderable procedural safeguards to the defendant in a capital trial. Facilities are available on death row for psychiatric services ... However, in the Court's view, having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by article 3. A further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration."

10.3 Counsel further quotes from the concurring opinion of Judge DeMeyer, arguing that "No State Party to the Convention can in that context, even if it has not yet ratified the Sixth Protocol, be allowed to extradite any person if that person thereby incurs the risk of being put to death in the requesting State."

10.4 Counsel also quotes from numerous articles analysing the Soering decision, including one by Gino J. Naldi of the University of East Anglia:

> "The Court considered whether the death penalty violated article 3. The Court noted that as originally drafted, the Convention did not seek to prohibit the death penalty. However, subsequent

national practice meant that few High Contracting Parties now retained it and this was reflected in Protocol No. 6 which provides for the abolition of the death penalty but which the United Kingdom has not ratified notwithstanding its virtual abolition of the death penalty. Yet the very existence of this Protocol led the Court to the conclusion that article 3 had not developed in such a manner that it could be interpreted as prohibiting the death penalty ...

"In the present case the Court found that Soering's fears that he would be exposed to the 'death row phenomenon' were real ... The fact that a condemned prisoner was subjected to the severe regime of death row in a high security prison for six to eight years, notwithstanding psychological and psychiatric services, compounded the problem ... The Court was additionally influenced by Soering's age and mental condition. Soering was eighteen years old at the time of the murders in 1985 and in view of a number of international instruments prohibiting the imposition of the death penalty on minors ... the Court expressed the opinion that a general principle now exists that the youth of a condemned person is a significant factor to be taken into account ... Another factor the Court found relevant was psychiatric evidence that Soering was mentally disturbed at the time of the crime. The Court was also influenced by the fact that Soering's extradition was sought by the Federal Republic of Germany whose constitution allows its nationals to be tried for offences committed in other countries but prohibits the death penalty. Soering could therefore be tried for his alleged crimes without being exposed to the 'death row phenomenon'."[10]

10.5 Counsel contests the argument by the State party that Mr. Kindler was not a minor at the time of the offence. "It is not sufficient to state that Mr. Kindler is not a minor and is charged with a serious offence because in a society in which minors and mentally defective citizens can be executed, the access to a pardon is almost non- existent for someone like Mr. Kindler; yet the right to apply for pardon is an essential one in the Covenant."

10.6 Counsel further contends that the Canadian Minister of Justice did not consider the issue of the "death row phenomenon" or the period of time or the conditions of "death row".

10.7 He points to works of law and political science favouring abolition, which are permeated by the horror at the thought of execution and the sense of cruelty which always accompanies it.

10.8 The fact that the Covenant provides for capital punishment for serious offenses does not prevent an evolution in the interpretation of the law. "By now capital punishment must be viewed as *per se* cruel and unusual, and as a violation of sections 6 and 7 of the Covenant in all but the most horrendous cases of heinous crime; it can no longer be accepted as the standard penalty for murder; thus except for those unusual cases, the Covenant does not authorize it. In this context, executing Mr. Kindler would *by itself* be a violation of sections 6 and 7 and he should not have been extradited without guarantees."

10.9 With regard to Canada's argument that it does not wish to become a haven for foreign criminals, counsel contends that there is no proof that this would happen, nor was such proof advanced at any time in the proceedings.

11. As to the admissibility of the communication, counsel rejects the State party's arguments as unfounded. In particular, he contends that "it is not logical to exclude extradition from the Covenant or to require certainty of execution as Canada suggests ... law almost never deals with certainties but only with probabilities and possibilities." He stresses "that there is plenty of evidence that, *with respect to the death sentence*, the legal system of the United States is not in conformity with the Covenant and that therefore, applying its own principles ..., Canada should have considered all the issues raised by Mr. Kindler. It is thus not possible for Canada to argue that Mr. Kindler's petition was inadmissible; he alleged *Canada's* repeated violation of the Covenant, not that of the United States; that the American system might be indirectly affected is no concern for Canada."

Review of admissibility and consideration of the merits

12.1 In his initial submission author's counsel claimed that Mr. Kindler was a victim of violations of articles 6, 7, 9, 10, 14 and 26 of the Covenant.

12.2 When the Committee, at its forty-fifth session, examined the admissibility of the communication, it found some of the author's allegations unsubstantiated and therefore inadmissible; it further considered that the communication raised new and complex questions with regard to the compatibility with the Covenant, *ratione materiae*, of extradition to face capital punishment, in particular with regard to the scope of articles 6 and 7 of the Covenant to such situations and their concrete application in the present case. It therefore declared the communication admissible inasmuch as it might raise issues under articles 6 and 7 of the Covenant. The State party has made extensive new submissions on both admissibility and merits and requested, pursuant to rule 93, paragraph 4, of the Committee's rules of procedure, a review of the Committee's decision on admissibility.

12.3 In reviewing its decision on admissibility, the Committee takes note of the objections of the State

[10] Gino J. Naldi, *Death Row Phenomenon Held Inhuman Treatment, The Review* (International Commission of Jurists), December 1989, pp. 61-62.

party and of the arguments by author's counsel in this respect. The Committee observes that with regard to the scope of articles 6 and 7 of the Covenant, the Committee's jurisprudence is not dispositive on issues of admissibility such as those raised in the instant communication. Therefore, the Committee considers that an examination on the merits of the communication will enable the Committee to pronounce itself on the scope of these articles and to clarify the applicability of the Covenant and Optional Protocol to cases concerning extradition to face capital punishment.

13.1 Before examining the merits of this communication, the Committee observes that, as indicated in the admissibility decision, what is at issue is not whether Mr. Kindler's rights have been or are likely to be violated by the United States, which is not a party to the Optional Protocol, but whether by extraditing Mr. Kindler to the United States, Canada exposed him to a real risk of a violation of his rights under the Covenant. States parties to the Covenant will often also be party to various bilateral obligations, including those under extradition treaties. A State party to the Covenant is required to ensure that it carries out all its other legal commitments in a manner consistent with the Covenant. The starting point for an examination of this issue must be the obligation of the State party under article 2, paragraph 1, of the Covenant, namely, to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant. The right to life is the most essential of these rights.

13.2 If a State party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.

14.1 With regard to a possible violation by Canada of article 6 the Covenant by its decision to extradite the author, two related questions arise:

(a) Did the requirement under article 6, paragraph 1, to protect the right to life prohibit Canada from exposing a person within its jurisdiction to the real risk (that is to say, a necessary and foreseeable consequence) of losing his life in circumstances incompatible with article 6 of the Covenant as a consequence of extradition to the United States?

(b) Did the fact that Canada had abolished capital punishment except for certain military offences require Canada to refuse extradition or request assurances from the United States, as it was entitled to do under article 6 of the Extradition Treaty, that the death penalty would not be imposed against Mr. Kindler?

14.2 As to (a), the Committee recalls its General Comment on article 6,[11] which provides that while States parties are not obliged to abolish the death penalty totally, they are obliged to limit its use. The General Comment further notes that the terms of article 6 also point to the desirability of abolition of the death penalty. This is an object towards which ratifying parties should strive: "All measures of abolition should be considered as progress in the enjoyment of the right to life". Moreover, the Committee notes the evolution of international law and the trend towards abolition, as illustrated by the adoption by the United Nations General Assembly of the Second Optional Protocol to the International Covenant on Civil and Political Rights. Furthermore, even where capital punishment is retained by States in their legislation, many of them do not exercise it in practice.

14.3 The Committee notes that article 6, paragraph 1, must be read together with article 6, paragraph 2, which does not prohibit the imposition of the death penalty for the most serious crimes. Canada itself did not impose the death penalty on Mr. Kindler, but extradited him to the United States, where he faced capital punishment. If Mr. Kindler had been exposed, through extradition from Canada, to a real risk of a violation of article 6, paragraph 2, in the United States, that would have entailed a violation by Canada of its obligations under article 6, paragraph 1. Among the requirements of article 6, paragraph 2, is that capital punishment be imposed only for the most serious crimes, in circumstances not contrary to the Covenant and other instruments, and that it be carried out pursuant to a final judgment rendered by a competent court. The Committee notes that Mr. Kindler was convicted of premeditated murder, undoubtedly a very serious crime. He was over 18 years of age when the crime was committed. The author has not claimed before the Canadian courts or before the Committee that the conduct of the trial in the Pennsylvania court violated his rights to a fair hearing under article 14 of the Covenant.

14.4 Moreover, the Committee observes that Mr. Kindler was extradited to the United States following extensive proceedings in the Canadian courts, which reviewed all the evidence submitted concerning Mr. Kindler's trial and conviction. In the circumstances, the Committee finds that the obligations arising under article 6, paragraph 1, did not require Canada to refuse the author's extradition.

14.5 The Committee notes that Canada has itself, save for certain categories of military offences, abolished capital punishment; it is not, however, a party to the Second Optional Protocol to the Covenant. As to question (b), namely whether the

[11] General Comment No. 6 [16] of 27 July 1982, para. 6.

fact that Canada has generally abolished capital punishment, taken together with its obligations under the Covenant, required it to refuse extradition or to seek the assurances it was entitled to seek under the extradition treaty, the Committee observes that the abolition of capital punishment does not release Canada of its obligations under extradition treaties. However, it is in principle to be expected that, when exercising a permitted discretion under an extradition treaty (namely, whether or not to seek assurances that capital punishment will not be imposed) a State which has itself abandoned capital punishment would give serious consideration to its own chosen policy in making its decision. The Committee observes, however, that the State party has indicated that the possibility to seek assurances would normally be exercised where exceptional circumstances existed. Careful consideration was given to this possibility.

14.6 While States must be mindful of the possibilities for the protection of life when exercising their discretion in the application of extradition treaties, the Committee does not find that the terms of article 6 of the Covenant necessarily require Canada to refuse to extradite or to seek assurances. The Committee notes that the extradition of Mr. Kindler would have violated Canada's obligations under article 6 of the Covenant, if the decision to extradite without assurances would have been taken arbitrarily or summarily. The evidence before the Committee reveals, however, that the Minister of Justice reached a decision after hearing argument in favour of seeking assurances. The Committee further takes note of the reasons given by Canada not to seek assurances in Mr. Kindler's case, in particular, the absence of exceptional circumstances, the availability of due process, and the importance of not providing a safe haven for those accused of or found guilty of murder.

15.1 As regards the author's claims that Canada violated article 7 of the Covenant, this provision must be read in the light of other provisions of the Covenant, including article 6, paragraph 2, which does not prohibit the imposition of the death penalty in certain limited circumstances. Accordingly, capital punishment as such, within the parameters of article 6, paragraph 2, does not *per se* violate article 7.

15.2 As to whether the "death row phenomenon" associated with capital punishment, constitutes a violation of article 7, the Committee recalls its jurisprudence to the effect that "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."[12] The Committee has indicated that the facts and the circumstances of each case need to be examined to see whether an issue under article 7 arises.

15.3 In determining whether, in a particular case, the imposition of capital punishment could constitute a violation of article 7, the Committee will have regard to the relevant personal factors regarding the author, the specific conditions of detention on death row, and whether the proposed method of execution is particularly abhorrent. In this context the Committee has had careful regard to the judgment given by the European Court of Human Rights in the *Soering v. United Kingdom* case.[13] It notes that important facts leading to the judgment of the European Court are distinguishable on material points from the facts in the present case. In particular, the facts differ as to the age and mental state of the offender, and the conditions on death row in the respective prison systems. The author's counsel made no specific submissions on prison conditions in Pennsylvania, or about the possibility or the effects of prolonged delay in the execution of sentence; nor was any submission made about the specific method of execution. The Committee has also noted in the Soering case that, in contrast to the present case, there was a simultaneous request for extradition by a State where the death penalty would not be imposed.

16. Accordingly, the Committee concludes that the facts as submitted in the instant case do not reveal a violation of article 6 of the Covenant by Canada. The Committee also concludes that the facts of the case do not reveal a violation of article 7 of the Covenant by Canada.

17. The Committee expresses its regret that the State party did not accede to the Special Rapporteur's request under rule 86, made in connection with the registration of the communication on 26 September 1991.

18. The Committee, acting under article 5, paragraph 4, of the Optional Protocol, finds that the facts before it do not reveal a violation by Canada of any provision of the International Covenant on Civil and Political Rights.

---

[12] *Howard Martin v. Jamaica*, No. 317/1988, Views adopted on 24 March 1993, para. 12.2.

[13] European Court of Human Rights, judgement of 7 July 1989.

* Six individual opinions, signed by seven Committee members, are appended.

APPENDIX

Individual opinions submitted pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the Committee's Views

A. INDIVIDUAL OPINION BY MR. KURT HERNDL AND MR. WALEED SADI
(*concurring on the merits/dissenting on admissibility*)

We fully concur in the Committee's finding that the facts of this case do not reveal a violation by Canada of any provision of the Covenant. We wish, however, to repeat our concerns expressed in the dissenting opinion we appended to the Committee's decision on admissibility of 31 July 1992:

"[...]

3. This communication in its essence poses a threat to the exercise by a State of its international law obligations under a valid extradition treaty. Indeed, an examination of the *travaux préparatoires* of the Covenant on Civil and Political Rights reveals that the drafters gave due consideration to the complex issue of extradition and decided to exclude this issue from the Covenant, not by accident, but because there were many delegations opposed to interference with their governments' international law obligations under extradition treaties.

4. Yet, in the light of the evolution of international law, in particular of human rights law, following the entry into force of the Covenant in 1976, the question arises whether under certain *exceptional* circumstances the Human Rights Committee could or even should examine matters directly linked with a State party's compliance with an extradition treaty. Such exceptional circumstances would be present if, for instance, a person were facing arbitrary extradition to a country where substantial grounds existed for believing that he or she could be subjected, for example, to torture. In other words, the Committee could declare communications involving the extradition of a person from a State party to another State (irrespective of whether it is a State party), admissible *ratione materiae* and *ratione loci*, provided that the author substantiated his claim that his basic human rights would be violated by the country seeking his extradition; this requires a showing of reasonable cause to believe that such violations would probably occur. In the communication at bar, the author has not made such a showing, and the State party has argued that the Extradition Treaty with the United States is not incompatible with the provisions of the Covenant and that it complies with the requirements of the Model Treaty on Extradition produced at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana in 1990.

5. The majority opinion nevertheless declared this communication admissible, albeit provisionally, because it Views the extradition of the author by Canada to Pennsylvania as possibly raising issues under articles 6 and 7 of the Covenant. Yet, the facts as presented to the Committee do not disclose any probability that violations of the author's Covenant rights by a State party to the Optional Protocol would occur. As an alien who illegally entered the territory of Canada, his only link with Canada is that in 1985 he was committed for extradition and that the legality of his extradition was tested in the Canadian courts and, following due consideration of his arguments, affirmed by the Supreme Court of Canada in September 1991. The author does not raise any complaint about a denial of due process in Canada. His allegations concern hypothetical violations of his rights by the United States, which is not a State party to the Optional Protocol. In our opinion, the 'link' with the State party is much too tenuous for the Committee to declare the communication admissible. Moreover, Mr. Kindler, who was extradited to the United States in September 1991, is still appealing his conviction before the Pennsylvania courts. In this connection, an unreasonable responsibility is being placed on Canada by requiring it to defend, explain or justify before the Committee the United States system of administration of justice.

6. Hitherto, the Committee has declared numerous communications inadmissible, where the authors had failed to substantiate their allegations for purposes of admissibility. A careful examination of the material submitted by author's counsel in his initial submission and in his comments on the State party's submission reveals that this is essentially a case where a deliberate attempt is made to avoid application of the death penalty, which still remains a legal punishment under the Covenant. Here the author has not substantiated his claim that his rights under the Covenant would, with a reasonable degree of probability, be violated by his extradition to the United States.

7. As for the issues the author alleges may arise under article 6, the Committee concedes that the Covenant does not prohibit the imposition of the death penalty for the most serious crimes. Indeed, if it did prohibit it, the Second Optional Protocol on the Abolition of the Death Penalty would be superfluous. Since neither Canada nor the United States is a party to the Second Optional Protocol, it cannot be expected of either State that they ask for or that they give assurances that the death penalty will not be imposed. The question whether article 6, paragraph 2, read in conjunction with article 6, paragraph 1, could lead to a different conclusion is, at best, academic and not a proper matter for examination under the Optional Protocol.

8. As for the issues that may allegedly arise under article 7 of the Covenant, we agree with the Committee's reference to its jurisprudence in the Views on communications Nos. 210/1986 and 225/1987 (*Earl Pratt and Ivan Morgan v. Jamaica*) and Nos. 270 and 271/1988 (*Barrett and Sutcliffe v. Jamaica*), in which the Committee decided that the so-called 'death row phenomenon' does not *per se* constitute cruel, inhuman and degrading treatment, even if prolonged judicial proceedings can be a source of mental strain for the convicted prisoners. In this connection it is important to note that the prolonged periods of detention on death row are a result of the convicted person's recourse to appellate remedies. In the instant case the author has not submitted any arguments that would justify the Committee's departure from its established jurisprudence.

9. A second issue allegedly arising under article 7 is whether the method of execution – in the State of Pennsylvania by lethal injection –could be deemed as

constituting cruel, inhuman or degrading treatment. Of course, any and every form of capital punishment can be seen as entailing a denial of human dignity; any and every form of execution can be perceived as cruel and degrading. But, since capital punishment is not prohibited by the Covenant, article 7 must be interpreted in the light of article 6, and cannot be invoked against it. The only conceivable exception would be if the method of execution were deliberately cruel. There is, however, no indication that execution by lethal injection inflicts more pain or suffering than other accepted methods of execution. Thus, the author has not made a *prima facie* case that execution by lethal injection may raise an issue under article 7.

10. We conclude that the author has failed to substantiate a claim under article 2 of the Optional Protocol, that the communication raises only remote issues under the Covenant and therefore that it should be declared inadmissible under article 3 of the Optional Protocol as an abuse of the right of submission."

K. Herndl
W. Sadi

B. INDIVIDUAL OPINION SUBMITTED BY MR. BERTIL WENNERGREN (DISSENTING)

I cannot share the Committee's Views on a non-violation of article 6 of the Covenant. In my opinion, Canada violated article 6, paragraph 1, of the Covenant by extraditing the author to the United States, without having sought assurances for the protection of his life, i.e. non-execution of a death sentence imposed upon him. I justify this conclusion as follows:

Firstly, I would like to clarify my interpretation of article 6 of the Covenant. The Vienna Convention on the Law of Treaties stipulates that a treaty must be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The object of the provisions of article 6 is human life and the purpose of its provisions is the protection of such life. Thus, paragraph 1 emphasizes this point by guaranteeing to every human being the inherent right to life. The other provisions of article 6 concern a secondary and subordinate object, namely to allow States parties that have not abolished capital punishment to resort to it until such time they feel ready to abolish it. In the *travaux préparatoires* to the Covenant, the death penalty was seen by many delegates and bodies participating in the drafting process an "anomaly" or a "necessary evil". Against this background, it would appear to be logical to interpret the fundamental rule in article 6, paragraph 1, in a wide sense, whereas paragraph 2, which addresses the death penalty, should be interpreted narrowly. The principal difference between my and the Committee's Views on this case lies in the importance I attach to the fundamental rule in paragraph 1 of article 6, and my belief that what is said in paragraph 2 about the death penalty has a limited objective that cannot by any reckoning override the cardinal principle in paragraph 1.

The rule in article 6, paragraph 1, of the Covenant stands out from among the others laid down in article 6; moreover, article 4 of the Covenant makes it clear that no derogations from this rule are permitted, not even in time of a public emergency threatening the life of the nation. No society, however, has postulated an absolute right to life. All human rights, including the right to life, are subject to the rule of necessity. If, but only if, absolute necessity so requires, it may be justifiable to deprive an individual of his life to prevent him from killing others or so as to avert man-made disasters. For the same reason, it is justifiable to send citizens into war and thereby expose them to a real risk of their being killed. In one form or another, the rule of necessity is inherent in all legal systems; the legal system of the Covenant is no exception.

Article 6, paragraph 2, makes an exception for States parties that have not abolished the death penalty. The Covenant permits them to continue applying the death penalty. This "dispensation" for States parties should not be construed as a justification for the deprivation of the life of individuals, albeit lawfully sentenced to death, and does not make the execution of a death sentence strictly speaking legal. It merely provides a possibility for States parties to be released from their obligations under articles 2 and 6 of the Covenant, namely to respect and to ensure to all individuals within their territory and under their jurisdiction the inherent right to life without any distinction, and enables them to make a distinction with regard to persons having committed the "most serious crime(s)".

The standard way to ensure the protection of the right to life is to criminalize the killing of human beings. The act of taking human life is normally subsumed under terms such as "manslaughter", "homicide" or "murder". Moreover, there may be omissions which can be subsumed under crimes involving the intentional taking of life, inaction or omission that causes the loss of a person's life, such as a doctor's failure to save the life of a patient by intentionally failing to activate life-support equipment, or failure to come to the rescue of a person in a life-threatening situation of distress. Criminal responsibility for the deprivation of life lies with private persons and representatives of the State alike. The methodology of criminal legislation provides some guidance when assessing the limits for a State party's obligations under article 2, paragraph 1, of the Covenant, to protect the right to life within its jurisdiction.

What article 6, paragraph 2, does not, in my view, is to permit States parties that have abolished the death penalty to reintroduce it at a later stage. In this way, the "dispensation" character of paragraph 2 has the positive effect of preventing a proliferation of the deprivation of peoples' lives through the execution of death sentences among States parties to the Covenant. The Second Optional Protocol to the Covenant was drafted and adopted so as to encourage States parties that have not abolished the death penalty to do so.

The United States has not abolished the death penalty and therefore may, by operation of article 6, paragraph 2, deprive individuals of their lives by the execution of death sentences lawfully imposed. The applicability of article 6, paragraph 2, in the United States should not however be construed as extending to other States when they must consider issues arising under article 6 of the Covenant in conformity with their

obligations under article 2, paragraph 1, of the Covenant. The "dispensation" clause of paragraph 2 applies merely domestically and as such concerns only the United States, as a State party to the Covenant.

Other States, however, are in my view obliged to observe their duties under article 6, paragraph 1, namely to protect the right to life. Whether they have or have not abolished capital punishment does not, in my opinion, make any difference. The dispensation in paragraph 2 does not apply in this context. Only the rule in article 6, paragraph 1, applies, and it must be applied strictly. A State party must not defeat the purpose of article 6, paragraph 1, by failing to provide anyone with such protection as is necessary to prevent his/her right to life from being put at risk. And under article 2, paragraph 1, of the Covenant, protection shall be ensured to *all* individuals without distinction of any kind. No distinction must therefore be made on the ground, for instance, that a person has committed a "most serious crime".

The value of life is immeasurable for any human being, and the right to life enshrined in article 6 of the Covenant is the supreme human right. It is an obligation of States parties to the Covenant to protect the lives of all human beings on their territory and under their jurisdiction. If issues arise in respect of the protection of the right to life, priority must not be accorded to the domestic laws of other countries or to (bilateral) treaty articles. Discretion of any nature permitted under an extradition treaty cannot apply, as there is no room for it under Covenant obligations. It is worth repeating that no derogation from a State's obligations under article 6, paragraph 1, is permitted. This is why Canada, in my view, violated article 6, paragraph 1, by consenting to extradite Mr. Kindler to the United States, without having secured assurances that Mr. Kindler would not be subjected to the execution of a death sentence.

B. Wennergren

C. Individual opinion submitted by Mr. Rajsoomer Lallah (dissenting)

1. I am unable to subscribe to the Committee's Views to the effect that the facts before it do not disclose a violation by Canada of any provision of the Covenant.

2.1 I start by affirming my agreement with the Committee's opinion, as noted in paragraph 13.1 of the Views, that what is at issue is not whether Mr. Kindler's rights have been, or run the real risk of being, violated in the United States and that a State party to the Covenant is required to ensure that it carries out other commitments it may have under a bilateral treaty in a manner consistent with its obligations under the Covenant. I further agree with the Committee's View, in paragraph 13.2, to the effect that, where a State party extradites a person in such circumstances as to expose him to a real risk that his rights under the Covenant will be violated in the jurisdiction to which that person is extradited, then that State party may itself be in violation of the Covenant.

2.2 I wonder, however, whether the Committee is right in concluding that, by extraditing Mr. Kindler, and thereby exposing him to the real risk of being deprived of his life, Canada did not violate its obligations under the Covenant. The question whether the author ran that risk under the Covenant in its concrete application to Canada must be examined, as the Committee sets out to do, in the light of the fact that Canada's decision to abolish the death penalty for all civil, as opposed to military, offences was given effect to in Canadian law.

2.3 The question which arises is what exactly are the obligations of Canada with regard to the right to life guaranteed under article 6 of the Covenant even if read alone and, perhaps and possibly, in the light of other relevant provisions of the Covenant, such as equality of treatment before the law under article 26 and the obligations deriving from article 5 (2) which prevents restrictions or derogations from Covenant rights on the pretext that the Covenant recognizes them to a lesser extent. The latter feature of the Covenant would have, in my view, all its importance since the right to life is one to which Canada gives greater protection than might be thought to be required, on a minimal interpretation, under article 6 of the Covenant.

2.4 It would be useful to examine, in turn, the requirements of articles 6, 26 and 5 (2) of the Covenant and their relevance to the facts before the Committee.

3.1 Article 6 (1) of the Covenant proclaims that everyone has the inherent right to life. It requires that this right shall be protected by law. It also provides that no one shall be arbitrarily deprived of his life. Undoubtedly, in pursuance of article 2 of the Covenant, domestic law will normally provide that the unlawful violation of that right will give rise to penal sanctions as well as civil remedies. A State party may further give appropriate protection to that right by outlawing the deprivation of life by the State itself as a method of punishment where the law previously provided for such a method of punishment. Or, with the same end in view, the State party which has not abolished the death penalty is required to restrict its application to the extent permissible under the remaining paragraphs of article 6, in particular, paragraph 2. But, significantly, paragraph 6 has for object to prevent States from invoking the limitations in article 6 to delay or to prevent the abolition of capital punishment. And Canada has decided to abolish this form of punishment for civil, as opposed to military, offences. It can be said that, in so far as civil offences are concerned, paragraph 2 is not applicable to Canada, because Canada is not a State which, in the words of that paragraph, has not abolished the death penalty.

3.2 It seems to me, in any event, that the provisions of article 6 (2) are in the nature of a derogation from the inherent right to life proclaimed in article 6 (1) and must therefore be strictly construed. Those provisions cannot justifiably be resorted to in order to have an adverse impact on the level of respect for, and the protection of, that inherent right which Canada has undertaken under the Covenant "to respect and to ensure to all individuals within its territory and subject to its jurisdiction". In furtherance of this undertaking, Canada has enacted legislative measures to do so, going to the extent of abolishing the death penalty for civil offences. In relation to the matter in hand, three observations are called for.

3.3 First, the obligations of Canada under article 2 of the Covenant have effect with respect to "all individuals within its territory and subject to its jurisdiction",

irrespective of the fact that Mr. Kindler is not a citizen of Canada. The obligations towards him are those that must avail to him in his quality as a human being on Canadian soil. Secondly, the very notion of "protection" requires prior preventive measures, particularly in the case of a deprivation of life. Once an individual is deprived of his life, it cannot be restored to him. These preventive measures necessarily include the prevention of any real risk of the deprivation of life. By extraditing Mr. Kindler without seeking assurances, as Canada was entitled to do under the Extradition Treaty, that the death sentence would not be applied to him, Canada put his life at real risk. Thirdly, it cannot be said that unequal standards are being expected of Canada as opposed to other States. In its very terms, some provisions of article 6 apply to States which do not have the death penalty and other provisions apply to those States which have not yet abolished that penalty. Besides, unequal standards may, unfortunately, be the result of reservations which States may make to particular articles of the Covenant though, I hasten to add, it is questionable whether all reservations may be held to be valid.

3.4 A further question arises under article 6 (1), which requires that no one shall be arbitrarily deprived of his life. The question is whether the granting of the same and equal level of respect and protection is consistent with the attitude that, so long as the individual is within Canada's territory, that right will be fully respected and protected to that level, under Canadian law viewed in its total effect even though expressed in different enactments (penal law and extradition law), whereas Canada might be free to abrogate that level of respect and protection by the deliberate and coercive act of sending that individual away from its territory to another State where the fatal act runs the real risk of being perpetrated. Could this inconsistency be held to amount to a real risk of an "arbitrary" deprivation of life within the terms of article 6 (1) in that unequal treatment is in effect meted out to different individuals within the same jurisdiction? A positive answer would seem to suggest itself as Canada, through its judicial arm, could not sentence an individual to death under Canadian law whereas Canada, through its executive arm, found it possible under its extradition law to extradite him to face the real risk of such a sentence.

3.5 For the above reasons, there was, in my view, a case before the Committee to find a violation by Canada of article 6 of the Covenant.

4. Consideration of the possible application of articles 26 and 5 of the Covenant would, in my view, lend further support to the case for a violation of article 6.

5. In the light of the considerations discussed in paragraph 3.4 above, it would seem that article 26 of the Covenant which guarantees equality before the law has been breached. Equality under this article, in my view, includes substantive equality under a State party's law viewed in its totality and its effect on the individual. Effectively, different and unequal treatment may be said to have been meted out to Mr. Kindler when compared with the treatment which an individual having committed the same offence would have received in Canada. It does not matter, for this purpose, whether Canada metes out this unequal treatment by reason of the particular arm of the State through which it acts, that is to say, through its judicial arm or through its executive arm. Article 26 regulates a State party's legislative, executive as well as judicial behaviour. That, in my view, is the prime principle, in questions of equality and non-discrimination under the Covenant, guaranteeing the application of the rule of law in a State party.

6. I have grave doubts as to whether, in deciding to extradite Mr. Kindler, Canada would have reached the same decision if it had properly directed itself on its obligations deriving from article 5 (2), in conjunction with articles 2, 6 and 26, of the Covenant. It would appear that Canada rather considered, in effect, the question whether there were, or there were not, special circumstances justifying the application of the death sentence to Mr. Kindler, well realizing that, by virtue of Canadian law, the death sentence could not have been imposed in Canada itself on Mr. Kindler on conviction there for the kind of offence he had committed. Canada had exercised its sovereign decision to abolish the death penalty for civil, as distinct from military, offences, thereby ensuring greater respect for, and protection of the individual's inherent right to life. Article 5 (2) would, even if article 6 of the Covenant were given a minimal interpretation, have prevented Canada from invoking that minimal interpretation to restrict or give lesser protection to that right by an executive act of extradition though, in principle, permissible under Canadian extradition law.

R. Lallah

D. Individual opinion submitted by Mr. Fausto Pocar (dissenting)

While I agree with the decision of the Committee in so far as it refers to the consideration of the claim under article 7 of the Covenant, I am not able to agree with the findings of the Committee that in the present case there has been no violation of article 6 of the Covenant. The question whether the fact that Canada had abolished capital punishment except for certain military offences required its authorities to refuse extradition or request assurances from the United States that the death penalty would not be imposed against Mr. Kindler, must in my view receive an affirmative answer.

Regarding the death penalty, it has to be recalled that, although article 6 of the Covenant does not prescribe categorically the abolition of capital punishment, it imposes a set of obligations on States parties that have not yet abolished it. As the Committee has pointed out in its General Comment 6 (16), "the article also refers generally to abolition in terms which strongly suggest that abolition is desirable." Furthermore, the wording of paragraphs 2 and 6 clearly indicates that article 6 tolerates – within certain limits and in view of a future abolition – the existence of capital punishment in States parties that have not yet abolished it, but may by no means be interpreted as implying for any State party an authorization to delay its abolition or, *a fortiori*, to enlarge its scope or to introduce or reintroduce it. Consequently, a State party that has abolished the death penalty is in my view under the legal obligation, according to article 6 of the Covenant, not to reintroduce it. This obligation must refer both to a direct

reintroduction within the State's jurisdiction, and to an indirect one, as it is the case when the State's jurisdiction, and to an indirect one, as it is the case when the State acts – through extradition, expulsion or compulsory return – in such a way that an individual within its territory and subject to its jurisdiction may be exposed to capital punishment in another State. I therefore conclude that in the present case there has been a violation of article 6 of the Covenant.

F. Pocar

E. Individual opinion submitted by Mrs. Christine Chanet (dissenting)

The questions posed to the Human Rights Committee by Mr. Kindler's communication are clearly set forth in paragraph 14.1 of the Committee's decision.

Paragraph 14.2 does not require any particular comment on my part.

On the other hand, when replying to the questions thus identified in paragraph 14.1, the Committee, in order to conclude in favour of a non-violation by Canada of its obligations under article 6 of the Covenant, was forced to undertake a joint analysis of paragraphs 1 and 2 of article 6 of the Covenant.

There is nothing to show that this is a correct interpretation of article 6. It must be possible to interpret every paragraph of an article of the Covenant separately, unless expressly stated otherwise in the text itself or deducible from its wording.

That is not so in the present case.

The fact that the Committee found it necessary to use both paragraphs in support of its argument clearly shows that each paragraph, taken separately, led to the opposite conclusion, namely, that a violation had occurred.

According to article 6, paragraph 1, no one shall be arbitrarily deprived of his life; this principle is absolute and admits of no exception.

Article 6, paragraph 2, begins with the words: "In countries which have not abolished the death penalty ...". This form of words requires a number of comments:

It is negative and refers not to countries in which the death penalty exists but to those in which it has not been abolished. Abolition is the rule, retention of the death penalty the exception.

Article 6, paragraph 2, refers only to countries in which the death penalty has not been abolished and *thus rules out the application of the text to countries which have abolished the death penalty*.

Lastly, the text imposes a series of obligations on the States in question. Consequently, by making a "joint" interpretation of the first two paragraphs of article 6 of the Covenant, the Committee has, in my view, committed three errors of law:

One error, in that it is applying to a country which has abolished the death penalty, Canada, a text exclusively reserved by the Covenant – and that in an express and unambiguous way – for non-abolitionist States.

The second error consists in regarding as an authorization to re-establish the death penalty in a country which has abolished it what is merely an implicit recognition of its existence. This is an extensive interpretation which runs counter to the proviso in paragraph 6 of article 6 that "nothing in this article shall be invoked ... to prevent the abolition of capital punishment". This extensive interpretation, which is restrictive of rights, also runs counter to the provision in article 5, paragraph 2, of the Covenant that "there shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent". Taken together, these texts prohibit a State from engaging in distributive application of the death penalty. There is nothing in the Covenant to force a State to abolish the death penalty but, if it has chosen to do so, the Covenant forbids it to re-establish it in an arbitrary way, even indirectly.

The third error of the Committee in the Kindler decision results from the first two. Assuming that Canada is implicitly authorized by article 6, paragraph 2, of the Covenant, to re-establish the death penalty, on the one hand, and to apply it in certain cases on the other, the Committee subjects Canada in paragraphs 14.3, 14.4 and 14.5, as if it were a non-abolitionist country, to a scrutiny of the obligations imposed on non-abolitionist States: penalty imposed only for the most serious crimes, judgement rendered by a competent court, etc.

This analysis shows that, according to the Committee, Canada, which had abolished the death penalty on its territory, has by extraditing Mr. Kindler to the United States re-established it by proxy in respect of a certain category of persons under its jurisdiction.

I agree with this analysis but, unlike the Committee, I do not think that this behaviour is authorized by the Covenant.

Moreover, having thus re-established the death penalty by proxy, Canada is limiting its application to a certain category of persons: those that are extraditable to the United States.

Canada acknowledges its intention of so practising in order that it may not become a haven for criminals from the United States. Its intention is apparent from its decision not to seek assurances that the death penalty would not be applied in the event of extradition to the United States, as it is empowered to do by its bilateral extradition treaty with that country.

Consequently, when extraditing persons in the position of Mr. Kindler, Canada is deliberately exposing them to the application of the death penalty in the requesting State.

In so doing, Canada's decision with regard to a person under its jurisdiction according to whether he is extraditable to the United States or not, constitutes a discrimination in violation of article 2, paragraph 1, and article 26 of the Covenant.

Such a decision affecting the right to life and placing that right, in the last analysis, in the hands of the Government which, for reasons of penal policy, decides whether or not to seek assurances that the death penalty will not be carried out, constitutes an arbitrary deprivation of the right to life forbidden by article 6, paragraph 1, of the Covenant and, consequently, a misreading by Canada of its obligations under this article of the Covenant.

Ch. Chanet

F. DISSENTING OPINION BY MR. FRANCISCO JOSE AGUILAR URBINA

I. *Inability to join in the majority opinion*

1. I requested the Secretariat to clarify various defects in the Draft in respect of which no explanation had been given despite the fact that I had already requested their elucidation in advance. I asked, *inter alia*, for explanations regarding the system followed in the State of Pennsylvania for sentencing a person. In paragraph 2.1 of the Draft it was stated that "*the jury recommended the death sentence*". From my first statement during the discussion, I commented that there could be three possibilities, and that whether I joined in the majority or opposed it depended on which procedure was applied. Those possibilities were:

(a) That the jury could pronounce only on the guilt of the accused and that it was left to the judge, as a matter of law, to impose the sentence;

(b) That the jury not only pronounced on the innocence or guilt of the accused but also recommended the penalty, with the judge, however, remaining completely free to impose the sentence in keeping with his assessment of the case in conformity with law (in the terms in which paragraph 2.1 was drafted, this would appear to be the procedure practised by the State of Pennsylvania);

(c) That the jury ruled the innocence or guilt of the accused and, at the same time, decided upon the sentence to be imposed, not by way of a recommendation but as a penalty which the judge would necessarily be obliged to declare, not being able to change it in any circumstance but simply serving as a mouthpiece for the jury.

Consequently, in so far as the crux of the matter was whether Canada, in granting Mr. Kindler's extradition, had exposed him, *necessarily or foreseeably*, to a violation of article 6 of the Covenant, I was unable to give an opinion until that point was clarified, orally and in writing. It was necessary for me to know for certain what conditions governed the imposition of the death penalty. However, the Secretariat explained that the author had informed the Committee that the recommendation of the jury was binding (and this is stated in paragraph 2.1 of the Views),[a] [...] that the question had been addressed in the Canadian courts where it had been established that such was the system applied in Pennsylvania.

2. I also asked for explanations concerning the powers of the Canadian Minister of Justice under the Extradition Treaty between Canada and the United States of America, especially because it was not at all clear – in the Spanish version of the Draft which contained the text of article 6 of the Treaty – whether the requesting State (in this case, the United States of America) should not have officially provided assurances that the death penalty would not be applied. Moreover, I requested to be given the possibility of acquainting myself with the text of article 25 of the 1985 Extradition Act, to which reference was made in paragraph 2.3 of the Draft but which was not reproduced anywhere.

3. I also requested the Secretariat to clarify exactly of which offence the author of the communication had been found guilty, in so far as a number of matters were not clear, especially when working with the Spanish version of the text:

(a) In paragraph 2.1 of the Draft it was stated that Joseph John Kindler had been "*convicted ... of first degree murder and kidnapping*".[b] Nevertheless, in other parts of the Draft, as well as in the Amendments, it was merely stated that Mr. Kindler had been convicted of committing a murder. The first aspect that remained unclear was the type of murder concerned, since there was confusion in the terms used which in practice made it impossible to know what sentence hung over the author of the communication. In some parts it was stated that it was first degree murder, in others murder or murder with aggravating circumstances; in one of the paragraphs of the draft it was even stated that he had been convicted of having committed "a most serious crime".[c] Faced with such confusion, I considered that the Committee could not have taken a decision until the acts for which Mr. Kindler had been convicted had been made absolutely clear. Although it is not for the Human Rights Committee to express an opinion on the procedure followed in the trial of the author of the communication in a country which is not a party to the Optional Protocol and which has not abolished the death penalty, it is important to know whether the acts imputed to him constitute "most serious crimes" within the meaning of article 6, paragraph 2, of the Covenant.

(b) In this connection, I asked for clarification, in the first place, as to whether the murder of which the author of the communication was convicted was the result of the kidnapping, of which he was also convicted, or whether the two offences were separate. This latter possibility can be inferred from the different treatment that has been given to the two offences in the Views, especially in so far as the "kidnapping" is mentioned only in paragraph 2.1.[d] I therefore asked to be informed whether the murder of which Mr. Kindler was convicted resulted from the kidnapping. In that connection, it should be borne in mind that basically there are three possibilities that can be imputed to the author of the communication as constituting murder – in the first two places, first degree murder – but which differ in seriousness for the purposes of the implementation of article 6, paragraph 2, of the Covenant:

[a] Views, para. 2.1.

[b] Draft, para. 2.1 (emphasis added).

[c] Draft, para. 14.4.

[d] Views, para. 2.1.

(1) That Mr. Kindler may have committed a purpose-related murder, in other words, a murder in which the author, at the time of the killing, was intending to prepare, facilitate or commit the kidnapping. One of the aims which the murderer may seek to achieve, in this particular case, is to secure impunity for himself. The important point here is that the death of the victim appears, in the eyes of the murderer, to be a necessary – or simply convenient or favourable – means of perpetrating another offence or of avoiding punishment for committing that other offence;

(2) That Mr. Kindler may have committed a cause-related murder. The murder results from the fact that the intended purpose of the attempt to commit another offence was not achieved – in the case of the author of the communication, the kidnapping. Cause-related murder is motivated by failure, unlike purpose-related murder, which is prompted by an illicit hope;

(3) The third possibility that presents itself is that the death of the kidnapped person may not have been caused by Mr. Kindler but may have been the result of action taken to prevent the perpetrator from committing the offence of kidnapping. Here the death results from the criminal actions of the author of the communication, although he himself did not commit the murder directly.

(c) The confusion increases when we see that in the Views mention is made of "murder", of "murder with aggravating circumstances" and of "premeditated murder". The first point that would have to be noted is that, in legal terms, first degree murder is in itself the killing of a person in aggravating circumstances, so that to speak of "first degree murder with aggravating circumstances" (*asesinato con circunstancias agravantes*) would be pleonastic. It is quite clear that the murder committed by Mr. Kindler is one in which first degree factors were involved. However, on the one hand not all first degree murders constitute most serious crimes within the meaning of article 6.

(d) On the other hand, the Committee, when it states that Mr. Kindler committed a *premeditated murder* without indicating that he committed more than one murder, would rule out the possibility that he may have committed other types of first degree murder. I asked the Secretariat to inform me on the basis of what information it was affirmed that specifically premeditated murder had been committed. Premeditated murder is a specific kind of murder different from other types of murder, such as those mentioned in subparagraphs (1) and (2) above. It is a kind of murder involving "cold" reflection on the part of the murderer, who not only decides to commit the crime but, once he has resolved to do so, begins to give detailed consideration to how to carry it out. Thus there is, in the offence of *premeditated murder*, a dual reflection: in the first place the murderer decides to commit the act; in the second place, he reflects on the means that he intends to use to carry it out.

(e) If premeditated murder was involved, the other offences related to kidnapping would be eliminated. It would no longer be a matter of categorization connected with the perpetration of the other offence (purpose-related murder) or with frustration at not having been able to carry it out successfully (cause-related murder), but rather of an "unrelated" murder involving, as the ground for aggravation, cold reflection regarding the means that were used to carry it out.

(f) Consequently, if what was involved was a *premeditated murder*, mention should not have been made of the kidnapping. However, if on the contrary the case was one of *related murder*, either purpose-related or cause-related, connected with the kidnapping, then these are no grounds for speaking of premeditated murder or for imputing to the author the coldness in the choice of means or manner of carrying out the murder that is characteristic of premeditation.

4. I find it intolerable that most of the doubts which I raised with the Secretariat were at no time cleared up before the Committee took a majority decision. The only doubt that was resolved was that concerning the system of sentencing followed in the State of Pennsylvania, but in the form of information imparted by the author to the Committee and not as a reliable fact. [e]

II. *Decision to write a dissenting opinion on the merits of the communication*

5. After having considered the unconditional handing-over of the author of the communication by the Government of Canada to the Government of the United States of America, I have arrived at the conclusion that Canada has violated the International Covenant on Civil and Political Rights.

III. *Extradition and the protection afforded by the Covenant*

6. In analysing the relationship between the Covenant and *extradition*, it is remiss – and even dangerous, as far as the full enjoyment of the rights set forth in the Covenant is concerned – to state that since "it is clear from the *travaux préparatoires* that it was not intended that article 13 of the Covenant, which provides *specific rights relating to the expulsion of aliens lawfully in the territory of a State party*, should detract from normal extradition arrangements", extradition would remain outside the scope of the Covenant.[f] In the first place, we have to note that extradition, even though in the broad sense it would amount to expulsion, in a narrow sense would be included within the procedures regulated by article 14 of the Covenant. Although the procedures for ordering the extradition of a person to the requesting State vary from country to country, they can roughly be grouped into three general categories: (1) a purely judicial procedure, (2) an exclusively administrative procedure, or (3) a mixed procedure involving action by the authorities of two branches of the State, the judiciary and the executive. This last procedure is the one followed in Canada. The important point, however, is that the authorities dealing with the extradition proceedings constitute, for this specific case at least, a "tribunal" that applies a procedure which must conform to the provisions of article 14 of the Covenant.

---

[e] Views, para. 2.1.

[f] Views, para. 6.6 (emphasis added).

7. The fact that the drafters of the International Covenant on Civil and Political Rights did not include extradition in article 13 is quite logical, but on that account it cannot be affirmed that their intention was to leave extradition proceedings outside the protection afforded by the Covenant. The fact is, rather, that extradition does not fit in with the legal situation defined in article 13. The essential difference lies, in my opinion, in the fact that this rule refers exclusively to the expulsion of "an alien lawfully in the territory of a State party".[g] Extradition is a kind of "expulsion" that goes beyond what is contemplated in the rule. Firstly, extradition is a specific procedure, whereas the rule laid down in article 13 is of a general nature; however article 13 merely stipulates that expulsion must give rise to a decision in accordance with law, and even – in cases where there are compelling reasons of national security – it is permissible for the alien not to be heard by the competent authority or to have his case reviewed. Secondly, whereas expulsion constitutes a unilateral decision by a State, grounded on reasons that lie exclusively within the competence of that State -provided that they do not violate the State's international obligations, such as those under the Covenant – extradition constitutes an act based upon a request by another State. Thirdly, the rule in article 13 relates to aliens who are in the territory of a State party to the Covenant, whereas extradition may relate both to aliens and to nationals; indeed, on the basis of its discussions the Committee has considered the practice of expelling nationals (for example exile) in general (other than under extradition proceedings) to be contrary to article 12.[h] Fourthly, the rule in article 13 relates to persons who are lawfully in the territory of a country; in the case of extradition, the individuals against whom the proceedings are initiated are not necessarily lawfully within the jurisdiction of a country; on the contrary – and especially if it is borne in mind that article 13 leaves the question of the lawfulness of the alien's presence to national law – in a great many instances persons who are subject to extradition proceedings have entered the territory of the requested State illegally, as in the case of the author of the communication.

8. Although extradition cannot be considered to be a kind of expulsion within the meaning of article 13 of the Covenant, this does not imply that it is excluded from the scope of the Covenant. Extradition must be strictly adapted in all cases to the rules laid down in the agreement. Thus the extradition proceedings must follow the rules of due process as required by article 14 and, furthermore, their consequences must not entail a violation of any other provision. Therefore, a State cannot allege that extradition is not covered by the Covenant in order to evade the responsibility that would devolve upon it for the possible absence of protection in a foreign jurisdiction.

IV. *The extradition of Mr. Joseph Kindler to the United States of America*

9. In this particular case, Canada extradited the author of the communication to the United States of America, where he had been found guilty of first degree murder. It will have to be seen – as the Committee stated in its decision on the admissibility of the communication – whether Canada, in granting Mr. Kindler's extradition, exposed him, necessarily or foreseeably, to a violation of article 6 of the Covenant.

10. The same State party argued that "the author cannot be considered a victim within the meaning of the Optional Protocol, since his allegations are derived from assumptions about *possible future events, which may not materialize and which are dependent on the law and actions of the authorities of the United States*".[i] Although it is impossible to foresee a future event, it must be understood that whether or not a person is a victim depends on whether that event is foreseeable or, in other words, on whether, according to common sense, it may happen, in the absence of exceptional events that prevent it from occurring – or necessary – in other words, it will inevitably occur, unless exceptional events prevent it from happening. An initial aspect that has to be elucidated is, then, the nature of the jury's decision under the Code of Criminal Procedure of the State of Pennsylvania. The fact that Mr. Kindler may (foreseeably) or must (necessarily) be sentenced to death depends on the judge's power to change the jury's "recommendation". Although the Secretariat merely indicated that the author of the communication had stated that the recommendation of the jury had to be complied with by the judge, documents in the possession of the Secretariat showed that it was more than a simple statement by Mr. Kindler.[j] Before the Supreme Court of Canada the author stated, without being refuted by the Canadian Executive or the contrary being established in any other way that "the recommendation is binding and the judge must impose the death sentence".[k] In view of this affirmation, we must then take it for granted that the author, necessarily and foreseeably, will be sentenced to death and that, consequently, he may be executed at any moment. In this connection, it is the law of Pennsylvania that obliges the judge to comply with the jury's order. Canada's contention that what is involved is an event that may not materialize because it depends on the law and actions of the authorities is groundless. In the case of the Code of Criminal Procedure under which the court that sentenced Mr. Kindler operates, the imposition of the death penalty is definite, since the judge cannot change the jury's decision.

11. It is possible, in this connection, that the author may appeal against the jury's decision, in which case the foreseeability and necessity of the execution could be affected in such a way that the death sentence might not hang over Mr. Kindler. However, four questions must be borne in mind in order to be able to decide that the death sentence would not necessarily or foreseeably be imposed:

[g] International Covenant on Civil and Political Rights.

[h] In this connection, see the summary records of the Committee's recent discussions regarding Zaire and Burundi, in relation to the expulsion of nationals, and Venezuela in relation to the continuing existence, in criminal law, of the penalty of exile.

[i] Views, para. 4.2 (emphasis added).

[j] See above, para. 8.

[k] Appeal of Joseph John Kindler to the Supreme Court of Canada, para. 1, p. 1.

(a) Whether the author still has the possibility of appealing against the sentence of first instance, in which he was sentenced to death;

(b) In the event of his still having that possibility, whether – if he was found guilty of the first degree murder of which he was convicted – the court of second instance must comply with the decision reached by the jury of first instance or whether it can impose another sentence more beneficial for the protection of the life of the author of the communication;

(c) The fact that the prevailing trend in the United States of America is to bar appeals in cases involving the death sentence. The intention not to accept appeals in such cases has already been stated, at least in the case of the Supreme Court of Justice;

(d) The fact that, according to the available documentation, the imposition of the death sentence might become increasingly frequent in the State of Pennsylvania. Thus, whereas in the author's pleas before the Supreme Court of Canada in May 1990 it is stated that the death penalty has not been applied in that State for a long time – although a large number of persons are awaiting execution by electric chair – the State party, in defending the extradition before the Committee, indicates that "the method of execution in Pennsylvania is lethal injection, which is the method proposed by those who advocate euthanasia ...".[l] Such an affirmation, which is, moreover, unacceptable in so far as it appears to be a defence of the death penalty by a State which has abolished it for all offences except a few of a military nature, would appear to serve to conceal the fact that, in the jurisdiction to which Mr. Kindler has been extradited, attempts have been made to find more effective methods of execution, implying that executions have been resumed in the State of Pennsylvania. Consequently, and in application of the principle of *in dubio pro reo*, it has to be assumed that the execution of the author of the communication is a foreseeable event which, furthermore, will necessarily take place unless exceptional events intervene.[m]

12. However, in connection with the "exceptional circumstances" mentioned by the State party in the reply of the Government of Canada to the communication from Joseph John Kindler following the Human Rights Committee's decision on admissibility dated 2 April 1993 (hereinafter referred to as the Reply),[n] the majority opinion in the Committee was that events that would have affected the jury's decision when it convicted Mr. Kindler were involved. The Canadian authorities should, therefore, have made an assessment of the proceedings at the trial in the United States.

13. Nevertheless, I cannot agree with the Committee in its assessment of what those "exceptional circumstances" are. In the first place, the Government of Canada has not explained what they consist of; it only mentions that "evidence showing that a fugitive would face *certain or foreseeable* violations of the Covenant"[o] would constitute an example of exceptional circumstances. It can be seen how the State party itself agrees that exceptional circumstances have a connection with the consequences of the extradition. Accordingly, the erroneous perception which the majority of the members of the Committee have had has led it to believe that the exceptional circumstances refer to the trial and conviction of Mr. Kindler in Pennsylvania. Thus the majority states that "all the evidence submitted concerning Mr. Kindler's trial and conviction" had been reviewed[p] when it is certain that the jurisprudence of the Supreme Court of Canada has indicated that the judge who deals with the extradition may not weigh the evidence or give an opinion as to its credibility and that such functions are left to the jury or judge in the trial that determines whether an offence has been committed.[q]

14. In the second place, the Committee observes, in its majority opinion, that the discretionary right to seek assurances "would normally be exercised where exceptional circumstances existed" and that "careful consideration was given to this possibility".[r] Nevertheless, here too the Committee has a wrong perception. Canada itself, in its Reply, refers to exceptional circumstances only in two paragraphs and in a very summary manner; it also states, with reference to them, that "*there was no evidence presented by Kindler* during the extradition process in Canada and there is no evidence in this communication to support the allegations that the use of the death penalty ... violates the Covenant".[s] This affirmation contains two elements which do not allow me to share the majority opinion:

(a) Firstly – and this relates to my contention in the previous paragraph – the exceptional circumstances are connected with the application of the death penalty and not with the proceedings at the trial and the sentencing;

(b) Secondly, there was no exhaustive examination of what the State considers to be exceptional circumstances, since Kindler submitted no evidence in that connection. According to what we are told by the State party, it was not the responsibility of the Canadian courts, the Minister of Justice or the Human Rights Committee to

---

[l] Views, para. 9.7.

[m] In this connection, I understand by "exceptional events" (it should be noted that "exceptional events" differ somewhat from "exceptional circumstances") those events or acts which would prevent the execution of the author of the communication. They would normally be of a political nature, such as a pardon or the entry into force of legislation abolishing the death penalty. However, since these are decisions of a political nature, taken by persons who depend on the voters' will, and since the death penalty is favoured by a substantial majority of the population of the United States, the possibility that such exceptional events could occur is extremely remote.

[n] Reply, paras. 22 and 23.

[o] Reply, para. 23 (emphasis added).

[p] Views, para. 14.4.

[q] Supreme Court of Canada, United States of America vs. Shepard (1977), 2 S.C.R. 1067, pp. 1083-1087.

[r] Views, para. 14.5.

[s] Reply, para. 23 (emphasis added). In the same connection, the State refers to exceptional circumstances in para. 86 of the same document.

study *ex officio* the details of the trial and sentencing but rather of Mr. Kindler to present, before all the organs that had heard the case, *evidence that the death penalty violated his rights*, in which case there would be an exceptional circumstance. In so far as the author did not present such "evidence", the State party admits that it had not been possible to give careful attention to that possibility.

15. Nevertheless, the most important aspect of the *exceptional circumstances* is that related to the State party's affirmations that they refer to the application of the death penalty. I have pointed out on several occasions that exceptional circumstances have to be considered in relation to the possibility that the death penalty may be applied. I do not share the idea expressed by Canada concerning the relationship between those circumstances and the death penalty. In my view, the most important matter is the link between the application of the death penalty and the protection given to the lives of persons within the jurisdiction of the Canadian State. For them, the death penalty constitutes in itself a *special circumstance*. For that reason -and in so far as the jury decided that the author of the communication must die – Canada had a duty to seek assurances that Joseph John Kindler would not be executed.

16. The fact that the death penalty constitutes a special circumstance derives from article 6 of the Extradition Treaty. Of all the provisions of the Treaty, only this one (relating to the extradition of persons who may be sentenced to death or who have already been so sentenced) makes it possible for one of the parties to seek from the other assurances that the individual whose extradition is requested will not be executed. This article stipulates that the death penalty is different from other sentences and must be viewed in a special way.

17. This provision also accepts that the States parties to the Extradition Treaty have values and traditions in regard to the death penalty *which the requesting State must respect*. Consequently, in order to guarantee respect for those values and traditions, both have provided, in article 6, for the inclusion of an exception rule in the Extradition Treaty. This fact is closely linked to the assertion which Canada made before the Human Rights Committee to the effect that the request for assurances was not pertinent in the case in question in so far as "The Government of Canada does not use extradition as a vehicle for imposing its concepts of criminal law policy on other States".[t] This contention seems to me to be unacceptable for three main reasons:

(a) It is stipulated in the Extradition Treaty that, where it is possible that the death penalty may be applied, the State requested to hand over the fugitive may seek assurances that he will not be executed and the requesting State has accepted a priori that it may be asked to apply a philosophy that does not accept death as a punishment for a crime under the ordinary law;

(b) The Extradition Treaty envisages that a person may not be extradited to the United States except for offences that are recognized as such in Canada. This would be the clearest case of the imposition of the penal concepts of one country on another, in so far as, even when there is reliable evidence of the guilt of an individual or he had already been sentenced in the United States, he could not be extradited since Canadian penal legislation would not consider his conduct to be an offence;

(c) Not to request assurances out of a desire to see the foreign law strictly applied amounts to imposing (in a self-inflicting manner) the law of one of the component parts of the United States of America (Pennsylvania) and its pro-death-penalty philosophy on the Canadian legal and social system.

18. It has been argued that Mr. Kindler was extradited without any assurances being sought because to have requested them would have prevented his handing-over to the United States authorities. This is another assertion that I cannot accept. On the one hand, since the State party to the Extradition Treaty has accepted in advance that assurances may be requested of it, it must be prepared to give them in any case.[u] On the other hand, Canada is affirming that the authorities of the United States of America are not willing *in any circumstance* to give those assurances and that they are even prepared to use extradition as a means of imposing their conception of penal law on Canada. I do not believe this to be the case.

19. The problem that arises with the extradition of Mr. Kindler to the United States without any assurances having been requested is that he has been deprived of the enjoyment of a right in conformity with the Covenant. Article 6, paragraph 2, of the Covenant, although it does not prohibit the death penalty, cannot be understood as an unrestricted authorization for it. In the first place, it has to be viewed in the light of paragraph 1, which declares that every human being has the inherent right to life. It is an unconditional right admitting of no exception. In the second place, it constitutes – for those States which have not abolished the death penalty – a limitation on its application, in so far as it may be imposed only for the most serious crimes. For those States which have abolished the death penalty it represents an insurmountable barrier. The spirit of the article is to eliminate the death penalty as a punishment, and the limitations which it imposes are of an absolute nature.

20. In this connection, when Mr. Kindler entered Canadian territory he already enjoyed an unrestricted right to life. By extraditing him without having requested assurances that he would not be executed, Canada has denied the protection which he enjoyed and has *necessarily* exposed him to be sentenced to death and *foreseeably* to being executed. Canada has therefore violated article 6 of the Covenant.

21. Further, Canada's misinterpretation of the rule in article 6, paragraph 2, of the International Covenant on Civil and Political Rights raises the question of whether it has also violated article 5, specifically paragraph 2 thereof. The Canadian Government has interpreted article 6, paragraph 2, as authorizing the death penalty.

[t] Views, para. 8.6.

[u] I must point out that article 6 of the Extradition Treaty between Canada and the United States of America places no limit on requests for assurances. The exceptional circumstances which could provide a basis for requesting assurances form part of the Extradition Act.

For that reason it has found that Mr. Kindler's extradition, even though he will necessarily be sentenced to death and will foreseeably be executed, would not be prohibited by the Covenant, since the latter would authorize the application of the death penalty. In making such a misinterpretation of the Covenant, the State party asserts that Mr. Kindler's extradition would not be contrary to the Covenant. In this connection, then, Canada has denied Mr. Joseph John Kindler a right which he enjoyed under its jurisdiction, adducing that the Covenant would give a lesser protection – in other words, that the International Covenant on Civil and Political Rights would recognize the right to life in a lesser degree than Canadian legislation. In so far as the misinterpretation of article 6, paragraph 2, has led Canada to consider that the Covenant recognizes the right to life in a lesser degree than its domestic legislation and has used that as a pretext to extradite the author to a jurisdiction where he will certainly be executed, Canada has also violated article 5, paragraph 2, of the Covenant.

22. I have to insist that Canada has misinterpreted article 6, paragraph 2, and that, when it abolished the death penalty, it became impossible for it to apply that penalty directly in its territory, except for the military offences for which it is still in force, or indirectly through the handing-over to another State of a person who runs the risk of being executed or who will be executed. Since it abolished the death penalty, Canada has to guarantee the right to life of all persons within its jurisdiction, without any limitation.

23. One final aspect to be dealt with is the way in which Mr. Kindler was extradited, no notice being taken of the request that the author should not be extradited prior to the Committee forwarding its final Views on the communication to the State party [v] made by the Special Rapporteur on New Communications under rule 86 of the rules of procedure of the Human Rights Committee. On ratifying the Optional Protocol, Canada undertook, with the other States parties, to comply with the procedures followed in connection therewith. In extraditing Mr. Kindler without taking into account the Special Rapporteur's request, Canada failed to display the good faith which ought to prevail among the parties to the Protocol and the Covenant.

24. Moreover, this fact gives rise to the possibility that there may also have been a violation of article 26 of the Covenant. Canada has given no explanation as to why the extradition was carried out so rapidly once it was known that the author had submitted a communication to the Committee. By its censurable action in failing to observe its obligations to the international community, the State party has prevented the enjoyment of the rights which the author ought to have had as a person under Canadian jurisdiction in relation to the Optional Protocol. In so far as the Optional Protocol forms part of the Canadian legal order, all persons under Canadian jurisdiction enjoy the right to submit communications to the Human Rights Committee so that it may hear their complaints. Since it appears that Mr. Kindler was extradited on account of his nationality [w] and in so far as he has been denied the possibility of enjoying its protection in accordance with the Optional Protocol, I find that the State party has also violated article 26 of the Covenant.

25. In conclusion, I find Canada to be in violation of article 5, paragraph 2, and articles 6 and 26 of the International Covenant on Civil and Political Rights. I agree with the majority opinion that there has been no violation of article 7 of the Covenant.

Francisco Jose Aguilar Urbina

[v] Rules of procedure of the Human Rights Committee.

[w] The various passages in the Reply which refer to the relations between Canada and the United States, the 4,800 kilometres of unguarded frontier between the two countries and the growing number of extradition applications by the United States to Canada should be taken into account. The State party has indicated that United States fugitives cannot be permitted to take the non-extradition of the author in the absence of assurances as an incentive to flee to Canada.

Communication No. 488/1992

Submitted by: Nicholas Toonen on 25 December 1991
Alleged victim: The author
State party: Australia
Declared admissible: 5 November 1992 (forty-sixth session)
Date of adoption of Views: 31 March 1994 (fiftieth session)*

Subject matter: Criminalization of homosexual activity between consenting adults in private – Alleged discrimination on the basis of sexual orientation in the public and the private sphere

Procedural issues: Admissibility *ratione personae* and *ratione temporis*

Substantive issues: Arbitrary interference with one's privacy – Discrimination on the basis of "sex" – Effective remedy

Articles of the Covenant: 2 (1), 17 and 26

Article of the Optional Protocol: 1

1. The author of the communication is Nicholas Toonen, an Australian citizen born in 1964, currently residing in Hobart in the state of Tasmania, Australia. He is a leading member of the Tasmanian Gay Law Reform Group and claims to be a victim of violations by Australia of articles 2, paragraph 1; 17; and 26 of the International Covenant on Civil and Political Rights.

The facts as submitted by the author

2.1 The author is an activist for the promotion of the rights of homosexuals in Tasmania, one of Australia's six constitutive states. He challenges two provisions of the Tasmanian Criminal Code, namely, sections 122 (a) and (c) and 123, which criminalize various forms of sexual contact between men, including all forms of sexual contact between consenting adult homosexual men in private.

2.2 The author observes that the above sections of the Tasmanian Criminal Code empower Tasmanian police officers to investigate intimate aspects of his private life and to detain him, if they have reason to believe that he is involved in sexual activities which contravene the above sections. He adds that the Director of Public Prosecutions announced, in August 1988, that proceedings pursuant to sections 122 (a) and (c) and 123 would be initiated if there was sufficient evidence of the commission of a crime.

2.3 Although in practice the Tasmanian police has not charged anyone either with "unnatural sexual intercourse" or "intercourse against nature" (section 122) nor with "indecent practice between male persons" (section 123) for several years, the author argues that because of his long-term relationship with another man, his active lobbying of Tasmanian politicians and the reports about his activities in the local media, and because of his activities as a gay rights activist and gay HIV/AIDS worker, his private life and his liberty are threatened by the continued existence of sections 122 (a) and (c) and 123 of the Criminal Code.

2.4 Mr. Toonen further argues that the criminalization of homosexuality in private has not permitted him to expose openly his sexuality and to publicize his Views on reform of the relevant laws on sexual matters, as he felt that this would have been extremely prejudicial to his employment. In this context, he contends that sections 122 (a) and (c) and 123 have created the conditions for discrimination in employment, constant stigmatization, vilification, threats of physical violence and the violation of basic democratic rights.

2.5 The author observes that numerous "figures of authority" in Tasmania have made either derogatory or downright insulting remarks about homosexual men and women over the past few years. These include statements made by members of the Lower House of Parliament, municipal councillors (such as "representatives of the gay community are no better than Saddam Hussein" and "the act of homosexuality is unacceptable in any society, let alone a civilized society"), of the church and of members of the general public, whose statements have been directed against the integrity and welfare of homosexual men and women in Tasmania (such as "[g]ays want to lower society to their level" and "You are 15 times more likely to be murdered by a homosexual than a heterosexual ..."). In some public meetings, it has been suggested that all Tasmanian homosexuals should be rounded up and "dumped" on an uninhabited island, or be subjected to compulsory sterilization. Remarks such as these, the author affirms, have had the effect of creating constant stress and suspicion in what ought to be routine contacts with the authorities in Tasmania.

2.6 The author further argues that Tasmania has witnessed, and continues to witness, a "campaign of official and unofficial hatred" against homosexuals and lesbians. This campaign has made it difficult for the Tasmanian Gay Law Reform Group to disseminate information about its activities and advocate the decriminalization of homosexuality. Thus, in September 1988, for example, the Group was refused permission to put up a stand in a public square in the city of Hobart, and the author claims that he, as a leading protester against the ban, was subjected to police intimidation.

2.7 Finally, the author argues that the continued existence of sections 122 (a) and (c) and 123 of the Criminal Code of Tasmania continue to have profound and harmful impacts on many people in Tasmania, including himself, in that it fuels discrimination and violence against and harassment of the homosexual community of Tasmania.

The complaint

3.1 The author affirms that sections 122 and 123 of the Tasmanian Criminal Code violate articles 2, paragraph 1; 17; and 26 of the Covenant because:

(a) They do not distinguish between sexual activity in private and sexual activity in public and bring private activity into the public domain. In their enforcement, these provisions result in a violation of the right to privacy, since they enable the police to enter a household on the mere suspicion that two consenting adult homosexual men may be committing a criminal offence. Given the stigma attached to homosexuality in Australian society (and especially in Tasmania), the violation of the right to privacy may lead to unlawful attacks on the honour and the reputation of the individuals concerned;

(b) They distinguish between individuals in the exercise of their right to privacy on the basis of sexual activity, sexual orientation and sexual identity;

(c) The Tasmanian Criminal Code does not outlaw any form of homosexual activity between consenting homosexual women in private and only some forms of consenting heterosexual activity between adult men and women in private. That the laws in question are not currently enforced by the judicial authorities of Tasmania should not be taken to mean that homosexual men in Tasmania enjoy effective equality under the law.

3.2 For the author, the only remedy for the rights infringed by sections 122 (a) and (c) and 123 of the Criminal Code through the criminalization of all forms of sexual activity between consenting adult homosexual men in private would be the repeal of these provisions.

3.3 The author submits that no effective remedies are available against sections 122 (a) and (c) and 123. At the legislative level, state jurisdictions have primary responsibility for the enactment and enforcement of criminal law. As the Upper and Lower Houses of the Tasmanian Parliament have been deeply divided over the decriminalization of homosexual activities and reform of the Criminal Code, this potential avenue of redress is said to be ineffective. The author further observes that effective administrative remedies are not available, as they would depend on the support of a majority of members of both Houses of Parliament, support which is lacking. Finally, the author contends that no judicial remedies for a violation of the Covenant are available, as the Covenant has not been incorporated into Australian law, and Australian courts have been unwilling to apply treaties not incorporated into domestic law.

The State party's information and observations

4.1 The State party did not challenge the admissibility of the communication on any grounds, while reserving its position on the substance of the author's claims.

4.2 The State party notes that the laws challenged by Mr. Toonen are those of the state of Tasmania and only apply within the jurisdiction of that state. Laws similar to those challenged by the author once applied in other Australian jurisdictions but have since been repealed.

The Committee's decision on admissibility

5.1 During its forty-sixth session, the Committee considered the admissibility of the communication. As to whether the author could be deemed a "victim" within the meaning of article 1 of the Optional Protocol, it noted that the legislative provisions challenged by the author had not been enforced by the judicial authorities of Tasmania for a number of years. It considered, however, that the author had made reasonable efforts to demonstrate that the threat of enforcement and the pervasive impact of the continued existence of these provisions on administrative practices and public opinion had affected him and continued to affect him personally, and that they could raise issues under articles 17 and 26 of the Covenant. Accordingly, the Committee was satisfied that the author could be deemed a victim within the meaning of article 1 of the Optional Protocol, and that his claims were admissible *ratione temporis*.

5.2 On 5 November 1992, therefore, the Committee declared the communication admissible inasmuch as it appeared to raise issues under articles 17 and 26 of the Covenant.

The State party's observations on the merits and author's comments thereon

6.1 In its submission under article 4, paragraph 2, of the Optional Protocol, dated 15 September 1993, the State party concedes that the author has been a victim of arbitrary interference with his privacy, and that the legislative provisions challenged by him cannot be justified on public health or moral grounds. It incorporates into its submission the observations of the government of Tasmania, which denies that the author has been the victim of a violation of the Covenant.

6.2 With regard to article 17, the Federal Government notes that the Tasmanian government submits that article 17 does not create a "right to privacy" but only a right to freedom from arbitrary or unlawful interference with privacy, and that as the challenged laws were enacted by democratic process, they cannot be an unlawful interference with privacy. The Federal Government, after reviewing the *travaux préparatoires* of article 17, subscribes to the following definition of "private": "matters which are individual, personal, or confidential, or which are kept or removed from public observation". The State party acknowledges that based on this definition, consensual sexual activity in private is encompassed by the concept of "privacy" in article 17.

6.3 As to whether sections 122 and 123 of the Tasmanian Criminal Code "interfere" with the author's privacy, the State party notes that the Tasmanian authorities advised that there is no policy to treat investigations or the prosecution of offences under the disputed provisions any differently from the investigation or prosecution of offences under the Tasmanian Criminal Code in general, and that the most recent prosecution under the challenged provisions dates back to 1984. The State party

acknowledges, however, that in the absence of any specific policy on the part of the Tasmanian authorities not to enforce the laws, the risk of the provisions being applied to Mr. Toonen remains, and that this risk is relevant to the assessment of whether the provisions "interfere" with his privacy. On balance, the State party concedes that Mr. Toonen is personally and actually affected by the Tasmanian laws.

6.4 As to whether the interference with the author's privacy was arbitrary or unlawful, the State party refers to the *travaux préparatoires* of article 17 and observes that the drafting history of the provision in the Commission on Human Rights appears to indicate that the term "arbitrary" was meant to cover interferences which, under Australian law, would be covered by the concept of "unreasonableness". Furthermore, the Human Rights Committee, in its general comment 16 (32) on article 17, states that the "concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be ... reasonable in the particular circumstances".[1] On the basis of this and the Committee's jurisprudence on the concept of "reasonableness", the State party interprets "reasonable" interferences with privacy as measures which are based on reasonable and objective criteria and which are proportional to the purpose for which they are adopted.

6.5 The State party does not accept the argument of the Tasmanian authorities that the retention of the challenged provisions is partly motivated by a concern to protect Tasmania from the spread of HIV/AIDS, and that the laws are justified on public health and moral grounds. This assessment in fact goes against the National HIV/AIDS Strategy of the Government of Australia, which emphasizes that laws criminalizing homosexual activity obstruct public health programmes promoting safer sex. The State party further disagrees with the Tasmanian authorities' contention that the laws are justified on moral grounds, noting that moral issues were not at issue when article 17 of the Covenant was drafted.

6.6 None the less, the State party cautions that the formulation of article 17 allows for some infringement of the right to privacy if there are reasonable grounds, and that domestic social mores may be relevant to the reasonableness of an interference with privacy. The State party observes that while laws penalizing homosexual activity existed in the past in other Australian states, they have since been repealed with the exception of Tasmania. Furthermore, discrimination on the basis of homosexuality or sexuality is unlawful in three of six Australian states and the two self-governing internal Australian territories. The Federal Government has declared sexual preference to be a ground of discrimination that may be invoked under ILO Convention No. 111 (Discrimination in Employment or Occupation Convention), and has created a mechanism through which complaints about discrimination in employment on the basis of sexual preference may be considered by the Australian Human Rights and Equal Opportunity Commission.

6.7 On the basis of the above, the State party contends that there is now a general Australian acceptance that no individual should be disadvantaged on the basis of his or her sexual orientation. Given the legal and social situation in all of Australia except Tasmania, the State party acknowledges that a complete prohibition on sexual activity between men is unnecessary to sustain the moral fabric of Australian society. On balance, the State party "does not seek to claim that the challenged laws are based on reasonable and objective criteria".

6.8 Finally, the State party examines, in the context of article 17, whether the challenged laws are a proportional response to the aim sought. It does not accept the argument of the Tasmanian authorities that the extent of interference with personal privacy occasioned by sections 122 and 123 of the Tasmanian Criminal Code is a proportional response to the perceived threat to the moral standards of Tasmanian society. In this context, it notes that the very fact that the laws are not enforced against individuals engaging in private, consensual sexual activity indicates that the laws are not essential to the protection of that society's moral standards. In the light of all the above, the State party concludes that the challenged laws are not reasonable in the circumstances, and that their interference with privacy is arbitrary. It notes that the repeal of the laws has been proposed at various times in the recent past by Tasmanian governments.

6.9 In respect of the alleged violation of article 26, the State party seeks the Committee's guidance as to whether sexual orientation may be subsumed under the term "... or other status" in article 26. In this context, the Tasmanian authorities concede that sexual orientation is an "other status" for the purposes of the Covenant. The State party itself, after review of the *travaux préparatoires*, the Committee's general comment on articles 2 and 26 and its jurisprudence under these provisions, contends that there "appears to be a strong argument that the words of the two articles should not be read

[1] *Official Records of the General Assembly, Forty-third Session, Supplement No. 40* (A/43/40), annex VI, general comment 16 (32), para. 4.

restrictively". The formulation of the provisions "without distinction of any kind, such as" and "on any ground such as" support an inclusive rather than exhaustive interpretation. While the *travaux préparatoires* do not provide specific guidance on this question, they also appear to support this interpretation.

6.10 The State party continues that if the Committee considers sexual orientation as "other status" for purposes of the Covenant, the following issues must be examined:

(a) Whether Tasmanian laws draw a distinction on the basis of sex or sexual orientation;

(b) Whether Mr. Toonen is a victim of discrimination;

(c) Whether there are reasonable and objective criteria for the distinction;

(d) Whether Tasmanian laws are a proportional means to achieve a legitimate aim under the Covenant.

6.11 The State party concedes that section 123 of the Tasmanian Criminal Code clearly draws a distinction on the basis of sex, as it prohibits sexual acts only between males. If the Committee were to find that sexual orientation is an "other status" within the meaning of article 26, the State party would concede that this section draws a distinction on the basis of sexual orientation. As to the author's argument that it is necessary to consider the impact of sections 122 and 123 together, the State party seeks the Committee's guidance on "whether it is appropriate to consider section 122 in isolation or whether it is necessary to consider the combined impact of sections 122 and 123 on Mr. Toonen".

6.12 As to whether the author is a victim of discrimination, the State party concedes, as referred to in paragraph 6.3 above, that the author is actually and personally affected by the challenged provisions, and accepts the general proposition that legislation does affect public opinion. However, the State party contends that it has been unable to ascertain whether all instances of anti-homosexual prejudice and discrimination referred to by the author are traceable to the effect of sections 122 and 123.

6.13 Concerning the issue of whether the differentiation in treatment in sections 122 and 123 is based on reasonable and objective criteria, the State party refers, *mutatis mutandis*, to its observations made in respect of article 17 (paragraphs 6.4 to 6.8 above). In a similar context, the State party takes issue with the argument of the Tasmanian authority that the challenged laws do not discriminate between classes of citizens but merely identify acts which are unacceptable to the Tasmanian community. This, according to the State party, inaccurately reflects the domestic perception of the purpose or the effect of the challenged provisions. While they specifically target acts, their impact is to distinguish an identifiable class of individuals and to prohibit certain of their acts. Such laws thus are clearly understood by the community as being directed at male homosexuals as a group. Accordingly, if the Committee were to find the Tasmanian laws discriminatory which interfere with privacy, the State party concedes that they constitute a discriminatory interference with privacy.

6.14 Finally, the State party examines a number of issues of potential relevance in the context of article 26. As to the concept of "equality before the law" within the meaning of article 26, the State party argues that the complaint does not raise an issue of procedural inequality. As regards the issue of whether sections 122 and 123 discriminate in "equal protection of the law", the State party acknowledges that if the Committee were to find the laws to be discriminatory, they would discriminate in the right to equal protection of the law. Concerning whether the author is a victim of prohibited discrimination, the State party concedes that sections 122 and 123 do have an actual effect on the author and his complaint does not, as affirmed by the Tasmanian authorities, constitute a challenge *in abstracto* to domestic laws.

7.1 In his comments, the author welcomes the State party's concession that sections 122 and 123 violate article 17 of the Covenant but expresses concern that the argumentation of the Government of Australia is entirely based on the fact that he is threatened with prosecution under the aforementioned provisions and does not take into account the general adverse effect of the laws on himself. He further expresses concern, in the context of the "arbitrariness" of the interference with his privacy, that the State party has found it difficult to ascertain with certainty whether the prohibition on private homosexual activity represents the moral position of a significant portion of the Tasmanian populace. He contends that, in fact, there is significant popular and institutional support for the repeal of Tasmania's anti-gay criminal laws, and provides a detailed list of associations and groups from a broad spectrum of Australian and Tasmanian society, as well as a detailed survey of national and international concern about gay and lesbian rights in general and Tasmania's anti-gay statutes in particular.

7.2 In response to the Tasmanian authorities' argument that moral considerations must be taken into account when dealing with the right to privacy, the author notes that Australia is a pluralistic and multi-cultural society whose citizens have different and at times conflicting moral codes. In these circumstances it must be the proper role of criminal

laws to entrench these different codes as little as possible; in so far as some values must be entrenched in criminal codes, these values should relate to human dignity and diversity.

7.3 As to the alleged violations of articles 2, paragraph 1, and 26, the author welcomes the State party's willingness to follow the Committee's guidance on the interpretation of these provisions but regrets that the State party has failed to give its own interpretation of these provisions. This, he submits, is inconsistent with the domestic Views of the Government of Australia on these provisions, as it has made clear domestically that it interprets them to guarantee freedom from discrimination and equal protection of the law on grounds of sexual orientation. He proceeds to review recent developments in Australia on the status of sexual orientation in international human rights law and notes that before the Main Committee of the World Conference on Human Rights, Australia made a statement which "remains the strongest advocacy of ... gay rights by any Government in an international forum". The author submits that Australia's call for the proscription, at the international level, of discrimination on the grounds of sexual preference is pertinent to his case.

7.4 Mr. Toonen further notes that in 1994, Australia will raise the issue of sexual orientation discrimination in a variety of forums: "It is understood that the National Action Plan on Human Rights which will be tabled by Australia in the Commission on Human Rights early next year will include as one of its objectives the elimination of discrimination on the grounds of sexual orientation at an international level".

7.5 In the light of the above, the author urges the Committee to take account of the fact that the State party has consistently found that sexual orientation is a protected status in international human rights law and, in particular, constitutes an "other status" for purposes of articles 2, paragraph 1, and 26. The author notes that a precedent for such a finding can be found in several judgements of the European Court of Human Rights.[2]

7.6 As to the discriminatory effect of sections 122 and 123 of the Tasmanian Criminal Code, the author reaffirms that the *combined* effect of the provisions is discriminatory because together they outlaw all forms of intimacy between men. Despite its apparent neutrality, section 122 is said to be by itself discriminatory. In spite of the gender neutrality of Tasmanian laws against "unnatural sexual intercourse", this provision, like similar and now repealed laws in different Australian states, has been enforced far more often against men engaged in homosexual activity than against men or women who are heterosexually active. At the same time, the provision criminalizes an activity practised more often by men sexually active with other men than by men or women who are heterosexually active. The author contends that in its general comment on article 26 and in some of its Views, the Human Rights Committee itself has accepted the notion of "indirect discrimination".[3]

7.7 Concerning the absence of "reasonable and objective criteria" for the differentiation operated by sections 122 and 123, Mr. Toonen welcomes the State party's conclusion that the provisions are not reasonably justified on public health or moral grounds. At the same time, he questions the State party's ambivalence about the moral perceptions held among the inhabitants of Tasmania.

7.8 Finally, the author develops his initial argument related to the link between the existence of anti-gay criminal legislation and what he refers to as "wider discrimination", i.e. harassment and violence against homosexuals and anti-gay prejudice. He argues that the existence of the law has adverse social and psychological impacts on himself and on others in his situation and cites numerous recent examples of harassment of and discrimination against homosexuals and lesbians in Tasmania.[4]

7.9 Mr. Toonen explains that since lodging his complaint with the Committee, he has continued to be the subject of personal vilification and harassment. This occurred in the context of the debate on gay law reform in Tasmania and his role as a leading voluntary worker in the Tasmanian community welfare sector. He adds that more importantly, since filing his complaint, he lost his employment partly as a result of his communication before the Committee.

7.10 In this context, he explains that when he submitted the communication to the Committee, he had been employed for three years as General Manager of the Tasmanian AIDS Council (Inc.). His employment was terminated on 2 July 1993 following an external review of the Council's work which had been imposed by the Tasmanian government, through the Department of Community

---

[2] *Dudgeon v. the United Kingdom of Great Britain and Northern Ireland*, judgment of 22 October 1981, paras. 64-70; *Norris v. Ireland*, judgment of 26 October 1988, paras. 39-47; *Modinos v. Cyprus*, judgment of 22 April 1993, paras. 20-25.

[3] The author refers to the Committee's Views in case No. 208/1986 (*Bhinder v. Canada*), adopted on 9 November 1989, paras. 6.1 and 6.2 (see *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40* (A/45/40), annex IX.E).

[4] These examples are documented and kept in the case file.

and Health Services. When the Council expressed reluctance to dismiss the author, the Department threatened to withdraw the Council's funding unless Mr. Toonen was given immediate notice. Mr. Toonen submits that the action of the Department was motivated by its concerns over his high profile complaint to the Committee and his gay activism in general. He notes that his complaint has become a source of embarrassment to the Tasmanian government, and emphasizes that at no time had there been any question of his work performance being unsatisfactory.

7.11 The author concludes that sections 122 and 123 continue to have an adverse impact on his private and his public life by creating the conditions for discrimination, continuous harassment and personal disadvantage.

Examination of the merits

8.1 The Committee is called upon to determine whether Mr. Toonen has been the victim of an unlawful or arbitrary interference with his privacy, contrary to article 17, paragraph 1, and whether he has been discriminated against in his right to equal protection of the law, contrary to article 26.

8.2 In so far as article 17 is concerned, it is undisputed that adult consensual sexual activity in private is covered by the concept of "privacy", and that Mr. Toonen is actually and currently affected by the continued existence of the Tasmanian laws. The Committee considers that sections 122 (a) and (c) and 123 of the Tasmanian Criminal Code "interfere" with the author's privacy, even if these provisions have not been enforced for a decade. In this context, it notes that the policy of the Department of Public Prosecutions not to initiate criminal proceedings in respect of private homosexual conduct does not amount to a guarantee that no actions will be brought against homosexuals in the future, particularly in the light of undisputed statements of the Director of Public Prosecutions of Tasmania in 1988 and those of members of the Tasmanian Parliament. The continued existence of the challenged provisions therefore continuously and directly "interferes" with the author's privacy.

8.3 The prohibition against private homosexual behaviour is provided for by law, namely, sections 122 and 123 of the Tasmanian Criminal Code. As to whether it may be deemed arbitrary, the Committee recalls that pursuant to its general comment 16 (32) on article 17, the "introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by the law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the circumstances".[5] The Committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

8.4 While the State party acknowledges that the impugned provisions constitute an arbitrary interference with Mr. Toonen's privacy, the Tasmanian authorities submit that the challenged laws are justified on public health and moral grounds, as they are intended in part to prevent the spread of HIV/AIDS in Tasmania, and because, in the absence of specific limitation clauses in article 17, moral issues must be deemed a matter for domestic decision.

8.5 As far as the public health argument of the Tasmanian authorities is concerned, the Committee notes that the criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV. The Government of Australia observes that statutes criminalizing homosexual activity tend to impede public health programmes "by driving underground many of the people at the risk of infection". Criminalization of homosexual activity thus would appear to run counter to the implementation of effective education programmes in respect of the HIV/AIDS prevention. Secondly, the Committee notes that no link has been shown between the continued criminalization of homosexual activity and the effective control of the spread of the HIV/AIDS virus.

8.6 The Committee cannot accept either that for the purposes of article 17 of the Covenant, moral issues are exclusively a matter of domestic concern, as this would open the door to withdrawing from the Committee's scrutiny a potentially large number of statutes interfering with privacy. It further notes that with the exception of Tasmania, all laws criminalizing homosexuality have been repealed throughout Australia and that, even in Tasmania, it is apparent that there is no consensus as to whether sections 122 and 123 should not also be repealed. Considering further that these provisions are not currently enforced, which implies that they are not deemed essential to the protection of morals in Tasmania, the Committee concludes that the provisions do not meet the "reasonableness" test in the circumstances of the case, and that they arbitrarily interfere with Mr. Toonen's right under article 17, paragraph 1.

8.7 The State party has sought the Committee's guidance as to whether sexual orientation may be considered an "other status" for the purposes of article 26. The same issue could arise under article 2, paragraph 1, of the Covenant. The Committee confines itself to noting, however, that in its view,

[5] See footnote 1.

the reference to "sex" in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.

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 reveal a violation of articles 17, paragraph 1, *juncto* 2, paragraph 1, of the Covenant.

10. Under article 2, paragraph 3 (a), of the Covenant, the author, as a victim of a violation of articles 17, paragraph 1, *juncto* 2, paragraph 1, of the Covenant, is entitled to a remedy. In the opinion of the Committee, an effective remedy would be the repeal of sections 122 (a) and (c) and 123 of the Tasmanian Criminal Code.

11. Since the Committee has found a violation of Mr. Toonen's rights under articles 17, paragraph 1, and 2, paragraph 1, of the Covenant requiring the repeal of the offending law, the Committee does not consider it necessary to consider whether there has also been a violation of article 26 of the Covenant.

12. The Committee would wish to receive, within 90 days of the date of the transmittal of its Views, information from the State party on the measures taken to give effect to the Views.

---

* The text of an individual opinion submitted by Mr. Bertil Wennergren is appended.

APPENDIX

Individual opinion submitted by Mr. Bertil Wennergren under rule 94, paragraph 3, of the rules of procedure of the Human Rights Committee

I do not share the Committee's view in paragraph 11 that it is unnecessary to consider whether there has also been a violation of article 26 of the Covenant, as the Committee concluded that there had been a violation of Mr. Toonen's rights under articles 17, paragraph 1, and 2, paragraph 1, of the Covenant. In my opinion, a finding of a violation of article 17, paragraph 1, should rather be deduced from a finding of violation of article 26. My reasoning is the following.

Section 122 of the Tasmanian Criminal Code outlaws sexual intercourse between men and between women. While section 123 also outlaws indecent sexual contacts between consenting men in open or in private, it does not outlaw similar contacts between consenting women. In paragraph 8.7, the Committee found that in its view, the reference to the term "sex" in article 2, paragraph 1, and in article 26 is to be taken as including sexual orientation. I concur with this view, as the common denominator for the grounds "race, colour and sex" are biological or genetic factors. This being so, the criminalization of certain behaviour operating under sections 122 (a) and (c) and 123 of the Tasmanian Criminal Code must be considered incompatible with article 26 of the Covenant.

Firstly, these provisions of the Tasmanian Criminal Code prohibit sexual intercourse between men and between women, thereby making a distinction between heterosexuals and homosexuals. Secondly, they criminalize other sexual contacts between consenting men without at the same time criminalizing such contacts between women. These provisions therefore set aside the principle of equality before the law. It should be emphasized that it is the criminalization as such that constitutes discrimination of which individuals may claim to be victims, and thus violates article 26, notwithstanding the fact that the law has not been enforced over a considerable period of time. The designated behaviour none the less remains a criminal offence.

Unlike the majority of the articles in the Covenant, article 17 does not establish any true right or freedom. There is no right to freedom or liberty of privacy, comparable to the right of liberty of the person, although article 18 guarantees a right to freedom of thought, conscience and religion as well as a right to manifest one's religion or belief in private. Article 17, paragraph 1, merely mandates that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, etc. Furthermore, the provision does not, as do other articles of the Covenant, specify on what grounds a State party may interfere by way of legislation.

A State party is therefore in principle free to interfere by law with the privacy of individuals on any discretionary grounds, not just on grounds related to public safety, order, health, morals, or the fundamental rights and freedoms of others, as spelled out in other provisions of the Covenant. However, under article 5, paragraph 1, nothing in the Covenant may be interpreted as implying for a State a right to perform any act aimed at the limitation of any of the rights and freedoms recognized therein to a greater extent than is provided for in the Covenant.

The discriminatory criminal legislation at issue here is not strictly speaking "unlawful", but it is incompatible with the Covenant, as it limits the right to equality before the law. In my view, the criminalization operating under sections 122 and 123 of the Tasmanian Criminal Code interferes with privacy to an unjustifiable extent and, therefore, also constitutes a violation of article 17, paragraph 1.

A similar conclusion cannot, in my opinion, be reached on article 2, paragraph 1, of the Covenant, as article 17, paragraph 1 protects merely against arbitrary and unlawful interferences. It is not possible to find legislation unlawful merely by reference to article 2, paragraph 1, unless one were to reason in a circuitous way. What makes the interference in this case "unlawful" follows from articles 5, paragraph 1, and 26, and not from article 2, paragraph 1. I therefore conclude that the challenged provisions of the Tasmanian Criminal Code and their impact on the author's situation are in violation of article 26, in conjunction with articles 17, paragraph 1, and 5, paragraph 1, of the Covenant.

I share the Committee's opinion that an effective remedy would be the repeal of sections 122 (a) and (c) and 123, of the Tasmanian Criminal Code.

Communication No. 492/1992

Submitted by: Lauri Peltonen on 23 December 1991 (represented by counsel)
Alleged victim: The author
State party: Finland
Declared admissible: 16 October 1992 (forty-sixth session)
Date of adoption of Views: 21 July 1994 (fifty-first session)*

Subject matter: Denial of a passport for failure to report to the military service

Procedural issues: Travaux préparatoires

Substantive issues: Right to leave any country

Article of the Covenant: 12

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

1. The author of the communication is Lauri Peltonen, a Finnish citizen born in 1968, residing in Stockholm, Sweden, since 1986. He claims to be a victim of a violation by Finland of article 12 of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as submitted by the author

2.1 In June 1990, the author applied for a passport at the Finnish Embassy in Stockholm. The Embassy refused to issue a passport, on the ground that Mr. Peltonen had failed to report for his military service in Finland on a specified date. Under section 9, subsection 1 (6), of the Passport Act of 1986, delivery of a passport "may be denied" to persons aged 17 to 30 if they are unable to demonstrate that the performance of military service is not an obstacle to the issuance of a passport.

2.2 The author appealed against the Embassy's decision to the Uusimaa Provincial Administrative Court, invoking his right to leave any country. By decision of 22 January 1991, the Court upheld the Embassy's decision. The author then appealed to the Supreme Administrative Court, which confirmed the previous decisions on 19 September 1991. With this, it is submitted, available domestic remedies have been exhausted.

2.3 The author notes that the administrative and judicial instances seized of his case did not justify the denial of a passport. In its decision, the Supreme Administrative Court merely observed that the Embassy had the right, under Section 9, subsection l (6), not to issue a passport to the author because he was a conscript and had failed to prove that military service was no obstacle for obtaining a passport. In this context, it is noted that the Government of Finland stated during the examination of its third periodic report under article 40 of the Covenant in October 1990 that:

> "... there might have been some misunderstanding concerning the question of obligation of military service. A passport could be issued to a person under duty of performing his military service and conscription, but its validity must temporarily expire during the period of military service. There is no de facto possibility for a conscript to leave the country during his military service and accordingly there will be no derogation from article 12 by withholding a valid passport during that period, which is only ... 8 to 11 months."[1]

2.4 The author contends that the interpretation by the Supreme Court of the words "may be denied" in section 9, subsection 1 (6), means that Finnish Embassies around the world have full discretion to deny passports to Finnish citizens until they reach the age of 30. The duration of the denial of a passport is likely to exceed by far the period of "8 to 11 months", as it did in this case. The author acknowledges that failure to report for military service is an offence under the Finnish Military Service Act. He observes, however, that the authorities could have instituted criminal or disciplinary proceedings against him; failure to do so is said to further underline that the denial of a passport was and continues to be used as a de facto punishment.

The complaint

3. It is submitted that the denial of a passport pursuant to section 9, subsection 1 (6), of the Passport Act is (a) a disproportionate punishment in relation to the offence of failure to report for military service, (b) a violation of the author's right, under article 12 of the Covenant, to leave any country, and (c) a punishment not prescribed by law.

The State party's information and observations

4. The State party concedes that domestic remedies have been exhausted, and that the claim is admissible *ratione materiae* and sufficiently substantiated. Accordingly, the State party raises no objections to the admissibility of the communication.

---

[1] CCPR/C/SR.1016, para. 21.

The Committee's decision on admissibility

5.1 During its forty-sixth session, the Committee considered the admissibility of the communication. It noted that the State party did not raise objections to the admissibility of the communication. It nevertheless *ex officio* examined the author's claims, and concluded that the admissibility criteria laid down in articles 2, 3 and 5, paragraph 2, of the Optional Protocol had been met.

5.2 On 16 October 1992, the Committee declared the communication admissible.

The State party's submission on the merits and the author's comments thereon

6.1 In its submission under article 4, paragraph 2, of the Optional Protocol, the State party explains the operation of the relevant Finnish law. It notes that section 7, paragraph 1, of the Constitution Act (94/1919) provides for the right of a Finnish citizen to leave his/her own country; this is further spelled out in the Passport Act (642/1986) and Passport Decree (643/86), which regulate the right to travel abroad. Furthermore, section 75, paragraph 1, of the Constitution Act regulates the obligation of Finnish citizens to participate in the defense of the country; this is spelled out in the Military Service Act (452/50) and the Non-Military Service Act (1723/91). In relation to the legal obligation of military service, both Acts contain certain restrictions on a conscript's freedom of movement. The State party adds that the Nordic States have agreed that their citizens do not need a passport to travel within the area of the Nordic States and that passport inspections on their borders have been abolished.

6.2 Section 3, paragraph 1, of the Passport Act provides that a Finnish citizen shall obtain a passport, unless otherwise stipulated in the Act. As stated above (see para. 2.1), a passport may be denied to persons aged 17 to 30 if they are unable to demonstrate that the performance of military service is not an obstacle to the issuance of a passport (sect. 9, subsect. 1 (6)). In such cases, a request for a passport should be accompanied, with a police clearance certificate, a military passport, a call-up certificate, an order to enter into military service, a call-up certificate exempting the applicant from active military service during peace-time, a call-up certificate entirely exempting him from active military service or a certificate of non-military service (section 4 of the Passport Decree). A Finnish citizen living abroad and falling into the category of section 9 (1) (6) must obtain a statement from the police of his last place of residence in Finland, showing that he is not liable for military service.

6.3 As to the authorities' discretion to deny a person a passport or not, the State party points out that when considering a passport application from a person falling within the category of section 9 (1), consideration must be given to "the significance of travel related to the applicant's family relations, state of health, subsistence, profession and other circumstances", in accordance with section 10 of the Act.[2] In this context, the State party refers to the *ratio legis* of the Passport Act as explained in Parliament, where it was noted that the decision to grant a passport is taken by legal discretion, based on acceptable objective grounds. Furthermore, according to a circular of the Legal Office of the Ministry for Foreign Affairs of 22 June 1992 (No. 0IK-4, 1988/1594/68.40), an Embassy must consider its decisions in Section 9 (1) cases on the basis of the statement obtained from the police of the applicant's last residence in Finland, and must take into account the circumstances of the case and the grounds referred to in section 10. Thus, the Embassy's discretion to grant a passport is not unlimited, since the Passport Act contains clearly specified grounds for rejecting a request for a passport.

6.4 As regards the time dimension, it is submitted that the application of section 9 (1)(6) of the Passport Act cannot be limited solely to the period of a person's actual military service, but that it necessarily covers a more extensive period before and after such service, in order to secure that a conscript really performs his military service. The State party explains that for a person who has participated in his call-up for military or alternative service, and who has been granted a deferral, e.g. for up to three years, of performance of such service a passport is generally granted up to 28 years of age. Once the person liable for military service has reached the age of 28, the passport is generally granted for a shorter period of time, so that by the age of 30, he must perform his military service. Generally, citizens are not called for military service after the age of 30.

6.5 The State party notes that Mr. Peltonen did not react to his military call-up in 1987, and that he has disregarded all subsequent call-ups. Pursuant to section 42 of the Military Service Act, a person liable for military service who commits the offence referred to in section 40 of the Act (non-appearance in a military call-up) and who, after investigation, is deemed fit for service, can immediately be called to service, unless he has reached the age of 30 years. Thus, if the author arrives in Finland, he may be subjected to a preliminary enquiry as a result of his non-appearance in the military call-up, be disciplined for the offence and immediately called to service. The State party points out that the author, by

[2] Section 10 is entitled "Considering the restrictions and obstacles for the granting of a passport".

arguing before the courts that he is not under an obligation to carry out the military duties imposed by the State, referred to one of the basic purposes of the provision of section 9 (1) (6) of the Passport Act, namely, to make sure that those who have not fulfilled their civic obligation of military or alternative service will do so and not avoid it by any other means. The State party further notes that the author did not show that his liability for military service did not constitute a bar to the issuing of a passport, and that there were no changes in his situation that would have warranted another conclusion. Furthermore, no mention was made in his request of any of the grounds referred to in section 10. In this context, the State party emphasizes that the author does not require a passport, for example, for professional reasons, and that he merely needed one for holiday travel.

6.6 The State party dismisses as groundless the claim that the denial of a passport is used as a de facto punishment for the author's failure to report for military service. It submits that the denial of the passport is based on considerations which are specified in the Constitution Act, Passport Act and Passport Decree, and which are related to the Military Service Act. The denial of a passport neither constitutes a punishment nor in any other way replaces the investigation of, and the corresponding punishment for, the offence of failing to report for military service. If the author returns to Finland and is arrested, his failure to attend the call-ups will be investigated and sanctioned. However, the offence cannot serve as a basis for an extradition request.

6.7 The State party notes that, pursuant to article 12, paragraph 3, of the Covenant, the right to leave any country may be subject to restrictions which are provided for by law, are necessary to protect national security and public order (*ordre public*), and are consistent with the other rights recognized in the Covenant. For the State party, it is clear from the above that the Passport Act, which was passed by Parliament, is based on the Constitution Act and is linked to the Military Service Act, fulfils the requirement of "provided by law". The State party further submits that the competent authorities and tribunals have affirmed that the provisions of the Passport Act are an adequate legal basis in the author's case, and that their assessment of the case is neither arbitrary nor unreasonable.

6.8 As regards the legitimate aim of the restriction, the State party asserts that the denial of a passport falls under the notion of "public order (*ordre public*)", within the meaning of article 12, paragraph 3; the denial of a passport to a conscript has additional, even if indirect, links to the notion of "national security". It argues that the authorities' decision to reject the author's application for a passport was necessary for the protection of public order, and constituted an interference by the public authorities with the author's right to leave the country under the relevant provisions of the Passport Act, which was, however, justified. It concludes that the denial of a passport in the case was also proportional in relation to the author's right to leave any country, and that the restriction is consistent with the other rights recognized by the Covenant.

7.1 Counsel, in his comments, challenges the State party's contention that when applying the Passport Act, the authorities follow precise legal rules that circumscribe their discretion. In this context, he notes that, during consideration of the third periodic report of Finland by the Committee, several Committee members expressed concern about the restrictions on the issuance of passports under the Passport Act and Decree.[3] Moreover, after the examination of the report, the Ministry for Foreign Affairs recommended to the Ministry of the Interior that the Passport Act be amended. Counsel further notes that the circular mentioned in the State party's submission (para. 6.3) is dated 22 June 1992, that is, after Mr. Peltonen's case was decided by the administrative and judicial authorities and after he had submitted the case to the Committee.

7.2 Counsel submits that article 12 of the Covenant does not make any distinction between travel for professional reasons and travel for holiday purposes; he argues that the right to freedom of movement does not allow States parties to draw such artificial distinctions.

7.3 The author does not challenge the State party's position that a State must have some means at its disposal to secure that conscripts actually perform their military service; he submits that what is at issue in the case is not whether the State party is allowed to take "some measures", but whether the measures taken in the case are acceptable in light of the provisions of the Covenant. If the State party wishes to take "some measures" to secure the performance of military service, it must take legislative action, for example, by amending the Criminal Code. It is submitted that if the State does not take such measures, it cannot use the Passport Act as a legal basis for a de facto punishment lasting for more than 10 years.

Examination of the merits

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

---

[3] CCPR/C/SR.1016, see in particular paragraphs 19 and 35-40.

8.2 As to the question of whether the State party's refusal to issue a passport to Mr. Peltonen, pursuant to section 9, subsection 1 (6), of the Finnish Passport Act, violates his right, under article 12, paragraph 2, of the Covenant, to leave any country, the Committee observes that a passport is a means of enabling an individual "to leave any country, including his own" as required by article 12, paragraph 2. The Committee further observes that, pursuant to article 12, paragraph 3, the right to leave any country may be subject to such restrictions as are "provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the ... Covenant". There are, therefore, circumstances in which a State, if its law so provides, may refuse a passport to one of its citizens.

8.3 The *travaux préparatoires* to article 12, paragraph 3, of the Covenant reveal that it was agreed upon that the right to leave the country could not be claimed, *inter alia*, in order to avoid such obligations as national service.[4] Thus, States parties to the Covenant, whose laws institute a system of mandatory national service may impose reasonable restrictions on the rights of individuals who have not yet performed such service to leave the country until service is completed, provided that all the conditions laid down in article 12, paragraph 3, are complied with.

8.4 In the present case, the Committee notes that the refusal by the Finnish authorities to issue a passport to the author, indirectly affects the author's right under article 12, paragraph 2, to leave any country, since he cannot leave his country of residence, Sweden, except to enter countries that do not require a valid passport. The Committee further notes that the Finnish authorities, when denying the author a passport, acted in accordance with section 9, subsection 1 (6), of the Passport Act, and that the restrictions on the author's right were thus provided by law. The Committee observes that restrictions of the freedom of movement of individuals who have not yet performed their military service are, in principle, to be considered necessary for the protection of national security and public order. The Committee notes that the author has stated that he needs his passport for holiday travelling and that he has not claimed that the authorities' decision not to provide him with a passport was discriminatory or that it infringed any of his other rights under the Covenant. In the circumstances of the present case, therefore, the Committee finds that the restrictions placed upon the author's right to leave any country are in accordance with article 12, paragraph 3, 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 do not reveal a violation by the State party of any of the provisions of the Covenant.

---

[4] See E/CN.4/SR.106, p. 4; E/CN.4/SR.150, para. 41; E/CN.4/SR.151, para. 4 and E/CN.4/SR.315, p. 12.

---

* The text of an individual opinion submitted by Mr. Bertil Wennergren is appended.

APPENDIX

Individual opinion submitted by Mr. Bertil Wennergren pursuant to rule 94, paragraph 3, of the rules of procedure of the Committee on Human Rights

Under article 12, paragraph 2, of the Covenant, everyone shall be free to leave any country, including his own. This right shall not, according to paragraph 3 of this article, be subject to any restrictions, except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the Covenant. The *travaux préparatoires* to article 12 reveal that it was agreed that the right to leave one's country could not be claimed in order to escape legal proceedings or to avoid such obligations as national service, the payment of fines, taxes or maintenance allowances. A proposed text that "anyone who is not subject to any lawful deprivation of liberty or to any outstanding obligations with regard to national service shall be free to leave any country including his own" was rejected earlier. The limitations agreed upon are covered by the text of paragraph 3. According to section 9 of the Finnish Passport Act (Law No. 642/86), which entered into force on 1 October 1987, a passport may be denied to a person, *inter alia*, if he is liable to perform military service and is at least 17 but not yet 30 years of age, unless he shows that his liability to perform military service does not constitute an obstacle to the issue of a passport.

The Nordic States have agreed that their citizens do not require a passport to travel within the territory of the Nordic States. The author therefore could leave Finland in 1986 and take residence in Sweden without a passport. He has been residing in Sweden ever since and has disregarded all call-ups for military service by the Finnish authorities. It is therefore unsurprising that the Supreme Administrative Court of Finland rejected his appeal against the Finnish Embassy's decision to refuse to provide him with a passport. As the Court observed, he was a conscript and had failed to prove that military service was no obstacle for him to obtain a passport.

What is at issue now is not the author's right to leave Finland. Thanks to the agreement among the Nordic States, he has been able to do so without a passport. What is at issue is his right to leave "any country", which, because of the aforementioned agreement, means "any of the other Nordic countries", as he can move freely from one of them to the other. Without a passport he cannot leave any Nordic State to travel to non-Nordic countries.

To me, it is difficult to see that article 12, paragraph 3, entitles the State party to deny the author a passport on any of the grounds mentioned in this paragraph. None of them justifies the State party's prohibition on Mr. Peltonen to leave any country other than Finland. Article 12, paragraph 2, of the Covenant, in my view, obliges the State party to respect the author's freedom of leaving any country other than Finland by issuing a passport to him.

It would not be justified to interpret paragraph 3 of article 12 as entitling a State party to deny a passport to a person if a passport would enable him to leave a country other than Finland because he avoids military service in Finland. Such an interpretation would allow the State party to use and abuse the refusal of a passport as a means of exerting pressure on a conscript, so as induce him to return to Finland and perform his military service and be disciplined for his non-appearance in the military call-ups.

It is not necessary either for the protection of national security, public order or public morals to use the refusal of a passport for restrictions on a person's freedom to leave any country for such purposes. This would be entirely incompatible with the object and purpose of paragraph 3. I therefore am of the opinion that the State party has violated article 12, paragraph 2, by refusing a passport to the author, which is a prerequisite for the exercise of his freedom to leave any country.

Communication No. 500/1992

Submitted by: Joszef Debreczeny (represented by counsel)
Alleged victim: The author
State party: The Netherlands
Declared admissible: 14 October 1993 (forty-ninth session)
Date of adoption of Views: 3 April 1995 (fifty-third session)

Subject matter: Incompatibility of employment as a civil servant with membership in municipal council under Durch law

Procedural issues: None

Substantive issues: Permissible restrictions on right to be elected to public office – Differential treatment based on reasonable and objective criteria – Failure of State party to enforce applicable legislation to comparable groups in other cases

Articles of the Covenant: 2 (1), 25 and 26

Article of the Optional Protocol: 2

1. The author of the communication is Joszef Debreczeny, a citizen of the Netherlands, residing at Damwoude (municipality of Dantumadeel), the Netherlands. He claims to be the victim of a violation by the Netherlands of articles 25 and 26, *juncto* article 2, paragraph 1, of the International Covenant on Civil and Political Rights. He is represented by counsel.

Facts as submitted by the author

2.1 The author states that, in general municipal elections, he was elected to the local council of Dantumadeel on 23 March 1990. The council, however, by decision of 10 April 1990, refused to accept his credentials; it considered that the author's employment as a national police sergeant, stationed at Dantumadeel, was incompatible with membership in the municipal council; in this connection, reference was made to article 25, paragraph f, of the *Gemeentewet* (Municipalities Act), which provides that membership in the municipal council is incompatible with, *inter alia*, employment as a civil servant in subordination to local authorities.

2.2 The author appealed the decision to the Raad van State (Council of State), which, on 26 April 1990, rejected his appeal. It considered that the author, as a national police officer, stationed at Dantumadeel, worked under the direct authority of the mayor of the municipality, for purposes of maintenance of public order and performance of auxiliary tasks; according to the Raad, this subordinate position was incompatible with membership in the local council, which is chaired by the mayor.

2.3 As the Raad van State is the highest administrative court in the Netherlands, the author submits that he has exhausted domestic remedies. He further states that the matter has not been submitted to any other procedure of international investigation or settlement.

Complaint

3.1 The author submits that the refusal to accept his membership in the local council of Dantumadeel violates his rights under article 25 (a) and (b) of the Covenant. He contends that every citizen, when duly elected, should have the right to be a member of the local council of the municipality where he resides, and that the relevant regulations, as applied to him, constitute an unreasonable restriction on this right within the meaning of article 25 of the Covenant.

3.2 According to the author, his subordination to the mayor of Dantumadeel is merely of a formal character; the mayor seldom gives direct orders to police sergeants. In support of his argument he submits that appointments of national policemen are made by the Minister of Justice, and that the mayor has authority over national police officers only with respect to the maintenance of public order; for the exercise of this authority the mayor is not accountable to the municipal council, but to the Minister of Internal Affairs.

3.3 The author further alleges that article 26 of the Covenant has been violated in his case. He contends that membership in the local council is not denied to local firemen and teaching staff, although they also work in a subordinate position to the mayor of the municipality. He also submits that other municipal councils have not challenged the credentials of local police officers, who are duly elected to the council. In this connection, he mentions examples of the municipalities of Sneek and Wapenveld.

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

4.1 By submission of 27 October 1992, the State party provides information about the factual and legal background of the case. It submits that the right to vote and to stand in elections is enshrined in article 4 of the Constitution of the Netherlands, according to which every national of the Netherlands "shall have an equal right to elect the members of the general representative bodies and to stand for election as a member of those bodies, subject to the limitations and exceptions prescribed by Act of Parliament".

4.2 In agreement with the Constitution, section 25 of the Municipalities Act sets forth the positions which may not be held simultaneously with membership in a municipal council. Three groups of positions are held to be incompatible with membership: (a) positions of authority over or supervision of the municipal council; (b) positions which are subject to the supervision of a municipal administrative authority; (c) positions which by their nature cannot be combined with membership in the council. The State party explains that the rationale for these exclusions is to guarantee the integrity of municipal institutions and hence to safeguard the democratic decision-making process, by preventing a conflict of interests.

4.3 Pursuant to section 25, paragraph 1 (f), of the Act, membership in the municipal council is incompatible with a position as a public servant appointed by or on behalf of the municipal authority or subordinate to it. Exceptions to incompatibility are made for those civil servants working for the public registrar's office, those working as teaching staff at public schools and those who give their services as volunteers.

4.4 Officers in the national police force are appointed by the Minister of Justice, but are, pursuant to section 35 of the Police Act, subject to the authority of the mayor when engaged in maintaining public order. The State party argues that, since a subordinate relationship exists and consequently a conflict of interests may arise, it is reasonable not to permit police officers to become members of the municipal council in the municipality in which they serve.

4.5 As regards the admissibility of the communication, the State party concedes that domestic remedies have been exhausted. However, it contends that the incompatibility of membership in the municipal council with the author's position in the national police force, as regulated in the Municipalities Act, is a reasonable restriction to the author's right to be elected and based on objective grounds. The State party submits that the author has no claim under article 2 of the Optional Protocol and that his communication should therefore be declared inadmissible.

5.1 In his comments on the State party's submission, the author argues that no conflict of interests exists between his position as a national police officer and membership in the municipal council. He submits that the council, not the mayor, is the highest authority of the municipality and that, with regard to the maintenance of public order, the mayor is accountable to the Minister of Justice, not to the council.

5.2 The author refers to his original communication and claims that inequality of treatment exists between officers in the national police force and other public officers who are subordinate to municipal authorities. In this context, he mentions that teachers in public schools were, until 1982, also barred from membership in municipal councils but are now eligible for membership, following an amendment to the law. The author therefore argues that no reasonable ground exists to hold his position as a national police officer incompatible with membership in the municipal council.

Committee's decision on admissibility

6. At its forty-ninth session, the Committee considered the admissibility of the communication. It noted the State party's argument that the restrictions placed upon the author's eligibility for membership in the municipal council of Dantumadeel were reasonable within the meaning of article 25. The Committee considered that the question whether the restrictions were reasonable

should be considered on the merits in the light of articles 25 and 26 of the Covenant. Consequently, on 14 October 1993, the Committee declared the communication admissible.

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

7.1 By submission of 17 August 1994, the State party reiterates that the Constitution of the Netherlands guarantees the right to vote and to stand in elections, and that section 25 of the Municipalities Act, which was in force at the time of Mr. Debreczeny's election, lays down the positions deemed incompatible with membership in a municipal council. Pursuant to this section, officials subordinate to the municipal authority are precluded from membership in the municipal council. The State party recalls that the rationale for the exclusion of certain categories of persons from membership in the municipal council is to guarantee the integrity of municipal institutions and hence to safeguard the democratic decision-making process, by preventing a conflict of interests.

7.2 The State party explains that the term "municipal authority" used in section 25 of the Act encompasses the municipal council, the municipal executive and the mayor. It points out that if holders of positions subordinate to municipal administrative bodies other than the council were to become members of the council, this would also undermine the integrity of municipal administration, since the council, as the highest administrative authority, can call such bodies to account.

7.3 The State party explains that officers of the national police force, like Mr. Debreczeny, are appointed by the Minister of Justice, but that they were, according to section 35 of the Police Act in force at the time of Mr. Debreczeny's election, subordinate to part of the municipal authority, namely the mayor, with respect to the maintenance of public order and emergency duties. The mayor has the power to issue instructions to police officers for these purposes and to issue all the necessary orders and regulations; he is accountable to the council for all measures taken. Consequently, police officers as members of the municipal council would on the one hand have to obey the mayor and on the other call him to account. According to the State party, this situation would give rise to an unacceptable conflict of interests, and the democratic decision-making process would lose its integrity. The State party maintains, therefore, that the restrictions excluding police officers from membership in the council of the municipality where the officers are posted are reasonable and do not constitute a violation of article 25 of the Covenant.

7.4 With regard to the author's statements that these restrictions do not apply to members of the fire brigade and to teachers, the State party points out that section 25 of the Municipalities Act makes two exceptions to the general rule that public servants appointed by or subordinate to the municipal institutions may not be council members. These exceptions apply to those who work for the emergency services on a voluntary basis or by virtue of a statutory obligation, and to teaching staff. The State party explains that the fire brigade in the Netherlands is manned by both professionals and volunteers. Under the law, only volunteer members of the fire brigade may serve on the municipal council; professional firemen are similarly excluded from taking seats in the council of the municipality in which they serve. The State party admits that formally volunteer firemen are appointed by and subordinate to the municipal authority. In the opinion of the State party, however, the mere fact of formal subordination to the municipal council does not in itself provide sufficient reason for denying a citizen the right to be elected to the council; in addition, there must exist a real risk of a conflict arising between individuals' interests as civil servants and their interests as council members, threatening to undermine the integrity of the relationship between municipal institutions. In the light of the fact that volunteers are more independent than professionals (who depend on the post for their livelihood) *vis-à-vis* the services they work for, the State party argues that the risk of a conflict of interests for volunteers is negligible and that it would therefore not be reasonable to restrict their constitutional right to be elected in a general representative body.

7.5 The State party further explains that private schools and public schools coexist on the basis of equality in the Netherlands, and that teachers in a public school are appointed by the municipal authority. Formally, a hierarchical relationship can therefore be said to exist. The State party points out, however, that education policy in the Netherlands is pre-eminently the concern of the State and that quality requirements and funding criteria are laid down by law. Supervision of public schools is carried out at the national level by the central education inspectorate, and not by the municipal authority. A conflict of interest between obeying the municipal authority and calling it to account, as exists for police officers, is therefore not likely to arise. The State party considers therefore that a restriction on the eligibility of teachers to a municipal council would be unreasonable.

7.6 The State party further addresses the cases in which, according to the author, local policemen were not prevented from becoming members in their respective municipal councils. The State party

begins by emphasizing that the Netherlands is a decentralized unitary State, and that municipal authorities have the power to regulate and administer their own affairs. In the context of elections, municipalities themselves are responsible in the first instance to ensure that councils are lawfully and properly composed. This means that, if a candidate has been elected, the council itself decides whether he may be admitted as a member or whether there are legal obstacles that prevent him from taking his seat. Appeal against the council's decision can be lodged with an administrative court; interested parties may moreover apply to an administrative court if they are of the opinion that a certain council member was wrongfully admitted.

7.7 In the case of Sneek, mentioned by the author, the State party indicates that the police officer who was appointed to the municipal council was employed by the National Police Waterways Branch and based at Leeuwarden. The State party states that as such he was neither subordinate to nor appointed by the municipality of Sneek and that his position is therefore not incompatible with membership in the council.

7.8 In the case of Heerde, mentioned by the author, the State party admits that, between 1982 and 1990, an officer of the National Police Force, employed in the Heerde unit of the force, served as a member of the municipal council. The State party submits that this membership was unlawful; however, since no interested party contested the policeman's election to the municipal council before a court, he was able to maintain his position. The State party argues that "the mere fact that a police officer in Heerde sat unlawfully on the council of the municipality in which he was employed does not mean that Mr. Debreczeny may also sit unlawfully on the council of the municipality in which he is employed". It adds that the principle of equality cannot be invoked to reproduce a mistake made in the application of the law.

7.9 In conclusion, the State party submits that there are no reasons to find that articles 25 or 26 of the Covenant were violated in the author's case. It argues that the provisions, laid down in section 25 of the Municipalities Act, governing the compatibility of positions with membership in a municipal council are completely reasonable, and that the protection of democratic decision-making procedures requires that individuals holding certain positions be barred from membership in municipal councils if such membership would entail an unacceptable risk of a conflict of interests. To prevent this general rule from leading to an unreasonable curtailment of the right to stand for election exceptions have been created for volunteer firemen and teaching staff, and the incompatibility of council membership for police officers has been limited to the council of the municipality in which the person in question is employed.

8.1 In his comments on the State party's submission, counsel to the author submits that the State party's interpretation of section 25 of the Municipalities Act, that the incompatibility is limited to those police officers who are elected to the council of the municipality in which they are employed, is too narrow. He submits that the law applies to all municipalities in which the person concerned can be theoretically requested to serve. In this context, counsel points out that the membership of the police officer in the municipal council of Sneek is therefore also against the law, since, although he is posted at Leeuwarden, his working region includes Sneek.

8.2 As regards the exception made for volunteer firemen, counsel points out that volunteers do receive an emolument for services rendered and that they are appointed by the municipal authority, whereas national police officers are appointed by the Minister of Justice. As regards teaching personnel, which is appointed by the municipal authority, counsel argues that there exists a more than theoretic risk of a conflict of interests, especially in the case of a headmaster functioning as a council member. In reply to the State party's argument that the statute for teaching staff is determined on the national level, counsel points out that this is also the case for national police officers.

8.3 Counsel argues that it is not reasonable to allow teaching staff to become members of the municipal council while maintaining the incompatibility for police officers. In this context, it is argued that 99 per cent of the national police officers do not receive direct orders from the mayor, but from their immediate superior, with whom the mayor communicates.

8.4 Counsel further refers to the parliamentary debate in 1981 which led to the exception of teaching staff from the incompatibility rules, during which the general character of the remaining incompatibilities was deemed to be arbitrary or insufficiently motivated. In this context, counsel states that parliament defended the exception for teaching staff *inter alia* by referring to section 52 of the Municipalities Act, which states that a councillor should refrain from voting on matters in which he is personally involved. It was argued that this clause offered sufficient guarantees for proper decision-making in municipal councils. Moreover, it was argued that it is up to the electorate, the political parties and the persons concerned to ensure that the democratic rules are observed.

8.5 Counsel contends that the same arguments apply to the position of national police officers who wish to take up their seat in the municipal council.

He submits that the probability that in a few cases complications may arise does not justify the categorical prohibition which was applied to Mr. Debreczeny. He concludes therefore that the limitation of Mr. Debreczeny's right to be elected was unreasonable. In this connection, he refers to a statement made by the Government during the parliamentary discussion on the restructuring of the police force, in which it was stated that members of a regional functional police unit shall be prohibited from becoming members of the municipal council only when it is plausible that the unit in a municipality can be deployed to a significant extent for public order purposes.

Examination of the merits

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

9.2 The issue before the Committee is whether the application of the restrictions provided for in section 25 of the Municipalities Act, as a consequence of which the author was prevented from taking his seat in the municipal council of Dantumadeel to which he was elected, violated the author's right under article 25 (b) of the Covenant. The Committee notes that the right provided for by article 25 is not an absolute right and that restrictions of this right are allowed as long as they are not discriminatory or unreasonable.

9.3 The Committee notes that the restrictions on the right to be elected to a municipal council are regulated by law and that they are based on objective criteria, namely the electee's professional appointment by or subordination to the municipal authority. Noting the reasons invoked by the State party for these restrictions, in particular, to guarantee the democratic decision-making process by avoiding conflicts of interest, the Committee considers that the said restrictions are reasonable and compatible with the purpose of the law. In this context, the Committee observes that legal norms dealing with bias, for example section 52 of the Municipalities Act to which the author refers, are not apt to cover the problem of balancing interests on a general basis. The Committee observes that the author was at the time of his election to the council of Dantumadeel serving as a police officer in the national police force, based at Dantumadeel and as such for matters of public order subordinated to the mayor of Dantumadeel, who was himself accountable to the council for measures taken in that regard. In these circumstances, the Committee considers that a conflict of interests could indeed arise and that the application of the restrictions to the author does not constitute a violation of article 25 of the Covenant.

9.4 The author has also claimed that the application of the restrictions to him is in violation of article 26 of the Covenant, because (a) the restrictions do not apply to volunteer firemen and to teaching staff and (b) in two cases, police officers were allowed to become members of the council of the municipality in which they served. The Committee notes that the exception for volunteer firemen and teaching staff is provided for by law and based on objective criteria, namely, for volunteer firemen, the absence of income dependency, and, for teaching staff, the lack of direct supervision by the municipal authority. With regard to the two specific cases mentioned by the author, the Committee considers that, even if the police officers concerned were in the same position as the author and were unlawfully allowed to take up their seats in the council, the failure to enforce an applicable legal provision in isolated cases does not lead to the conclusion that its application in other cases is discriminatory.[1] In this connection, the Committee notes that the author has not claimed any specific ground for discrimination and that the State party has explained the reasons for the different treatment stating that, in one case, the facts were materially different and that, in the other, the membership was unlawful but the court never had an opportunity to review it because the case was not brought before it by any of the interested parties. The Committee concludes therefore that the facts of Mr. Debreczeny's case do not reveal a violation of article 26 of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a breach of any of the provisions of the Covenant.

---

[1] See also the Committee's decision declaring inadmissible communication No. 273/1988 (*B.d.B. v. the Netherlands*), adopted on 30 March 1989, in which the Committee stated that it is "not competent to examine errors allegedly committed in the application of laws concerning persons other than the authors of a communication" (para. 6.6).

Communication No. 511/1992

Submitted by: Ilmari Länsman *et al.* (represented by counsel) on 11 June 1992
Alleged victim: The authors
State party: Finland
Declared admissible: 14 October 1993 (forty-ninth session)
Date of adoption of Views: 26 October 1994 (fifty-second session)

Subject matter: Authorization of quarrying on traditional Sami herding territory

Procedural issues: Effectiveness of domestic remedies – Consideration of request for interim measures of protection

Substantive issues: Minority rights – Economic activities as an essential element of a minority culture – Proportionate measures in the interest of the national economy

Article of the Covenant: 27

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

1. The authors of the communication are Ilmari Länsman and forty-seven other members of the Muotkatunturi Herdsmen's Committee and members of the Angeli local community. They claim to be the victims of a violation by Finland of article 27 of the International Covenant on Civil and Political Rights. They are represented by counsel.

The facts as presented by the authors

2.1 The authors are all reindeer breeders of Sami ethnic origin from the area of Angeli and Inari; they challenge the decision of the Central Forestry Board to pass a contract with a private company, Arktinen Kivi Oy (Arctic Stone Company) in 1989, which would allow the quarrying of stone in an area covering ten hectares on the flank of the mountain Etela-Riutusvaara. Under the terms of the initial contract, this activity would be authorized until 1993.

2.2 The members of the Muotkatunturi Herdsmen's Committee occupy an area ranging from the Norwegian border in the West, to Kaamanen in the East, comprising both sides on the road between Inari and Angeli, a territory traditionally owned by them. The area is officially administered by the Central Forestry Board. For reindeer herding purposes, special pens and fences, designed for example to direct the reindeers to particular pastures or locations, have been built around the village of Angeli. The authors point out that the question of ownership of lands traditionally used by the Samis is disputed between the Government and the Sami community.

2.3 The authors contend that the contract signed between the Arctic Stone Company and the Central Forestry Board would not only allow the company to extract stone but also to transport it right through the complex system of reindeer fences to the Angeli-Inari road. They note that in January of 1990, the company was granted a permit by the Inari municipal authorities for the extraction of some 5,000 cubic metres of building stone, and that it obtained a grant from the Ministry of Trade and Industry for this very purpose.

2.4 The authors admit that until now, only some limited test-quarrying has been carried out; by September 1992, some 100,000 kilograms of stone (approximately 30 cubic metres) had been extracted. The authors concede that the economic value of the special type of stone concerned, anorthocite, is considerable, since it may replace marble in, above all, representative public buildings, given that it is more resistant to air-borne pollution.

2.5 The authors affirm that the village of Angeli is the only remaining area in Finland with a homogenous and solid Sami population. The quarrying and transport of anorthocite would disturb their reindeer herding activities and the complex system of reindeer fences determined by the natural environment. They add that the transport of the stone would run next to a modern slaughterhouse already under construction, where all reindeer slaughtering must be carried out as of 1994, so as to meet strict export standards.

2.6 Furthermore, the authors observe that the site of the quarry, mount Etelä-Riutusvaara, is a sacred place of the old Sami religion, where in old times reindeer were slaughtered, although the Samis now inhabiting the area are not known to have followed these traditional practices for several decades.

2.7 As to the requirement of exhaustion of domestic remedies, the authors point out that 67 members of the Angeli local community appealed, without success, against the quarrying permit to the Lapland Provincial Administrative Board as well as to the Supreme Administrative Court,[1] where they specifically invoked article 27 of the Covenant. On 16 April 1992, the Supreme

[1] It should be noted that *not* all of the authors of the communication before the Committee appealed to the Supreme Court.

Administrative Court dismissed the appeal without addressing the alleged violations of the Covenant. According to the authors, no further domestic remedies are available.

2.8 Finally, at the time of submission of the communication in June 1992, the authors, fearing that further quarrying is imminent, requested the adoption of interim measures of protection, under rule 86 of the Committee's rules of procedure, so as to avoid irreparable damage.

The complaint

3.1 The authors affirm that the quarrying of stone on the flank of the Etelä-Riutusvaara mountain and its transportation through their reindeer herding territory would violate their rights under article 27 of the Covenant, in particular their right to enjoy their own culture, which has traditionally been and remains essentially based on reindeer husbandry.

3.2 In support of their contention of a violation of article 27, the authors refer to the Views adopted by the Committee in the cases of *Ivan Kitok (No. 197/1985)* and *B. Ominayak and members of the Lubicon Lake Band v. Canada (No. 167/1984)*, as well as to ILO Convention No.169 concerning the rights of indigenous and tribal people in independent countries.

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

4.1 The State party confirms that quarrying of stone in the area claimed by the authors was made possible by a permit granted by the Angeli Municipal Board on 8 January 1990. Pursuant to Act No. 555/1981 on extractable land resources, this permit was at the basis of a contract passed between the Central Forestry Board and a private company, which is valid until 31 December 1993.

4.2 The State party opines that those communicants to the Committee who, in the matter under consideration, have applied both to the Lapland Provincial Administrative Board *and* to the Supreme Administrative Court have exhausted all available domestic remedies. As the number of individuals who appealed to the Supreme Administrative Court is however lower than the number of those who filed a complaint with the Committee, the State party considers the communication inadmissible on the ground of non-exhaustion of domestic remedies in respect of those authors who were not a party to the case before the Supreme Administrative Court.

4.3 The State party concedes that "extraordinary appeals" against the decision of the Supreme Administrative Court would have no prospect of success, and that there are no other impediments, on procedural grounds, to the admissibility of the communication. On the other hand, it submits that the authors' request for the adoption of interim measures of protection was "clearly premature", as only test quarrying on the contested site has been carried out.

5.1 In his comments, counsel rejects the State party's argument that those authors who did not personally sign the appeal to the Supreme Administrative Court failed to exhaust available domestic remedies. He argues that "[a]ll the signatories of domestic appeals and the communication have invoked the same grounds, both on the domestic level and before the Human Rights Committee. The number and identity of signatories was of no relevance for the outcome of the Supreme Court judgment, since the legal matter was the same for all the signatories of the communication...".

5.2 Counsel contends that in the light of the Committee's jurisprudence in the case of *Sandra Lovelace v. Canada*, *all* the authors should be deemed to have complied with the requirements of article 5, paragraph 2 (b), of the Optional Protocol. In this case, he recalls, the Committee decided that the Protocol does not impose on authors the obligation to seize the domestic courts if the highest domestic court has already substantially decided the question at issue. He affirms that in the case of Mr. Länsman and his co-authors, the Supreme Administrative Court has already decided the matter *in respect of all the authors*.

5.3 In further comments dated 16 August 1993, counsel notes that the lease contract for Arktinen Kivi Oy expires at the end of 1993, and that negotiations for a longer lease are underway. If agreement on a long-term lease is reached, Arktinen intends to undertake considerable investments, *inter alia* for road construction. Counsel further notes that even the limited test quarrying carried out so far has left considerable marks on Mount Etelä-Riutusvaara. Similarly, the marks and scars left by the provisional road allegedly will remain in the landscape for hundreds of years, because of extreme climatic conditions. Hence, the consequences for reindeer herding are greater and will last longer than the total amount of stone to be taken from the quarry (5,000 cubic metres) would suggest. Finally, counsel reiterates that the location of the quarry and the road leading to it are of crucial importance for the activities of the Muotkatunturi Herdsmen's Committee, because their new slaughterhouse and the area used for rounding up reindeers are situated in the immediate vicinity.

The Committee's admissibility decision

6.1 During its 49th session, the Committee considered the admissibility of the communication. It noted that the State party did not object to the

admissibility of the complaint in respect of all those authors which had appealed the quarrying permit both to the Lapland Provincial Administrative Board *and* to the Supreme Administrative Court of Finland, and that only in respect of those authors who had not personally appealed to the Supreme Administrative Court did it contend that domestic remedies had not been exhausted.

6.2 The Committee disagreed with the State party's reasoning and recalled that the facts at the basis of the decision of the Supreme Administrative Court of 16 April 1992 and of the case before the Committee were identical; had those who did not personally sign the appeal to the Supreme Administrative Court done so, their appeal would have been dismissed along with that of the other appellants. It was unreasonable to expect that if they applied to the Supreme Administrative Court now, on the same facts and with the same legal arguments, this court would hand down another decision. The Committee reiterated its earlier jurisprudence that wherever the jurisprudence of the highest domestic tribunal has decided the matter at issue, thereby eliminating any prospect of success of an appeal to the domestic courts, authors are not required to exhaust domestic remedies, for the purposes of the Optional Protocol. The Committee therefore concluded that the requirements of article 5, paragraph 2 (b), of the Optional Protocol had been met.

6.3 The Committee considered that the authors' claims pertaining to article 27 had been substantiated, for purposes of admissibility, and that they should be considered on their merits. As to the authors' request for interim measures of protection, it noted that the application of rule 86 of the rules of procedure would be premature but that the authors retained the right to address another request under rule 86 to the Committee if there were reasonably justified concerns that quarrying might resume.

6.4 On 14 October 1993, therefore, the Committee declared the communication admissible in so far as it appeared to raise issues under article 27 of the Covenant.

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

7.1 In its submission under article 4, paragraph 2, dated 26 July 1994, the State party supplements and corrects the facts of the case. Concerning the issue of ownership of the area in question, it notes that the area is state-owned, as it had been awarded to the State in a general reparceling. It was inscribed as state-owned in the land register and is regarded as such in the jurisprudence of the Supreme Court (judgment of 27 June 1984 dealing with the determination of water limits in the Inari municipality). Powers inherent in the ownership are used by the Finnish Forestry and Park Service (formerly the Central Forestry Board), which is entitled, *inter alia*, to construct roads.

7.2 The State party further provides information on another case involving planned logging and road construction activities in the Inari District, which had been decided by the Inari District Court and the Rovaniemi Court of Appeal. These courts assessed the matter at issue in the light of article 27 of the Covenant but concluded that the contested activities did not prevent the complainants from practising reindeer herding.

7.3 As to the merits of the authors' claim under article 27, the State party concedes that the concept "culture" in article 27 also covers reindeer herding as an "essential component of the Sami culture". It examines whether the quarrying permit, its exploitation, and the contract between the Central Forestry Board and Arktinen Kivi Oy violates the authors' rights under article 27. In this connection, several provisions of Act No. 555/1981 on Extractable Land resources are relevant. Thus, Section 6 stipulates that an extraction (quarrying) permit may be delivered if certain conditions laid down in the Act have been met. Section 11 defines these conditions as "orders which the applicant must follow in order to avoid or restrict damages caused by the project in question". Under Section 9, subsection 1, the contractor is liable to compensate the owner of real estate for any extraction of land resources which causes (environmental or other) damage which cannot be qualified as minor. Section 16, litera 3, allows the State authority to amend the conditions of the initial permit or to withdraw it, especially when extraction of land resources has had unpredictable harmful environmental effects.

7.4 As to the permit issued to Arktinen Kivi Oy, the State party notes that it is valid until 31 December 1999, but only if the Finnish Forestry and Park Service upholds the contract until that date. Another condition requires that during and after the quarrying, the area in question must be kept "clear and safe". Condition No. 3 lays down that every year, quarrying should be carried out within the period 1 April to 30 September, as requested by the Muotkatunturi Herdsmens' Committee in its letter of 5 November 1989 to the Inari municipality. This is because reindeers do not pasture in the area during this period. The same condition also stipulates that means of communication (transport) to and within the area must be arranged in coordination with the Herdsmens' Committee, and that any demands of the Angeli Community Committee should be given due consideration.

7.5 In October 1989, a contract between the Central Forestry Board and the company was

concluded, which gave the company the right to use and extract stone in an area covering 10 hectares, to a maximum of 200 cubic metres. This contract was valid until the end of 1993. Under the terms of the contract, means of transportation/communication had to be agreed upon with the district forester. Edges of holes had to be smoothed during quarrying; after quarrying, the slopes had to be remodelled in such a way as not to constitute a danger for animals and men and not to disfigure the landscape. In March 1993, the company requested a new land lease contract; an inspection of the site on 30 July 1993 was attended by a representative of the Forest District, the company, the Angeli Community Committee, the Herdsmens' Committee, and the building inspector of Inari community. The company representatives noted that the construction of a proper road was necessary for the project's profitability; the representative of the Forest District replied that the Herdsmens' Committee and the company had to find a negotiated solution. The State party adds that the Forestry and Park Service has informed the Government that a decision on a possible new contract with the company will be taken only *after* the adoption of Views by the Committee in the present case.

7.6 As to actual quarrying, the State party notes that the company's activity in the area has been insignificant, both in terms of amount of extracted stone (30 cubic metres) and the extent (10 hectares) of the quarrying area on Mt. Riutusvaara. By comparison, the total area used by the Muotkatunturi Herdsmens' Committee covers 2,586 square kilometres, whereas the area fenced in for quarrying covered only approximately one hectare and is only four kilometres away from the main road. In two expert statements dated 25 October 1991 submitted to the Supreme Administrative Court, it is noted that "extraction of land resources from Etelä-Riutusvaara has, as regards its size, no significance on the bearing capacity of the pastures of the Muotkatunturi Herdsmens' Committee". Neither can, in the State party's opinion, the extraction have any other negative effects on reindeer husbandry. The Government disagrees with the authors' assertion that already limited test quarrying has caused considerable damage to Etelä-Riutusvaara.

7.7 In the above context, the State party notes that it appears from an opinion of the Environmental Office of the Lapland County Administrative Board (dated 8 May 1991) that only low pressure explosives are used to extract stone from the rock: "Extraction is carried out my means of sawing and wedging techniques ... to keep the rock as whole as possible". As a result, possible harm to the environment remains minor. Furthermore, it transpires from a statement dated 19 August 1990 from the Inari Municipal Executive Board to the County Administrative Board that special attention was paid by the Board and the company to avoid disturbing reindeer husbandry in the area. The State party refers to Section 2, subsection 2, of the Reindeer Husbandry Act, which requires that the northernmost State-owned areas shall not be used in ways which can seriously impair reindeer husbandry; it adds that the obligations imposed by article 27 were observed in the permit proceedings.

7.8 With regard to the question of road construction in the quarrying area, the State party notes that transport of the test blocks of stone initially took place on an existing road line, with the help of one of the authors. The company only extended the road line for approximately one kilometre into another direction (*not* through the authors' reindeer fences), while using the existing road for transport of stone to the main road. The State party observes that the road line has thus been decided upon by the authors themselves. At a meeting on 15 October 1993 of the Inari Advisory Board, the company advised that the construction of a proper road would improve the profitability of the project; and as conceded by the Inari Municipal Board in a written submission to the Supreme Administrative Court in August 1991, the construction of such a road is technically possible without causing disturbances for reindeer husbandry.

7.9 The State party submits that in the light of the above and given that only 30 cubic metres of rock have actually been extracted, the company's activity has been insignificant in relation to the authors' rights under article 27, especially reindeer herding. Similar conclusions would apply to the possible quarrying of the total allowable extractable amount of stone and its transport over a proper road to the main road. In this context, the State party recalls the Committee's Views in *Lovelace v. Canada*, which state that "not every interference can be regarded as a denial of rights within the meaning of article 27 ... (but) restrictions must have both a reasonable and objective justification and be consistent with the other provisions of the Covenant...". This principle, according to the State party, applies to the present case.

7.10 The State party concedes "that the concept of culture in the sense of article 27 provides for a certain protection of the traditional means of livelihood for national minorities and can be deemed to cover livelihood and related conditions insofar as they are essential for the culture and necessary for its survival. This means that not every measure and every effect of it, which in some way alters the previous conditions, can be construed as adverse interference in the rights of minorities to enjoy their own culture under article 27". Relevant references to the issue have been made by the Parliamentary Committee for

Constitutional Law, in relation with Government Bill 244/1989, to the effect that reindeer husbandry exercised by Samis shall not be subject to unnecessary restrictions.

7.11 This principle, the State party notes, was underlined by the authors themselves in their appeal to the Lapland County Administrative Board: thus, before the domestic authorities, the authors themselves took the stand that only unnecessary and essential interferences with their means of livelihood, in particular reindeer husbandry, would raise the spectre of a possible violation of the Covenant.

7.12 The State disagrees with the statement of the authors' counsel before the Supreme Administrative Court (10 June 1991) according to which, by reference to the Committee's Views in the case of *B. Ominayak and members of the Lubicon Lake Band v. Canada*,[2] every measure, even a minor one, which obstructs or impairs reindeer husbandry must be interpreted as prohibited by the Covenant. In this context, the State party quotes from paragraph 9 of the Committee's General Comment on article 27, which lays down that the rights under article 27 are "directed to ensure the survival and continued development of the cultural, religious and social identity of the minorities concerned...". Furthermore, the question of "historical inequities", which arose in the *Lubicon Lake Band* case, does not arise in the present case. The State party rejects as irrelevant the authors' reliance on certain academic interpretations of article 27 and on certain national court decisions. It claims that the Human Rights Committee's Views in the case of *Kitok*,[3] imply that the Committee endorses the principle that States enjoy a certain degree of discretion in the application of article 27 – which is normal in all regulation of economic activities. According to the State party, this view is supported by the decisions of the highest tribunals of States parties to the Covenant and the European Commission on Human Rights.

7.13 The State party concludes that the requirements of article 27 have "continuously been taken into consideration by the national authorities in their application and implementation of the national legislation and the measures in question". It reiterates that a margin of discretion must be left to national authorities even in the application of article 27: "As confirmed by the European Court of Human Rights in many cases ..., the national judge is in a better position than the international judge to make a decision. In the present case, two administrative authorities and ... the Supreme Administrative Court, have examined the granting of the permit and related measures and considered them as lawful and appropriate". It is submitted that the authors can continue to practise reindeer husbandry and are not forced to abandon their lifestyle. The quarrying and the use of the old forest road line, or the possible construction of a proper road, are insignificant or at most have a very limited impact on this means of livelihood.

8.1 In his comments, dated 31 August 1994, counsel informs the Committee that since the initial submission of the complaint, the Muotkatunturi Herdsmens' Committee has somewhat changed its reindeer herding methods. As of spring 1994, young fawns are not kept fenced in with their mothers, so that the reindeer pasture more freely and for a larger part of the year than previously in areas north of the road between Angeli and Inari, including Southern Riutusvaara. Reindeer now also pasture in the area in April and September. Counsel adds that Southern Riutusvaara is definitely not unsuitable for reindeer pasture, as contended by the State party, as the reindeer find edible lichen there.

8.2 As to the supplementary information provided by the State party, the authors note that thus far, the companies quarrying on Mount Etelä-Riutusvaara have *not* covered any holes or smoothed edges and slopes after the expiry of their contracts. The authors attach particular importance to the State party's observation that the lease contract between the Central Forestry Board and Arktinen Kivi Oy was valid until the end of 1993. This implies that no contractual obligations would be breached if the Human Rights Committee were to find that any further quarrying would be unacceptable in the light of article 27.

8.3 As to the road leading to the quarry, the authors dismiss as misleading the State party's argument that the disputed road has been or would have been constructed in part "by one of the authors". They explain that the road line has been drawn by the two companies wishing to extract stone from the area. Counsel concedes however that the first company used a Sami as "employee or subcontractor in opening the road line. This is probably the reason why the person in question ... did not want to sign the communication to the Human Rights Committee".

8.4 The authors criticize that the State party has set an unacceptably high threshold for the application of article 27 of the Covenant and note that what the Finnish authorities appear to suggest is that only once a State party has explicitly conceded that a certain minority has suffered historical inequities, it might be possible to conclude that new developments which obstruct the cultural life of a minority constitute a

[2] Views adopted by the Committee at its 38th session, 26 March 1990.

[3] Case No. 197/1985, Views adopted during the Committee's 33rd session on 27 July 1988, paragraph 9.3.

violation of article 27. To the authors, this interpretation of the Committee's Views in the *Lubicon Lake Band* case is erroneous. They contend that what was decisive in *Ominayak* was that a series of incremental adverse events could together constitute a 'historical inequity' which amounted to a violation of article 27.[4]

8.5 According to counsel, the situation of the Samis in the Angeli area may be compared with "assimilation practices", or at least as a threat to the cohesiveness of their group through quarrying, logging and other forms of exploitation of traditional Sami land for purposes other than reindeer herding.

8.6 While the authors agree that the question of ownership of the land tracts at issue is not *per se* the subject matter of the case, they observe that (a) ILO Convention No. 169, although not yet ratified by Finland, has a relevance for domestic authorities which is comparable to the effect of concluded treaties (opinion No. 30 of 1993 by the Parliamentary Constitutional Law Committee) and (b) neither the general reparceling nor the entries into the land register can have constitutive effect for the ownership of traditional Sami territory. In this context, the authors note that the legislator is considering a proposal to create a system of collective land ownership by the Sami villages:

> "As long as the land title controversy remains unsettled..., Finnish Samis live in a situation that is very sensitive and vulnerable in relation to any measures threatening their traditional economic activities. Therefore, the existing Riutusvaara quarry and the road to it, created with the involvement of public authorities, are to be considered a violation of article 27... The renewal of a land lease contract between the Central Forestry Board [sc.: its legal successor] and the ... company would also violate article 27".

8.7 Finally, the authors point to new developments in Finland which are said to highlight the vulnerability of their own situation. As a consequence of the Agreement on the European Economic Area (EEA), which entered into force on 1 January 1994, foreign and transnational companies registered within the EEA obtain a broader access to the Finnish market than before. The most visible consequence has been the activity of multinational mining companies in Finnish Lapland, including the northernmost parts inhabited by Samis. Two large foreign mining companies have registered large land tracts for research into the possibility of mining operations. These areas are located in the herding areas of some Reindeer Herding Committees. On 11 June 1994, the Sami Parliament expressed concern over this development. The authors consider that the outcome of the present case will have a bearing on the operation of the foreign mining companies in question.

8.8 The information detailed in 8.7 above is supplemented by a further submission from counsel dated 9 September 1994. He notes that the activity of multinational mining companies in Northern Lapland has led to a resurgence of interest among Finnish companies in the area. Even a Government agency, the Centre for Geological Research (Geologian tutkimuskeskus) has applied for land reservations on the basis of the Finnish Mining Act. This agency has entered six land reservations of 9 square kilometres each *in the immediate vicinity* of the Angeli village and partly *on the slopes* of Mt. Riutusvaara. Two of these land tracts are located within an area which is the subject of a legal controversy about logging activities between the local Samis and the government forestry authorities.

Examination of the merits

9.1 The Committee has examined the present communication in the light of all the information provided by the parties. The issue to be determined by the Committee is whether quarrying on the flank of Mt. Etelä-Riutusvaara, in the amount that has taken place until the present time or in the amount that would be permissible under the permit issued to the company which has expressed its intention to extract stone from the mountain (i.e. up to a total of 5,000 cubic metres), would violate the authors' rights under article 27 of the Covenant.

9.2 It is undisputed that the authors are members of a minority within the meaning of article 27 and as such have the right to enjoy their own culture; it is further undisputed that reindeer husbandry is an essential element of their culture. In this context, the Committee recalls that economic activities may come within the ambit of article 27, if they are an essential element of the culture of an ethnic community.[5]

9.3 The right to enjoy one's culture cannot be determined *in abstracto* but has to be placed in context. In this connection, the Committee observes that article 27 does not only protect *traditional* means of livelihood of national minorities, as indicated in the State party's submission. Therefore, that the authors may have adapted their methods of reindeer herding over the years and practice it with the help of modern technology does not prevent them from invoking

[4] In this context, the authors refer to the analysis of the Views in the *Lubicon Lake Band* case by Professor Benedict Kingsbury (25 Cornell International Law Journal (1992)), and by Professor Manfred Nowak (CCPR Commentary, 1993).

[5] Views on communication No. 197/1985 (*Kitok v. Sweden*), adopted on 27 July 1988, paragraph 9.2.

article 27 of the Covenant. Furthermore, mountain Riutusvaara continues to have a spiritual significance relevant to their culture. The Committee also notes the concern of the authors that the quality of slaughtered reindeer could be adversely affected by a disturbed environment.

9.4 A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27. Article 27 requires that a member of a minority shall not be denied his right to enjoy his culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under article 27. However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27.

9.5 The question that therefore arises in this case is whether the impact of the quarrying on Mount Riutusvaara is so substantial that it does effectively deny to the authors the right to enjoy their cultural rights in that region. The Committee recalls paragraph 7 of its General Comment on article 27, according to which minorities or indigenous groups have a right to the protection of traditional activities such as hunting, fishing or, as in the instant case, reindeer husbandry, and that measures must be taken "to ensure the effective participation of members of minority communities in decisions which affect them".

9.6 Against this background, the Committee concludes that quarrying on the slopes of Mt. Riutusvaara, in the amount that has already taken place, does not constitute a denial of the authors' right, under article 27, to enjoy their own culture. It notes in particular that the interests of the Muotkatunturi Herdsmens' Committee and of the authors were considered during the proceedings leading to the delivery of the quarrying permit, that the authors *were* consulted during the proceedings, and that reindeer herding in the area does not appear to have been adversely affected by such quarrying as has occurred.

9.7 As far as future activities which may be approved by the authorities are concerned, the Committee further notes that the information available to it indicates that the State party's authorities have endeavoured to permit only quarrying which would minimize the impact on any reindeer herding activity in Southern Riutusvaara and on the environment; the intention to minimize the effects of extraction of stone from the area on reindeer husbandry is reflected in the conditions laid down in the quarrying permit. Moreover, it has been agreed that such activities should be carried out primarily outside the period used for reindeer pasturing in the area. Nothing indicates that the change in herding methods by the Muotkatunturi Herdsmens' Committee (see paragraph 8.1 above) could not be accommodated by the local forestry authorities and/or the company.

9.8 With regard to the authors' concerns about future activities, the Committee notes that economic activities must, in order to comply with article 27, be carried out in a way that the authors continue to benefit from reindeer husbandry. Furthermore, *if* mining activities in the Angeli area were to be approved on a large scale and significantly expanded by those companies to which exploitation permits have been issued, then this may constitute a violation of the authors' rights under article 27, in particular of their right to enjoy their own culture. The State party is under a duty to bear this in mind when either extending existing contracts or granting new ones.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee do not reveal a breach of article 27 or any other provision of the Covenant.

Communication No. 516/1992

Submitted by: Mrs. Alina Simunek, Mrs. Dagmar Tuzilova Hastings and Mr. Josef Prochazka on 17 September 1991
Alleged victim: The authors and Jaroslav Simunek (Mrs. Alina Simunek's husband)
State party: Czech Republic
Declared admissible: 22 July 1994 (fifty-first session)
Date of adoption of Views: 19 July 1995 (fifty-fourth session)

Subject matter: Alleged discriminatory requirements under Czech law for restitution of property confiscated under previous political regime

Procedural issues: State party's failure to make submission on admissibility – Admissibility *ratione materiae* and *ratione temporis* – Continuing violation – Lack of substantiation of claim

Substantive issues: Equality before the law – Equal protection of the law – Unreasonable criteria for differentiation – Irrelevance of discriminatory intent – Effective remedy

Articles of the Covenant: 14 (6) and 26

Articles of the Optional Protocol: 1 and 3

1. The authors of the communications are Alina Simunek, who acts on her behalf and on behalf of her husband, Jaroslav Simunek, Dagmar Tuzilova Hastings and Josef Prochazka, residents of Canada and Switzerland, respectively. They claim to be victims of violations of their human rights by the Czech Republic. The Covenant was ratified by Czechoslovakia on 23 December 1975. The Optional Protocol entered into force for the Czech Republic on 12 June 1991.[1]

The facts as submitted by the authors

2.1 Alina Simunek, a Polish citizen born in 1960, and Jaroslav Simunek, a Czech citizen, currently reside in Ontario, Canada. They state that they were forced to leave Czechoslovakia in 1987, under pressure of the security forces of the communist regime. Under the legislation then applicable, their property was confiscated. After the fall of the Communist government on 17 November 1989, the Czech authorities published statements which indicated that expatriate Czech citizens would be rehabilitated in as far as any criminal conviction was concerned, and their property restituted.

2.2 In July 1990, Mr. and Mrs. Simunek returned to Czechoslovakia in order to submit a request for the return of their property, which had been confiscated by the District National Committee, a State organ, in Jablonece. It transpired, however, that between September 1989 and February 1990, all their property and personal effects had been evaluated and auctioned off by the District National Committee. Unsaleable items had been destroyed. On 13 February 1990, the authors' real estate was transferred to the Jablonece Sklarny factory, for which Jaroslav Simunek had been working for twenty years.

2.3 Upon lodging a complaint with the District National Committee, an arbitration hearing was convened between the authors, their witnesses and representatives of the factory on 18 July 1990. The latter's representatives denied that the transfer of the authors' property had been illegal. The authors thereupon petitioned the office of the district public prosecutor, requesting an investigation of the matter on the ground that the transfer of their property had been illegal, since it had been transferred in the absence of a court order or court proceedings to which the authors had been parties. On 17 September 1990, the Criminal Investigations Department of the National Police in Jablonece launched an investigation; its report of 29 November 1990 concluded that no violation of (then) applicable regulations could be ascertained, and that the authors' claim should be dismissed, as the Government had not yet amended the former legislation.

2.4 On 2 February 1991, the Czech and Slovak Federal Government adopted Act 87/1991, which entered into force on 1 April 1991. It endorses the rehabilitation of Czech citizens who had left the country under communist pressure and lays down the conditions for restitution or compensation for loss of property. Under Section 3, subsection 1, of the Act, those who had their property turned into State ownership in the cases specified in Section 6 of the Act are entitled to restitution, but only if they are citizens of the Czech and Slovak Federal Republic *and* are permanent residents in its territory.

2.5 Under Section 5, subsection 1, of the Act, anyone currently in (illegal) possession of the property shall restitute it to the rightful owner, upon

[1] The Czech and Slovak Federal Republic ratified the Optional Protocol in March 1991 but, on 31 December 1992, the Czech and Slovak Federal Republic ceased to exist. On 22 February 1993, the Czech Republic notified its succession to the Covenant and the Optional Protocol.

a written request from the latter, who must also prove his or her claim to the property and demonstrate how the property was turned over to the State. Under subsection 2, the request for restitution must be submitted to the individual in possession of the property, within six months of the entry into force of the Act. If the person in possession of the property does not comply with the request, the rightful owner may submit his or her claim to the competent tribunal, within one year of the date of entry into force of the Act (subsection 4).

2.6 With regard to the issue of exhaustion of domestic remedies, it appears that the authors have not submitted their claims for restitution to the local courts, as required under Section 5, subsection 4, of the Act. It transpires from their submissions that they consider this remedy ineffective, as they do not fulfil the requirements under Section 3, subsection 1. Alina Simunek adds that they have lodged complaints with the competent municipal, provincial and federal authorities, to no avail. She also notes that the latest correspondence is a letter from the Czech President's Office, dated 16 June 1992, in which the author is informed that the President's Office cannot intervene in the matter, and that only the tribunals are competent to pronounce on the matter. The author's subsequent letters remained without reply.

2.7 Dagmar Hastings Tuzilova, an American citizen by marriage and currently residing in Switzerland, emigrated from Czechoslovakia in 1968. On 21 May 1974, she was sentenced *in absentia* to a prison term as well as forfeiture of her property, on the ground that she had 'illegally emigrated' from Czechoslovakia. Her property, 5/18 shares of her family's estate in Pilsen, is currently held by the Administration of Houses in this city.

2.8 By decision of 4 October 1990 of the District Court of Pilsen, Dagmar Hastings Tuzilova was rehabilitated; the District Court's earlier decision, as well as all other decisions in the case, were declared null and void. All her subsequent applications to the competent authorities and a request to the Administration of Houses in Pilsen to negotiate the restitution of her property have, however, not produced any tangible result.

2.9 Apparently, the Administration of Housing agreed, in the spring of 1992, to transfer the 5/18 of the house back to her, on the condition that the State notary in Pilsen agreed to register this transaction. The State notary, however, has so far refused to register the transfer. At the beginning of 1993, the District Court of Pilsen confirmed the notary's action (Case No. 11 Co. 409/92). The author states that she was informed that she could appeal this decision, via the District Court in Pilsen, to the Supreme Court. She apparently filed an appeal with the Supreme Court on 7 May 1993, but no decision had been taken as of 20 January 1994.

2.10 On 16 March 1992, Dagmar Hastings Tuzilova filed a civil action against the Administration of Houses, pursuant to Section 5, subsection 4, of the Act. On 25 May 1992, the District Court of Pilsen dismissed the claim, on the ground that, as an American citizen residing in Switzerland, she was not entitled to restitution within the meaning of Section 3, subsection 1, of Act 87/1991. The author contends that any appeal against this decision would be ineffective.

2.11 Josef Prochazka is a Czech citizen born in 1920, who currently resides in Switzerland. He fled from Czechoslovakia in August 1968, together with his wife and two sons. In the former Czechoslovakia, he owned a house with two three-bedroom apartments and a garden, as well as another plot of land. Towards the beginning of 1969, he donated his property, in the appropriate form and with the consent of the authorities, to his father. By judgments of a district court of July and September 1971, he, his wife and sons were sentenced to prison terms on the grounds of "illegal emigration" from Czechoslovakia. In 1973, Josef Prochazka's father died; in his will, which was recognized as valid by the authorities, the author's sons inherited the house and other real estate.

2.12 In 1974, the court decreed the confiscation of the author's property, because of his and his family's "illegal emigration", in spite of the fact that the authorities had, several years earlier, recognized as lawful the transfer of the property to the author's father. In December 1974, the house and garden were sold, according to the author at a ridiculously low price, to a high party official.

2.13 By decisions of 26 September 1990 and of 31 January 1991, respectively, the District Court of Ustí rehabilitated the author and his sons as far as their criminal conviction was concerned, with retroactive effect. This means that the court decisions of 1971 and 1974 (see paragraphs 2.11 and 2.12 above) were invalidated.

The complaint

3.1 Alina and Jaroslav Simunek contend that the requirements of Act 87/1991 constitute unlawful discrimination, as it only applies to "pure Czechs living in the Czech and Slovak Federal Republic". Those who fled the country or were forced into exile by the ex-communist regime must take a permanent residence in Czechoslovakia to be eligible for restitution or compensation. Alina Simunek, who lived and worked in Czechoslovakia for eight years, would not be eligible at all for restitution, on account

of her Polish citizenship. The authors claim that the Act in reality legalizes former Communist practices, as more than 80% of the confiscated property belongs to persons who do not meet these strict requirements.

3.2 Alina Simunek alleges that the conditions for restitution imposed by the Act constitute discrimination on the basis of political opinion and religion, without however substantiating her claim.

3.3 Dagmar Hastings Tuzilova claims that the requirements of Act 87/1991 constitute unlawful discrimination, contrary to article 26 of the Covenant.

3.4 Josef Prochazka also claims that he is a victim of the discriminatory provisions of Act 87/1991; he adds that as the court decided, with retroactive effect, that the confiscation of his property was null and void, the law should not be applied to him at all, as he never lost his legal title to his property, and because there can be no question of 'restitution' of the property.

The Committee's admissibility decision

4.1 On 26 October 1993, the communications were transmitted to the State party under rule 91 of the rules of procedure of the Human Rights Committee. No submission under rule 91 was received from the State party, despite a reminder addressed to it. The authors were equally requested to provide a number of clarifications; they complied with this request by letters of 25 November 1993 (Alina and Jaroslav Simunek), 3 December 1993 and 11/12 April 1994 (Josef Prochazka) and 19 January 1994 (Dagmar Hastings Tuzilova).

4.2 At its 51st session the Committee considered the admissibility of the communication. It noted with regret the State party's failure to provide information and observations on the question of the admissibility of the communication. Notwithstanding this absence of cooperation on the part of the State party, the Committee proceeded to ascertain whether the conditions of admissibility under the Optional Protocol had been met.

4.3 The Committee noted that the confiscation and sale of the property in question by the authorities of Czechoslovakia occurred in the 1970's and 1980's. Irrespective of the fact that all these events took place prior to the date of entry into force of the Optional Protocol for the Czech Republic, the Committee recalled that the right to property, as such, is not protected by the Covenant.

4.4 The Committee observed, however, that the authors complained about the discriminatory effect of the provisions of Act 87/1991, in the sense that they apply only to persons unlawfully stripped of their property under the former regime who now have a permanent residence in the Czech Republic and are Czech citizens. Thus the question before the Committee was whether the law could be deemed discriminatory within the meaning of article 26 of the Covenant.

4.5 The Committee observed that the State party's obligations under the Covenant applied as of the date of its entry into force. A different issue arose as to when the Committee's competence to consider complaints about alleged violations of the Covenant under the Optional Protocol was engaged. In its jurisprudence under the Optional Protocol, the Committee has consistently held that it cannot consider alleged violations of the Covenant which occurred before the entry into force of the Optional Protocol for the State party, unless the violations complained of continue after the entry into force of the Optional Protocol. A continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or by clear implication, of the previous violations of the State party.

4.6 While the authors in the present case have had their criminal convictions quashed by Czech tribunals, they still contend that Act No. 87/1991 discriminates against them, in that in the case of two of the applicants (Mr. and Mrs. Simunek; Mrs. Hastings Tuzilova), they cannot benefit from the law because they are not Czech citizens or have no residence in the Czech Republic, and that in the case of the third applicant (Mr. Prochazka), the law should not have been deemed applicable to his situation at all.

5. On 22 July 1994 the Human Rights Committee therefore *decided* that the communication was admissible in as much as it may raise issues under articles 14, paragraph 6, and 26 of the Covenant.

The State party's observations on the merits and author's comments thereon

6.1 In its submission, dated 12 December 1994, the State party argues that the legislation in question is not discriminatory. It draws the Committee's attention to the fact that according to article 11, Section 2, of the Charter of Fundamental Rights and Freedoms, which is part of the Constitution of the Czech Republic, "... the law may specify that some things may be owned exclusively by citizens or by legal persons having their seat in the Czech Republic."

6.2 The State party affirms its commitment to the settlement of property claims by restitution of properties to persons injured during the period of 25 February 1948 to 1 January 1990. Although

certain criteria had to be stipulated for the restitution of confiscated properties, the purpose of such requirements is not to violate human rights. The Czech Republic cannot and will not dictate to anybody where to live. Restitution of confiscated property is a very complicated and de facto unprecedented measure and therefore it cannot be expected to rectify all damages and to satisfy all the people injured by the Communist regime.

7.1 With respect to the communication submitted by Mrs. Alina Simunek the State party argues that the documents submitted by the author do not define the claims clearly enough. It appears from her submission that Mr. Jaroslav Simunek was probably kept in prison by the State Security Police. Nevertheless, it is not clear whether he was kept in custody or actually sentenced to imprisonment. As concerns the confiscation of the property of Mr. and Mrs. Simunek, the communication does not define the measure on the basis of which they were deprived of their ownership rights. In case Mr. Simunek was sentenced for a criminal offence mentioned in Section 2 or Section 4 of Law No. 119/1990 on judicial rehabilitation as amended by subsequent provisions, he could claim rehabilitation under the law or in review proceedings and, within three years of the entry into force of the court decision on his rehabilitation, apply to the Compensations Department of the Ministry of Justice of the Czech Republic for compensation pursuant to Section 23 of the above-mentioned Law. In case Mr. Simunek was unlawfully deprived of his personal liberty and his property was confiscated between 25 February 1948 and 1 January 1990 in connection with a criminal offence mentioned in Section 2 and Section 4 of the Law but the criminal proceedings against him were not initiated, he could apply for compensation on the basis of a court decision issued at the request of the injured party and substantiate his application with the documents which he had at his disposal or which his legal adviser obtained from the archives of the Ministry of the Interior of the Czech Republic.

7.2 As concerns the restitution of the forfeited or confiscated property, the State party concludes from the submission that Alina and Jaroslav Simunek do not comply with the requirements of Section 3 (1) of Law No. 87/1991 on extrajudicial rehabilitations, namely the requirements of citizenship of the Czech and Slovak Federal Republic and permanent residence on its territory. Consequently, they cannot be recognized as persons entitled to restitution. Remedy would be possible only in case at least one of them complied with both requirements and applied for restitution within 6 months from the entry into force of the law on extrajudicial rehabilitations (i.e. by the end of September 1991).

8.1 With respect to the communication of Mrs. Dagmar Hastings-Tuzilova the State party clarifies that Mrs. Dagmar Hastings-Tuzilova claims the restitution of the 5/18 shares of house No. 2214 at Cechova 61, Pilsen, forfeited on the basis of the ruling of the Pilsen District Court of 21 May 1974, by which she was sentenced for the criminal offence of illegal emigration according to Section 109 (2) of the Criminal Law. She was rehabilitated pursuant to Law No. 119/1990 on judicial rehabilitations by the ruling of the Pilsen District Court of 4 October 1990. She applied for restitution of her share of the estate in Pilsen pursuant to Law No. 87/1991 on extrajudicial rehabilitations. Mrs. Hastings-Tuzilova concluded an agreement on the restitution with the Administration of Houses in Pilsen, which the State Notary in Pilsen refused to register due to the fact that she did not comply with the conditions stipulated by Section 3 (1) of the law on extrajudicial rehabilitations.

8.2 Mrs. Hastings-Tuzilova, although rehabilitated pursuant to the law on judicial rehabilitations, cannot be considered entitled person as defined by Section 19 of the law on extrajudicial rehabilitations, because on the date of application she did not comply with the requirements of Section 3 (1) of the above-mentioned law, i.e. requirements of citizenship of the Czech and Slovak Federal Republic and permanent residence on its territory. Moreover, she failed to fulfil the requirements within the preclusive period stipulated by Section 5 (2) of the law on extrajudicial rehabilitations. Mrs. Hastings-Tuzilova acquired Czech citizenship and registered her permanent residence on 30 September 1992.

8.3 Section 20 (3) of the law on extrajudicial rehabilitations says that the statutory period for the submission of applications for restitution based on the sentence of forfeiture which was declared null and void after the entry into force of the law on extrajudicial rehabilitations starts on the day of the entry into force of the annulment. Nevertheless, this provision cannot be applied in the case of Mrs. Hastings-Tuzilova due to the fact that her judicial rehabilitation entered into force on 9 October 1990, i.e. before the entry into force of Law No. 87/1991 on extrajudicial rehabilitations (1 April 1991).

9.1 With respect to the communication of Mr. Josef Prochazka the State party argues that Section 3 of Law No. 87/1991 on extrajudicial rehabilitations defines the entitled person, i.e. the person who could within the statutory period claim the restitution of property or compensation. Applicants who did not acquire citizenship of the Czech and Slovak Federal Republic and register their permanent residence on its territory before the end of the statutory period determined for the submission of applications (i.e. before 1 October 1991

for applicants for restitution and before 1 April 1992 for applicants for compensation) are not considered entitled persons.

9.2 From Mr. Prochazka's submission the State party concludes that the property devolved to the State on the basis of the ruling of the Usti nad Labem District Court of 1974 which declared the 1969 deed of gift null and void for the reason that the donor left the territory of the former Czechoslovak Socialist Republic. Such cases are provided for in Section 6 (1) (f) of the law on extrajudicial rehabilitations which defined the entitled person as the transferee according to the invalidated deed, i.e. in this case the entitled person is the unnamed father of Mr. Prochazka. Consequently, the persons to whom the sentence of forfeiture invalidated under Law No. 119/1990 on judicial rehabilitations applies, cannot be regarded as entitled persons, as Mr. Prochazka incorrectly assumes.

9.3 With regard to the fact that the above-mentioned father of Mr. Prochazka died before the entry into force of the law on extrajudicial rehabilitations, the entitled persons are the testamentary heirs – Mr. Prochazka's sons Josef Prochazka and Jiri Prochazka, provided that they were citizens of the former Czech and Slovak Federal Republic and had permanent residence on its territory. The fact that they were rehabilitated pursuant to the law on judicial rehabilitations has no significance in this case. From Mr. Prochazka's submission the State party concludes that Josef Prochazka and Jiri Prochazka are Czech citizens but live in Switzerland and did not apply for permanent residence in the Czech Republic.

10.1 By letter of 21 February 1995, Alina and Jaroslav Simunek contend that the State party has not addressed the issues raised by their communication, namely the compatibility of Act No. 87/1991 with the non-discrimination requirement of article 26 of the Covenant. They claim that Czech hard-liners are still in office and that they have no interest in the restitution of confiscated properties, because they themselves benefited from the confiscations. A proper restitution law should be based on democratic principles and not allow restrictions that would exclude former Czech citizens and Czech citizens living abroad.

10.2 By letter of 12 June 1995 Mr. Prochazka informed the Committee that by order of the District Court of 12 April 1995 the plot of land he inherited from his father will be returned to him (paragraph 2.11).

10.3 Mrs. Hastings Tuzilova had not submitted comments by the time of the consideration of the merits of this communication by the Committee.

Examination of the merits

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

11.2 This communication was declared admissible only insofar as it may raise issues under article 14, paragraph 6, and article 26 of the Covenant. With regard to article 14, paragraph 6, the Committee finds that the authors have not sufficiently substantiated their allegations and that the information before it does not sustain a finding of a violation.

11.3 As the Committee has already explained in its decision on admissibility (para. 4.3 above), the right to property, as such, is not protected under the Covenant. However, a confiscation of private property or the failure by a State party to pay compensation for such confiscation could still entail a breach of the Covenant if the relevant act or omission was based on discriminatory grounds in violation of article 26 of the Covenant.

11.4 The issue before the Committee is whether the application of Act 87/1991 to the authors entailed a violation of their rights to equality before the law and to the equal protection of the law. The authors claim that this Act, in effect, reaffirms the earlier discriminatory confiscations. The Committee observes that the confiscations themselves are not here at issue, but rather the denial of a remedy to the authors, whereas other claimants have recovered their properties or received compensation therefor.

11.5 In the instant cases, the authors have been affected by the exclusionary effect of the requirement in Act 87/1991 that claimants be Czech citizens and residents of the Czech Republic. The question before the Committee, therefore, is whether these preconditions to restitution or compensation are compatible with the non-discrimination requirement of article 26 of the Covenant. In this context the Committee reiterates its jurisprudence that not all differentiation in treatment can be deemed to be discriminatory under article 26 of the Covenant.[2] A differentiation which is compatible with the provisions of the Covenant and is based on reasonable grounds does not amount to prohibited discrimination within the meaning of article 26.

11.6 In examining whether the conditions for restitution or compensation are compatible with the Covenant, the Committee must consider all relevant

[2] *Zwaan de Vries v. The Netherlands*, Communication No. 182/1984, Views adopted on 9 April 1987, para. 13.

factors, including the authors' original entitlement to the property in question and the nature of the confiscations. The State party itself acknowledges that the confiscations were discriminatory, and this is the reason why specific legislation was enacted to provide for a form of restitution. The Committee observes that such legislation must not discriminate among the victims of the prior confiscations, since all victims are entitled to redress without arbitrary distinctions. Bearing in mind that the authors' original entitlement to their respective properties was not predicated either on citizenship or residence, the Committee finds that the conditions of citizenship and residence in Act 87/1991 are unreasonable. In this connection the Committee notes that the State party has not advanced any grounds which would justify these restrictions. Moreover, it has been submitted that the authors and many others in their situation left Czechoslovakia because of their political opinions and that their property was confiscated either because of their political opinions or because of their emigration from the country. These victims of political persecution sought residence and citizenship in other countries. Taking into account that the State party itself is responsible for the departure of the authors, it would be incompatible with the Covenant to require them permanently to return to the country as a prerequisite for the restitution of their property or for the payment of appropriate compensation.

11.7 The State party contends that there is no violation of the Covenant because the Czech and Slovak legislators had no discriminatory intent at the time of the adoption of Act 87/1991. The Committee is of the view, however, that the intent of the legislature is not alone dispositive in determining a breach of article 26 of the Covenant. A politically motivated differentiation is unlikely to be compatible with article 26. But an act which is not politically motivated may still contravene article 26 if its effects are discriminatory.

11.8 In the light of the above considerations, the Committee concludes that Act 87/1991 has had effects upon the authors that violate their rights under article 26 of the Covenant.

12.1 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the denial of restitution or compensation to the authors constitutes a violation of article 26 of the International Covenant on Civil and Political Rights.

12.2 In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, which may be compensation if the properties in question cannot be returned. To the extent that partial restitution of Mr. Prochazka's property appears to have been or may soon be effected (para. 10.2), the Committee welcomes this measure, which it deems to constitute partial compliance with these Views. The Committee further encourages the State party to review its relevant legislation to ensure that neither the law itself nor its application is discriminatory.

12.3 Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views.

Communication No. 518/1992

Submitted by: Jong-Kyu Sohn (represented by counsel) on 7 July 1992
Alleged victim: The author
State party: Republic of Korea
Declared admissible: 18 March 1994 (fiftieth session)
Date of adoption of Views: 19 July 1995 (fifty-fourth session)

Subject matter: Conviction of labour union leader for issuing statements in support of a strike

Procedural issues: Effectiveness of domestic remedies

Substantive issues: Freedom of expression – Reasonableness of restrictions under article 19 (3)

Article of the Covenant: 19

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

1. The author of the communication is Mr. Jong-Kyu Sohn, a citizen of the Republic of Korea, residing at Kwangju, Republic of Korea. He claims to be a victim of a violation by the Republic of Korea of article 19, paragraph 2, 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 has been president of the Kumho Company Trade Union since 27 September 1990 and is a founding member of the Solidarity Forum of Large Company Trade Unions. On 8 February 1991, a strike was called at the Daewoo Shipyard Company at Guhjae Island in the province of Kyungsang-Nam-Do. The Government announced that it would send in police troops to break the strike. Following that announcement, the author had a meeting, on 9 February 1991, with other members of the Solidarity Forum, in Seoul, 400 kilometres from the place where the strike took place. At the end of the meeting they issued a statement supporting the strike and condemning the Government's threat to send in troops. That statement was transmitted to the workers at the Daewoo Shipyard by facsimile. The Daewoo Shipyard strike ended peacefully on 13 February 1991.

2.2 On 10 February 1991, the author, together with some 60 other members of the Solidarity Forum, was arrested by the police when leaving the premises where the meeting had been held. On 12 February 1991, he and six others were charged with contravening article 13 (2) of the Labour Dispute Adjustment Act (Law No. 1327 of 13 April 1963, amended by Law No. 3967 of 28 November 1987), which prohibits others than the concerned employer, employees or trade union, or persons having legitimate authority attributed to them by law, to intervene in a labour dispute for the purpose of manipulating or influencing the parties concerned. He was also charged with contravening the Act on Assembly and Demonstration (Law No. 4095 of 29 March 1989), but notes that his communication relates only to the Labour Dispute Adjustment Act. One of the author's co-accused later died in detention, according to the author under suspicious circumstances.

2.3 On 9 August 1991, a single judge of the Seoul Criminal District Court found the author guilty as charged and sentenced him to one and a half years' imprisonment and three years' probation. The author's appeal against his conviction was dismissed by the Appeal Section of the same court on 20 December 1991. The Supreme Court rejected his further appeal on 14 April 1992. The author submits that, since the Constitutional Court had declared, on 15 January 1990, that article 13 (2) of the Labour Dispute Adjustment Act was compatible with the Constitution, he has exhausted domestic remedies.

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

The complaint

3.1 The author argues that article 13 (2) of the Labour Dispute Adjustment Act is used to punish support for the labour movement and to isolate the workers. He argues that the provision has never been used to charge those who take the side of management in a labour dispute. He further claims that the vagueness of the provision, which prohibits any act to influence the parties, violates the principle of legality (*nullum crimen, nulla poena sine lege*).

3.2 The author further argues that the provision was incorporated into the law to deny the right to freedom of expression to supporters of labourers or trade unions. In this respect, he makes reference to the Labour Union Act, which prohibits third party support for the organization of a trade union. He concludes that any support to labourers or trade unions may thus be punished, by the Labour Dispute Adjustment Act at the time of strikes and by the Labour Union Act at other times.

3.3 The author claims that his conviction violates article 19, paragraph 2, of the Covenant. He emphasizes that the way he exercised his freedom of expression did not infringe the rights or reputations of others, nor did it threaten national security or public order, or public health or morals.

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

4.1 By submission of 9 June 1993, the State party argues that the communication is inadmissible on the grounds of failure to exhaust domestic remedies. The State party submits that available domestic remedies in a criminal case are exhausted only when the Supreme Court has issued a judgement on appeal and when the Constitutional Court has reached a decision on the constitutionality of the law on which the judgement is based.

4.2 As regards the author's argument that he has exhausted domestic remedies because the Constitutional Court has already declared that article 13 (2) of the Labour Dispute Adjustment Act, on which his conviction was based, is constitutional, the State party contends that the prior decision of the Constitutional Court only examined the compatibility of the provision with the right to work, the right to equality and the principle of legality, as protected by the Constitution. It did not address the question of whether the article was in compliance with the right to freedom of expression.

4.3 The State party argues, therefore, that the author should have requested a review of the law in the light of the right to freedom of expression, as protected by the Constitution. Since he failed to do so, the State party argues that he has not exhausted domestic remedies.

4.4 The State party submits, in addition, that the author's sentence was revoked on 6 March 1993, under a general amnesty granted by the President of the Republic of Korea.

5.1 In his comments on the State party's submission, the author maintains that he has exhausted all domestic remedies and that it would be futile to request the Constitutional Court to pronounce itself on the constitutionality of the Labour Dispute Adjustment Act when it has done so in the recent past.

5.2 The author submits that if the question of constitutionality of a legal provision is brought before the Constitutional Court, the Court is legally obliged to take into account all possible grounds that may invalidate the law. As a result, the author argues that it is futile to bring the same question to the Court again.

5.3 In this context, the author notes that, although the majority opinion in the judgement of the Constitutional Court of 15 January 1990 did not refer to the right to freedom of expression, two concurring opinions and one dissenting opinion did. He submits that it is clear therefore that the Court did in fact consider all the grounds for possible unconstitutionality of the Labour Dispute Adjustment Act, including a possible violation of the constitutional right to freedom of expression.

The Committee's admissibility decision

6.1 At its 50th session, the Committee considered the admissibility of the communication. After having examined the submissions of both the State party and the author concerning the constitutional remedy, the Committee found that the compatibility of article 13 (2) of the Labour Dispute Adjustment Act with the Constitution, including the constitutional right to freedom of expression, had necessarily been before the Constitutional Court in January 1990, even though the majority judgement chose not to refer to the right to freedom of expression. In the circumstances, the Committee considered that a further request to the Constitutional Court to review article 13 (2) of the Act, by reference to freedom of expression, did not constitute a remedy which the author still needed to exhaust under article 5, paragraph 2, of the Optional Protocol.

6.2 The Committee noted that the author was arrested, charged and convicted not for any physical support for the strike in progress but for participating in a meeting in which verbal expressions of support were given, and considered that the facts as submitted by the author might raise issues under article 19 of the Covenant which should be examined on the merits. Consequently, the Committee declared the communication admissible.

The State party's observations on the merits and author's comments thereon

7.1 By submission of 25 November 1994, the State party takes issue with the Committee's consideration when declaring the communication admissible that "the author was arrested, charged and convicted not for any physical support for the strike in progress but for participating in a meeting in which verbal expressions of support were given". The State party emphasizes that the author not only attended the meeting of the Solidarity Forum on 9 February 1991, but also actively participated in distributing propaganda on 10 or 11 February 1991 and, on 11 November 1990, was involved in a violent demonstration, during which Molotov cocktails were thrown.

7.2 The State party submits that because of these offences, the author was charged with and convicted of violating articles 13 (2) of the Labour Dispute Adjustment Act and 45 (2) of the Act on Assembly and Demonstration.

7.3 The State party explains that the articles of the Labour Dispute Adjustment Act, prohibiting intervention by third parties in a labour dispute, are meant to maintain the independent nature of a labour dispute between employees and employer. It points out that the provision does not prohibit counselling or giving advice to the parties involved.

7.4 The State party invokes article 19, paragraph 3, of the Covenant, which provides that the right to freedom of expression may be subject to certain restrictions *inter alia* for the protection of national security or of public order.

7.5 The State party reiterates that the author's sentence was revoked on 6 March 1993, under a general amnesty.

8.1 In his comments, the author states that, although it is true that he was sentenced for his participation in the demonstration of November 1990 under the Act on Assembly and Demonstration, this does not form part of his complaint. He refers to the judgment of the Seoul Criminal District Court of 9 August 1991, which shows that the author's participation in the November demonstration was a crime punished separately, under the Act on Assembly and Demonstration, from his participation in the activities of the Solidarity Forum and his support for the strike of the Daewoo Shipyard Company in February 1991, which were punished under the Labour Dispute Adjustment Act. The author states that the two incidents are unrelated to each other. He reiterates that his complaint only regards the "prohibition of third party intervention", which he claims is in violation of the Covenant.

8.2 The author argues that the Spate party's interpretation of the freedom of expression as guaranteed in the Covenant is too narrow. He refers to paragraph 2 of article 19, which includes the freedom to impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print. The author argues therefore that the distribution of leaflets containing the Solidarity Forum's statements supporting the strike at the Daewoo Shipyard falls squarely within the right to freedom of expression. He adds that he did not distribute the statements himself, but only transmitted them by telefax to the striking workers at the Daewoo Shipyard.

8.3 As regards the State party's argument that his activity threatened national security and public order, the author notes that the State party has not specified what part of the statements of the Solidarity Forum threatened public security and public order and for what reasons. He contends that a general reference to public security and public order does not justify the restriction of his freedom of expression. In this connection he recalls that the statements of the Solidarity Forum contained arguments for the legitimacy of the strike concerned, strong support for the strike and criticism of the employer and of the Government for threatening to break the strike by force.

8.4 The author denies that the statements by the Solidarity Forum posed a threat to the national security and public order of South Korea. It is stated that the author and the other members of the Solidarity Forum are fully aware of the sensitive situation in terms of South Korea's confrontation with North Korea. The author cannot see how the expression of support for the strike and criticism of the employer and the government in handling the matter could threaten national security. In this connection the author notes that none of the participants in the strike was charged with breaching the National Security Law. The author states that in the light of the constitutional right to strike, police intervention by force can be legitimately criticised. Moreover, the author argues that public order was not threatened by the statements given by the Solidarity Forum, but that, on the contrary, the right to express one's opinion freely and peacefully enhances public order in a democratic society.

8.5 The author points out that solidarity among workers is being prohibited and punished in the Republic of Korea, purportedly in order to "maintain the independent nature of a labour dispute", but that intervention in support of the employer to suppress workers' rights is being encouraged and protected. He adds that the Labour Dispute Adjustment Act was enacted by the Legislative Council for National Security, which was instituted in 1980 by the military government to replace the National Assembly. It is argued that the laws enacted and promulgated by this undemocratic body do not constitute laws within the meaning of the Covenant, enacted in a democratic society.

8.6 The author notes that the Committee of Freedom of Association of the International Labour Organization has recommended that the Government repeal the provision prohibiting the intervention by a third party in labour disputes, because of its incompatibility with the ILO constitution, which guarantees workers' freedom of expression as an essential component of the freedom of association.[1]

8.7 Finally, the author points out that the amnesty has not revoked the guilty judgment against him, nor compensated him for the violations of his Covenant rights, but merely lifted residual restrictions imposed upon him as a result of his sentence, such as the restriction on his right to run for public office.

[1] 294th Report of the Committee on Freedom of Association, June 1994, paragraphs 218 to 274. See also the 297th Report, March-April 1995, paragraph 23.

9.1 By further submission of 20 June 1995, the State party explains that the labour movement in the Republic of Korea can be generally described as being politically oriented and ideologically influenced. In this connection it is stated that labour activists in Korea do not hesitate in leading workers to extreme actions by using force and violence and engaging in illegal strikes in order to fulfil their political aims or carry out their ideological principles. Furthermore, the State party argues that there have been frequent instances where the idea of a proletarian revolution has been implanted in the minds of workers.

9.2 The State party argues that if a third party interferes in a labour dispute to the extent that the third party actually manipulates, instigates or obstructs the decisions of workers, such a dispute is being distorted towards other objectives and goals. The State party explains therefore that, in view of the general nature of the labour movement, it has felt obliged to maintain the law concerning the prohibition of third party intervention.

9.3 Moreover, the State party submits that in the instant case, the written statement distributed in February 1991 to support the Daewoo Shipyard Trade Union was used as a disguise to incite a nation-wide strike of all workers. The State party argues that "in the case where a national strike would take place, in any country, regardless of its security situation, there is considerable reason to believe that the national security and public order of the nation would be threatened."

9.4 As regards the enactment of the Labour Dispute Adjustment Act by the Legislative Council for National Security, the State party argues that, through the revision of the constitution, the effectiveness of the laws enacted by the Council was acknowledged by public consent. The State party moreover argues that the provision concerning the prohibition of the third party intervention is being applied fairly to both the labour and the management side of a dispute. In this connection the State party refers to a case currently before the courts against someone who intervened in a labour dispute on the side of the employer.

Issues and proceedings before the Committee

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

10.2 The Committee has taken note of the State party's argument that the author participated in a violent demonstration in November 1990, for which he was convicted under the Act on Assembly and Demonstration. The Committee has also noted that the author's complaint does not concern this particular conviction, but only his conviction for having issued the statement of the Solidarity Forum in February 1991. The Committee considers that the two convictions concern two different events, which are not related. The issue before the Committee is therefore only whether the author's conviction under article 13, paragraph 2, of the Labour Dispute Adjustment Act for having joined in issuing a statement supporting the strike at the Daewoo Shipyard Company and condemning the Government's threat to send in troops to break the strike violates article 19, paragraph 2, of the Covenant.

10.3 Article 19, paragraph 2, of the Covenant guarantees the right to freedom of expression and includes "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media". The Committee considers that the author, by joining others in issuing a statement supporting the strike and criticizing the Government, was exercising his right to impart information and ideas within the meaning of article 19, paragraph 2, of the Covenant.

10.4 The Committee observes that any restriction of the freedom of expression pursuant to paragraph 3 of article 19 must cumulatively meet the following conditions: it must be provided for by law, it must address one of the aims enumerated in paragraph 3 (a) and (b) of article 19, and must be necessary to achieve the legitimate purpose. While the State party has stated that the restrictions were justified in order to protect national security and public order and that they were provided for by law, under article 13 (2) of the Labour Dispute Adjustment Act, the Committee must still determine whether the measures taken against the author were necessary for the purpose stated. The Committee notes that the State party has invoked national security and public order by reference to the general nature of the labour movement and by alleging that the statement issued by the author in collaboration with others was a disguise for the incitement to a national strike. The Committee considers that the State party has failed to specify the precise nature of the threat which it contends that the author's exercise of freedom of expression posed and finds that none of the arguments advanced by the State party suffice to render the restriction of the author's right to freedom of expression compatible with paragraph 3 of article 19.

11. 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 disclose a violation of article 19, paragraph 2, of the Covenant.

12. The Committee is of the view that Mr. Sohn is entitled, under article 2, paragraph 3 (a), of the Covenant, to an effective remedy, including appropriate compensation, for having been convicted for exercising his right to freedom of expression. The Committee further invites the State party to review article 13 (2) of the Labour Dispute Adjustment Act. The State party is under an obligation to ensure that similar violations do not occur in the future.

13. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

Communication No. 539/1993

Submitted by: Keith Cox (represented by counsel) on 4 January 1993
Alleged victim: The author
State party: Canada
Declared admissible: 3 November 1993 (Forty-ninth session)
Date of adoption of Views: 31 October 1994 (fifty-second session)*

Subject matter: Extradition of author by State to another another jurisdiction where author faces the death penalty – Risk of exposure to "death row phenomenon"

Procedural issues: Interim measures of protection – Lack of substantiation of claim – Admissibility *ratione materiae* – Effectiveness of domestic remedies

Substantive issues: State party's liability for necessary and foreseeable consequences of extradition – Right to life – Torture and inhuman treatment – Death row phenomenon – Method of execution of capital sentence

Articles of the Covenant: 6, 7, 14 and 26

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

1. The author of the communication is Keith Cox, 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, 7, 14 and 26 of the International Covenant on Civil and Political Rights. The author had submitted an earlier communication which was declared inadmissible because of non-exhaustion of domestic remedies on 29 July 1992.[1]

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, although the two other accomplices were tried and sentenced to life terms.

2.2 Pursuant to the extradition request of the United States Government and in accordance with the Extradition Treaty, the Superior Court of Québec, on 26 July 1991, 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

[1] See UN Doc. CCPR/C/45/D/486/1993.

Superior Court of Québec. The author's representative appealed to the Court of Appeal of Québec on 17 October 1991. On 25 May 1992, he abandoned his appeal, considering that, in the light of the Court's jurisprudence, it was bound to fail.

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 articles 6, 14 and 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.

Interim measures

4.1 On 12 January 1993 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.

4.2 At its forty-seventh session the Committee decided to invite both the author and the State party to make further submissions on admissibility.

The State party's observations

5.1 The State party, in its submission, dated 26 May 1993, submits that the communication should be declared inadmissible on the grounds that extradition is beyond the scope of the Covenant, or alternatively that, even if in exceptional circumstances the Committee could examine questions relating to extradition, the present communication is not substantiated, for purposes of admissibility.

5.2 With regard to domestic remedies, the State party explains that extradition is a two step process under Canadian law. The first step involves a hearing at which a judge examines whether a factual and legal basis for extradition exists. The judge considers *inter alia* the proper authentication of materials provided by the requesting State, admissibility and sufficiency of evidence, questions of identity and whether the conduct for which the extradition is sought constitutes a crime in Canada for which extradition can be granted. In the case of fugitives wanted for trial, the judge must be satisfied that the evidence is sufficient to warrant putting the fugitive on trial. The person sought for extradition may submit evidence at the judicial hearing, after which the judge decides whether the fugitive should be committed to await surrender to the requesting State.

5.3 Judicial review of a warrant of committal to await surrender can be sought by means of an application for a *writ of habeas corpus* in a provincial court. A decision of the judge on the *habeas corpus* application can be appealed to the provincial court of appeal and then, with leave, to the Supreme Court of Canada.

5.4 The second step of the extradition process begins following the exhaustion of the appeals in the judicial phase. The Minister of Justice is charged with the responsibility of deciding whether to surrender the person sought for extradition. The fugitive may make written submissions to the Minister, and counsel for the fugitive may appear before the Minister to present oral argument. In coming to a decision on surrender, the Minister considers the case record from the judicial phase, together with any written and oral submissions from the fugitive, the relevant treaty terms which pertain to the case to be decided and the law on extradition. While the Minister's decision is discretionary, the discretion is circumscribed by law. The decision is based upon a consideration of many factors, including Canada's obligations under the applicable treaty of extradition, facts particular to the person and the nature of the crime for which extradition is sought. In addition, the Minister must consider the terms of the *Canadian Charter of Rights and Freedoms* and the various instruments, including the Covenant, which outline Canada's international human rights obligations. A fugitive, subject to an extradition request, cannot be surrendered unless the Minister of Justice orders the fugitive surrendered and, in any case, not until all available avenues for judicial review of the Minister's decision, if pursued, are completed. For extradition requests before 1 December 1992, including the author's request, the Minister's decision is reviewable either by way of an application for a *writ of habeas corpus* in a provincial court or by way of judicial review in the Federal Court pursuant to section 18 of the *Federal Court Act*. As with appeals against a warrant of committal, appeals against a review of the warrant of surrender can be pursued, with leave, up to the Supreme Court of Canada.

5.5 The courts can review the Minister's decision on jurisdictional grounds, i.e. whether the Minister acted fairly, in an administrative law sense, and for its consistency with the Canadian constitution, in particular, whether the Minister's decision is consistent with Canada's human rights obligations.

5.6 With regard to the exercise of discretion in seeking assurances before extradition, the State party explains that each extradition request from the United States, in which the possibility exists that the person sought may face the imposition of the death penalty, must be considered by the Minister of Justice and decided on its own particular facts. "Canada does not routinely seek assurances with respect to the non-imposition of the death penalty. The right to seek assurances is held in reserve for use only where exceptional circumstances exist. This policy ... is in application of article 6 of the Canada-United States Extradition Treaty. The Treaty was never intended to make the seeking of assurances a routine occurrence. Rather, it was the intention of the parties to the Treaty that assurances with respect to the death penalty should only be sought in circumstances where the particular facts of the case warrant a special exercise of the discretion. This policy represents a balancing of the rights of the individual sought for extradition with the need for the protection of the people of Canada. This policy reflects ... Canada's understanding of and respect for the criminal justice system of the United States."

5.7 Moreover, the State party refers to a continuing flow of criminal offenders from the United States into Canada and a concern that, unless such illegal flow is discouraged, Canada could become a safe haven for dangerous offenders from the United States, bearing in mind that Canada and the United States share a 4,800 kilometre unguarded border. In the last twelve years there has been an increasing number of extradition requests from the United States. In 1980 there were 29 such requests; by 1992 the number had grown to 88, including requests involving death penalty cases, which were becoming a new and pressing problem. "A policy of routinely seeking assurances under article 6 of the Canada-United States Extradition Treaty would encourage even more criminal offenders, especially those guilty of the most serious crimes, to flee the United States into Canada. Canada does not wish to become a haven for the most wanted and dangerous criminals from the United States. If the Covenant fetters Canada's discretion not to seek assurances, increasing numbers of criminals may come to Canada for the purpose of securing immunity from capital punishment."

6.1 As to the specific facts of the instant communication, the State party indicates that Mr. Cox is a black male, 40 years of age, of sound mind and body, an American citizen with no immigration status in Canada. He is charged in the state of Pennsylvania with two counts of first degree murder, one count of robbery and one count of criminal conspiracy to commit murder and robbery, going back to an incident that occurred in Philadelphia, Pennsylvania in 1988, where two teenage boys were killed pursuant to a plan to commit robbery in connection with illegal drug trafficking. Three men, one of whom is alleged to be Mr. Cox, participated in the killings. In Pennsylvania, first degree murder is punishable by death or a term of life imprisonment. Lethal injection is the method of execution mandated by law.

6.2 With regard to the exhaustion of domestic remedies, the State party indicates that Mr. Cox was ordered committed to await extradition by a judge of the Quebec Superior Court on 26 July 1991. This order was challenged by the author in an application for *habeas corpus* before the Quebec Superior Court. The application was dismissed on 13 September 1991. Mr. Cox then appealed to the Quebec Court of Appeal, and, on 18 February 1992, before exhausting domestic remedies in Canada, he submitted a communication to the Committee, which was registered under No. 486/1992. Since the extradition process had not yet progressed to the second stage, the communication was ruled inadmissible by the Committee on 26 July 1992.

6.3 On 25 May 1992, Mr. Cox withdrew his appeal to the Quebec Court of Appeal, thus concluding the judicial phase of the extradition process. The second stage, the ministerial phase, began. He petitioned the Minister of Justice asking that assurances be sought that the death penalty would not be imposed. In addition to written submissions, counsel for the author appeared before the Minister and made oral representations. "It was alleged that the judicial system in the state of Pennsylvania was inadequate and discriminatory. He submitted materials which purported to show that the Pennsylvania system of justice as it related to death penalty cases was characterized by inadequate legal representation of impoverished accused, a system of assignment of judges which resulted in a 'death penalty court', selection of jury members which resulted in 'death qualified juries' and an overall problem of racial discrimination. The Minister of Justice was of the view that the concerns based on alleged racial discrimination were premised largely on the possible intervention of a specific prosecutor in the state of Pennsylvania who, according to officials in that state, no longer has any connection with his case. It was alleged that, if returned to face possible imposition of the death penalty, Mr. Cox would be exposed to the 'death row phenomenon'. The Minister of Justice was of the view that the submissions indicated that the conditions of incarceration in the state of Pennsylvania met the constitutional standards of the United States and that situations which needed improvement were being addressed ... it was argued that assurances be sought on the basis that there is a growing international movement for the abolition of the death penalty... The Minister of Justice, in coming to the decision to

order surrender without assurances, concluded that Mr. Cox had failed to show that his rights would be violated in the state of Pennsylvania in any way particular to him, which could not be addressed by judicial review in the United States Supreme Court under the Constitution of the United States. That is, the Minister determined that the matters raised by Mr. Cox could be left to the internal working of the United States system of justice, a system which sufficiently corresponds to Canadian concepts of justice and fairness to warrant entering into and maintaining the Canada-United States Extradition Treaty." On 2 January 1993, the Minister, having determined that there existed no exceptional circumstances pertaining to the author which necessitated the seeking of assurances in his case, ordered him surrendered without assurances.

6.4 On 4 January 1993, author's counsel sought to reactivate his earlier communication to the Committee. He has indicated to the Government of Canada that he does not propose to appeal the Minister's decision in the Canadian courts. The State party, however, does not contest the admissibility of the communication on this issue.

7.1 As to the scope of the Covenant, the State party contends that extradition *per se* is beyond its scope and refers to the *travaux préparatoires*, showing that the drafters of the Covenant specifically considered and rejected a proposal to deal with extradition in the Covenant. "It was argued that the inclusion of a provision on extradition in the Covenant would cause difficulties regarding the relationship of the Covenant to existing treaties and bilateral agreements." (A/2929, Chapt. VI, para. 72) In the light of the history of negotiations during the drafting of the Covenant, the State party submits "that a decision to extend the Covenant to extradition treaties or to individual decisions pursuant thereto, would stretch the principles governing the interpretation of the Covenant, and of human rights instruments in general, in unreasonable and unacceptable ways. It would be unreasonable because the principles of interpretation which recognize that human rights instruments are living documents and that human rights evolve over time cannot be employed in the face of express limits to the application of a given document. The absence of extradition from the articles of the Covenant when read with the intention of the drafters must be taken as an express limitation."

7.2 As to the author's standing as a "victim" under article 1 of the Optional Protocol, the State party concedes that he is subject to Canada's jurisdiction during the time he is in Canada in the extradition process. However, the State party submits "that Cox is not a victim of any violation in Canada of rights set forth in the Covenant ... because the Covenant does not set forth any rights with respect to extradition. In the alternative, it contends that even if [the] Covenant extends to extradition, it can only apply to the treatment of the fugitive sought for extradition with respect to the operation of the extradition process within the State Party to the Protocol. Possible treatment of the fugitive in the requesting State cannot be the subject of a communication with respect to the State Party to the Protocol (extraditing State), except perhaps for instances where there was evidence before that extraditing State such that a violation of the Covenant in the requesting State was reasonably foreseeable."

7.3 The State party contends that the evidence submitted by author's counsel to the Committee and to the Minister of Justice in Canada does not show that it was reasonably foreseeable that the treatment that the author may face in the United States would violate his rights under the Covenant. The Minister of Justice and the Canadian Courts, to the extent that the author availed himself of the opportunities for judicial review, considered all the evidence and argument submitted by counsel and concluded that Mr. Cox's extradition to the United States to face the death penalty would not violate his rights, either under Canadian law or under international instruments, including the Covenant. Thus, the State party concludes that the communication is inadmissible because the author has failed to substantiate, for purposes of admissibility, that the author is a victim of any violation in Canada of rights set forth in the Covenant.

Counsel's submissions on admissibility

8.1 In his submission of 7 April 1993, author's counsel argues that an attempt to further exhaust domestic remedies in Canada would be futile in the light of the judgment of the Canadian Supreme Court in the cases of Kindler and Ng. "I chose to file the communication and apply for interim measures prior to discontinuing the appeal. This move was taken because I presumed that a discontinuance in the appeal might result in the immediate extradition of Mr. Cox It was more prudent to seize the Committee first, and then discontinue the appeal, and I think this precaution was a wise one, because Mr. Cox is still in Canada... Subsequent to discontinuation of the appeal, I filed an application before the Minister of Justice, Kim Campbell, praying that she exercise her discretionary power under article 6 of the Extradition Act, and refuse to extradite Mr. Cox until an assurance had been provided by the United States government that if Mr. Cox were to be found guilty, the death penalty would not be applied... I was granted a hearing before Minister Campbell, on November 13, 1992. In reasons dated January 2, 1993 Minister Campbell

refused to exercise her discretion and refused to seek assurances from the United States government that the death penalty not be employed... It is possible to apply for judicial review of the decision of Minister Campbell, on the narrow grounds of breach of natural justice or other gross irregularity. However, there is no suggestion of any grounds to justify such recourse, and consequently no such dilatory recourse has been taken ... all useful and effective domestic remedies to contest the extradition of Mr. Cox have been exhausted."

8.2 Counsel contends that the extradition of Mr. Cox would expose him to the real and present danger of:

> "a. arbitrary execution, in violation of article 6 of the Covenant;
>
> b. discriminatory imposition of the death penalty, in violation of articles 6 and 26 of the Covenant;
>
> c. imposition of the death penalty in breach of fundamental procedural safeguards, specifically by an impartial jury (the phenomenon of 'death qualified' juries), in violation of articles 6 and 14 of the Covenant;
>
> d. prolonged detention on 'death row', in violation of article 7 of the Covenant."

8.3 With respect to the system of criminal justice in the United States, author's counsel refers to the reservations which the United States formulated upon its ratification of the Covenant, in particular to article 6: "The United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age." Author's counsel argues that this is "an enormously broad reservation that no doubt is inconsistent with the nature and purpose of the treaty but that furthermore ... creates a presumption that the United States does not intend to respect article 6 of the Covenant."

9.1 In his comments, dated 10 June 1993, on the State party's submission, counsel addresses the refusal of the Minister to seek assurances on the non-imposition of the death penalty, and refers to the book *La Forest's Extradition to and from Canada*, in which it is stated that Canada in fact routinely seeks such an undertaking. Moreover, the author contests the State party's interpretation that it was not the intention of the drafters of the extradition treaty that assurances be routinely sought. "It is known that the provision in the extradition treaty with the United States was added at the request of the United States. Does Canada have any evidence admissible in a court of law to support such a questionable claim? I refuse to accept the suggestion in the absence of any serious evidence."

9.2 As to the State party's argument that extradition is intended to protect Canadian society, author's counsel challenges the State party's belief that a policy of routinely seeking guarantees will encourage criminal law offenders to seek refuge in Canada and contends that there is no evidence to support such a belief. Moreover, with regard to Canada's concern that if the United States does not give assurances, Canada would be unable to extradite and have to keep the criminal without trial, author's counsel argues that "a state government so devoted to the death penalty as a supreme punishment for an offender would surely prefer to obtain extradition and keep the offender in life imprisonment rather than to see the offender freed in Canada. I know of two cases where the guarantee was sought from the United States, one for extradition from the United Kingdom to the state of Virginia (Soering) and one for extradition from Canada to the state of Florida (O'Bomsawin). In both cases the states willingly gave the guarantee. It is pure demagogy for Canada to raise the spectre of 'a haven for many fugitives from the death penalty' in the absence of evidence."

9.3 As to the murders of which Mr. Cox was accused, author's counsel indicates that "two individuals have pleaded guilty to the crime and are now serving life prison terms in Pennsylvania. Each individual has alleged that the other individual actually committed the murder, and that Keith Cox participated."

9.4 With regard to the scope of the Covenant, counsel refers to the *travaux préparatoires* of the Covenant and argues that consideration of the issue of extradition must be placed within the context of the debate on the right to asylum, and claims that extradition was in fact a minor point in the debates. Moreover, "nowhere in the summary records is there evidence of a suggestion that the Covenant would not apply to extradition requests when torture or cruel, inhuman and degrading punishment might be imposed... Germane to the construction of the Covenant, and to Canada's affirmations about the scope of human rights law, is the more recent Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides, in article 3, that States parties shall not extradite a person to another State where there are serious grounds to believe that the person will be subjected to torture... It is respectfully submitted that it is appropriate to construe articles 7 and 10 of the Covenant in light of the more detailed provisions in the Convention Against Torture. Both instruments were drafted by the same organization, and are parts of the same international human rights system. The Convention Against Torture was meant to give more detailed and specialized protection; it is an enrichment of the Covenant."

9.5 As to the concept of victim under the Optional Protocol, author's counsel contends that this is not a matter for admissibility but for the examination of the merits.

Committee's admissibility decision

10.1 […]

10.2 With regard to the requirement of the exhaustion of domestic remedies, the Committee noted that the author did not complete the judicial phase of examination, since he withdrew the appeal to the Court of Appeal after being advised that it would have no prospect of success and, therefore, that legal aid would not be provided for that purpose. With regard to the ministerial phase, the author indicated that he did not intend to appeal the Minister's decision to surrender Mr. Cox without seeking assurances, since, as he asserts, further recourse to domestic remedies would have been futile in the light of the 1991 judgment of the Canadian Supreme Court in Kindler and Ng.[2] The Committee noted that the State party had explicitly stated that it did not wish to express a view as to whether the author had exhausted domestic remedies and did not contest the admissibility of the communication on this ground. In the circumstances, basing itself on the information before it, the Committee concluded that the requirements of article 5, paragraph 2 (b), of the Covenant had been met.

10.3 Extradition as such is outside the scope of application of the Covenant (communication No. 117/1981 [*M.A. v. Italy*], paragraph 13.4). Extradition is an important instrument of cooperation in the administration of justice, which requires that safe havens should not be provided for those who seek to evade fair trial for criminal offences, or who escape after such fair trial has occurred. But a State party's obligation in relation to a matter itself outside the scope of the Covenant may still be engaged by reference to other provisions of the Covenant.[3] In the present case the author does not claim that extradition as such violates the Covenant, but rather that the particular circumstances related to the effects of his extradition would raise issues under specific provisions of the Covenant. The Committee finds that the communication is thus not excluded from consideration *ratione materiae*.

10.4 With regard to the allegations that, if extradited, Mr. Cox would be exposed to a real and present danger of a violation of articles 14 and 26 of the Covenant in the United States, the Committee observed that the evidence submitted did not substantiate, for purposes of admissibility, that such violations would be a foreseeable and necessary consequence of extradition. It does not suffice to assert before the Committee that the criminal justice system in the United States is incompatible with the Covenant. In this connection, the Committee recalled its jurisprudence that, under the Optional Protocol procedure, it cannot examine *in abstracto* the compatibility with the Covenant of the laws and practice of a State.[4] For purposes of admissibility, the author has to substantiate that in the specific circumstances of his case, the Courts in Pennsylvania would be likely to violate his rights under articles 14 and 26, and that he would not have a genuine opportunity to challenge such violations in United States courts. The author has failed to do so. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

10.5 The Committee considered that the remaining claim, that Canada violated the Covenant by deciding to extradite Mr. Cox without seeking assurances that the death penalty would not be imposed, or if imposed, would not be carried out, may raise issues under articles 6 and 7 of the Covenant which should be examined on the merits.

11. On 3 November 1993, the Human Rights Committee decided that the communication was admissible in so far as it may raise issues under articles 6 and 7 of the Covenant. The Committee reiterated its request to the State party, under rule 86 of the Committee's rules of procedure, that the author not be extradited while the Committee is examining the merits of the communication.

State party's request for review of admissibility and submission on the merits; and author's comments

12.1 In its submission under article 4, paragraph 2, of the Optional Protocol, the State party maintains that the communication is inadmissible and requests the Committee to review its decision of 3 November 1993. The State party also submits its response on the merits of the communication.

12.2 With regard to the notion of "victim" within the meaning of article 1 of the Optional Protocol, the

[2] The Supreme Court found that the decision of the Minister to extradite Mr. Kindler and Mr. Ng without seeking assurances that the death penalty would not be imposed or, if imposed, would not be carried out, did not violate their rights under the Canadian Charter of Rights and Freedoms.

[3] See the Committee's decisions in communications Nos. 35/1978 (*Aumeeruddy-Cziffra et al. v. Mauritius*, Views adopted on 9 April 1981) and 291/1988 (*Torres v. Finland*, Views adopted on 2 April 1990).

[4] Views in communication No. 61/1979, *Leo Hertzberg et al. v. Finland*, para. 9.3.

State Party indicates that Mr. Keith Cox has not been convicted of any crime in the United States, and that the evidence submitted does not substantiate, for purposes of admissibility, that violations of articles 6 and 7 of the Covenant would be a foreseeable and necessary consequence of his extradition.

12.3 The State party explains the extradition process in Canada, with specific reference to the practice in the context of the Canada-United States Extradition Treaty. It elaborates on the judicial phase, which includes a methodical and thorough evaluation of the facts of each case. After the exhaustion of the appeals in the judicial phase, a second phase of review follows, in which the Minister of Justice is charged with the responsibility of deciding whether to surrender the person for extradition, and in capital cases, whether the facts of the particular case justify seeking assurances that the death penalty will not be imposed. Throughout this process the fugitive can present his arguments against extradition, and his counsel may appear before the Minister to present oral argument both on the question of surrender and, where applicable, on the seeking of assurances. The Minister's decision is also subject to judicial review. In numerous cases, the Supreme Court of Canada has had occasion to review the exercise of the ministerial discretion on surrender, and has held that the right to life and the right not to be deprived thereof except in accordance with the principles of fundamental justice, apply to ministerial decisions on extradition.

12.4 With regard to the facts particular to Mr. Keith Cox, the State party reViews his submissions before the Canadian courts, the Minister of Justice (see paras. 6.2 and 6.3 *supra*) and before the Committee and concludes that the evidence adduced fails to show how Mr. Cox satisfies the criterion of being a "victim" within the meaning of article 1 of the Optional Protocol. Firstly, it has not been alleged that the author has already suffered any violation of his Covenant rights; secondly, it is not reasonably foreseeable that he would become a victim after extradition to the United States. The State party cites statistics from the Pennsylvania District Attorney's Office and indicates that since 1976, when Pennsylvania's current death penalty law was enacted, no one has been put to death; moreover, the Pennsylvania legal system allows for several appeals. But not only has Mr. Cox not been tried, he has not been convicted, nor sentenced to death. In this connection the State party notes that the two other individuals who were alleged to have committed the crimes together with Mr. Cox were not given death sentences but are serving life sentences. Moreover, the death penalty is not sought in all murder cases. Even if sought, it cannot be imposed in the absence of aggravating factors which must outweigh any mitigating factors. Referring to the Committee's jurisprudence in the *Aumeeruddy-Cziffra* case that the alleged victim's risk be "more than a theoretical possibility", the State party states that no evidence has been submitted to the Canadian courts or to the Committee which would indicate a real risk of his becoming a victim. The evidence submitted by Mr. Cox is either not relevant to him or does not support the view that his rights would be violated in a way that he could not properly challenge in the courts of Pennsylvania and of the United States. The State party concludes that since Mr. Cox has failed to substantiate, for purposes of admissibility, his allegations, the communication should be declared inadmissible under article 2 of the Optional Protocol.

13.1 As to the merits of the case, the State party refers to the Committee's Views in the *Kindler* and *Ng* cases, which settled a number of matters concerning the application of the Covenant to extradition cases.

13.2 As to the application of article 6, the State party relies on the Committee's view that paragraph 1 (right to life) must be read together with paragraph 2 (imposition of the death penalty), and that a State party would violate paragraph 6, paragraph 1, if it extradited a person to face possible imposition of the death penalty in a requesting State where there was a real risk of a violation of paragraph 6, paragraph 2.

13.3 Whereas Mr. Cox alleges that he would face a real risk of a violation of article 6 of the Covenant because the United States "does not respect the prohibition on the execution of minors", the State party indicates that Mr. Cox is over 40 years of age. As to the other requirements of article 6, paragraph 2, of the Covenant, the State party indicates that Mr. Cox is charged with murder, which is a very serious criminal offence, and that if the death sentence were to be imposed on him, there is no evidence suggesting that it would not be pursuant to a final judgment rendered by a court.

13.4 As to hypothetical violations of Mr. Cox's rights to a fair trial, the State party recalls that the Committee declared the communication inadmissible with respect to articles 14 and 26 of the Covenant, since the author had not substantiated his allegations for purposes of admissibility. Moreover, Mr. Cox has not shown that he would not have a genuine opportunity to challenge such violations in the courts of the United States.

13.5 As to article 7 of the Covenant, the State party first addresses the method of judicial execution in Pennsylvania, which is by lethal injection. This method was recently provided for by the Pennsylvania legislature, because it was considered to inflict the least suffering. The State party further indicates that the Committee, in its decision in the

Kindler case, which similarly involved the possible judicial execution by lethal injection in Pennsylvania, found no violation of article 7.

13.6 The State party then addresses the submissions of counsel for Mr. Cox with respect to alleged conditions of detention in Pennsylvania. It indicates that the material submitted is out of date and refers to recent substantial improvements in the Pennsylvania prisons, particularly in the conditions of incarceration of inmates under sentence of death. At present these prisoners are housed in new modern units where cells are larger than cells in other divisions, and inmates are permitted to have radios and televisions in their cells, and to have access to institutional programs and activities such as counselling, religious services, education programs, and access to the library.

13.7 With regard to the so-called "death row phenomenon", the State party distinguishes the facts of the Cox case from those in the *Soering v. United Kingdom* judgment of the European Court of Justice. The decision in *Soering* turned not only on the admittedly bad conditions in some prisons in the state of Virginia, but also on the tenuous state of health of Mr. Soering. Mr. Cox has not been shown to be in a fragile mental or physical state. He is neither a youth, nor elderly. In this connection, the State party refers to the Committee's jurisprudence in the *Vuolanne v. Finland* case, where it held that "the assessment of what constitutes inhuman or degrading treatment falling within the meaning of article 7 depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim."[5]

13.8 As to the effects of prolonged detention, the State party refers to the Committee's jurisprudence that the "death row phenomenon" does not violate article 7,if it consists only of prolonged periods of delay on death row while appellate remedies are pursued. In the case of Mr. Cox, it is not at all clear that he will reach death row or that he will remain there for a lengthy period of time pursuing appeals.

14.1 In his comments on the State party's submission, counsel for Mr. Cox stresses that the state of Pennsylvania has stated in its extradition application that the death penalty is being sought. Accordingly, the prospect of execution is not so very remote.

14.2 With regard to article 7 of the Covenant, author's counsel contends that the use of plea bargaining in a death penalty case meets the definition of torture. "What Canada is admitting ... is that Mr. Cox will be offered a term of life imprisonment instead of the death penalty *if he pleads guilty*. In other words, if he admits to the crime he will avoid the physical suffering which is inherent in imposition of the death penalty."

14.3 As to the method of execution, author's counsel admits that no submissions had been made on this subject in the original communication. Nevertheless, he contends that execution by lethal injection would violate article 7 of the Covenant. He argues, on the basis of a deposition by Professor Michael Radelet of the University of Florida, that there are many examples of "botched" executions by lethal injection.

14.4 As to the "death row phenomenon", counsel for Mr. Cox specifically requests that the Committee reconsider its case law and conclude that there is a likely violation of article 7 in Mr. Cox's case, since "nobody has been executed in Pennsylvania for more than twenty years, and there are individuals awaiting execution on death row for as much as fifteen years."

14.5 Although the Committee declared the communication inadmissible as to articles 14 and 26 of the Covenant, author's counsel contends that article 6 of the Covenant would be violated if the death penalty were to be imposed "arbitrarily" on Mr. Cox because he is black. He claims that there is systemic racism in the application of the death penalty in the United States.

Examination of the merits

15. The Committee has taken note of the State party's information and arguments on admissibility, submitted after the Committee's decision of 3 November 1993. It observes that no new facts or arguments have been submitted that would justify a reversal of the Committee's decision on admissibility. Therefore, the Committee proceeds to the examination of the merits.

16.1 With regard to a potential violation by Canada of article 6 of the Covenant if it were to extradite Mr. Cox to face the possible imposition of the death penalty in the United States, the Committee refers to the criteria set forth in its Views on communications Nos. 470/1991 (*Kindler v. Canada*) and 469/1991 (*Chitat Ng v. Canada*). Namely, for States that have abolished capital punishment and are called to extradite a person to a country where that person may face the imposition of the death penalty, the extraditing State must ensure that the person is not exposed to a real risk of a violation of his rights under article 6 in the receiving State. In other words, if a State party to the Covenant takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be

[5] Views in communication No. 265/1987, *Vuolanne v. Finland*, para. 9.2.

in violation of the Covenant. In this context, the Committee also recalls its General Comment on Article 6,[6] which provides that while States parties are not obliged to abolish the death penalty, they are obliged to limit its use.

16.2 The Committee notes that article 6, paragraph 1, must be read together with article 6, paragraph 2, which does not prohibit the imposition of the death penalty for the most serious crimes. Canada, while not itself imposing the death penalty on Mr. Cox, is asked to extradite him to the United States, where he may face capital punishment. If Mr. Cox were to be exposed, through extradition from Canada, to a real risk of a violation of article 6, paragraph 2, in the United States, that would entail a violation by Canada of its obligations under article 6, paragraph 1. Among the requirements of article 6, paragraph 2, is that capital punishment be imposed only for the most serious crimes, in circumstances not contrary to the Covenant and other instruments, and that it be carried out pursuant to a final judgment rendered by a competent court. The Committee notes that Mr. Cox is to be tried for complicity in two murders, undoubtedly very serious crimes. He was over 18 years of age when the crimes were committed. The author has not substantiated his claim before the Canadian courts or before the Committee that trial in the Pennsylvania courts with the possibility of appeal would not be in accordance with his right to a fair hearing as required by the Covenant.

16.3 Moreover, the Committee observes that the decision to extradite Mr. Cox to the United States followed proceedings in the Canadian courts at which Mr. Cox's counsel was able to present argument. He was also able to present argument at the ministerial phase of the proceedings, which themselves were subject to appeal. In the circumstances, the Committee finds that the obligations arising under article 6, paragraph 1, did not require Canada to refuse the author's extradition without assurances that the death penalty would not be imposed.

16.4 The Committee notes that Canada itself, save for certain categories of military offences, abolished capital punishment; it is not, however, a party to the Second Optional Protocol to the Covenant. As to whether the fact that Canada has generally abolished capital punishment, taken together with its obligations under the Covenant, required it to refuse extradition or to seek the assurances it was entitled to seek under the extradition treaty, the Committee observes that the domestic abolition of capital punishment does not release Canada of its obligations under extradition treaties. However, it is in principle to be expected that, when exercising a permitted discretion under an extradition treaty (namely, whether or not to seek assurances that capital punishment will not be imposed) a State which has itself abandoned capital punishment would give serious consideration to its own chosen policy in making its decision. The Committee observes, however, that the State party has indicated that the possibility to seek assurances would normally be exercised where exceptional circumstances existed. Careful consideration was given to this possibility. The Committee notes the reasons given by Canada not to seek assurances in Mr. Cox's case, in particular, the absence of exceptional circumstances, the availability of due process in the state of Pennsylvania, and the importance of not providing a safe haven for those accused of or found guilty of murder.

16.5 While States parties must be mindful of the possibilities for the protection of life when exercising their discretion in the application of extradition treaties, the Committee finds that Canada's decision to extradite without assurances was not taken arbitrarily or summarily. The evidence before the Committee reveals that the Minister of Justice reached a decision after hearing argument in favor of seeking assurances.

16.6 The Committee notes that the author claims that the plea bargaining procedures, by which capital punishment could be avoided if he were to plead guilty, further violates his rights under the Covenant. The Committee finds this not to be so in the context of the criminal justice system in Pennsylvania.

16.7 With regard to the allegations of systemic racial discrimination in the United States criminal justice system, the Committee does not find, on the basis of the submissions before it, that Mr. Cox would be subject to a violation of his rights by virtue of his colour.

17.1 The Committee has futher considered whether in the specific circumstances of this case, being held on death row would constitute a violation of Mr. Cox's rights under article 7 of the Covenant. While confinement on death row is necessarily stressful, no specific factors relating to Mr. Cox's mental condition have been brought to the attention of the Committee. The Committee notes also that Canada has submitted specific information about the current state of prisons in Pennsylvania, in particular with regard to the facilities housing inmates under sentence of death, which would not appear to violate article 7 of the Covenant.

17.2 As to the period of detention on death row in reference to article 7, the Committee notes that Mr. Cox has not yet been convicted nor sentenced, and that the trial of the two accomplices in the murders of which Mr. Cox is also charged did not end with sentences of death but rather of life

[6] General Comment No. 6/16 of 27 July 1982, para. 6.

imprisonment. Under the jurisprudence of the Committee,[7] on the one hand, every person confined to death row must be afforded the opportunity to pursue all possibilities of appeal, and, on the other hand, the State party must ensure that the possibilities for appeal are made available to the condemned prisoner within a reasonable time. Canada has submitted specific information showing that persons under sentence of death in the state of Pennsylvania are given every opportunity to avail themselves of several appeal instances, as well as opportunities to seek pardon or clemency. The author has not adduced evidence to show that these procedures are not made available within a reasonable time, or that there are unreasonable delays which would be imputable to the State. In these circumstances, the Committee finds that the extradition of Mr. Cox to the United States would not entail a violation of article 7 of the Covenant.

17.3 With regard to the method of execution, the Committee has already had the opportunity of examining the Kindler case, in which the potential judicial execution by lethal injection was not found to be in violation of article 7 of the Covenant.

18. The Committee, acting under article 5, paragraph 4, of the Optional Protocol, finds that the facts before it do not sustain a finding that the extradition of Mr. Cox to face trial for a capital offence in the United States would constitute a violation by Canada of any provision of the International Covenant on Civil and Political Rights.

---

[7] Views in communications Nos. 210/1986 and 225/1987, *Earl Pratt and Ivan Morgan v. Jamaica*, para. 13.6; No. 250/1987, *Carlton Reid v. Jamaica*, para. 11.6; Nos. 270/1988 and 271/1988, *Randolph Barrett and Clyde Sutcliffe v. Jamaica*, para. 8.4; No. 274/1988, *Loxley Griffith v. Jamaica*, para. 7.4; No. 317/1988, *Howard Martin v. Jamaica*, para. 12.1; No. 470/1991, *Kindler v. Canada*, para. 15.2.

* The texts of 8 individual opinions, signed by 13 Committee members, are appended to the present document.

APPENDIX

A. Individual opinions appended to the Committee's decision on admissibility of 3 November 1993

1. INDIVIDUAL OPINION BY MRS. ROSALYN HIGGINS, CO-SIGNED BY MESSRS. LAUREL FRANCIS, KURT HERNDL, ANDREAS MAVROMMATIS, BIRAME NDIAYE AND WALEED SADI (DISSENTING)

We believe that this case should have been declared inadmissible. Although extradition as such is outside the scope of the Covenant (see *M.A. v. Italy*, communication No. 117/1981, decision of 10 April 1984, paragraph 13.4), the Committee has explained, in its decision on communication No. 470/1991 (*Joseph J. Kindler v. Canada*, Views adopted on 30 July 1993), that a State party's obligations in relation to a matter itself outside the scope of the Covenant may still be engaged by reference to other provisions of the Covenant.

But here, as elsewhere, the admissibility requirements under the Optional Protocol must be met. In its decision on *Kindler*, the Committee addressed the issue of whether it had jurisdiction, *ratione loci*, by reference to article 2 of the Optional Protocol, in an extradition case that brought into play other provisions of the Covenant. It observed that "if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that the person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant" (paragraph 6.2).

We do not see on what jurisdictional basis the Committee proceeds to its finding that the communication is admissible under articles 6 and 7 of the Covenant. The Committee finds that the communication is inadmissible by reference to article 2 of the Optional Protocol (paragraph 10.4) insofar as claims relating to fair trial (article 14) and discrimination before the law (article 26) are concerned. We agree. But this negative finding cannot form a basis for admissibility in respect of articles 6 and 7. The Committee should have applied the same test ("foreseeable and necessary consequences") to the claims made under articles 6 and 7, before simply declaring them admissible in respect of those articles. It did not do so – and in our opinion could not have found, in the particular circumstances of the case, a proper legal basis for jurisdiction had it done so.

The above test is relevant also to the admissibility requirement, under article 1 of the Optional Protocol, that an author be a "victim" of a violation in respect of which he brings a claim. In other words, it is not always necessary that a violation already have occurred for an action to come within the scope of article 1. But the violation that will affect him personally must be a "necessary and foreseeable consequence" of the action of the defendant State.

It is clear that in the case of Mr. Cox, unlike in the case of Mr. Kindler, this test is not met. Mr. Kindler had, at the time of the Canadian decision to extradite him, been tried in the United States for murder, found guilty as charged and recommended to the death sentence by the jury. Mr. Cox, by contrast, has not yet been tried and *a fortiori* has not been found guilty or recommended to the death penalty. Already it is clear that his extradition would *not* entail the possibility of a "necessary and foreseeable consequence of a violation of his rights" that would require examination on the merits. This failure to meet the test of "prospective victim" within the meaning of article 1 of the Optional Protocol is emphasized by the fact that Mr. Cox's two co-defendants in the case in which he has been charged have already been tried in the State of Pennsylvania, and sentenced not to death but to a term of life imprisonment.

The fact that the Committee – and rightly so in our view – found that *Kindler* raised issues that needed to be considered on their merits, and that the admissibility

criteria were there met, does not mean that every extradition case of this nature is necessarily admissible. In every case, the tests relevant to articles 1, 2, 3 and 5, paragraph 2, of the Optional Protocol must be applied to the particular facts of the case.

The Committee has not at all addressed the requirements of article 1 of the Optional Protocol, that is, whether Mr. Cox may be considered a "victim" by reference to his claims under articles 14, 26, 6 or 7 of the Covenant.

We therefore believe that Mr. Cox was not a "victim" within the meaning of article 1 of the Optional Protocol, and that his communication to the Human Rights Committee is inadmissible.

The duty to address carefully the requirements for admissibility under the Optional Protocol is not made the less necessary because capital punishment is somehow involved in a complaint.

For all these reasons, we believe that the Committee should have found the present communication inadmissible.

Rosalyn Higgins Laurel Francis Kurt Herndl
Andreas Mavrommatis Birame Ndiaye Waleed Sadi

2. Individual opinion by Mrs. Elizabeth Evatt (dissenting)

For his claim to be admissible, the author must show that he is a victim. To do this he must submit facts which support the conclusion that his extradition exposed him to a real risk that his rights under articles 6 and 7 of the Covenant would be violated (in the sense that the violation is necessary and foreseeable). The author in the present case has not done so.

As to article 6, the author is, of course, exposed by his extradition to the risk of facing the death penalty for the crime of which he is accused. But he has not submitted facts to show a real risk that the imposition of the death penalty would itself violate article 6, which does not exclude the death penalty in certain limited circumstances. Furthermore, his accomplices in the crime he is charged with were sentenced to life imprisonment, a factor which does not support the contention that the author's extradition would expose him to a "necessary and foreseeable" risk that the death penalty will be imposed.

As to article 7, the claim that the author has been exposed to a real risk of a violation of this provision by his extradition is based on the death row phenomenon (paragraph 8.2); the author has not, however, submitted facts which, in the light of the Committee's jurisprudence, show that there is a real risk of violation of this article if he is extradited to the United States. Furthermore, since, in my opinion, the author's extradition does not expose him to a real risk of being sentenced to death, his extradition entails *a fortiori* no necessary and foreseeable consequence of a violation of his rights while on death row.

For these reasons I am of the view that the communication is inadmissible under articles 1 and 2 of the Optional Protocol.

Elizabeth Evatt

B. Individual opinions appended to the Committee's Views

1. Individual opinion by Messrs. Kurt Herndl and Waleed Sadi (concurring)

We concur with the Committee's finding that the facts of the instant case do not reveal a violation of either article 6 or 7 of the Covenant.

In our opinion, however, it would have been more consistent with the Committee's jurisprudence to set aside the decision on admissibility of 3 November 1993 and to declare the communication inadmissible under articles 1 and 2 of the Optional Protocol, on grounds that the author does not meet the "victim" test established by the Committee. Bearing in mind that Mr. Cox has not been tried, let alone convicted or sentenced to death, the hypothetical violations alleged appear quite remote for the purpose of considering this communication admissible.

However, since the Committee has proceeded to an examination of the merits, we would like to submit the following considerations on the scope of articles 6 and 7 of the Covenant and their application in the case of Mr. Keith Cox.

Article 6

As a starting point, we would note that article 6 does not expressly prohibit extradition to face capital punishment. Nevertheless, it is appropriate to consider whether a prohibition would follow as a necessary implication of article 6.

In applying article 6, paragraph 1, of the Covenant, the Committee must, pursuant to article 31 of the Vienna Convention on the Law of Treaties, interpret this provision *in good faith* in accordance with the ordinary meaning to be given to the terms in their context. As to the ordinary meaning of the words, a prohibition of extradition is not apparent. As to the context of the provision, we believe that article 6, paragraph 1, must be read in conjunction with article 6, paragraph 2, which does not prohibit the imposition of the death penalty for the most serious crimes; part of the context to be considered is also the fact that a large majority of States – at the time of the drafting of the Covenant and still today – retain the death penalty. One may not like this objective context, it must not be disregarded.

Moreover, the notion *in good faith* entails that the intention of the parties to a treaty should be ascertained and carried out. There is a general principle of international law according to which no State can be bound without its consent. States parties to the Covenant gave consent to certain specific obligations under article 6 of the Covenant. The fact that this provision does not address the link between the protection of the right to life and the established practice of States in the field of extradition is not without significance.

Had the drafters of article 6 intended to preclude all extradition to face the death penalty, they could have done so. Considering that article 6 consists of six paragraphs, it is unlikely that such an important matter would have been left for future interpretation. Nevertheless, an issue under article 6 could still arise if

extradition were granted for the imposition of the death penalty in breach of article 6, paragraphs 2 and 5. While this has been recognized by the Committee in its jurisprudence (see the Committee's Views in communication No. 469/1991 (*Ng v. Canada*) and No. 470/1990 (*Kindler v. Canada*)), the yardstick with which a possible breach of article 6, paragraphs 2 and 5, has to be measured, remains a restrictive one. Thus, the extraditing State may be deemed to be in violation of the Covenant only if the *necessary and foreseeable consequence* of its decision to extradite is that the Covenant rights of the extradited person will be violated in another jurisdiction.

In this context, reference may be made to the Second Optional Protocol, which similarly does *not* address the issue of extradition. This fact is significant and lends further support to the proposition that under international law extradition to face the death penalty is not prohibited under all circumstances. Otherwise the drafters of this new instrument would surely have included a provision reflecting this understanding.

An obligation not to extradite, as a matter of principle, without seeking assurances is a substantial obligation that entails considerable consequences, both domestically and internationally. Such consequences cannot be presumed without some indication that the parties intended them. If the Covenant does not expressly impose these obligations, States cannot be deemed to have assumed them. Here reference should be made to the jurisprudence of the International Court of Justice according to which interpretation is not a matter of revising treaties or of reading into them what they do not expressly or by necessary implication contain.[1]

Admittedly, since the primary beneficiaries of human rights treaties are not States or governments but human beings, the protection of human rights calls for a more liberal approach than that normally applicable in the case of ambiguous provisions of multilateral treaties, where, as a general rule, the "meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties."[2] Nonetheless, when giving a broad interpretation to any human rights treaty, care must be taken not to frustrate or circumvent the ascertainable will of the drafters. Here the rules of interpretation set forth in article 32 of the Vienna Convention on the Law of Treaties help us by allowing the use of the *travaux préparatoires*. Indeed, a study of the drafting history of the Covenant reveals that when the drafters discussed the issue of extradition, they decided not to include any specific provision in the Covenant, so as to avoid conflict or undue delay in the performance of existing extradition treaties (E/CN.4/SR.154, paras. 26-57).

It has been suggested that extraditing a person to face the possible imposition of the death sentence is tantamount, for a State that has abolished capital punishment, to reintroducing it. While article 6 of the Covenant is silent on the issue of reintroduction of capital punishment, it is worth recalling, by way of comparison, that an express prohibition of reintroduction of the death penalty is provided for in article 4 (3) of the American Convention on Human Rights, and that Protocol 6 to the European Convention does not allow for derogation. A commitment not to reintroduce the death penalty is a laudable one, and surely in the spirit of article 6, paragraph 6, of the Covenant. But certainly this is a matter for States parties to consider before they assume a binding obligation. Such obligation may be read into the Second Optional Protocol, which is not subject to derogation. But, as of November 1994, only 22 countries have become parties -- Canada has not signed or ratified it. Regardless, granting a request to extradite a foreign national to face capital punishment in another jurisdiction cannot be equated to the reintroduction of the death penalty.

Moreover, we recall that Canada is not itself imposing the death penalty, but merely observing an obligation under international law pursuant to a valid extradition treaty. Failure to fulfil a treaty obligation engages State responsibility for an internationally wrongful act, giving rise to consequences in international law for the State in breach of its obligation. By extraditing Mr. Cox, with or without assurances, Canada is merely complying with its obligation pursuant to the Canada-U.S. Extradition Treaty of 1976, which is, we would note, compatible with the United Nations Model Extradition Treaty.

Finally, it has been suggested that Canada may have restricted or derogated from article 6 in contravention of article 5 (2) of the Covenant (the "savings clause", see Manfred Nowak's CCPR Commentary, 1993, pp. 100 et seq.). This is not so, because the rights of persons under Canadian jurisdiction facing extradition to the United States were not necessarily broader under any norm of Canadian law than in the Covenant and had not been finally determined until the Supreme Court of Canada issued its 1991 judgments in the *Kindler* and *Ng* cases. Moreover, this determination was not predicated on the Covenant, but rather on the Canadian Charter of Rights and Freedoms.

Article 7

The Committee has pronounced itself in numerous cases on the issue of the "death row phenomenon" and has held that "prolonged judicial proceedings do not *per se* constitute cruel, inhuman and degrading treatment, even if they can be a source of mental strain for the convicted persons."[3] We concur with the Committee's reaffirmation and elaboration of this holding in the instant decision. Furthermore we consider that prolonged imprisonment under sentence of death could raise an issue under article 7 of the Covenant if the prolongation were

[1] Oppenheim, *International Law*, 1992 edition, vol. 1, p. 1271.

[2] This corresponds to the principle of interpretation known as *in dubio mitius*. Ibid., p. 1278.

[3] Views on communications Nos. 210/1986 and 225/1987 (*Earl Pratt and Ivan Morgan v. Jamaica*) adopted on 6 April 1989, paragraph 13.6. This holding has been reaffirmed in some ten subsequent cases, including Nos. 270/1988 and 271/1988 (*Randolph Barrett & Clyde Sutcliffe v. Jamaica*), adopted on 30 March 1992, paragraph 8.4, and No. 470/1991 (*Kindler v. Canada*), adopted on 30 July 1993, paragraph 15.2.

unreasonable and attributable primarily to the State, as when the State is responsible for delays in the handling of the appeals or fails to issue necessary documents or written judgments. However, in the specific circumstances of the Cox case, we agree that the author has not shown that, if he were sentenced to death, his detention on death row would be unreasonably prolonged for reasons imputable to the State.

We further believe that imposing rigid time limits for the conclusion of all appeals and requests for clemency is dangerous and may actually work against the person on death row by accelerating the execution of the sentence of death. It is generally in the interest of the petitioner to remain alive for as long as possible. Indeed, while avenues of appeal remain open, there is hope, and most petitioners will avail themselves of these possibilities, even if doing so entails continued uncertainty. This is a dilemma inherent in the administration of justice within all those societies that have not yet abolished capital punishment.

Kurt Herndl
Waleed Sadi

2. Individual opinion by Mr. Tamas Ban (partly concurring, partly dissenting)

I share the Committee's conclusion that the extradition of Mr. Cox by Canada to the United States to face the possible imposition of the death penalty, under the specific circumstances of this case, would not constitute a violation of article 6 of the Covenant, and that judicial execution by lethal injection would not *per se* constitute a violation of article 7.

I cannot accept the Committee's position, however, that the prospects for Mr. Cox being held for a long period of time on death row, if sentenced to death, would not amount to a violation of his rights under article 7 of the Covenant.

The Committee based its finding of non violation of article 7, regarding the "death row phenomenon" on the following arguments: (1) prison conditions in the state of Pennsylvania have been considerably improved in recent times; (2) Mr. Cox has not yet been convicted nor sentenced, the trial of his two accomplices did not end with sentence of death; (3) no evidence has been adduced to show that all possibilities for appeal would not be available within a reasonable time, or that there would be unreasonable delays which would be imputable to the state (*supra*, paragraphs 17.1 and 17.2).

Concerning the prison conditions in Pennsylvania, the State party, Canada, has in fact shown that substantial improvements in the condition of incarceration of inmates under death sentence have taken place in that state (paragraph 13.6). The measures taken are said to consist mainly of the improvement of the physical conditions of the inmates.

Although I accept the notion that physical conditions play an important role when assessing the overall situation of prison inmates on death row, my conviction is that the decisive factor is rather *psychological* than physical; a long period spent in awaiting execution or the granting of pardon or clemency necessarily entails a permanent stress, an ever increasing fear which gradually fills the mind of the sentenced individual, and which, by the very nature of this situation, amounts – depending on the length of time spent on death row – to cruel, inhuman and degrading treatment, in spite of every measure taken to improve the physical conditions of the confinement.

Turning now to the second argument, that Mr. Cox has not yet been convicted nor sentenced, and that he therefore has no claim under article 7 (since only *de facto* sentenced-to-death convicts are in a situation to assert a violation of their rights not to be exposed to torture, cruel, inhuman or degrading treatment), I believe this argument is irrelevant when looking into the merits of the case. It could have been raised, and indeed, the State party did raise it during the admissibility procedure, but it was not honoured by the Committee. I would like to note that the Committee has taken a clear stand in its earlier jurisprudence on the responsibility of States parties for their otherwise lawful decisions to send an individual within their jurisdiction into another jurisdiction, where that person's rights would be violated as a necessary and foreseeable consequence of the decision (e.g. Committee's Views in the Kindler case, paragraph 6.2). I will try to show below, discussing the third argument, that in the present case the violation of Mr. Cox's rights following his extradition is necessary and foreseeable.

Concerning the third argument, the Committee held that the author adduced no evidence to show that all possibilities for appeal against the death sentence would not be available in the state of Pennsylvania within a reasonable time, or that there would be unreasonable delays imputable to that state, as a result of which Mr. Cox could be exposed at length to the "death row phenomenon".

I contest this finding of the Committee. In his submission of 18 September 1994, counsel for Mr. Cox contended that "nobody has been executed in Pennsylvania for more than twenty years, and there are individuals awaiting execution on death row for as much as fifteen years."

In its submission of 21 October 1994, the State party – commenting on several statements made by counsel in his above mentioned submission of 18 September – remained silent on this point. In other words, it did not challenge or contest it in any way. In my opinion this lack of response testifies that the author has adduced sufficient evidence to show that appeal procedures in the state of Pennsylvania can last such a long time, which cannot be considered as reasonable.

While fully accepting the Committee's jurisprudence to the effect that every person sentenced to death must be afforded the opportunity to pursue all possibilities of appeal in conformity with article 6, paragraph 4 – a right the exercise of which, in capital cases, necessarily entails a shorter or longer stay on death row – I believe that in such cases States parties must strike a sound balance between two requirements: on the one hand all existing remedies must be made available, but on the other hand – with due regard to article 14, paragraph 3 (c) – effective measures must be taken to the effect that the final decision be made within a reasonable time to avoid the violation of the sentenced person's rights under article 7.

Bearing in mind that in the state of Pennsylvania inmates face the prospect of spending a very long time – sometimes 15 years – on death row, the violation of Mr. Cox's rights can be regarded as a foreseeable and necessary consequence of his extradition. For this reason I am of the opinion that the extradition of Mr. Cox by Canada to the United States without reasonable guarantees would amount to a violation of his rights under article 7 of the Covenant.

I would like to make it clear that my position is strongly motivated by the fact that by Mr. Cox's surrender to the United States, the Committee would lose control over an individual at present within the jurisdiction of a State party to the Optional Protocol.

Tamas Ban

3. Individual opinion by Messrs. Francisco José Aguilar Urbina and Fausto Pocar (dissenting)

We cannot agree with the finding of the Committee that in the present case, there has been no violation of article 6 of the Covenant. The question whether the fact that Canada had abolished capital punishment except for certain military offences required its authorities to request assurances from the United States to the effect that the death penalty would not be imposed on Mr. Keith Cox and to refuse extradition unless clear assurances to this effect are given, must in our view receive an affirmative answer.

Regarding the death penalty, it must be recalled that, although article 6 of the Covenant does not prescribe categorically the abolition of capital punishment, it imposes a set of obligations on States parties that have not yet abolished it. As the Committee pointed out in its General Comment 6 (16), "the article also refers generally to abolition in terms which strongly suggest that abolition is desirable". Furthermore, the wording of paragraphs 2 and 6 clearly indicates that article 6 tolerates – within certain limits and in view of future abolition – the existence of capital punishment in States parties that have not yet abolished it, but may by no means be interpreted as implying for any State party an authorization to delay its abolition or, *a fortiori*, to enlarge its scope or to introduce or reintroduce it. Accordingly, a State party that has abolished the death penalty is in our view under the legal obligation, under article 6, paragraph 1, of the Covenant, not to reintroduce it. This obligation must refer both to a direct reintroduction within the State party's jurisdiction, as well as to an indirect one, as is the case when the State acts – through extradition, expulsion or compulsory return – in such a way that an individual within is territory and subject to its jurisdiction may be exposed to capital punishment in another State. We therefore conclude that in the present case there has been a violation of article 6 of the Covenant.

Regarding the claim under article 7, we cannot agree with the Committee that there has not been a violation of the Covenant. As the Committee observed in its Views on communication No. 469/1991 (*Charles Chitat Ng v. Canada*), "by definition, every execution of a sentence of death may be considered to constitute cruel and inhuman treatment within the meaning of article 7 of the Covenant", unless the execution is permitted under article 6, paragraph 2. Consequently, a violation of the provisions of article 6 that may make such treatment, in certain circumstances, permissible, entails necessarily, and irrespective of the way in which the execution may be carried out, a violation of article 7 of the Covenant. It is for these reasons that we conclude in the present case there has been a violation of article 7 of the Covenant.

Francisco José Aguilar Urbina
Fausto Pocar

4. Individual opinion by Ms. Christine Chanet (dissenting)

As in the Kindler case, when replying to the questions relating to article 6 of the Covenant, the Committee in order to conclude in favour of a non-violation by Canada of its obligations under that article, was forced to undertake a joint analysis of paragraphs 1 and 2 of article 6 of the Covenant.

There is nothing to show that this is a correct interpretation of article 6. It must be possible to interpret every paragraph of an article of the Covenant separately, unless expressly stated otherwise in the text itself or deducible from its wording.

That is not so in the present case.

The fact that the Committee found it necessary to use both paragraphs in support of its argument clearly shows that each paragraph, taken separately, led to the opposite conclusion, namely, that a violation had occurred.

According to article 6, paragraph 1, no one shall be arbitrarily deprived of his life; this principle is absolute and admits of no exception.

Article 6, paragraph 2, begins with the words: "In countries which have not abolished the death penalty ...". This form of words requires a number of comments:

It is negative and refers not to countries in which the death penalty exists but to those in which it has not been abolished. Abolition is the rule, retention of the death penalty the exception.

Article 6, paragraph 2, refers only to countries in which the death penalty has not been abolished and *thus rules out the application of the text to countries which have abolished the death penalty*.

Lastly, the text imposes a series of obligations on the States in question.

Consequently, by making a "joint" interpretation of the first two paragraphs of article 6 of the Covenant, the Committee has, in my view, committed three errors of law:

One error, in that it is applying to a country which has abolished the death penalty, Canada, a text exclusively reserved by the Covenant – and that in an express and unambiguous way – for non-abolitionist States.

The second error consists in regarding as an authorization to re-establish the death penalty in a country which has abolished it what is merely an implicit recognition of its existence. This is an extensive

interpretation which runs counter to the proviso in paragraph 6 of article 6 of that "nothing in this article shall be invoked ... to prevent the abolition of capital punishment". This extensive interpretation, which is restrictive of rights, also runs counter to the provision in article 5, paragraph 2, of the Covenant that "there shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent". Taken together, these texts prohibit a State from engaging in distributive application of the death penalty. There is nothing in the Covenant to force a State to abolish the death penalty but, if it has chosen to do so, the Covenant forbids it to re-establish it in an arbitrary way, even indirectly.

The third error of the Committee in the decision results from the first two. Assuming that Canada is implicitly authorized by article 6, paragraph 2, of the Covenant, to re-establish the death penalty, on the one hand, and to apply it in certain cases on the other, the Committee subjects Canada in paragraphs 14.3, 14.4 and 14.5 as if it were a non-abolitionist country, to a scrutiny of the obligations imposed on non-abolitionist States: penalty imposed only for the most serious crimes, judgement rendered by a competent court, etc.

This analysis shows that, according to the Committee, Canada, which had abolished the death penalty on its territory, has by extraditing Mr. Cox to the United States re-established it by proxy in respect of a certain category of persons under its jurisdiction.

I agree with this analysis but, unlike the Committee, I do not think that this behaviour is authorized by the Covenant.

Moreover, having thus re-established the death penalty by proxy, Canada is limiting its application to a certain category of persons: those that are extraditable to the United States.

Canada acknowledges its intention of so practising in order that it may not become a haven for criminals from the United States. Its intention is apparent from its decision not to seek assurances that the death penalty would not be applied in the event of extradition to the United States, as it is empowered to do by its bilateral extradition treaty with that country.

Consequently, when extraditing persons in the position of Mr. Cox, Canada is deliberately exposing them to the application of the death penalty in the requesting State.

In so doing, Canada's decision with regard to a person under its jurisdiction according to whether he is extraditable to the United States or not, constitutes a discrimination in violation of article 2, paragraph 1, and article 26 of the Covenant.

Such a decision affecting the right to life and placing that right, in the last analysis, in the hands of the Government which, for reasons of penal policy, decides whether or not to seek assurances that the death penalty will not be carried out, constitutes an arbitrary deprivation of the right to life forbidden by article 6, paragraph 1, of the Covenant and, consequently, a misreading by Canada of its obligations under this article of the Covenant.

Christine Chanet

5. Individual opinion by Mr. Rajsoomer Lallah (dissenting)

By declining to seek assurances that the death penalty would not be imposed on Mr. Cox or, if imposed, would not be carried out, Canada violates, in my opinion, its obligations under article 6, paragraph 1, of the Covenant, read in conjunction with articles 2, 5 and 26. The reasons which lead me to this conclusion were elaborated in my individual opinion on the Views in the case of *Joseph Kindler v. Canada* (Communication No. 470/1991).

I would add one further observation. The fact that Mr. Cox has not yet been tried and sentenced to death, as Mr. Kindler had been when the Committee adopted its Views on his case, makes no material difference. It suffices that the offence for which Mr. Cox faces trial in the United States carries in principle capital punishment as a sentence he faces under the law of the United States. He therefore faces a charge under which his life is in jeopardy.

Rajsoomer Lallah

6. Individual opinion by Mr. Bertil Wennergren (dissenting)

I do not share the Committee's Views about a non-violation of article 6 of the Covenant, as set out in paragraph 16.2 and 16.3 of the Views. On grounds which I developed in detail in my individual opinion concerning the Committee's Views on communication 470/1991 (*Joseph John Kindler v. Canada)*, Canada did, in my opinion, violate article 6, paragraph 1, of the Covenant; it did so when, after the decision to extradite Mr. Cox to the United States had been taken, the Minister of Justice ordered him surrendered without assurances that the death penalty would not be imposed or, if imposed, would not be carried out.

As to whether the extradition of Mr. Cox to the United States would entail a violation of article 7 of the Covenant because of the so-called "death row phenomenon" associated with the imposition of a capital sentence in the case, I wish to add the following observations to the Committee's Views in paragraphs 17.1 and 17.2. The Committee has been informed that no individual has been executed in Pennsylvania for over twenty years. According to information available to the Committee, condemned prisoners are held segregated from other prisoners. While they may enjoy some particular facilities, such as bigger cells, access to radio and television sets of their own, they are nonetheless confined to death row awaiting execution for years. And this *not* because they avail themselves of all types of judicial appellate remedies, but because the State party does not consider it appropriate, for the time being, to proceed with the execution. If the State party considers it necessary, for policy reasons, to have resort to the death penalty as such but not necessary and not even opportune to carry out capital sentences, a condemned person's

confinement to death row should, in my opinion, last for as short a period as possible, with commutation of the death sentence to life imprisonment taking place as early as possible. A stay for a prolonged and indefinite period of time on death row, in conditions of particular isolation and under the threat of execution which might by unforeseeable changes in policy become real, is not, in my opinion, compatible with the requirements of article 7, because of the unreasonable mental stress that this implies.

Thus, the extradition of Mr.Cox might also be in violation of article 7. However, there is not enough information in this case about the current practice of the Pennsylvania criminal justice and penitentiary system to allow any conclusion along the lines indicated above. What has been developed above remains hypothetical and in the nature of principles.

Bertil Wennergren

ANNEX

RESPONSES RECEIVED FROM STATES PARTIES AND AUTHORS AFTER THE ADOPTION OF VIEWS BY THE HUMAN RIGHTS COMMITTEE

Communication No. 309/1988

Submitted by: Carlos Orihuela Valenzuela
Alleged victim: The author and his family
State party: Peru
Declared admissible: 22 March 1991 (forty-first session)
Date of adoption of Views: 14 July 1993 (forty-eighth session)

Follow-up information received from the State party

By submission of 24 September 1996, the State party informs the Committee that the National Council for Human Rights has tried to contact the author or his family, to no avail. The proceedings have been traced to the Second Civil Chamber of the Superior Court of Lima, where it is hoped the archive files will be found.

Follow-up information received from the author

By submission of 18 February 1997, the author appears to indicate that the Committee's recommendations have not been complied with by the State party.

Communication No. 328/1988

Submitted by: Myriam Zelaya Dunaway and Juan Zelaya, later joined by their brother, the alleged victim, on 20 July 1988
Alleged victim: Roberto Zelaya Blanco
State party: Nicaragua
Declared admissible: 29 March 1992 (forty-fourth session)
Date of adoption of Views: 18 October 1995 (fifty-first session)

Folllow-up information received from the State party

None

Follow-up information received from the authors

By letters dated 29 December 1994 and 24 April 1995, the author asked about the steps taken by the State party to implement the Committee's recommendations and requests the Special Rapporteur's intercession.

Communication No. 516/1992

Submitted by: Mrs. Alina Simunek, Mrs. Dagmar Hastings, Tuzilova and Mr. Josef Prochazka on 17 September 1991
Alleged victim: The authors and Jaroslav Simunek (Mrs. Alina Simunek's husband)
State party: Czech Republic
Declared admissible: 22 July 1994 (fifty-first session)
Date of adoption of Views: 19 July 1995 (fifty-fourth session)

Follow-up information received from the State party

By submission dated 22 November 1995, the State party indicated that concrete measures, including review of the incriminated legislation, the return of the authors' property, or their compensation were being discussed.

Follow-up information received from the authors

By letter of 30 October 1995, Mrs. Hastings confirmed that her property had been returned to her. By letter of 14 May 1996, Mr. Prochazka complained that the valuation of his property, forming the basis for determining his compensation entitlement, was being delayed by the authorities. Further letters from Mr. Prochazka dated 24 March and 17 April 1997, indicated that proceedings before the District Court of Usti nad Labem were prolonged. In letters dated 6 and 17 January 1997, and 12 June and 3 July 1998, Mrs. A. Simunek complained that her property had still not been restituted to her. By letter of 20 May 1998, Mrs. Simunek informed the Committee about her intention to submit a new complaint against the Czech Republic. The Czech Society for the Preservation of Human Rights informed the Secretary-General that the findings of the HRC had been ignored by the State party. The Committee's Views were repeatedly quoted by the the Helsinki Committee of the U.S. Congress in several recommendations, findings and decisions.

Communication No. 518/1992

Submitted by: Jong-Kyu Sohn (represented by counsel) on 7 July 1992
Alleged victim: The author
State party: Republic of Korea
Declared admissible: 18 March 1994 (fiftieth session)
Date of adoption of Views: 19 July 1995 (fifty-fourth session)

Follow-up information received from the State party

During follow-up consultations held in the course of the 60th session, the Permanent Representative informed the Special Rapporteur that the Labour Disputes Adjustment Act had been amended to permit third party intervention. The author's claim for compensation had been rejected in first and second instance and was now before the Supreme Court.

Follow-up information received from the author

By letter of 26 October 1995, counsel noted that the State party had refused to comply with the Committee's recommendations, on the ground that they are "non-binding"; he forwarded a press release from the Labour Department to this effect.

INDEXES

INDEX BY ARTICLES OF THE COVENANT

INDEX BY ARTICLES OF THE OPTIONAL PROTOCOL

SUBJECT INDEX

AUTHOR AND VICTIM INDEX