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HIGH COMMISSIONER FOR HUMAN RIGHTS



INTERNATIONAL COVENANT
ON CIVIL AND POLITICAL RIGHTS

SELECTED DECISIONS OF THE
HUMAN RIGHTS COMMITTEE
under
THE OPTIONAL PROTOCOL

Volume 6

*Fifty-sixth to sixty-fifth sessions
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NOTE

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INTRODUCTION

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

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

3. Under the Optional Protocol, individuals who claim that any of their rights set forth in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Human Rights Committee for consideration. No communication can be received by the Committee if it concerns a State party to the Covenant that is not also a party to the Optional Protocol. As of 30 July 1999, 95 of the 145 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.7), pursuant to which the Committee shall ascertain:

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

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

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

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

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

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

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

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

7. The Committee started work under the Optional Protocol at its second session in 1977. From then until its sixty-seventh session in the autumn of 1999, 901 communications relating to alleged violations by 61 States parties were placed before it for consideration. By the end of the Committee's sixty-seventh session, the status of these communications was as follows:

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8. In its first twenty-two years, the Committee received many more than the 901 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

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)*.

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 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 protection³. Volume 3 contains a selection of decisions adopted from the thirty-third to thirty-ninth sessions, Volume 4 a selection of decisions adopted from the fortieth to the forty-sixth session and Volume 5 covers sessions forty-seven to fifty-five.

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

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

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

² *Human Rights Committee, Selected Decisions under the Optional Protocol (Second to sixteenth sessions)*, New York, 1985 (United Nations publication, Sales No. 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 a discussion of the Committee's jurisprudence, see Manfred Nowak: *ICCPR Commentary*, 2nd edition (Engel Verlag, 2005).

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

be followed during the period covered by the present volume.

14. An important development in terms of jurisprudence was the steady increase in the number of individual opinions appended by

members of the Committee to decisions (rule 104 of the Rules of Procedure). It is particularly noteworthy that many members have appended joint individual opinions, whether concurring or dissenting. Readers will find numerous examples of this practice in the present volume.

FINAL DECISIONS

A. Decisions declaring a decision inadmissible

Communication No. 593/1994

Submitted by: Patrick Holland

Alleged victim: The author

State party: Ireland

Declared inadmissible: 25 October 1996 (fifty-eighth session)

Subject matter: Fairness and impartiality of proceedings before Special Criminal Courts

Procedural issues: Inadmissibility *ratione temporis* - Exhaustion of domestic remedies

Substantive issues: Unfair trial - Discrimination

Article of the Covenant: 14 (1)

Article of the Optional Protocol and Rules of procedure: 5 (2) (b)

1. The author of the communication is Patrick Holland, an Irish citizen, born on 12 March 1939, at the time of submission of the communication serving a prison term in Ireland. He claims to be a victim of a violation by Ireland of articles 14 and 26 of the Covenant. Both the Covenant and the Optional Protocol entered into force for Ireland on 8 March 1990.

The facts as submitted by the author

2.1 The author was arrested on 6 April 1989 under section 30 of the Offences against the State Act 1939 and charged with possession of explosives for unlawful purposes. He was tried on 27 June 1989 by a Special Criminal Court, together with four co-defendants, found guilty and sentenced to ten years' imprisonment. On appeal against sentence, the Court of Appeal, on 21 May 1990, reduced the sentence to seven years' imprisonment, considering that the judgment of the Special Court might give the impression that he was convicted of a more serious charge, namely of possession of explosives for enabling others to endanger life. The author was released from prison on 27 September 1994.

2.2 At the trial before the Special Criminal Court, the author pleaded guilty of the charge, allegedly because his lawyer had told him that "in this court, they are going to believe the police" and that his

sentence would be heavier if he would plead not guilty. In this context, the author states that one of his co-accused who pleaded not-guilty was indeed sentenced to a longer term of imprisonment.

2.3 The author submits that there was no evidence against him, but that the police claimed that he had admitted to them that he knew about the explosives in his house. No tape recording of the author's alleged confession was provided; he did not sign any confession.

2.4 The author explains that in April 1989, an acquaintance of his, A.M., stayed with him in his house, having come from England to inquire into the possibilities of renting a restaurant or pub. On 3 April 1989, they were joined by P.W., a friend of A.M., who had come to Dublin to attend a court hearing. The author states that he did not know P.W. before, but that he allowed him to stay at his house. The author, who had his own printing business, worked most of the time, only coming home to sleep or eat. At lunchtime on 6 April 1989, the police raided his house, and arrested him, A.M. and P.W. and a fourth acquaintance, a former colleague, who was visiting the author. Explosives were found in a black bag, but the author denies having had knowledge of their presence.

The complaint

3.1 The author claims that the trial against him was unfair, because the Special Criminal Court does not constitute an independent and impartial tribunal, in violation of article 14, paragraph 1, of the Covenant. In this connection, the author explains that the Irish Constitution permits the establishment of "special courts" for the trial of offences in cases where it is determined that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order. The author points out that it is the

Government who decides which cases are to be brought before a special court. The author quotes from section 39 of the Offences against the State Act, which provides that members of special courts are appointed and removed at will by the Government. The remuneration, if any, is determined by the Ministry for Finance. Members of special courts need not be members of the judiciary; barristers and solicitors of at least seven years standing and high ranking officers of the Defence Forces may also be appointed.

3.2 The author contends that the special courts represent a threat to the equality of treatment of those accused of crimes, because the independence of the members of such courts is not protected. In this context, the author refers to the judgment in his case, which appeared to sentence him for a more serious offence than for which he had been charged.

3.3 The author further alleges that he was discriminated against in the prison system because he "fought for his rights" through the courts in order to have his proper entitlement to parole established. He states that two of his co-accused, who received the same sentence, were moved to an open prison in 1992 and early 1993, whereas the author was only moved to an open prison in the beginning of 1994. The author points out that regular weekend home visits are allowed from an open prison, whereas he was unable to obtain permission to visit his sister in hospital before she died on 22 December 1993; he was granted parole from 22 to 27 December 1993, after she had already died.

State party's submission and the author's comments

4.1 By submission of 5 December 1994, the State party argues that the communication is inadmissible *ratione temporis*, since the substance of the author's complaint relates to his trial in the Special Criminal Court on 27 June 1989, that is before the entry into force of the Covenant and its Optional Protocol for Ireland.

4.2 The State party further argues that the communication is inadmissible for failure to exhaust domestic remedies. It notes that the essence of the author's claim is that he did not receive a fair trial before an independent and impartial tribunal and that he claims that he was innocent of the offences with which he was charged. However, the author withdrew his plea of not guilty, leaving the trial court with no option but to accept his acknowledgement and sentence him accordingly. The State party submits that he might have been acquitted, had he pleaded not guilty. It contests the author's suggestion that persons tried in the Special Criminal Courts are invariably convicted.

4.3 The State party further submits that the author failed to request the judges of the Special Court to disqualify themselves on the grounds that they were not independent and impartial. In this connection, the State party notes that the author, in fact, has not alleged any bias against the judges of the court which tried him. His argument seems to be that by virtue of the method of appointment and dismissal of the members of the Court a lack of independence and impartiality could arise, not that it did.

4.4 The State party explains that the Special Court is subject to control through judicial review by the High Court. A person who alleges a breach of the constitution or of natural justice can seek an order from the High Court quashing a decision by the Special Criminal Court or prohibiting it from acting contrary to the Constitution or to the rules of natural justice. If the author would have had reason to argue that he had not received a fair trial in the Special Court, he could therefore have sought an order of judicial review from the High Court, which he failed to do.

4.5 In this context, the State party refers to the Supreme Court's decision in the *Eccles* case¹, where it was held that the Government could not lawfully terminate the appointment of individual members of the Special Court for disagreeing with their decisions. The Court found that whereas the express constitutional guarantees of judicial independence did not apply to the Special Court, it enjoyed a derived guarantee of independence in carrying out its function.

4.6 The State party also argues that it would have been open to the author to argue at the hearing of his appeal that his conviction was defective by reason of lack of independence of the judges. The State party notes that the author, however, failed to appeal against his conviction and made no allegation that the Special Court was biased or lacked independence.

4.7 Further, the State party argues that the author has not shown that he is personally a victim of the violation alleged. The State party refers to the author's argument that under the applicable legislation the independence of the court cannot be guaranteed. The State party submits that this is an argument of an *actio popularis*, since the author does not argue that the judges who tried him did in fact lack independence or that they were biased against him, nor does he specify any shortcoming in the proceedings. In this context, the State party refers to the decision by the European Commission on Human Rights in the *Eccles* case², which found that

¹ *Eccles v. Ireland* [1985] I.R. 545.

² *Eccles e.a. v. Ireland*, application No. 12839/87, decision of 9 December 1988.

the Special Court was independent within the meaning of article 6 of the European Convention.

4.8 The State party explains that article 38 of the Constitution provides that special courts may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order. The Offences against the State Act, 1939, provides for the establishment of such special courts, if the Government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order and publishes a proclamation accordingly. Any such Government proclamation may be annulled by resolution of the Lower House of Parliament. A Special Criminal Court was first established in 1939 and remained in existence until 1962. In 1972, due to the situation arising from the troubles in Northern Ireland, the Special Criminal Court was re-established.

4.9 Section 39 of the Offences against the State Act regulates the appointment of members to the Court. The State party underlines that with few exceptions the members of the Special Criminal Court since 1972 have been judges of ordinary courts at the times of their appointment, and that since 1986 the Court has been comprised only of serving judges. No members of the Defence Forces have been appointed to the Court since its establishment in 1972.

4.10 Section 40 of the Act provides that the determination of the Special Criminal Court is to be according to the opinion of the majority and that individual opinions are not to be disclosed. Pursuant to section 44 of the Act convictions or sentences of a Special Criminal Court are subject to appeal to the Court of Criminal Appeal in the same way as convictions and sentences of the Central Criminal Court. There are no rules of evidence applying to the Special Criminal Court which do not apply to the ordinary courts, apart for provisions permitting the taking of evidence on commission in Northern Ireland.

4.11 Finally, the State party informs the Committee that the Court before which the author was tried consisted of a judge of the High Court, a judge of the Circuit Court and a District Justice. The State party adds that it is not aware of any challenge to the members' personal impartiality and independence.

5.1 On 8 February 1995, the author provides his comments on the State party's submission. He reiterates that members of the Special Court can be dismissed at will by the Government and that there is

therefore no guarantee for their independence and impartiality.

5.2 As to the State party's argument that his communication is inadmissible for non-exhaustion of domestic remedies because he withdrew his plea of not guilty, the author explains that after he had pleaded not guilty, his barrister asked the Court for a short recess. He then came to see him and advised him to plead guilty, since he was before the Special Criminal Court and a not guilty plea would result in a 12 years' sentence. Consequently, he pleaded guilty.

5.3 As regards the State party's argument that he failed to ask the judges of the trial court to disqualify themselves, that he failed to have the trial proceedings quashed by judicial review and that he failed to appeal against his conviction or to raise the alleged lack of independence of the court as a ground of appeal, the author states that he could not have done any of these things because his own defence counsel had already told him to plead guilty and he himself had not yet learned about United Nations human rights treaties. The author recalls that as a layman he was depending on his legal advisers, who let him down and never raised these issues. In this connection, the author states that he knows of a lot of people who stood up and did not recognise the court and then were sentenced for that alone.

Further State party submission

6.1 Upon request of the Committee, the State party, by further submission of 2 July 1996, comments on the admissibility of the author's claim that he had been discriminated against in the prison system, and explains the legislation and practice surrounding the decision to bring the author's case before the Special Criminal Court.

6.2 As regards the author's claim that he is a victim of discrimination, the State party confirms that the two co-accused who were sentenced to six years' imprisonment were moved to an open prison prior to the completion of their sentences and that the author and one other co-accused remained in a closed institution until their release. The State party explains further that the co-accused moved to an open prison received the standard 25% remission of their sentences and were released about six months early. The third co-accused spent the duration of his sentence in a high security facility and was released 36 days prior to his release date.

6.3 The State party explains that the author was considered for a transfer to an open prison, but that, since the author had friends and relatives in Dublin, and all the open facilities were outside the Dublin area, it was decided that it would be better if he stayed in a closed institution in Dublin. The author

was offered early release from 27 June 1994, that is three months prior to his release date. However, he declined to leave prison as he had nowhere to live. He was subsequently released on 22 September 1994, four days early.

6.4 The State party submits that transfers from a closed to an open prison are benefits accorded certain prisoners on the basis of their records, home addresses and other relevant considerations, but that it is not a right to which all prisoners are equally entitled. Reference is made to the Judgment of the European Court of Human Rights in the *Ashingdane* case³.

6.5 It is further submitted that the author was not treated differently from others, but that the decision to keep the author in a closed institution in Dublin was taken, as were the decisions to transfer two of his co-accused to an open institution outside Dublin, by reference to their personal and family circumstances and were intended to facilitate communication between the detainees and persons close to them. Moreover, it is submitted that, might the Committee nevertheless find that the author was treated differently, this treatment was based on reasonable and objective criteria and did not amount to discrimination.

6.6 The State party argues that the communication is inadmissible under article 3 of the Optional Protocol, for being incompatible with the provisions of the Covenant. Further, it is argued that the author's claim is inadmissible for non-exhaustion of domestic remedies, since it was open to the author to seek judicial review of the order made by the minister of Justice to transfer him to Whatefield Detention Centre in Dublin and not to an open prison. It was also open to the author to institute proceedings for alleged breach of constitutional rights, since the Constitution in article 10.1 protects the right of all citizens to be held equal before the law. It is submitted that the author never availed himself of any of the remedies open to him.

7.1 As regards the procedures of deciding whether a case will be tried before a Special Criminal Court, the State party explains that the Director of Public Prosecutions decides in accordance with law whether a case will be tried by the ordinary Criminal Courts or by the Special Criminal Court under part V of the Offences against the State Act. The Director is independent of the Government and the police in the discharge of his functions. The Offences against the State Act provides for certain offences to be scheduled under that Act. Where a person is charged with a scheduled offence, the Director of Public Prosecutions, under section 47 (1) of the Act, may have that person

brought before the Special Criminal Court to be tried on such offence. The author was charged with possession of explosive substances for an unlawful object, a scheduled indictable offence in accordance with section 47 (1) of the Act.

7.2 A panel of nine judges, appointed by the Government and all being judges of the High Court, Circuit Court or District Court, is available to hear cases in the Special Criminal Court. The designation of members to hear a case is exclusively a matter for the judges of the panel to decide. The State party strongly refutes any suggestion that the judges of the Special Criminal Court lack independence or would have been biased against the author.

7.3 The State party explains that the decision to charge the author with the offence in question, as well as the decision to refer the author's case to the Special Criminal Court, was based on an assessment of the available evidence that was made known to the Director of Public Prosecutions by the Irish police.

7.4 The State party explains that the institution of the Special Criminal Court can be challenged since it is subject to constitutional scrutiny. It is also possible to challenge the constitutionality of various aspects of the legislation relating to the Special Criminal Court. Several such challenges have been undertaken. The author however did not attempt to initiate any proceedings in this respect.

7.5 The State party explains that it is also possible to challenge the referral of a case to the Special Criminal Court through judicial review of the Director of Public Prosecutions' decision. However, the relevant case law all relates to situations where the accused had been charged with a non-scheduled offence and the Director decided that he or she be tried before the Special Criminal Court. In availing himself of this remedy, the author would have had to show that the Director of Public Prosecutions had acted with *mala fides*.

7.6 The State party reiterates that the communication should be declared inadmissible.

Author's comments on the State party's submission

8.1 In his comments on the State party's submission, the author emphasizes that his main complaint is that the Special Criminal Court was illegal, because it was set up without making an application under article 4, paragraph 3, of the Covenant. He contends that there is no escaping a conviction before the Special Court and reiterates that when he pleaded not guilty, his solicitor told him that his sentence would be lower with a guilty plea, upon which he changed his plea.

8.2 The author reiterates that he was not allowed to leave prison in time to visit his dying sister in

³ (14/1983/70/106)

December 1993, but that he was only given leave after she died, to attend her funeral.

Issues and proceedings before the Committee

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

9.2 The Committee has taken note of the State party's argument that the communication is inadmissible *ratione temporis*. The Committee refers to its prior jurisprudence and reiterates that it is precluded from considering a communication if the alleged violations occurred before the entry into force of the Covenant for the State party concerned, *unless* the alleged violations continue or have continuing effects which in themselves constitute a violation. The Committee notes that, although the author was convicted and sentenced at first instance in June 1989, that is before the entry into force of the Covenant for Ireland, his appeal was dismissed on 21 May 1990, that is after the entry into force of the Covenant for Ireland, and his imprisonment lasted until August 1994. In the circumstances, the Committee is not precluded *ratione temporis* from considering the author's communication.

9.3 As regards the author's claim that he did not receive a fair trial because he was tried before a Special Criminal Court, which was established in

violation of article 14 of the Covenant, the Committee notes that the author pleaded guilty to the charge against him, that he failed to appeal his conviction, and that he never raised any objections with regard to the impartiality and independence of the Special Court. In this context, the Committee notes that the author was represented by legal counsel throughout and that it appears from the file that he made use of his right to petition the High Court with regard to other issues but did not raise the aforesaid issue. In the circumstances, the Committee finds that the author has failed to fulfil the requirement of article 5, paragraph 2 (b), of the Optional Protocol, to exhaust available domestic remedies.

9.4 As regards the author's claim that he was discriminated against because he was not transferred to an open prison at the same time as his co-accused, the Committee notes that the State party has argued, and the author has not denied, that it would have been open to the author to seek judicial review of this decision. In the circumstances, the Committee considers that this claim is also inadmissible under article 5, paragraph 2 (b), of the Optional Protocol, for non-exhaustion of domestic remedies.

10. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible;

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

Communication No. 608/1995

Submitted by: Franz Nahlik

Alleged victim: The author

State party: Austria

Declared inadmissible: 22 July 1996 (fifty-seventh session)

Subject matter: Alleged discrimination, in the allocation of retirement benefits

Procedural issues: None

Substantive issues: Discrimination

Article of the Covenant: 26

Articles of the Optional Protocol and Rules of procedure: 1 and 2

1. The author of the communication is Franz Nahlik, an Austrian citizen, residing in Elsbethen, Austria. He submits the communication on his own behalf and on behalf of 27 former colleagues. They claim to be victims of a violation by Austria of article 26 of the International Covenant on Civil and Political Rights.

The facts as submitted by the author

2.1 The author worked at that Social Insurance Board in Salzburg (*Salzburger Gebietskrankenkasse*) and retired before 1 January 1992. He states that he and his 27 former colleagues receive retirement benefits under the relevant schemes of the Regulations of Service for Employees of the Social Insurance Board. As of 1 January a collective agreement between the Social Insurance Board in Salzburg (*Salzburger Gebietskrankenkasse*) and the employees modified the scheme; the agreement provided for a linear pay raise of four percent starting on 1 January 1992 and a permanent monthly entitlement of 200,- ATS, which is regarded as a regular payment to be included in the calculation of employees' retirement benefits. The Salzburg

Regional Insurance Board took the position that only active employees, but not employees retired before 1 January 1992, should receive this entitlement.

2.2 The authors, represented by counsel, filed a lawsuit against the Board with the Salzburg Federal District Court sitting in labour and social matters (*Landesgericht Salzburg als Arbeits- und Sozialgericht*), which was dismissed on 21 December 1992. In the opinion of the Court, the parties to a collective agreement are free under federal labour law to include provisions stipulating different pension computation treatment of active and retired employees or even norms creating conditions to the disadvantage of retirees. The authors then appealed to the Federal Court of Appeal in Linz (*Oberlandesgericht in Linz*), which confirmed the District Court's judgment on 11 May 1993. Subsequently, the Supreme Court (*Oberster Gerichtshof*) dismissed the authors' appeal on 22 September 1993. It considered that although the sum of 200,- ATS was part of the authors' permanent income (*ständiger Bezug*), only part of the income would be considered as monthly salary (*Gehalt*), which is the basis for determining the level of retirement benefits to be paid. Moreover, since this was stipulated in the collective agreement, a different pension treatment of the income of active and retired employees was permissible.

The complaint

3.1 The author claims that the Republic of Austria violated the retirees' rights to equality before the law and to equal protection of the law without any discrimination. In particular, he states that the different treatment between active and retired employees and between pre-January-1992-retirees and post-January-1992-retirees was not based on reasonable and objective criteria, as the groups of persons concerned find themselves in a comparable situation with regard to their income and they face the very same economic and social conditions. It is further argued that the different treatment was arbitrary in that it did not pursue any legitimate aim and that the discretionary power of the drafters of the collective agreement, approved by the Austrian courts, violates the general principle of equal treatment under labour law.

3.2 It is stated that the matter has not been submitted to another procedure of international investigation or settlement.

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

4. By submission of 18 September 1995, the State party acknowledges that domestic remedies have been exhausted. It argues however that the

communication is inadmissible because the author challenges a regulation in a collective agreement over which the State party has no influence. The State party explains that collective agreements are contracts based on private law and exclusively within the discretion of the contracting parties. The State party concludes that the communication is therefore inadmissible under article 1 of the Optional Protocol, since one cannot speak of a violation by a State party.

5.1 In his comments of 19 November 1995, the author explains that he does not request the Committee to review *in abstracto* a collective agreement, but rather to examine whether the State party, and in particular the courts, failed to give proper protection against discrimination and thereby violated article 26 of the Covenant. The author contends therefore that the violation of which he claims to be a victim is indeed attributable to the State party.

5.2 As regards the State party's claim that it had no influence over the contents of the collective agreement, the author explains that the collective agreement in the present case is a special type of agreement and qualifies as a legislative decree under Austrian law. Negotiated and concluded by public professional organisations established by law, the procedures and contents of collective agreements are set forth in federal laws, which stipulate what a collective agreement may regulate. Further, federal courts are entrusted with a full judicial review of the agreements. In order to enter into force, the collective agreement (and its eventual amendments) have to be confirmed by the Federal Minister for Labour and Social Affairs. The agreement is then published in the same manner as legislative decrees of federal and local administrative authorities.

5.3 The author therefore contests the State party's assertion that it had no influence over the contents of the collective agreement, and claims instead that the State party controls the conclusion of collective agreements and their execution on the legislative, administrative and judicial levels. The author notes that the State party has enacted legislation and delegated certain powers to autonomous organs. He observes however that article 26 of the Covenant prohibits discrimination "in law or in practice in any field regulated and protected by public authorities"¹. The author concludes that the State party was thus under obligation to comply with article 26 and failed to do so.

6.1 In a further submission, dated May 1996, the State party explains that the amended collective

¹ *Broeks v. The Netherlands*, communication No. 172/1984.

agreement provides for a monthly bonus of AS 200 to employees of Austrian Social Security Institutions. This bonus is not taken into account when assessing pensions to which the recipients became entitled before 1 January 1992. In legal terms, the question is whether or not this bonus is a so-called "permanent emolument" (*ständiger Bezug*) to which not only employees but also pensioners are entitled. The State party submits that this issue has been examined by the Courts which concluded that the payment is not such a permanent emolument and that therefore pensioners are not entitled to it.

6.2 The State party further submits that active employees and pensioners are two different classes of persons who may be treated differently with respect to the entitlement to the monthly bonus.

6.3 The State party reiterates that since a collective agreement is a contract under private law, which is concluded outside the sphere of influence of the State, article 26 is not applicable to the provisions of the collective agreement. As regards the Courts, the State party explains that they determine disputes on the basis of the collective agreement, interpreting the text as well as the intentions of the parties. In the instant case, the exclusion of pensioners from the monthly bonus was precisely the intention of the parties. Further, the State party explains that collective agreements are *not* legislative decrees and the courts had therefore no possibility to challenge the agreement before the Constitutional Court.

6.4 The State party maintains its position that the communication is inadmissible under article 1 of the Optional Protocol.

7.1 In his comments, the author notes that the State party's observations relate mainly to the merits of his complaint, and are irrelevant for admissibility.

7.2 As regards the State party's statement that the collective agreement is a contract under private law, the author refers to his previous submissions, which show the active involvement of the Government in the collective agreement covering the staff of the Austrian Social Security Institutions, which are institutions of public law.

7.3 As regards the State party's argument that active and retired employees are two different classes of persons, the author points out that his complaint relates to the difference in treatment between employees who retired before 1 January 1992, and those who retired after 1 January 1992. He emphasizes that the regular payment of 200 ATS is not taken into account when determining the pension of those who retired before 1 January 1992, whereas it is taken into account in the determination of the pensions of those who retired after 1 January 1992. He claims that this constitutes a discrimination based on age.

7.4 The author reiterates that, under the Covenant, the courts are obliged to provide effective protection against discrimination, and therefore should have overruled the provision in the collective agreement discriminating among pensioners on the ground of the date of their retirement.

Issues and proceedings before the Committee

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

8.2 The Committee has noted the State party's argument that the communication is inadmissible under article 1 of the Optional Protocol since it relates to alleged discrimination within a private agreement, over which the State party has no influence. The Committee observes that under articles 2 and 26 of the Covenant, the State party is under an obligation to ensure that all individuals within its territory and subject to its jurisdiction are free from discrimination, and consequently the courts of States parties are under an obligation to protect individuals against discrimination, whether this occurs within the public sphere or among private parties in the quasi-public sector of, for example, employment. The Committee further notes that the collective agreement at issue in the instant case, is regulated by law and does not enter into force except on confirmation by the Federal Minister for Labour and Social Affairs. Moreover, the Committee notes that this collective agreement concerns the staff of the Social Insurance Board, an institution of public law implementing public policy. For these reasons, the Committee cannot agree with the State party's argument that the communication should be declared inadmissible under article 1 of the Optional Protocol.

8.3 The Committee notes that the author claims that he is a victim of discrimination, because his pension is based on the salary before 1 January 1992, without the 200 ATS monthly entitlement which became effective for active employees on that date.

8.4 The Committee recalls that the right to equality before the law and to equal protection of the law without discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26. In the instant case, the contested differentiation is based only superficially on a distinction between employees who retired before 1 January 1992 and those who retired after that date. Actually, this distinction is based on a different treatment of active and retired employees at the time. With regard to this distinction, the Committee considers that the author

has failed to substantiate, for purposes of admissibility, that the distinction was not objective or how it was arbitrary or unreasonable. Therefore, the Committee concludes that the communication is inadmissible under article 2 of the Optional Protocol.

9. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible;

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

APPENDIX

Individual opinion submitted by Mrs. Elizabeth Evatt, Ms. Cecilia Medina Quiroga, Mr. Francisco José Aguilar Urbina, Mr. Prafullachandra Natwarlal Bhagwati and Mr. Andreas Mavrommatis pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the Committee's decision on communication No. 608/1995, Franz Nahlik v. Austria

The author of this communication is challenging a distinction made between those employees of the Social Insurance Board who retired before January 1992 and those who retire after that date. The pension entitlements for each group are based on the current monthly salary of employees. Under a collective agreement between the Social Insurance Board in Salzburg and its employees, the salary of current employees can be supplemented by regular payments which do not form part of the monthly salary [para 2.2.]. By this means, it is possible to benefit current employees by payments which do not affect existing pensions in any way, but yet can be taken into account in calculating the pension for employees who retire on or after 1 January 1992.

The problem is to decide whether this distinction amounts to discrimination of a kind not permitted by article 26 of the Covenant.

To answer this question it is necessary to consider whether the aim of the differentiation is to achieve a purpose which is legitimate under the Covenant and whether the criteria for differentiation are reasonable and objective. The State party claims that the differentiation is based on reasonable grounds; the author, on the other hand, claims that the basis of differentiation is unreasonable and discriminatory. The author's claim falls within the scope of article 26 of the Covenant and raises a point of substance which cannot be determined without consideration of the issues outlined above, that is to say, without consideration of the merits of the case. The claim has thus been substantiated for purposes of admissibility.

Ideally, where the issues raised by the author involve claims of discrimination of this kind, and where there are no complex questions concerning admissibility (other than those concerning the substantiation of the claim of discrimination), the Committee should be able to call for submissions to enable it to deal with admissibility and merits in one step. However, that is not the procedure provided for in the rules and was not adopted for this case. In the absence of such a procedure, some cases such as this one are found to be inadmissible, because the Committee is of the view that the claim of discrimination has not been made out. This separate opinion emphasises that a claim of discrimination which raises an issue of substance which requires consideration on the merits should be found admissible.

A further reason to have declared this particular case admissible is the fact that neither the State nor the author were given notice that the Committee would decide on admissibility having regard to the substance of the matter. The author himself pointed to the fact that the State's observations to his communication related mainly to the merits and were irrelevant for admissibility (paragraph 7.1). A finding that the communication is inadmissible would deny to the author an opportunity to respond to the submission of the State party.

For these reasons we consider the communication admissible.

Communication No. 643/1995

Submitted by: Peter Drobek [represented by the Kingsford Legal Centre, Australia]

Alleged victim: The author

State party: Slovakia

Declared inadmissible: 14 July 1997 (sixtieth session)

Subject matter: Expropriation of property on grounds of ethnic origin

Procedural issues: Inadmissibility *ratione temporis* - Substantiation of claims

Substantive issues: Discrimination - Legitimacy of differential treatment - Interference with honour and reputation

Articles of the Covenant: 2, 17 and 26

Article of the Optional Protocol and Rules of procedure: 2

1. The author of the communication, dated 31 May 1994, is Peter Drobek, an Australian citizen, born in Bratislava. He claims to be the victim of violations by Slovakia of articles 2, 17 and 26 of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for Czechoslovakia on 12 June 1991. After the dissolution of the Czech and Slovak Federal Republic, Slovakia notified its succession to the Covenant and to the Optional Protocol effective the first day of the new Republic, 1 January 1993. The author is represented by counsel.

The facts as submitted by the author

2.1 The author would have inherited from his father and his uncle certain properties in Bratislava which were expropriated pursuant to the Benes Decrees Nos. 12 and 108 of 1945 under which all properties owned by ethnic Germans were confiscated. In 1948, the Communist regime expropriated all private property used to generate income. After the fall of the communist regime, the Czech and Slovak Federal Republic enacted Law 87/1991¹ and after the creation of the State of Slovakia, the Slovakian Government instituted a policy whereby property taken under the Communist regime could be reclaimed. However, the restitution legislation did not cover confiscation effected under the Benes decrees.

¹ See Committee's Views on communication No. 516/1992 (*Simunek et al. v. Czech Republic*), adopted 19 July 1995, and No. 586/1994 (*Adam v. Czech Republic*), adopted 23 July 1996.

2.2 The author tried to avail himself of the restitution legislation and sought the return of his properties. On 25 May 1993, the local Court of Bratislava dismissed his claims. Counsel claims that the Court does not address the issue of discrimination and the racial injustice the author has suffered. In this respect, he claims that, as there are no effective domestic remedies available to him to obtain redress for the racial discrimination suffered, domestic remedies have been exhausted.

The complaint

3.1 The author claims to be the victim of a violation of articles 2 and 26 of the Covenant by the Slovak Government, because it has endorsed the ethnic discrimination committed before the Covenant existed by enacting a law which grants relief to those who had their lands expropriated for reasons of economic ideology and does not provide it to those expropriated on ethnic grounds. Counsel claims that article 2 of the Covenant in conjunction with the preamble are to be interpreted to mean that the rights contained in the Covenant derive from the inherent dignity of the human person and that the breach committed prior to the entry into force of the Covenant has been repeated by the enactment of discriminatory legislation in 1991 and by the decisions of the Slovak Courts of 1993 and 1995.

3.2 The author claims that there is a violation of article 17 as his family were treated as criminals, their honour and reputation being damaged. In this respect, the author claims that until the Slovak Government rehabilitates them and returns their property, the Government will continue to be in breach of the Covenant.

State party's observations and author comments thereon

4. On 11 August 1995, the communication was transmitted to the State party under rule 91 of the Committee's rules of procedure. No submission under rule 91 was received from the State party, despite a reminder addressed to it on 20 August 1996.

5.1 By a letter of 10 August 1995, counsel informed the Committee that domestic remedies had been exhausted in respect of the author's property claim and that the City Court Session, on

9 February 1995, had rejected the author's appeal to the judgement of the Local Court, in Bratislava. The author provides the text of the decision in Slovak and an English translation. There had never been any remedies available in respect of the author's discrimination claim.

5.2 By a further letter of 23 July 1996, counsel claims that Slovak authorities discriminate against individuals of German origin.

Admissibility considerations

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant. The Committee notes with regret the State party's failure to provide information and observations on the question of the admissibility of the communication.

6.2 The Committee notes that the challenged law entered into force for the territory of Slovakia in 1991, when that country was still part of the Czech and Slovak Federal Republic, that is, before Slovakia's succession to the Covenant and the Optional Protocol in January 1993. Considering, however, that Slovakia continued to apply the provisions of the 1991 law after January 1993, the communication is not inadmissible *ratione temporis*.

6.3 Although the author's claim relates to property rights, which are not as such protected by the Covenant, he contends that the 1991 law violates his rights under articles 2 and 26 of the Covenant in that it applies only to individuals whose property was confiscated after 1948 and thus excludes from compensation in respect of property taken from ethnic Germans by a 1945 decree of the pre-Communist regime. The Committee has already had occasion to hold that laws relating to property rights may violate articles 2 and 26 of the Covenant if they are discriminatory in character. The question the Committee must therefore resolve in the instant case is whether the 1991 law applied to the claimant falls into this category.

6.4 In its views on communication 516/1992 (*Simunek v. Czech Republic*), the Committee held that the 1991 law violated the Covenant because it excluded from its application individuals whose property was confiscated after 1948 simply because they were not nationals or residents of the country after the fall of the Communist regime in 1989. The instant case differs from the views in the above case, in that the author in the present case does not allege discriminatory treatment in respect of confiscation of property after 1948. Instead, he contends that the 1991 law is discriminatory because it does not also

compensate victims of the 1945 seizures decreed by the pre-Communist regime.

6.5 The Committee has consistently held that not every distinction or differentiation in treatment amounts to discrimination within the meaning of articles 2 and 26. The Committee considers that, in the present case, legislation adopted after the fall of the Communist regime in Czechoslovakia to compensate the victims of that regime does not appear to be prima facie discriminatory within the meaning of article 26 merely because, as the author contends, it does not compensate the victims of injustices allegedly committed by earlier regimes. The author has failed to substantiate such a claim with regard to articles 2 and 26.

6.6 The author has claimed that Slovakia violated article 17 of the International Covenant on Civil and Political Rights by not rectifying the alleged criminalization of his family by the Slovak authorities. The Committee considers that the author has failed to substantiate this particular claim.

7. The Human Rights Committee therefore decides:

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

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

APPENDIX

Individual opinion submitted by Ms. Cecilia Medina Quiroga and Mr. Eckart Klein pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the Committee's decision on communication No. 643/1995, Peter Drobek v. Slovakia

The author of the communication contends that the State party discriminated against him by enacting Law 87/1991, which grants relief to individuals whose lands were confiscated by the communist regime and which does not grant it to those of German origin whose lands were confiscated under the Benes Decrees.

The Committee has declared this communication inadmissible for lack of substantiation of the author's claim. We do not agree with this decision. The author has given clear reasons why he thinks he is being discriminated against by the State party: this is not only because of the fact that Law 87/1991 applies only to property seized under the communist regime and not to the 1945 seizures decreed between 1945 and 1948 by the pre-communist regime; the author argues that the enactment of Law 87/1991 reflects the support by Slovakia of discrimination which individuals of German origin suffered immediately after the Second World War. He further adds that such discrimination on the part of the Slovak authorities continues until the present day

(paragraphs 3.1 and 5.2). Since article 26 of the Covenant must be respected by all State party authorities, legislative acts also have to meet its requirements; accordingly, a law which is discriminatory for any of the reasons set out in article 26 would violate the Covenant.

The State party has not responded to the author's allegations. A claim of discrimination that raises an issue of substance - not disputed at the admissibility stage by the State party - requires consideration on the merits. We therefore conclude that this communication should have been declared admissible.

Communication No. 645/1995

Submitted by: Ms. Vaihere Bordes and Mr. John Temeharo [represented by counsel]

Alleged victims: The authors

State party: France

Declared inadmissible:* 22 July 1996 (fifty-seventh session)

Subject matter: Nuclear tests in the South Pacific as a potential threat to life of inhabitants of French Polynesia

Procedural issues: Status of "victim" within meaning of article of the Optional Protocol - Reservation to article 5 (2) (a) of the Optional Protocol

Substantive issues: Nuclear weapons and right to life - Interference with privacy and family life

Articles of the Covenant: 6 and 17

Articles of the Optional Protocol and Rules of Procedure: 1, 2 and 5, paragraph 2 (a), and rules 85 and 86

1. The authors of the communication are Vaihere Bordes, Noël Narii Tauria and John Temeharo, all French citizens residing in Papeete, Tahiti, French Polynesia. All claim to be victims of violations by France of articles 6 and 17 of the International Covenant on Civil and Political Rights. The authors are represented by counsel.

The facts as presented by the authors and claim

2.1 On 13 June 1995, French President Jacques Chirac announced that France intended to conduct a series of underground nuclear tests on the atolls of Mururoa and Fangataufa in the South Pacific. The authors challenge the decision of President Chirac, which they claim is in clear violation of international law. They contend that the tests represent a threat to their right to life and their right not to be subjected to arbitrary interference with their privacy and their family life. After the submission of the communication, six underground nuclear tests were

carried out between 5 September 1995 and the beginning of 1996. According to the State party, these underground tests would be the last to be carried out by France, as President Chirac has announced France's intention to accede to the Comprehensive Nuclear Test Ban Treaty, which is scheduled to be adopted in Geneva in late 1996.

2.2 The authors recall the General Comments of the Human Rights Committee on the right to life, in particular General Comment 14 [23] on nuclear weapons, and add that numerous studies show the danger to life caused by nuclear tests, on account of the direct effects of the radiation on the health of individuals living in the test area, which manifests itself in an increased number of cancer and leukaemia cases, as well as genetical risks. Indirectly, human life is said to be threatened through the contamination of the food chain.

2.3 According to the authors, the French authorities have failed to take sufficient measures to protect their life and security. They claim that the authorities have not been able to show that the underground nuclear tests do not constitute a danger to the health of the inhabitants of the South Pacific and to the environment. They therefore request the Committee to ask France, under rule 86 of the rules of procedure, not to carry out any nuclear tests until an independent international commission has found that the tests are indeed without risks and do not violate any of the rights protected under the Covenant. During its 54th and 55th sessions, the Committee decided not to grant interim protection under rule 86.

2.4 With regard to the requirement of exhaustion of domestic remedies, the authors contend that because of the urgent nature of their cases, they cannot be expected to await the outcome of judicial procedures before the French tribunals. It is further argued that domestic remedies are ineffective in practice, and would fail to offer the authors any protection or any remedy.

* Pursuant to rule 85 of the rules of procedure, Committee member Christine Chanet did not participate in the examination of the present communication.

State party's submission on the admissibility of the complaint and authors' comments

3.1 In its submission under rule 91 of the rules of procedure, dated 22 January 1996, the State party challenges the admissibility of the communication on several grounds.

3.2 The State party argues that, in the first instance, the authors do not qualify as "victims" within the meaning of articles 1 and 2 of the Optional Protocol. In this context, it refers to the arguments developed in its submission to the European Commission of Human Rights in a case (No. 28024/95) virtually identical to that before the Committee introduced before that body. The State party provides a detailed description of the geology of the atoll of Mururoa, where most of the underground tests are carried out, and of the techniques developed for the conduct of the tests. These techniques, the State party notes, are designed to provide a maximum of security and to minimize the risks of radioactive contamination of the environment and atmosphere. It dismisses the authors' argument that earlier underground tests in the 1970s and incidents said to have occurred during those tests have led to fissures in the atoll's geology and, thereby, increases the risk of radiation escaping from the underground shafts where the nuclear devices are tested, through a process known as "venting".

3.3 The State party further rejects the argument that the tests expose the population of the islands surrounding the testing area to an increased risk of radiation. It recalls that the level of radioactivity at Mururoa is identical to that measured over and at other islands and atolls in the South Pacific and is, for example, less than that measured in metropolitan France: thus, the level of Caesium 137 measured in French Polynesia in 1994 was one third of the level measured in France and in the northern hemisphere at the same date where, it is noted, the emissions resulting from the nuclear accident which occurred at Tchernobyl (Ukraine) in 1985 are still clearly measurable.

3.4 Similar considerations apply to the alleged and expected contamination of the food chain through the nuclear tests. The State party refutes the authors' argument that they run a risk of contamination through consumption of agricultural products produced and fish caught in proximity of the testing area. It points out that all serious scientific studies on the environmental effects of underground nuclear tests have concluded that whatever radioactive elements reach the surface of the lagoon at Mururoa or Fangataufa, are subsequently diluted by the ocean to levels which are perfectly innocuous for the marine fauna and flora and, *a fortiori*, for human beings. In the same vein,

the State party rejects as unfounded and unsubstantiated the authors' contention that the incidence of cases of cancer has risen in French Polynesia *as a result* of French nuclear tests in the area.

3.5 The State party notes that it has granted access to the testing area to several independent commissions of inquiry in the past, including, in 1982, a mission led by the internationally recognized vulcanologist Haroun Tazieff, in 1983, a mission of experts from New Zealand, Australia and Papua New Guinea, one by J. Y. Cousteau in 1987, etc. That the monitoring of the environmental effects of the tests carried out by the French authorities has been serious and of high quality has, *inter alia*, been confirmed by the Lawrence Livermore Laboratory (California) and the International Laboratory of Marine Radioactivity in Monaco.

3.6 In the light of the above, the State party affirms that the authors have failed to discharge the burden of proof that they are "victims" within the meaning of article 1 of the Optional Protocol. It notes that the authors cannot argue that the risk to which they might be exposed through the nuclear tests would be such as to render imminent a violation of their rights under articles 6 and 17 of the Covenant. Purely theoretical and hypothetical violations, however, do not suffice to make them "victims" within the meaning of the Optional Protocol.

3.7 Subsidiarily, the State party contends that the communication is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol, since two of the authors, Ms. Bordes and Mr. Taura, are co-authors of the complaint which was placed before the European Commission of Human Rights and registered by that body in August 1995 (case No. 28204/95). The State party recalls its reservation to article 5, paragraph 2 (a), pursuant to which the Committee "shall not have competence to consider a communication from an individual if the same matter is being examined or has already been considered under another procedure of international investigation or settlement". As the case which was examined by the European Commission and declared inadmissible on 4 December 1995 in fact concerned the alleged unlawfulness of the French nuclear tests and thus the "same matter", the Committee's competence in respect of the present case is said to be excluded.

3.8 Equally subsidiarily, the State party submits that the complaint is inadmissible on the basis of non-exhaustion of domestic remedies. It refers to its arguments developed before the European Commission of Human Rights on this point: thus, the authors *could* have filed a complaint before the *Conseil d'État* and argued that President Chirac's

decision to resume nuclear tests constituted an abuse of (executive) power (... *recours pour excès de pouvoir*). Contrary to what the authors affirm, such a recourse could not *a priori* be deemed futile or ineffective. Furthermore, the State party notes that as the authors essentially invoke the potential risks which the tests entail for their health and the environment, they should have requested compensation from the competent authorities, which they failed to do. If their request had been rejected, they could have filed a complaint before the administrative tribunals, invoking the State's no fault responsibility (*responsabilité sans faute*).

3.9 Finally, the State submits that the authors' claim is incompatible *ratione materiae* with articles 6 and 17 of the Covenant. For the State party, article 6 only applies in the event of a real and immediate threat to the right to life, which presents itself with some degree of certainty; such is not the case in the authors' situation. Similar considerations apply to article 17, where the prohibited unlawful interference with private or family life is a real and effective interference, and not the risk of a purely hypothetical interference.

4.1 In her comments, dated 8 April 1996, counsel for the authors contends that the risk of adverse effects of the nuclear tests already carried out on the authors' life, health and environment is real and serious. She deplores the absence of an independent international investigation into the impacts of the programmed and concluded tests. She criticizes the lack of transparency of the French authorities, which are said to even misrepresent the *true* number of underground nuclear tests carried out on Mururoa and Fangataufa since the 1970s. She further points out that even the reports invoked by the State party itself (see paragraph 3.5 above) contain passages which caution that the danger of escape of radioactive particles (Caesium 134, Iodine 131) from the underground shafts and consequently contamination of the atmosphere is real; however, the State party has chosen to invoke only those conclusions favourable to its position.

4.2 Counsel argues that the tests do have adverse impacts on the marine environment in the testing area, and from there have repercussions on the whole region's ecosystem, by propagation of radiation through the food chain (especially fish). She notes that a July 1995 report prepared by *Médecins Sans Frontières* rightly criticizes the absence of medical supervision of the population of French Polynesia in the aftermath of the nuclear tests.

4.3 It is submitted that the nuclear tests carried out will, with some degree of probability, increase the incidence of cases of cancer among inhabitants of French Polynesia. Counsel concedes that it is too early to gauge the extent of the contamination of the

ecosystem, the marine environment and the food chain by radiation, as cancers may take 10 to 30 years to develop and manifest themselves; the same is true for genetical malformations. She notes that some reports have revealed the presence of Iodine 131 in significant quantities in the lagoon of Mururoa after the tests, and surmises that the discovery of Caesium 134 in the lagoon's waters is an indicator of the leaky nature of the underground shafts, from which more radioactivity is likely to escape in the future. Finally, negative effects are expected from the poisoning of fish in the South Pacific by a toxic substance found on algae growing on dead coral reefs, and which trigger a disease known as ciguatera; there is said to be a correlation between the conduct of nuclear tests in the South Pacific and the increase in poisoning of fish and of human beings by ciguatera.

4.4 On the basis of the above, counsel argues that the authors *do* qualify as victims within the meaning of article 1 of the Optional Protocol. The risks to the health of Mr. Temeharo and Ms. Bordes are said to be significant, clearly exceeding the threshold of purely hypothetical threats. The evaluation of the threats to the authors' rights under articles 6 and 17 can only be, according to counsel, made during evaluation of the *merits* of the authors' claims. For purposes of admissibility, the burden of proof is said to have been discharged, as the authors have made *prima facie* substantiated allegations.

4.5 Counsel denies that the communication is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol. She notes that Ms. Bordes withdrew her complaint from the European Commission of Human Rights by letter of 17 August 1995; conversely, Mr. Tauria withdrew his complaint from consideration by the Human Rights Committee by letter of 18 August 1995. Counsel further contends that the French reservation to article 5, paragraph 2 (a), of the Optional Protocol, is inapplicable in the present case: in this context, she affirms that the reservation only applies if the "same matter" has been the subject of a decision *on the merits* by another instance of international investigation or settlement. In the instant case, the European Commission of Human Rights declared the case presented to it inadmissible, without entering into a debate on the merits of the authors' claims.

4.6 Counsel submits that the authors should be deemed to have complied with the requirement of exhaustion of domestic remedies, since available judicial remedies are clearly ineffective. In this context, she notes that President Chirac's decision to resume nuclear tests in the South Pacific is not susceptible of judicial control: this is said to be confirmed by the jurisprudence of the French *Conseil d'État*, the highest administrative tribunal.

Thus, in a judgment handed down in 1975 Judgment in the case of *Sieur Paris de Bollardière*, 11 July 1975, the *Conseil d'État* had already held that the establishment of a security zone around the nuclear testing areas in the South Pacific were governmental decisions ("*acte de gouvernement*") which could not be dissociated from France's international relations and were not susceptible of control by national tribunals. The same considerations are applicable to the present case. Counsel further notes that the French section of Greenpeace challenged the resumption of nuclear tests before the *Conseil d'État*: by judgment of 29 September 1995, the *Conseil d'État* dismissed the complaint, on the basis of the "act of government" theory¹.

4.7 Counsel reiterates that the authors' complaints are compatible *ratione materiae* with articles 6 and 17 of the Covenant. As far as article 6 is concerned, she recalls that the Human Rights Committee has consistently, including in General Comment 6 [16] on article 6, argued that the right to life must not be interpreted restrictively, and that States should adopt positive measures to protect this right. In the context of examination of periodic State reports, for example, the Committee has frequently enquired into States parties' policies relating to measures to reduce infant mortality or improve life expectancy and policies relating to the protection of the environment or of public health. Counsel emphasizes that the Committee itself has stated, in its General Comment 14 [21] of 2 November 1984, that the development, testing, possession and deployment of nuclear weapons constitutes one of the most serious threats to the right to life.

4.8 As far as the authors' claim under article 17 is concerned, counsel notes that the risks to the authors' family life are real: thus, the danger that they lose a member of their family through cancer, leukaemia, ciguatera, etc., increases as long as measures are not taken to prevent the escape of radioactive material set free by the underground tests into the atmosphere and environment. This is said to constitute an unlawful interference with the authors' right to their family life.

Issues and proceedings before the Committee

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

5.2 The Committee notes that Mr. Tauira withdrew his communication from consideration by

¹ *Association Greenpeace France*, judgment of 29 September 1995.

the Committee by letter dated 18 August 1995, so as to enable him to present his case to the European Commission of Human Rights. In his respect, therefore, the Committee discontinues consideration of his complaint. Conversely, Ms. Bordes withdrew her application to the European Commission by telefax of 17 August 1995, before any decision was adopted by the European Commission of Human Rights. Given, therefore, that the authors of the case which was before the European Commission and of the present case are not identical, the Committee need not examine whether the French reservation to article 5, paragraph 2 (a), of the Optional Protocol, applies in the present case.

5.3 In the initial communication, the authors challenge President Chirac's decision to resume nuclear underground tests on Mururoa and Fangataufa as a violation of their rights under articles 6 and 17 of the Covenant. In subsequent letters, they reformulate their claim in that the actual conduct of tests has increased the risks to their lives and for their families.

5.4 The Committee has noted the State party's contention that the authors do not qualify as "victims" within the meaning of article 1 of the Optional Protocol. It recalls 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 omission of a State party has already adversely affected his or her enjoyment of such right, or that there is a real threat of such result.²

5.5 The issue in the present case therefore is whether the announcement and subsequent conduct of underground nuclear tests by France on Mururoa and Fangataufa resulted in a violation of their right to life and their right to their family life, specific to Ms. Bordes and Mr. Temeharo, or presented an imminent threat to their enjoyment of such rights. The Committee observes that, on the basis of the information presented by the parties, the authors have not substantiated their claim that the conduct of nuclear tests between September 1995 and the beginning of 1996 did not place them in a position in which they could justifiably claim to be victims whose right to life and to family life was then violated or was under a real threat of violation.

5.6 Finally, as to the authors' contention that the nuclear tests will further deteriorate the geological structure of the atolls on which the tests are carried out, further fissurate the limestone caps of the atolls, etc., and thereby increase the likelihood of an accident of catastrophic proportions, the Committee

² See, e.g., decision on communication No. 429/1990 (*E.W. et al. v. the Netherlands*), adopted on 8 April 1993, paragraph 6.

notes that this contention is highly controversial even in concerned scientific circles; it is not possible for the Committee to ascertain its validity or correctness.

5.7 On the basis of the above considerations and after careful examination of the arguments and materials before it, the Committee is not satisfied that the authors can claim to be victims within the meaning of article 1 of the Optional Protocol.

5.8 In the light of the above, the Committee need not address the other inadmissibility grounds that have been adduced by the State party.

5.9 Although the authors have not shown that they are "victims" within the meaning of article 1 of the Optional Protocol, the Committee wishes to

reiterate, as it observed in its General Comment 14 [23], that "it is evident that the designing, *testing*, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today".³

6. The Human Rights Committee therefore decides:

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

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

³ General Comment 14 [23], adopted on 2 November 1984.

Communication No. 669/1995

Submitted by: Gerhard Malik [represented by counsel]

Alleged victim: The author

State party: Czech Republic

Declared inadmissible: 21 October 1998 (sixty-fourth session)

Subject matter: Discriminatory effect or expropriation decrees adopted in 1945 in their application to former residents of the former Czechoslovakia

Procedural issues: Failure to substantiate claim - Non-exhaustion of domestic remedies

Substantive issues: Equality before the courts - Principle of non-discrimination – Enjoyment of minority rights

Articles of the Covenant: 12 (4), 14, 26 and 27

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

1. The author of the communication is Gerhard Malik, a German citizen residing in Dossenheim, Germany. Mr. Malik claims to be a victim of violations of articles 12, 14, 26 and 27 of the International Covenant on Civil and Political Rights by the Czech Republic. He is represented by Leewog and Grones, a law firm in Mayen, Germany. The Covenant entered into force for Czechoslovakia on 23 March 1976, the Optional Protocol on 12 June 1991. The Czech and Slovak Federal Republic ceased to exist on 31 December 1992. On 22 February 1993, the Czech Republic notified its succession to the Covenant and the Optional Protocol.

The facts as presented by the author

2.1 Mr. Malik was born a citizen of Czechoslovakia on 3 July 1932 in Schoenbrunn/Oder, in what was then known as Eastern Sudetenland. This territory had been part of the Austrian Empire until November 1918, when it became part of the new State of Czechoslovakia. In October 1938, the territory became part of Germany by virtue of the Munich Agreement, and at the end of the Second World War in May 1945 it was restored to Czechoslovakia. Since 1 January 1993 it forms part of the Czech Republic.

2.2 The author states that in 1945 he himself, his parents and grandparents were deprived of Czechoslovak citizenship by virtue of the Benes Decree No.33 of 2 August 1945 on the Determination of Czechoslovak citizenship of persons belonging to the German and Hungarian Ethnic Groups.

2.3 Mr. Malik and his family were subjected to collective exile, together with other members of the German ethnic group of Schoenbrunn, who were expelled to the United States occupation zone of Germany on 21 July 1946. According to the author, he and his family did not have any real or legal opportunity to oppose this measure. Their property was confiscated by virtue of Benes Decree No.108/1945 of 25 October 1945. The author

submits the text of the decree and a copy of the relevant page from the registry book in Novy Jicin (Schoenbrunn), which shows that his family's property was confiscated pursuant to Decree No. 108/1945.

The complaint

3.1 The author complains of a continued violation of his rights to enter his own country, to equality before the courts, to non-discrimination and to the enjoyment of minority rights. The continuing violation has been allegedly renewed by the judgement of 8 March 1995 of the Constitutional Court of the Czech Republic, which reaffirms the continued validity of the Benes Decrees. The validity of the Benes Decrees has been repeatedly confirmed by Czech authorities, including the Czech Prime Minister, Vaclav Klaus, on 23 August 1995.

3.2 Mr. Malik claims that over the past decades he has been deprived of the right enunciated in article 12, paragraph 4, of the Covenant, that is to return to his homeland, where his parents and grandparents were born and where his ancestors are buried. Moreover, he has been deprived of the right to exercise his cultural rights, in community with other members of the German ethnic group, to worship in the churches of his ancestors and to live in the land where he was born and where he grew up.

3.3 Mr. Malik specifically complains of the denial of equality before the courts, in violation of article 14, and of discrimination, in violation of article 26. He points out that the enforced expatriation in 1945, the expropriations and the expulsions were carried out in a collective way, and were not based on conduct but rather on status. All members of the German minority, including Social Democrats and other antifascists were expelled and their property was confiscated, just because they were German. In this context he refers to the policy of ethnic cleansing in the former Yugoslavia, which has been recognized to be in violation of international law. He also refers to the Nazi expatriation and expropriation of German Jews, which were arbitrary and discriminatory. He points out that while Nazi laws have been abrogated and restitution or compensation has been effected for Nazi confiscations, neither Czechoslovakia nor the Czech Republic has offered restitution or compensation to the expatriated, expropriated and expelled German minority.

3.4 Mr. Malik notes that by virtue of Law No. 87/1991 Czech citizens with Czech residence may obtain restitution or compensation for properties that were confiscated by the Government of Czechoslovakia in the period from 1948 to 1989. Mr. Malik and his family do not qualify for compensation

under this law, because their properties were confiscated in 1945, and because they lost their Czech citizenship as a result of Benes Decree No. 33 and their residence because of their expulsion. Moreover, he points out that whereas there is a restitution and compensation law for Czechs, none has been enacted to allow any form of restitution or compensation for the German minority. This is said to constitute a violation of article 26 of the Covenant.

3.5 With regard to the application of the Covenant to the facts of his case, Mr. Malik points out that although the Benes Decrees date back to 1945 and 1946, they have continuing effects which themselves constitute violations of the Covenant. Moreover, the Decrees were reaffirmed in the Judgment of the Czech Constitutional Court of 8 March 1995. The discriminatory law on restitution of 1991 also falls within the period of application of the Covenant and the Optional Protocol to the Czech Republic.

3.6 As to the requirement of exhaustion of domestic remedies, the author states that not only does Czech legislation not establish a recourse for persons in his situation, but, moreover, as long as the discriminatory Benes Decrees are held to be valid and constitutional, any appeal against them is futile. In this context the author refers to a recent challenge of the Benes Decrees, which an ethnic German resident in the Czech Republic, brought before the Supreme Constitutional Court of the Czech Republic. On 8 March 1995 the Court held that the Benes Decrees were valid and constitutional. Therefore, no available and effective remedies exist in the Czech Republic.

State party's observations on admissibility

4.1 By submission of 15 February 1996, the State party notes that the author is a German citizen residing in Germany. At the time of submission of the communication, he was not a citizen nor a resident of the Czech Republic and thus did not hold any legally relevant status in the territory of the Czech Republic.

4.2 The State party recalls that Decree No. 33 of 2 August 1945, through which the author was deprived of his Czechoslovak citizenship, contained provisions enabling restoration of Czechoslovak citizenship. Applications for restoration of citizenship were to be lodged with the appropriate authority within six months of the decree being issued. Since the author and his family did not avail themselves of this opportunity to have their citizenship restored to them, the State party submits that domestic remedies have not been exhausted.

4.3 The State party challenges the author's argument that he and his family did not have any real opportunity to oppose their removal from

Czechoslovakia. The State party argues that they were removed because they failed to exhaust domestic remedies against the deprivation of their citizenship. With reference to the principle *ignorantia legis neminem excusat*, the State party maintains that the legal status of the author and his family changed due to omission on their part and that the possible objection that they were not informed about the appropriate legislation is irrelevant.

4.4 With regard to the expropriation of his family's property, and the ensuing alleged violation of his Covenant rights, the State party points out that it has only been bound by the Covenant since its entry into force in 1976, and argues that the Covenant can thus not be applied to events that occurred in 1945-1946. With regard to the author's argument that the Constitutional Court's judgement of 8 March 1995 reaffirms the violations of the past, and makes any appeal to the Courts futile, the State party points out that following the said judgement decree No. 108/1945 no longer operates as a constitutional regulation and that the compatibility of the decree with higher laws (such as the Constitution and the Covenant) can thus be challenged before the courts. In this context, the State party points out that Constitutional Law No. 2/1993 (Charter of Fundamental Rights and Freedoms) contains a prohibition of any form of discrimination. The State party therefore challenges the author's statement that exhaustion of domestic remedies would be futile. According to the State party, the author's statement demonstrates ignorance of Czech law and is incorrect.

4.5 The State party submits that international treaties on human rights and fundamental freedoms binding on the Czech Republic are immediately applicable and superior to law. The State party explains that its Constitutional Court has the power to nullify laws or regulations if it determines that they are unconstitutional. Anyone who claims that his or her rights have been violated by a decision of a public authority may submit a motion for review of the legality of such decision.

4.6 With regard to the author's argument that the violation of his rights continues under the existing Czech legislation, the State party claims that the author could have, on the basis of the direct applicability of the Covenant in Czech legislation, brought action before the Czech courts. Moreover, the State party denies that the author's rights were ever violated and consequently the alleged violations cannot continue at present either.

4.7 In conclusion, the State party requests the Committee to declare the communication inadmissible on the grounds that the author has failed to exhaust domestic remedies, and on the

ground that the alleged violations occurred before the entry into force of the Covenant and the Optional Protocol thereto.

Author's comments

5.1 In his comments on the State party's submission, counsel recalls that it is not the author's fault that he is no longer a Czech citizen nor was a resident of the Czech Republic, because he was stripped of his citizenship and he was expelled by the State party.

5.2 Counsel argues that the State party is likewise estopped from claiming that the author or his family could have regained his citizenship pursuant to an application. Counsel recalls that at the time the author and his family were threatened with immediate expulsion by the State party which had also confiscated all of their property, as a result of which they were totally destitute. As a consequence, the remedies existing in 1945 were in practice not available to the author and his family, nor to most Germans. Counsel submits that if the State party contends that persons in the situation of the author could have availed themselves of effective domestic remedies, it should provide examples of those who did so successfully.

5.3 The author points out that at the time of the expulsion of his family, they were treated as outlaws. Thousands of Germans were detained in camps. According to the author, not only was a complaint to the Czech authorities futile, but in many cases when people did complain, they were subjected to physical abuse.

5.4 The author acknowledges that the Covenant entered into force for Czechoslovakia only in 1976. However, he contends that the restitution legislation of 1991 is discriminatory, because it excludes restitution for the German minority. Furthermore, he argues that the Constitutional Court's decision of 8 March 1995, which confirmed the continuing validity of the Benes Decrees, is a confirmation of a past violation and thus brings the communication within the applicability of the Covenant and the Optional Protocol. Counsel refers to the Committee's Views in case No. 516/1992 (*Simunek v. Czech Republic*), where the Committee held that confiscations that occurred in the period prior to the entry into force of the Covenant and Optional Protocol may nevertheless be the subject of a communication before the Committee if the effects of the confiscations have continued or if the legislation intended to remedy the confiscations is discriminatory.

5.5 With regard to the Constitutional Court's statement that decree No. 108/1945 no longer had a constitutive character, the author submits that this is

a statement of fact, since the confiscations had been completed and the Germans had no possibility to contest them. With regard to the State party's statement that the Constitutional Court has the power to repeal laws or their provisions if they are inconsistent with the Constitution or with an international human rights treaty, counsel submits that the Constitutional Court was requested to repeal the Benes decrees as being discriminatory but instead confirmed their constitutionality in its judgement of 8 March 1995. Following this judgement, no effective remedy is available to the author, as it would be futile to challenge the legality of the decrees again.

5.6 With regard to the State party's claim that domestic remedies are available to the author at present, counsel requests the State party to indicate precisely, in the circumstances of the author's case, what procedure would be available to him and to give examples of successful use of this procedure by others. In this connection, counsel refers to the Committee's jurisprudence that it is not sufficient for a State party to list the legislation in question, but that a State party should explain how an author can avail himself of the legislation in his concrete situation.

5.7 Finally, counsel argues that if indeed the Covenant is superior to Czech law, then the State party is under an obligation to correct the discrimination to which the author and his family were subjected in 1945 and all the consequences emanating therefrom. According to counsel, there is no indication that the State party is prepared to do so. On the contrary, counsel claims that recent statements by high officials in the State party's Government, announcing the privatization of formerly confiscated German property, show that there is no willingness on the part of the State party to give any relief to the author or anyone in a similar situation.

Issues and proceedings before the Committee

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

6.2 With regard to the author's claim under article 12, paragraph 4, of the Covenant, the Committee notes that the deprivation of his citizenship and his expulsion in 1946 were based on Benes' decree No. 33. Although the Constitutional Court of the Czech Republic declared Benes' decree No. 108, authorizing the confiscation of properties belonging to ethnic Germans, constitutional, the Court was never called upon to decide the constitutionality of

decree No. 33. The Committee also notes that, following the Court's judgment of 8 March 1995, the Benes' decrees have lost their constitutional status. The compatibility of decree No. 33 with higher laws, including the Covenant which has been incorporated in Czech national law, can thus be challenged before the courts of the Czech Republic. The Committee considers that under article 5, paragraph 2 (b), of the Optional Protocol, the author should bring his claim first before the domestic courts before the Committee is in a position to examine his communication. This claim is thus inadmissible for non-exhaustion of domestic remedies.

6.3 The Committee likewise considers that the author has failed to substantiate, for purposes of admissibility, his claim under article 27 of the Covenant. This part of the communication is thus inadmissible under article 2 of the Optional Protocol.

6.4 The author has further claimed violations of articles 14 and 26, because, whereas a law has been enacted to provide compensation to Czech citizens for properties confiscated in the period from 1948 to 1989, no compensation law has been enacted for ethnic Germans for properties confiscated in 1945 and 1946 following the Benes decrees.

6.5 The Committee has consistently held that not every distinction or differentiation in treatment amounts to discrimination within the meaning of articles 2 and 26. The Committee considers that in the present case, legislation adopted after the fall of the Communist regime in Czechoslovakia to compensate victims of that regime does not appear to be *prima facie* discriminatory within the meaning of article 26 merely because, as the author contends, it does not compensate the victims of injustices committed in the period before the communist regime¹. The Committee considers that the author has failed to substantiate, for purposes of admissibility, his claim that he is a victim of violations of articles 14 and 26 in this regard. This part of the communication is thus 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 and to the author.

¹ See the Committee's decision declaring inadmissible communication No. 643/1995 (*Drobek v. Slovakia*), 14 July 1997.

APPENDIX

Individual opinion submitted by Ms. Cecilia Meddina Quiroga and Mr. Eckart Klein pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the Committee's decision on communication No. 669/1995, Gerhard Malik v. Czech Republic

To our regret we cannot follow the Committee's decision that the communication is also inadmissible as far as the author claims that he is a victim of a violation of article 26 of the Covenant, because the Law No. 87/1991 would deliberately discriminate against him for ethnical reasons (See para. 3.4). For the reasons given in our Individual Opinion in Communication No. 643/1995 (*Drobek v. Slovakia*), we think that the Committee should have declared the communication admissible in this regard.

Communication No. 670/1995

Submitted by: Mr. Rüdiger Schlosser [represented by counsel]

Alleged victim: The author

State party: Czech Republic

Declared inadmissible: 21 October 1998 (sixty-fourth session)

Subject matter: Discriminatory effect of expropriation decrees adopted in 1945 in their application to former residents of the former Czechoslovakia

Procedural issues: Failure to substantiate claim - Non-exhaustion of domestic remedies

Substantive issues: Equality before the courts - Principle of non-discrimination

Articles of the Covenant: 12 (4), 14, 26 and 27

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

1. The author of the communication is Rüdiger Schlosser, a German citizen residing in Tretow, Germany (Province of Brandenburg, former German Democratic Republic). Mr. Schlosser claims to be a victim of violations of articles 12, 14, 26 and 27 of the International Covenant on Civil and Political Rights by the Czech Republic. He is represented by Leewog and Grones, a law firm in Mayen, Germany. The Covenant entered into force for Czechoslovakia on 23 March 1976, the Optional Protocol on 12 June 1991. The Czech and Slovak Federal Republic ceased to exist on 31 December 1992. On 22 February 1993, the Czech Republic notified its succession to the Covenant and the Optional Protocol.

The facts as submitted by the author

2.1 Mr. Schlosser was born a citizen of Czechoslovakia on 7 June 1932 in Aussig (today Usti nad Labem), in what was then known as Sudetenland. This territory had been part of the Austrian Empire until November 1918, when it became part of the new State of Czechoslovakia. In

October 1938, the territory became part of Germany by virtue of the Munich Agreement, and at the end of the Second World War in May 1945 it was restored to Czechoslovakia. Since 1 January 1993 it forms part of the Czech Republic.

2.2 The author states that in 1945 he as well as his parents were deprived of Czechoslovak citizenship by virtue of the Benes Decree No. 33 of 2 August 1945 on the Determination of Czechoslovak citizenship of persons belonging to the German and Hungarian Ethnic Groups.

2.3 Mr. Schlosser and his family were subjected to collective exile, together with other members of the German ethnic group of Aussig, who were expelled to Saxonia in the then Soviet occupation zone of Germany on 20 July 1945. He claims that this expulsion was in violation of international law, since it was based on ethnic and linguistic discrimination. Mr. Schlosser's father Franz, who died in 1967, was an antifascist and member of the Social Democratic party. He had been a businessman in the construction industry and owned two houses and several pieces of real estate, which were confiscated by virtue of Benes Decrees No. 12/1945 of 21 June 1945 and No. 108/1945 of 25 October 1945. The author submits the text of the decrees and a copy of the relevant pages from the registry book of Chabarovice, Usti nad Labem, which show that the property was confiscated pursuant to the Benes Decrees.

The complaint

3.1 The author complains of a continued violation of his rights to enter his own country, to equality

before the courts, to non-discrimination and to the enjoyment of minority rights. The continuing violation has been renewed by the judgement of 8 March 1995 of the Constitutional Court of the Czech Republic, which reaffirms the continued validity of the Benes Decrees, which were applied to the author and his family. The validity of the Benes Decrees has been repeatedly confirmed by Czech authorities, including the Czech Prime Minister, Vaclav Klaus, on 23 August 1995.

3.2 Mr. Schlosser claims that over the past decades he has been deprived of the right enunciated in article 12, paragraph 4, of the Covenant, that is to return to his homeland and settle there, where his parents and grandparents were born and where his ancestors are buried. Moreover, he claims that he has been deprived of the right to exercise his cultural rights, in community with other members of the German ethnic group, to worship in the churches of his ancestors and to live in the land where he was born and where he grew up. In this context he also invokes the right to return enunciated by the United Nations Security Council with regard to expellees and refugees from Bosnia, Croatia and Serbia (Security Council Resolutions Nos. 941/1994, 947/1994, 981/1995 and 1009/1995).

3.3 With regard to the exercise of his minority rights in his homeland, Mr. Schlosser points out that no State is allowed to frustrate the exercise of the rights of its subjects by depriving them of citizenship and expelling them.

3.4 Mr. Schlosser specifically complains of the denial of equality before the courts, in violation of article 14, and of discrimination, in violation of article 26. He points out that the enforced expatriation in 1945, the expropriations and the expulsions were carried out in a collective way, and were not based on conduct but rather on status. All members of the German minority, including Social Democrats and other antifascists were expelled and their property was confiscated, just because they were German; none of them were given the opportunity of having their rights determined by a court of law. In this context he refers to the policy of ethnic cleansing in the former Yugoslavia, which has been recognized to be in violation of international law. He also refers to the Nazi expatriation and expropriation of German Jews, which were arbitrary and discriminatory. He points out that while Nazi laws have been abrogated and restitution or compensation has been effected for Nazi crimes, neither Czechoslovakia nor the Czech Republic has offered restitution or compensation to the expatriated, expropriated and expelled German minority.

3.5 Mr. Schlosser notes that by virtue of Law No. 87/1991 Czech citizens with Czech residence

may obtain restitution or compensation for properties that were confiscated by the Government of Czechoslovakia in the period from 1948 to 1989. Mr. Schlosser and his family do not qualify for compensation under this law, because their properties were confiscated in 1945, and because they lost their Czech citizenship as a result of Benes Decree No. 33 and their residence because of their expulsion. Moreover, he points out that whereas there is a restitution and compensation law for Czechs, none has been enacted to allow any form of restitution or compensation for the German minority. This is said to constitute a violation of article 26 of the Covenant.

3.6 With regard to the application of the Covenant to the facts of his case, Mr. Schlosser points out that although the Benes Decrees date back to 1945 and 1946, they have continuing effects which in themselves constitute violations of the Covenant. In particular, the deprivation of Czech citizenship has continuing effects and prevents him and members of his family from returning to the Czech Republic except as tourists. Current Czech law does not provide a right for former Czech citizens of German ethnic origin to return and settle there. Moreover, the Benes Decrees were reaffirmed in the judgment of the Czech Constitutional Court of 8 March 1995. The discriminatory law on restitution of 1991 also falls within the period of application of the Covenant and the Optional Protocol to the Czech Republic.

3.7 As to the requirement of exhaustion of domestic remedies, the author states that not only does Czech legislation not establish a recourse for persons in his situation, but, moreover, as long as the discriminatory Benes Decrees are held to be valid and constitutional, any appeal against them is futile. In this context the author refers to a recent challenge of the Benes Decrees, which an ethnic German resident in the Czech Republic brought before the Constitutional Court of the Czech Republic. On 8 March 1995, the Court ruled that the Benes Decrees were valid and constitutional. Therefore, no suitable and effective remedies exist in the Czech Republic.

State party's admissibility observations

4.1 By submission of 15 February 1996, the State party notes that the author is a German citizen residing in Germany. At the time of submission of the communication, he was not a citizen nor a resident of the Czech Republic and thus did not hold any legally relevant status in the territory of the Czech Republic.

4.2 The State party recalls that Decree No. 33 of 2 August 1945, through which the author was deprived of his Czechoslovak citizenship, contained

provisions enabling restoration of Czechoslovak citizenship. Applications for restoration of citizenship were to be lodged with the appropriate authority within six months of the decree being issued. Since the author and his family did not avail themselves of this opportunity to have their citizenship restored to them, the State party submits that domestic remedies have not been exhausted.

4.3 The State party challenges the author's argument that he and his family did not have any real opportunity to oppose their removal from Czechoslovakia. The State party argues that the author and his family left the country not due to coercion but by their own choice. Since they were still Czechoslovakian citizens at the time they left the country, they could have made use of the remedies available to all nationals. They also failed to exhaust domestic remedies against the deprivation of their citizenship. With reference to the principle *ignorantia legis neminem excusat*, the State party maintains that the legal status of the author and his family changed due to omission on their part and that the possible objection that they were not informed about the appropriate legislation is irrelevant.

4.4 With regard to the expropriation of his family's property, and the ensuing alleged violation of his Covenant rights, the State party points out that it has only been bound by the Covenant since its entry into force in 1976, and argues that the Covenant can thus not be applied to events that occurred in 1945-1946. With regard to the author's argument that the Constitutional Court's judgement of 8 March 1995 reaffirms the violations of the past, and makes any appeal to the Courts futile, the State party points out that following the said judgement decree No. 108/1945 no longer operates as a constitutional regulation and that the compatibility of the decree with higher laws (such as the Constitution and the Covenant) can thus be challenged before the courts. In this context, the State party points out that Constitutional Law No. 2/1993 (Charter of Fundamental Rights and Freedoms) contains a prohibition of any form of discrimination. The State party therefore challenges the author's statement that exhaustion of domestic remedies would be futile. According to the State party, the author's statement demonstrates ignorance of Czech law and is incorrect.

4.5 The State party submits that international treaties on human rights and fundamental freedoms binding on the Czech Republic are immediately applicable and superior to law. The State party explains that its Constitutional Court has the power to nullify laws or regulations if it determines that they are unconstitutional. Anyone who claims that his or her rights have been violated by a decision of

a public authority may submit a motion for review of the legality of such decision.

4.6 With regard to the author's argument that the violation of his rights continues under the existing Czech legislation, the State party claims that the author could have, on the basis of the direct applicability of the Covenant in Czech legislation, brought action before the Czech courts. Moreover, the State party denies that the author's rights were ever violated and consequently the alleged violations cannot continue at present either.

4.7 In conclusion, the State party requests the Committee to declare the communication inadmissible on the grounds that the author has failed to exhaust domestic remedies, and on the ground that the alleged violations occurred before the entry into force of the Covenant and the Optional Protocol thereto.

Author's comments

5.1 In his comments on the State party's submission, counsel recalls that it is not the author's fault that he is no longer a Czech citizen nor is a resident of the Czech Republic, because he was stripped of his citizenship and was expelled by the State party.

5.2 Counsel argues that the State party is likewise estopped from claiming that the author or his family could have regained his citizenship pursuant to an application. Counsel recalls that at the time the author and his family, despite the fact that they were members of the Social Democratic Party and anti-fascists, were already expelled by the State party (July 1945) which had also confiscated all of their property, as a result of which they were totally destitute. As a consequence, the remedies existing in 1945 were in practice not available to the author and his family, nor to most Germans. Counsel submits that if the State party contends that persons in the situation of the author could have availed themselves of effective domestic remedies, it should provide examples of those who did so successfully.

5.3 The author points out that at the time of the expulsion of his family, they were treated as total outlaws. Thousands of Germans were detained in camps. According to the author, not only was a complaint to the Czech authorities futile, but in many cases when people did complain, they were subjected to physical abuse.

5.4 The author acknowledges that the Covenant entered into force for Czechoslovakia only in 1976. However, he contends that the restitution legislation of 1991 is discriminatory, because it excludes restitution for the German minority. Furthermore, he

argues that the Constitutional Court's decision of 8 March 1995, which confirmed the continuing validity of the Benes Decrees, is a confirmation of a past violation and thus brings the communication within the applicability of the Covenant and the Optional Protocol. Counsel refers to the Committee's Views in case No. 516/1992 (Simunek v. Czech Republic), where the Committee held that confiscations that occurred in the period prior to the entry into force of the Covenant and Optional Protocol may nevertheless be the subject of a communication before the Committee if the effects of the confiscations have continued or if the legislation intended to remedy the confiscations is discriminatory.

5.5 With regard to the Constitutional Court's statement that decree No. 108/1945 no longer had a constitutive character, the author submits that this is a statement of fact, since the confiscations had been completed and the Germans had no possibility to contest them. With regard to the State party's statement that the Constitutional Court has the power to repeal laws or their provisions if they are inconsistent with the Constitution or with an international human rights treaty, counsel submits that the Constitutional Court was requested to repeal the Benes decrees as being discriminatory but instead confirmed their constitutionality in its judgement of 8 March 1995. Following this judgement, no effective remedy is available to the author, as it would be futile to challenge the legality of the decrees again.

5.6 With regard to the State party's claim that domestic remedies are available to the author at present, counsel requests the State party to indicate precisely, in the circumstances of the author's case, what procedure would be available to him and to give examples of successful use of this procedure by others. In this connection, counsel refers to the Committee's jurisprudence that it is not sufficient for a State party to list the legislation in question, but that a State party should explain how an author can avail himself of the legislation in his concrete situation.

5.7 Finally, counsel argues that if indeed the Covenant is superior to Czech law, then the State party is under an obligation to correct the discrimination to which the author and his family were subjected in 1945 and all the consequences emanating therefrom. According to counsel, there is no indication that the State party is prepared to do so. On the contrary, counsel claims that recent statements by high officials in the State party's Government, announcing the privatization of formerly confiscated German property, show that there is no willingness on the part of the State party

to give any relief to the author or anyone in a similar situation.

Issues and proceedings before the Committee

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

6.2 With regard to the author's claim under article 12, paragraph 4, of the covenant, the Committee notes that the deprivation of his citizenship was based on Benes' decree No. 33. Although the Constitutional Court in the Czech Republic declared Benes' decree No. 108, authorizing the confiscation of properties belonging to ethnic Germans, constitutional, the Court was never called upon to decide the constitutionality of decree No. 33. The Committee also notes that, following the Court's judgment of 8 March 1995, the Benes' decrees have lost their constitutional status. The compatibility of decree No. 33 with higher laws, including the Covenant which has been incorporated in Czech national law, can thus be challenged before the courts in the Czech Republic. The Committee considers that under article 5, paragraph 2 (b), of the Optional Protocol, the author should bring his claim first before the domestic courts before the Committee is in a position to examine his communication. This claim is thus inadmissible for non-exhaustion of domestic remedies.

6.3 The Committee likewise considers that the author has failed to substantiate, for purposes of admissibility, his claim under article 27 of the Covenant. This part of the communication is thus inadmissible under article 2 of the Optional Protocol.

6.4 The author has further claimed violations of articles 14 and 26, because, whereas a law has been enacted to provide compensation to Czech citizens for properties confiscated in the period from 1948 to 1989, no compensation law has been enacted for ethnic Germans for properties confiscated in 1945 and 1946 following the Benes decrees.

6.5 The Committee has consistently held that not every distinction or differentiation in treatment amounts to discrimination within the meaning of articles 2 and 26. The Committee considers that in the present case, legislation adopted after the fall of the Communist regime in Czechoslovakia to compensate victims of that regime does not appear to be *prima facie* discriminatory within the meaning of article 26 merely because, as the author contends, it does not compensate the victims of injustices omitted in the period before the communist

regime¹. The Committee considers that the author has failed to substantiate, for purposes of admissibility, his claim that he is a victim of violations of articles 14 and 26 in this regard. This part of the communication is thus 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 and to the author.

¹ See the Committee's decision declaring inadmissible communication No. 643/1995 (*Drobek v. Slovakia*), 14 July 1997.

APPENDIX

Individual opinion submitted by Ms. Cecilia Meddina Quiroga and Mr. Eckart Klein pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the Committee's decision on communication No 670/1995,

Rüdiger Schlosser v. Czech Republic

To our regret we cannot follow the Committee's decision that the communication is also inadmissible as far as the author claims that he is a victim of a violation of article 26 of the Covenant, because the Law No. 87/1991 would deliberately discriminate against him for ethnical reasons (See para. 3.5). For the reasons given in our Individual Opinion on the decision on Communication No. 643/1995, (*Drobek v. Slovakia*) we think that the Committee should have declared the communication admissible in this regard.

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

Communications Nos 422/1990, 423/1990 and 424/1990

Submitted by: Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou

Alleged victim: The authors

State party: Togo

Declared admissible: 30 June 1994 (fifty-first session)

Date of adoption of Views: 12 July 1996 (fifty-seventh session))

Subject matter: Arrest and dismissal from employment of civil servants for alleged defamation of State party's president

Procedural issues: Admissibility *ratione temporis* - Continuing effects - Partial reversal of admissibility decision

Substantive issues: The right to compensation following arbitrary arrest - Freedom of expression - Denial of equal access to public service

Articles of the Covenant: 9 (1) and (5), 19 and 25 (c)

Articles of the Optional Protocol and Rules of Procedure: 2 (3) (a), 4 (2), and 5 (1) and 2 (b), and rules 88 (2) and 93 (3)

Finding: Violation [articles 19 and 25 (c)]

1. The authors of the communications are Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou, three Togolese citizens currently residing in Lomé, Togo. The authors claim to be the victims of violations by Togo of articles 9 and 19 of the International Covenant on Civil and Political Rights by Togo. The Optional Protocol entered into force for Togo on 30 June 1988.

Facts as submitted by the authors

2.1 The author of communication No. 422/1990, Mr. Aduayom, is a teacher at the University of Benin (Togo) in Lomé. He was arrested on 18 September 1985 by the police in Lomé and transferred to a Lomé penitentiary on 25 September 1985. He was charged with the offence of *lèse-majesté (outrage au Chef de l'Etat dans l'exercice de sa fonction)*, and criminal proceedings were instituted against him. However, on 23 April 1986, the charges against him were dropped, and the author was

released. Thereafter, he unsuccessfully requested his reinstatement in the post of *maitre assistant* at the University, which he had held prior to his arrest.

2.2 The author of communication No. 423/1990, Mr. Diasso, also was a teacher at the University of Benin. He was arrested on 17 December 1985 by agents of the Togolese Gendarmerie Nationale, allegedly on the ground that he was in possession of pamphlets criticizing the living conditions of foreign students in Togo and suggesting that money "wasted" on political propaganda would be better spent on improving the living conditions in, and the equipment of, Togolese universities. He was taken to a Lomé prison on 29 January 1986. He was also charged with the offence of *lèse-majesté*, but the Ministry, after conceding that the charges against him were unfounded, released him on 2 July 1986. Thereafter, he has unsuccessfully sought reinstatement in his former post of adjunct professor of economics at the University.

2.3 The author of case No. 424/1990, Mr. Dobou, was an inspector in the Ministry of Post and Telecommunications. He was arrested on 30 September 1985 and transferred to a Lomé prison on 4 October 1985, allegedly because he had been found reading a document outlining in draft form the statutes of a new political party. He was charged with the offence of *lèse-majesté*. On 23 April 1986, however, the charges were dropped and the author was released. Subsequently, he unsuccessfully requested reinstatement in his former post.

2.4 The authors' wages were suspended under administrative procedures after their arrest, on the ground that they had unjustifiably deserted their posts.

2.5 With respect to the requirement of exhaustion of domestic remedies, the authors state that they submitted their respective cases to the National

Commission on Human Rights, an organ they claim was established for the purpose of investigating claims of human rights violations. The Commission, however, did not examine their complaints and simply forwarded their files to the Administrative Chamber of the Court of Appeal. This instance, apparently, has not seen fit to examine their cases. The author of case No. 424/1990 additionally complains about the delays in the procedure before the Court of Appeal; thus, he was sent documents submitted by the Ministry of Post and Telecommunications some seven months after their receipt by the Court.

The complaint

3.1 The authors claim that their arrest and detention was contrary to article 9, paragraph 1, of the Covenant. This was implicitly conceded by the State party when it dropped all the charges against them. They further contend that the State party has violated article 19 in respect to them, because they were persecuted for having carried, read or disseminated documents that contained no more than an assessment of Togolese politics, either at the domestic or foreign policy level.

3.2 The authors request reinstatement in the posts they had held prior to their arrest, and request compensation under article 9, paragraph 5, of the Covenant.

State party's admissibility observations and authors' comments

4.1 The State party objects to the admissibility of the communications on the ground that the authors have failed to exhaust available domestic remedies. It observes that the procedure is regularly engaged before the Court of Appeal. In the cases concerning Messrs Aduayom and Diasso (communications Nos 422/1990 and 423/1990), the employer (the University of Benin) did not file its own submission, so that the Administrative Chamber of the Court of Appeal cannot pass sentence. With respect to the case of Mr. Dobou (No. 424/1990), the author allegedly did not comment on the statement of the Ministry of Post and Telecommunications. The State party concludes that domestic remedies have not been exhausted, since the Administrative Chamber has not handed down a decision.

4.2 The State party also notes that the Amnesty Law of 11 April 1991 decreed by the President of the Republic constitutes another remedy for the authors. The law covers all political cases as defined by the Criminal Code ("*infractions à caractère ou d'inspiration politique, prévues par la législation pénale*") which occurred before 11 April 1991. Article 2 of the Law expressly allows for the

reinstatement in public or private office. The amnesty is granted by the Public Prosecutor ("*Procureur de la République ou juge chargé du Ministère Public*") within three days after the request (article 4). According to article 3, the petition under these provisions does not prevent the victim from pursuing his claims before the ordinary tribunals.

5.1 After a request for further clarifications formulated by the Committee during the forty-ninth session, the authors, by letters dated 23 December, 15 November and 16 December 1993 respectively, informed the Committee that they were reinstated in their posts pursuant to the Law of 11 April 1991. Mr. Diasso notes that he was reinstated with effect from 27 May 1991, the others with effect from 1 July 1991.

5.2 The authors note that there has been no progress in the proceedings before the Administrative Chamber of the Court of Appeal, and that their cases appear to have been shelved, after their reinstatement under the Amnesty Law. They argue, however, that the law was improperly applied to their cases, since they had never been tried and convicted for committing an offence, but had been unlawfully arrested, detained and subsequently released after the charges against them were dropped. They add that they have not been given arrears on their salaries for the period between arrest and reinstatement, during which they were denied their income.

5.3 As regards the statute of the University of Benin, the authors submit that, although the University is, at least in theory, administratively and financially autonomous, it is in practice under the control of the State, as 95 per cent of its budget is State-controlled.

5.4 The authors refute the State party's argument that they have failed to exhaust domestic remedies. In this context, they argue that the proceedings before the Administrative Chamber of the Court of Appeal are wholly ineffective, since their cases were obviously filed after their reinstatement under the Amnesty Law, and nothing has happened since. They do not, however, indicate whether they have filed complaints with a view to recovering their salary arrears.

The Committee's admissibility decision

6.1 During its fifty-first session, the Committee considered the admissibility of the communication. It noted with concern that no reply had been received from the State party in respect of a request for clarification on the issue of exhaustion of domestic remedies, which had been addressed to it on 26 October 1993.

6.2 The Committee noted the authors' claims under article 9 and observed that their arrest and detention occurred prior to the entry into force of the Optional Protocol for Togo (30 June 1988). It further noted that the alleged violations had continuing effects after the entry into force of the Optional Protocol for Togo, in that the authors were denied reinstatement in their posts until 27 May and 1 July 1991 respectively, and that no payment of salary arrears or other forms of compensation had been effected. The Committee considered that these continuing effects could be seen as an affirmation of the previous violations allegedly committed by the State party. It therefore concluded that it was not precluded *ratione temporis* from examining the communications and considered that they might raise issues under articles 9, paragraph 5; 19; and 25 (c), of the Covenant.

6.3 The Committee took note of the State party's argument that domestic remedies had not been exhausted, as well as of the authors' contention that the procedure before the Administrative Chamber of the Court of Appeal was ineffective, because no progress in the adjudication of their cases was made after their reinstatement under the Amnesty Law, and that indeed said cases appeared to have been filed. On the basis of the information before it, the Committee did not consider that an application to the Administrative Chamber of the Court of Appeal constituted an available and effective remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

6.4 On 30 June 1994, therefore, the Committee declared the communication admissible in as much as it appeared to raise issues under articles 9, paragraph 5; 19; and 25 (c), of the Covenant. It further decided, pursuant to rule 88, paragraph 2, of its rules of procedure, to deal jointly with the authors' communications.

Examination of the merits

7.1 The deadline for the submission of the State party's observations under article 4, paragraph 2, of the Optional Protocol expired on 10 February 1995. No submission has been received from the State party, in spite of a reminder addressed to it on 26 October 1995. The Committee regrets the absence of cooperation on the part of the State party, as far as the merits of the authors' claims are concerned. It is implicit in article 4, paragraph 2, of the Optional Protocol that a State party must furnish the Committee, in good faith and within the imparted deadlines, with all the information at its disposal. This the State party has failed to do; in the circumstances, due weight must be given to the authors' allegations, to the extent that they have been adequately substantiated.

7.2 Accordingly, the Committee has considered the present communications in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

7.3 The authors contend that they have not been compensated for the time they were arbitrarily arrested, contrary to article 9, paragraph 5. The procedures they initiated before the Administrative Chamber of the Court of Appeal have not, on the basis of the information available to the Committee, resulted in any judgment or decision, be it favourable or unfavourable to the authors. In the circumstances, the Committee sees no reason to go back on its admissibility decision, in which it had held that recourse to the Administrative Chamber of the Court of Appeal did not constitute an available and effective remedy. As to whether it is precluded *ratione temporis* from considering the authors' claim under article 9, paragraph 1, the Committee wishes to note that its jurisprudence has been not to entertain claims under the Optional Protocol based on events which occurred after entry into force of the Covenant but before entry into force of the Optional Protocol for the State party. Some of the members feel that the jurisprudence of the Committee on this issue may be questionable and may have to be reconsidered in an appropriate (future) case. In the instant case, however, the Committee does not find any elements which would allow it to make a finding under the Optional Protocol on the lawfulness of the authors' arrest, since the arrests of the authors took place in September and December 1985, respectively, and they were released in April and July 1986, respectively, prior to the entry into force of the Optional Protocol for Togo on 30 June 1988. Accordingly, the Committee is precluded *ratione temporis* from examining the claim under article 9, paragraph 5.

7.4 In respect of the claim under article 19, the Committee observes that it has remained uncontested that the authors were first prosecuted and later not reinstated in their posts, between 1986 and 1991, *inter alia*, for having read and, respectively, disseminated information and material critical of the Togolese Government in power and of the system of governance prevailing in Togo. The Committee observes that the freedoms of information and of expression are cornerstones in any free and democratic society. It is in the essence of such societies that its citizens must be allowed to inform themselves about alternatives to the political system/parties in power, and that they may criticize or openly and publicly evaluate their Governments without fear of interference or punishment, within the limits set by article 19, paragraph 3. On the basis of the information before the Committee, it appears that the authors were not reinstated in the posts they

had occupied prior to their arrest, because of such activities. The State party implicitly supports this conclusion by qualifying the authors' activities as "political offences", which came within the scope of application of the Amnesty Law of 11 April 1991; there is no indication that the authors' activities represented a threat to the rights and the reputation of others, or to national security or public order (article 19, paragraph 3). In the circumstances, the Committee concludes that there has been a violation of article 19 of the Covenant.

7.5 The Committee recalls that the authors were all suspended from their posts for a period of well over five years for activities considered contrary to the interests of the Government; in this context, it notes that Mr. Dobou was a civil servant, whereas Messrs Aduayom and Diasso, were employees of the University of Benin, which is in practice state-controlled. As far as the case of Mr. Dobou is concerned, the Committee observes that access to public service on general terms of equality encompasses a duty, for the State, to ensure that there is no discrimination on the ground of political opinion or expression. This applies *a fortiori* to those who hold positions in the public service. The rights enshrined in article 25 should also be read to encompass the freedom to engage in political activity individually or through political parties, freedom to debate public affairs, to criticize the Government and to publish material with political content.

7.6 The Committee notes that the authors were suspended from their posts for alleged "desertion" of the same, after having been arrested for activities deemed to be contrary to the interests of the State party's Government. Mr. Dobou was a civil servant, whereas Messrs. Aduayom and Diasso were employees of the University of Benin, which is in practice state-controlled. In the circumstances of the authors' respective cases, an issue under article 25 (c) arises in so far as the authors' inability to recover their posts between 30 June 1988 and 27 May and 1 July 1991, respectively, is concerned. In this context, the Committee notes that the non-payment of salary arrears to the authors is a consequence of their non-reinstatement in the posts they had previously occupied. The Committee concludes that there has been a violation of article 25 (c) in the authors' case for the period from 30 June 1988 to 27 May and to 1 July 1991, respectively.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal violations by Togo of articles 19 and 25 (c) of the Covenant.

9. Pursuant to article 2, paragraph 3 (a), of the Covenant, the authors are entitled to an appropriate remedy, which should include compensation determined on the basis of a sum equivalent to the salary which they would have received during the period of non-reinstatement starting from 30 June 1988. The State party is under an obligation to ensure that similar violations do not occur in the future.

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

APPENDIX

Individual opinion submitted by Mr. Fausto Pocar pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the Views of the Committee on communications Nos. 422 - 424/1990, Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo

While I concur with the Committee's findings on the issues raised by the authors' claims under articles 19 and 25 (c), I cannot subscribe to the Committee's conclusions on issues raised under article 9, paragraph 5, of the Covenant. On this issue, the Committee argues that since it is precluded *ratione temporis* from establishing the lawfulness of the authors' arrest and detention under article 9, paragraph 1, of the Covenant, it is also precluded *ratione temporis* from examining their claim to compensation under article 9, paragraph 5. I cannot share these conclusions, for the following reasons.

Firstly, it is my personal view that the claim under article 9, paragraph 1, could have been considered by the Committee *even if* the alleged facts occurred prior to the entry into force of the Optional Protocol for Togo. As I had the opportunity to indicate with regard to other communications, and in more general terms when the Committee discussed its General Comment on reservations (see CCPR/C/SR.1369, page 6, paragraph 31), the Optional Protocol provides for a procedure which enables the Committee to monitor the implementation of the obligations assumed by States parties to the Covenant, but it has no substantive impact on the obligations as such, which must be observed as from the entry into force of the Covenant. In other words, it enables the Committee to consider violations of such obligations not only within the reporting procedure established under article 40 of the Covenant, but also in the context of the consideration of individual communications. From the merely procedural

nature of the Optional Protocol it follows that, unless a reservation is entered by a State party upon accession to the Protocol, the Committee's competence also extends to events that occurred before the entry into force of the Optional Protocol for that State, provided such events occurred or continued to have effects after the entry into force of the Covenant.

But even assuming, as the majority view does, that the Committee was precluded *ratione temporis* from considering the authors' claim under article 9, paragraph 1, of the Covenant, it would still be incorrect to conclude that it is equally precluded, *ratione temporis*, from examining their claim under article 9, paragraph 5. Although the right to compensation, to which any person unlawfully arrested or detained is entitled, may also be construed as a specification of the remedy within the meaning of article 2, paragraph 3, i.e. the remedy for the violation of the right set forth in article 9, paragraph 1, the Covenant does not establish a causal link between the two provisions contained in article 9. Rather, the wording of article 9, paragraph 5, suggests that its applicability does not depend on a finding of violation of

article 9, paragraph 1; indeed, the unlawfulness of an arrest or detention may derive not only from a violation of the provisions of the Covenant, but also from a violation of a provision of domestic law. In this latter case, the right to compensation may exist independently of whether the arrest or detention can be regarded as the basis for a claim under article 9, paragraph 1, provided that it is unlawful under domestic law. In other words, for the purpose of the application of article 9, paragraph 5, the Committee is not precluded from considering the unlawfulness of an arrest or detention, even if it might be precluded from examining it under other provisions of the Covenant. This also applies when the impossibility to invoke other provisions is due to the fact that arrest or detention occurred prior to the entry into force of the Covenant or, following the majority view, prior to the entry into force of the Optional Protocol. Since in the present case the unlawfulness of the authors' arrest and detention under domestic law is undisputed, I conclude that their right to compensation under article 9, paragraph 5, of the Covenant has been violated, and that the Committee should have made a finding to this effect.

Communication No. 454/1991

Submitted by: Enrique García Pons

Alleged victim: The author

State party: Spain

Declared admissible: 30 June 1994 (fifty-first session)

Date of adoption of Views: 30 October 1995 (fifty-fifth session)

Subject matter: Alleged discrimination in access to public service and discrimination

Procedural issues: Non-exhaustion of domestic remedies - Partial reversal of admissibility decision

Substantive issues: Discrimination - Denial of fair hearing - Discrimination in access to public service

Articles of the Covenant: 14 (1), 25, and 26

Articles of the Optional Protocol and Rules of procedure: 1, 2, 3, and 5, paragraph 2 (b), and rule 93 (4)

Finding: No violation

1. The author of the communication is Enrique García Pons, a Spanish citizen born in 1951, currently residing in Badalona, Spain. He claims to be a victim of violations by Spain of articles 14, paragraph 1, 25 (c), and 26 of the International Covenant on Civil and Political Rights.

The facts as submitted by the author

2.1 The author is a civil servant, assigned to the sub-office of the National Employment Agency (Instituto Nacional de Empleo) in the municipality of

Badalona. On 20 December 1986, he was appointed substitute for the District Judge of Badalona, a function which he performed until 16 October 1987; following his nomination, he requested his employer, the Ministry of Labour and Social Security (INEM), to formalize his change of status and to certify that he was, in terms of administrative status, assigned to "special services". The Ministry did not grant his request.

2.2 Later in 1987, the author was again appointed substitute District Judge of Badalona; he did not, however, assume his functions, since the post of District Judge had been taken up by a new judge. The author therefore requested unemployment benefits (*prestaciones de desempleo*). Again, he requested the formal recognition of his administrative status, but his employer did not process his request. The same situation prevailed in 1988; the author therefore filed a complaint with the competent administrative tribunal against the Instituto Nacional de Empleo, requesting unemployment benefits. On 27 May 1988, the Juzgado de lo Social No. 9 (Barcelona) rejected his request because the author was free to resume his former post, and therefore did not satisfy the requirements under the unemployment benefits scheme. It was argued that what the author intended

was to leave his post at the lower scale in order to claim unemployment benefits at a higher scale, while preparing his entrance into a judicial career.

2.3 On 11 May 1989, the Instituto Nacional de Empleo declared the author to be on "voluntary leave of absence" since the end of 1986. The author contested this decision and continued to assume, whenever called upon to do so, the functions of a substitute district judge. He argued that since all substitute judges contribute to unemployment benefit insurance, he himself should be able to benefit from its coverage. He appealed on these grounds against the decision of 27 May 1988 to the Tribunal Superior de Justicia de Cataluña which, on 30 April 1990, dismissed his appeal.

2.4 On 22 June 1990, the author filed an appeal (*recurso de amparo*) with the Constitutional Tribunal. On 21 September 1990, the Constitutional Tribunal rejected his complaint. The author re-petitioned the Constitutional Tribunal on 10 November 1990, pointing out that he was the only substitute judge in all of Spain to whom unemployment benefits had been denied, and that this situation violated his constitutional rights. On 3 December 1990, the Constitutional Tribunal confirmed its earlier decision. With this, the author submits, available domestic remedies have been exhausted.

The complaint

3. The author alleges to be a victim of denial of equality before the courts, as provided for in article 14, of discrimination in access to public service, in violation of article 25, paragraph c, and of discrimination because of denial of unemployment benefits, in violation of article 26 of the Covenant.

State party's submission on admissibility

4. In a submission dated 17 September 1991, the State party stated that "the communication of Mr. García Pons satisfies, in principle, the conditions of admissibility set forth in articles 3 and 5, paragraph 2, of the Optional Protocol ... and that it is not incompatible with the provisions of the Covenant". While not objecting to the communication's admissibility, it indicated that it would, in due course, make submissions on the merits.

Committee's admissibility decision

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

5.2 The Committee found that the author had substantiated his allegations, for purposes of admissibility, and was satisfied that the communication was not inadmissible under articles 1, 2, and 3 of the Optional Protocol. It further noted that the State party conceded that domestic remedies had been exhausted.

6. On 30 June 1994 the Human Rights Committee therefore decided that the communication was admissible inasmuch as it appeared to raise issues under articles 14, 25 and 26 of the Covenant.

State party's submissions on the merits

7.1 In its submissions of 13 February and 15 June 1995 the State party contests any violations of the Covenant. As to the facts of the case, the State party indicates that the author is not unemployed, but a civil servant, and that although on several occasions he has been given leave to assume the post of a substitute judge, he has always been able to return to his established post; thus, he has never been unemployed and accordingly cannot qualify for unemployment benefits. The author's submission suffers from the contradiction between his desire to be a judge on a permanent appointment and his unwillingness to give up the security of his status as civil servant in his current position.

7.2 As to the author's allegation that he is the only unemployed substitute judge who does not receive unemployment benefits, the State party states that the author has not cited a single example of a person in the same circumstances as himself, i.e. a civil servant on temporary leave from an established post, who has been treated differently. Only those unemployed substitute judges receive unemployment benefits who are, in fact, unemployed. This is not the author's situation. Nor can he expect the adoption of special legislation for himself to allow him to retain his civil service post while not performing its functions and, instead, preparing for competitive exams while receiving unemployment benefits on his expired substitute judge assignment.

7.3 With regard to an alleged violation of article 14 of the Covenant, the State party affirms that the author has had equal access to all Spanish courts, including the Constitutional Court, and that all of his complaints were examined fairly by the competent tribunals, as evidenced in the respective judgments and other submissions. Admittedly, the author disagrees with the disposition of his case, but he has not substantiated a claim that procedural guarantees were not observed by the various instances involved.

7.4 As to the alleged violation of article 25 of the Covenant, the State party points out that at no time in the many proceedings engaged by the author did

he invoke the right protected under article 25 of the Covenant. Moreover, this issue is not germane to the case, which focuses not on the right of equal access to public service but on the alleged denial of unemployment benefits.

Author's comments

8.1 In his comments, dated 29 March and 29 July 1995, the author reiterates his claim to be a victim of discrimination and contends that the relevant Spanish laws are incompatible with the Covenant, in particular the 1987 Rules and Circular 10/86 of the Undersecretary in the Justice Ministry concerning the status of substitute judges. He further alleges that the lack of permanence and the insecurity of substitute judges endangers the independence of the judiciary.

8.2 He rejects the State party's contention that he has primarily economic concerns and expects special legislation for himself. Far from having earned substantially more as a judge, he was compelled to return to his civil service post in order to attend to his minimum needs. He further stresses that during various periods from 1986 to 1992 he served as a devoted substitute judge and paid unemployment insurance. He contends that the relevant legislation and practice should be adjusted to ensure that persons who pay unemployment insurance benefit therefrom when the terms of temporary employment end, notwithstanding the possibility of returning to another post in the civil service.

8.3 The author concludes that since his is the only substitute judge who does not receive unemployment benefits, he is a victim of discrimination within the meaning of article 26 of the Covenant.

Review of admissibility and examination of the merits

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

9.2 With regard to the author's allegations concerning article 25, paragraph c, of the Covenant, the Committee notes that the State party has submitted that the author never invoked the substance of this right in any proceedings before Spanish tribunals; the author has not claimed that it would not have been open to him to invoke this right before the local courts. Therefore, pursuant to rule 93, paragraph 4, of the Committee's rules of procedure the Committee sets aside that part of its admissibility decision concerning article 25 of the

Covenant and declares it inadmissible because of non-exhaustion of domestic remedies.

9.3 Before addressing the merits in this case, the Committee observes that although the right to social security is not protected, as such, in the International Covenant on Civil and Political Rights, issues under the Covenant may nonetheless arise if the principle of equality contained in articles 14 and 26 of the Covenant is violated.

9.4 In this context the Committee reiterates its jurisprudence that not every differentiation in treatment can be deemed to be discriminatory under the relevant provisions of the Covenant¹. A differentiation which is compatible with the provisions of the Covenant and is based on reasonable grounds does not amount to prohibited discrimination.

9.5 The Committee notes that the author claims to be the only unemployed substitute judge who does not receive unemployment benefits. The information before the Committee reveals, however, that the relevant category of recipients of unemployment benefits encompasses only those unemployed substitute judges who cannot immediately return to another post upon termination of their temporary assignments. The author does not belong to this category, since he enjoys the status of a civil servant. In the Committee's opinion, a distinction between unemployed substitute judges who are not civil servants on leave and those who are cannot be deemed arbitrary or unreasonable. The Committee therefore concludes that the alleged differentiation in treatment does not entail a violation of the principle of equality and non-discrimination enunciated in article 26 of the Covenant.

9.6 With regard to the author's allegations concerning article 14, the Committee has carefully studied the various judicial proceedings engaged by the author in Spain as well as their disposition and concludes that the evidence submitted does not support a finding that he has been denied a fair hearing within the meaning of article 14, paragraph 1, of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, finds that the facts before it do not reveal a violation by Spain of any provision of the International Covenant on Civil and Political Rights.

¹ *Zwaan-de Vries v. The Netherlands*, Communication No. 182/1984, Views adopted on 9 April 1987, para. 13. *Alina Simunek v. The Czech Republic*, Communication No. 516/1992, Views adopted on 19 July 1995, para 11.3.

Communication No. 480/1991

Submitted by: José Luis García Fuenzalida [represented by a non-governmental organization]

Alleged victim: The author

State party: Ecuador

Declared admissible: 15 March 1995 (fifty-third session)

Date of adoption of Views: 12 July 1996 (fifty-seventh session) *

Subject matter: Discrimination and ill-treatment of detainees on grounds of sexual orientation

Procedural issues: Failure to substantiate claim

Substantive issues: Principle of non-discrimination - Arbitrary arrest - Torture and ill-treatment - Unfair trial

Articles of the Covenant: 2 (3) (a), 3, 7, 9, 10, 14, and 26

Articles of the Optional Protocol and Rules of Procedure: 2, 3, 4, paragraph 2, and 5, paragraphs 2 (b) and 4, and rules 85 and 93 (3)

Finding: Violation [articles 7, 10, paragraph 1, 14, paragraphs 3 (c) and (e) and 5]

1. The author of the communication is José Luis García Fuenzalida, a Chilean citizen, currently residing in Quito. At the time of submission of the communication, he was imprisoned at the Cárcel No. 2 in Quito. He claims to be a victim of violations by Ecuador of articles 3, 7, 9 and 14 of the International Covenant on Civil and Political Rights. He is represented by the Ecumenical Human Rights Commission, a non-governmental organization in Ecuador.

The facts as submitted by the author

2.1 The author is a hairdresser by profession. He was detained on 5 July 1989 and charged two days later with the rape, on 5 May 1989, of one D. K., a United States Peace Corps volunteer. He claims to be innocent and argues that he has never had sexual relations with any woman. The author was tried by the *Tribunal Cuarto de Pichincha*. On 11 April 1991, he was found guilty as charged and sentenced, on 30 April 1991, to eight years' imprisonment. On 2 May 1991, the author appealed to the Superior Court, demanding the nullity and cassation of the judgement. The request for nullity was rejected by the court and the appeal on cassation was not resolved within the period of 30 days established by law. After waiting for two years and six months for a

decision by the Court of Cassation, the author withdrew his appeal on cassation in exchange for his release. He was released on parole in October 1994.

2.2 With regard to his arrest, the author states that on 5 July 1989, at approximately 7 p.m., he was detained by police officers, thrown to the floor of a vehicle and blindfolded. From the submission it is not clear whether an arrest warrant had been issued. The author apparently did not know the reason for his arrest and initially supposed it was in connection with drugs. It was not until two days later that he learned about the alleged rape. He was interrogated regarding his whereabouts on the day of the rape. He claims to have been subjected to serious ill-treatment, including being left shackled to a bed overnight. It is also alleged that, in contravention of Ecuadorian law and practice, samples of his blood and hair were taken.

2.3 It is alleged that during the evening of 6 July 1989, the author was blindfolded and that a brine solution was poured into his eyes and nostrils. The author alleges that at some point of the interrogation the blindfold fell from his eyes and he was able to identify an officer who, the author claims, had a grudge against him from a prior detention on suspicion of murdering a homosexual friend.

2.4 That same evening, he was taken to the Criminal Investigation Department of Pichincha (SIC-P), where he was subjected to death threats until he consented to sign an incriminating statement. However, it is clear from the judgement that the author, during his trial, denied both the charges and the voluntariness of the statement. The judgement reflects that the author made before the judge a long and detailed statement of the facts concerning his detention and confession under duress.

2.5 The author claims that he learned of the facts of the rape only when charges were read to him on 7 July 1989, just before he was put on an identification parade in which the victim identified him. The author further alleges that, before he was put on the identification parade, he was taken to his house to shower, shave and dress, as instructed by the police. The author also claims that the police took several pieces of underwear from his house, which were then used as evidence against him, despite the testimony by a witness, MC. M. P., that they belonged to her.

* Pursuant to rule 85 of the rules of procedure, Committee member Julio Prado Vallejo did not take part in the adoption of the Committee's views.

2.6 Finally, the author alleges that on Saturday, 8 July 1989, he was shot in the leg by a police officer in what the police claimed was an attempt to escape and the author claims was a set-up. He was hospitalized with leg injuries and claims that the psychological torture continued while he was in the hospital. An affidavit given during the trial by a member of the Ecuadorian Human Rights Commission who visited the author in the hospital states: "I was able to see that there were two wounds on one of his legs caused by a bullet. I also saw several cigarette burns on his chest and hand." This same person further states in the affidavit: "I talked to a patient who was in the bed next to Mr. García's and asked him whether it was true that a police officer had been harassing Mr. García. He replied that he had indeed heard that person (the police officer) threaten Mr. García."

2.7 The case for the prosecution was that, during the night of 5 May 1989, D. K. was abducted by an assailant and forced into a car. The victim was kept on the floor of the car and repeatedly sexually assaulted. Finally, the victim was thrown out of the car and left on the roadside. The victim reported the incident to the Consulate of the United States of America, which reported it to the police. During the trial the police claimed that they had found the victim's underwear in the author's house.

2.8 As to the exhaustion of domestic remedies in respect of the physical abuse to which the author was allegedly subjected, it is stated that a lawyer filed a complaint against the police officers on the author's behalf. There is no further information concerning the status of the investigation of the complaint.

The complaint

3.1 The author claims to be the victim of a violation of article 3 in conjunction with article 26 of the Covenant, owing to the difficulties he encountered in retaining a lawyer, allegedly because of his homosexuality.

3.2 The author also claims to have suffered repeated violations of article 7, because he was subjected to torture and ill-treatment following his arrest. This was corroborated during the trial by a member of the Ecuadorian Ecumenical Human Rights Commission.

3.3 The author further claims a violation of article 9, because he was subjected to arbitrary arrest and detention, since he claims that he was not involved in the rape.

3.4 The author further claims that his trial was unfair and in violation of article 14 of the Covenant. In this respect, counsel contends that the accused was convicted notwithstanding the contradictory evidence contained in the statement given by the

victim herself, who described her assailant as being very tall and having a pock-marked face. The author, whom the victim identified, is short, measuring only 1.50 metres, and has no pockmarks on his face.

3.5 The author also claims that, in view of the submission by the victim of a laboratory report on samples of blood and semen taken from her and samples of blood and hair taken from him against his will and showing the existence of an enzyme which the author does not have in his blood, he requested the court to order an examination of his own blood and semen, a request which the court denied.

3.6 Moreover, the author complains about the delays in the judicial proceedings, in particular the fact that his appeal on cassation had not been dealt with in the period provided for by law and that, after more than two and a half years of waiting for the decision of the Court of Cassation, he finally had to abandon that recourse in order to obtain his release on parole.

Committee's admissibility decision

4. On 26 August 1992, the communication was transmitted to the State party, which was requested to submit to the Committee information and observations in respect of the question of admissibility of the communication. Despite two reminders sent on 10 May 1993 and 9 December 1994, no submission had been received from the State party.

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

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

5.3 The Committee noted with concern the absence of cooperation from the State party, despite the two reminders addressed to it. On the basis of the information before it, the Committee found that it was not precluded from considering the communication under article 5, paragraph 2 (b), of the Optional Protocol.

5.4 The Committee considered that the author had not substantiated, for purposes of admissibility, that he had been unequally treated owing to his homosexuality and that that had been the cause of his difficulty in retaining a lawyer. That part of the communication was therefore declared inadmissible under article 2 of the Optional Protocol.

5.5 With respect to the author's complaint that he had been subjected to torture and ill-treatment, in

violation of article 7 of the Covenant, as attested to by a member of the Ecuadorian Ecumenical Human Rights Commission during the trial, the Committee found that the facts as submitted by the author, which had not been contested by the State party, might raise issues under both articles 7 and 10 of the Covenant. In the absence of any cooperation from the State party, the Committee found that the author's claims were substantiated, for the purposes of admissibility.

5.6 With regard to the allegations that the author had been subjected to arbitrary detention, in violation of article 9 of the Covenant, the Committee found that the facts as submitted were substantiated, for the purposes of admissibility, and should accordingly be considered on their merits, especially with regard to the warrant of arrest and the moment at which the author was informed of the reasons for his arrest.

5.7 In respect of the author's allegations that the evidence in his case was not properly evaluated by the Court, the Committee referred to its prior jurisprudence and reiterated that it was generally for the appellate courts of States parties to the Covenant to evaluate facts and evidence in a particular case. Accordingly, that part of the communication was declared inadmissible as being incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

5.8 The author also submitted information concerning the procedures at the trial and the delays of over two and a half years encountered in the appeal on cassation, which, the Committee found, raised issues under article 14 of the Covenant to be examined on the merits.

6. On 15 March 1995, the Human Rights Committee decided that the communication was admissible and that the State party and the author should be requested to submit copies of the arrest warrant and of any relevant resolutions and judgements in the case, as well as medical reports and information about investigations into the alleged physical abuse of Mr. García.

State party's merits observations and comments by the author

7.1 The State party, on 18 October 1995, submitted to the Committee some documents relating to the case, without submitting a reply to the author's communication.

7.2 From the police report, it appears that the police give a version of the facts concerning torture and ill-treatment which differs from the author's version. The State party explains that it was unable to question the accused police officer because he is no longer in the police force and it has been impossible to locate him.

7.3 The judgement against the author reveals that the judge believed the police version and minimized the importance of the statement made by a nun who visited the author in the hospital, the content of which is referred to in paragraph 2.6 above.

7.4 With regard to Mr. García's leg wound, the State party insists that the shot was fired in connection with an escape attempt:

"With regard to the wound suffered by the detainee, it is noted that during an investigation carried out on Saturday, 8 July, in Bosmediano street, where the other person involved allegedly lived, he took advantage of the inattention of the officers guarding him to make a sudden and precipitate escape; the persons responsible for the detainee shouted after him and then fired shots, one of which hit him, causing a fracture of the left femur, as a result of which he was taken to the Eugenio Espejo hospital for medical treatment; the wound was never inflicted in the offices of the former criminal investigation service of Pichincha; it is also noted that there is a statement signed in the presence of Dr. Hilda María Argüello L., second prosecutor in the Pichincha criminal court, on this incident."

The documents submitted by the State party do not indicate that the court conducted any investigation whatsoever into the circumstances in which Mr. García was wounded, such as, for example, questioning the witnesses who, according to the police, saw the author attempt to escape.

7.5 The State party also submitted the text of report No. 4271-SIC-P of 8 July 1989, drawn up by Claudio Guerra; the report shows that Mr. García was arrested on Thursday, 6 July 1989, at 10 a.m. by police officers on the basis of previous investigations, and that the police confiscated a woman's undergarment, identified as belonging to Miss D. K., in Mr. García's home. A copy of a statement by Mr. García, dated 7 July 1989, admitting to having committed the rape and to having taken Miss K's undergarment, and of another statement dated 9 July 1989 admitting his attempt to escape, have been submitted, both statements having been made before Dr. Hilda Argüello, second prosecutor of the Pichincha criminal court. A copy of a note dated 8 July 1989 by officer 06 is also attached, describing the escape attempt and indicating that other witnesses can confirm the facts, in particular that shots had first been fired in the air before the fleeing defendant was wounded. A copy of the statement by Miss D. K., dated 7 July 1989, has been submitted regarding the identification parade organized on 6 July 1989 in which she immediately identified Mr. García among a group of 10 men, and was absolutely sure that the man in front of her was indeed the man who had raped her. A medical report on Mr. García's hospitalization is

also included. Another attached police report states that, prior to the investigation, some photographs were sent to Miss K., but the photograph of Mr. García was first sent by facsimile, and Miss K. stated in a telephone conversation from the United States that: "This looks the most like him of any of the photographs I have seen."

7.6 It is noted that Mr. García was released on parole on 5 October 1994 and was required to report to the prison centre every week. Mr. García has not done so, and it has not been possible to locate him, since he is not residing at his last address.

7.7 The State party submitted documents indicating that Mr. García was arrested on 6 July 1989, to be investigated for the crime of rape committed against Miss D. K., a United States national, on 5 May 1989. The register of aliens shows that Mr. García was married to an Ecuadorian woman. The State party has not sent the texts of the arrest warrant for Mr. García or of the judgements.

8.1 In a letter of 29 December 1995, the Ecumenical Human Rights Commission, which is representing Mr. García, refers to a statement made by the author in the presence of the judge in 1989 in which he maintains that he is innocent, denies having tried to escape and accuses officer 06 of having fired at him in an interrogation room, after first placing a handkerchief on his leg. He maintains that his confession was obtained by means of torture. This statement is found in the record of proceedings.

8.2 It is argued that if the police force itself is responsible for carrying out an investigation of a complaint like Mr. García's, the notorious *esprit de corps* of the force gives rise to lies, and the police are always vindicated in the end so as to avoid penalties.

Examination of the merits

9.1 The Committee has considered the communication in the light of all the information, materials and legal documents submitted by the parties. The conclusions it has reached are based on the following considerations.

9.2 With regard to the arrest and imprisonment of Mr. García, the Committee has considered the documents submitted by the State party, which do not show that the arrest was illegal or arbitrary or that Mr. García had not been informed of the reasons for his arrest. Consequently, the Committee cannot make a determination on the alleged violation of article 9 of the Covenant.

9.3 With regard to the allegations of ill-treatment perpetrated by a police officer, the Committee observes that they were submitted by the author to the Cuarto de Pichincha criminal court, which

rejected them, as is shown by the judgement of 30 April 1991. In principle, it is not for the Committee to question the evaluation of the evidence made by national courts, unless that evaluation was manifestly arbitrary or constituted a denial of justice. The materials made available to the Committee by the author do not demonstrate the existence of such shortcomings in the procedure followed before the courts.

9.4 The file does not, however, reveal any evidence that the incident in which the author suffered a bullet wound was investigated by the court. The accompanying medical report neither states nor suggests how the wound might have occurred. Given the information submitted by the author and the lack of investigation of the serious incident in which the author was wounded, the Committee concludes that there has been a violation of articles 7 and 10 of the Covenant.

9.5 With regard to the trial in the court of first instance, the Committee finds it regrettable that the State party has not submitted detailed observations about the author's allegations that the trial was not impartial. The Committee has considered the legal decisions and the text of the judgement dated 30 April 1991, especially the court's refusal to order expert testimony of crucial importance to the case, and concludes that that refusal constitutes a violation of article 14, paragraphs 3 (e) and 5, of the Covenant.

9.6 With regard to the information submitted by the author concerning delays in the judicial proceedings, in particular the fact that his appeal was not dealt with in the period provided for by law, and that, after waiting more than two and a half years for a decision on his appeal, he had to abandon that recourse in order to obtain conditional release, the Committee notes that the State party has not offered any explanation or sent copies of the relevant decisions. Referring to its prior jurisprudence, the Committee reiterates that, in accordance with article 14, paragraph 3 (c), of the Covenant, the State party has to ensure that there is no undue delay in the proceedings. The State party has not submitted any information that would justify the delays. The Committee concludes that there has been a violation of article 14, paragraph 3 (c), as well as of article 14, paragraph 5, since the author was obliged to abandon his appeal in exchange for conditional release.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, considers that the facts before it reveal violations by Ecuador of articles 7, 10, paragraph 1, and 14, paragraphs 3 (c) and (e) and 5, of the Covenant.

11. In accordance with the provisions of article 2, paragraph 3 (a), of the Covenant, the State party has an obligation to provide an effective remedy to the author. In the Committee's view, that entails compensation, and the State party is under an obligation to ensure that there will be no such violations in future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to

determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within a period of 90 days, information on the measures taken to give effect to its views.

Communication No. 526/1993

Submitted by: Micahel and Brian Hill [represented by a non-governmental organization]

Alleged victim: The authors

State party: Spain

Declared admissible: 22 March 1995 (fifty-third session)

Date of adoption of Views: 2 April 1997 (fifty-ninth session)

Subject matter: Detention and alleged unfair trial of British citizens in Spanish courts

Procedural issues: Exhaustion of domestic remedies
- Sufficient substantiation of claim

Substantive issues: Adequacy of arrest procedure -
Right to trial without undue delay - Minimum guarantees of defence in criminal proceedings
- Right to review of conviction and sentence

Articles of the Covenant: 9, 10, 14 (1) (2), (3) (b), (c), (d) and (e), and (5)

Article of the Optional Protocol and Rules of procedure: 5, paragraph 2 (a) and (b)

Finding: Violation [articles 9, paragraph 3, 10 and 14, paragraphs 3 (c) and (d) and 5]

1. The authors of the communication are Michael Hill, born in 1952, and Brian Hill, born in 1963, both British citizens, residing in Herefordshire, United Kingdom of Great Britain and Northern Ireland. They claim to be victims of violations by Spain of articles 9 and 10 and article 14, paragraphs 1, 2 and 3 (b) and (e), of the International Covenant on Civil and Political Rights. Michael Hill also invokes article 14, paragraph 3 (d), of the Covenant. The Covenant entered into force for Spain on 27 August 1977, and the Optional Protocol on 25 April 1985.

The facts as submitted by the authors

2.1 The authors owned a construction firm in Cheltenham, United Kingdom, which declared bankruptcy during the detention of the authors in

Spain. In July 1985, they went on holiday to Spain. The Gandía police arrested them on 16 July 1985, on suspicion of having firebombed a bar in Gandía, an accusation which the authors have denied since the time of their arrest, claiming that they were in the bar until 2:30 a.m. but did not return at 4 a.m. to set fire to the premises.

2.2 At the police station, the authors requested the police to allow them to contact the British Consulate, so as to obtain the aid of a consular representative who could assist as an independent interpreter. The request was denied, and a young, unqualified interpreter, a student interpreter, was called to assist in the interrogation, which took place without the presence of defence counsel. The authors state that they could not express themselves properly, as they did not speak Spanish, and the interpreter's English was very poor. As a result, serious misunderstandings allegedly arose. They deny having been informed of their rights at the time of their arrest or during the interrogation and allege that they were not properly informed of the reasons for their detention until 7 or 8 hours, respectively, after the arrest.

2.3 The authors further state that they were confronted with an alleged eyewitness to the crime during a so-called identification parade made up of the authors, in handcuffs, and two uniformed policemen. The witness, who initially could not describe the authors of the crime, eventually pointed them out.

2.4 They also complain that their new camper, valued at 2.5 million pesetas, as well as all their money and other personal effects, were confiscated and not returned by the police.

2.5 On 19 July 1985, the authors were formally charged with arson and causing damage to private property. The indictment stated that the authors, on 16 July 1985, had left the bar at 3 a.m., driven away in their camper, returned at 4 a.m. and thrown a bottle containing petrol and petrol-soaked paper through a window of the bar.

2.6 On 20 July 1985, they appeared before the examining magistrate (Gandía No. 1) in order to submit a statement denying their involvement in the crime.

2.7 After having been held in police custody for 10 days, for five of which they were allegedly left without food and with only warm water to drink, they were transferred to a prison in Valencia.

2.8 On 29 July 1985, a lawyer was assigned to them for the preliminary hearing; this lawyer allegedly told the authors that, if they could pay a certain amount of money, they would be released. It is not clear from the authors' submissions how the preliminary hearing proceeded. It would appear, however, that they claim that confusion and misunderstandings were common, due to the incompetence of the interpreter. In this context, it is submitted that the police records stated that their camper operated on "*petróleo*" (diesel). When asked by the examining magistrate (who was also under the impression that the camper ran on diesel) what substance their spare container contained, they replied to him that it was filled with petrol, which was translated as "*petróleo*" by the interpreter. The judge then said that they were lying. The authors attempted to explain that their camper ran on petrol, and that in the back of the vehicle they had a spare four-litre container filled with petrol. According to them, the judge must have seen or smelled from a sample that the container was indeed filled with "*gasolina*" (petrol), and since he believed that the camper ran on diesel, he must have thought that there was a container with petrol for manufacturing the Molotov cocktail.

2.9 Upon conclusion of the preliminary hearing, the authors were informed that the trial would take place in November 1985. However, the trial was delayed, reportedly on the ground that some documents could not be found. On 26 November 1985, the authors were summoned to court to sign some papers, whereupon the judge told them that he would contact their lawyer in order to set a new date for the trial. On 10 December 1985, the authors informed the legal aid lawyer that his services were no longer required, as they were not satisfied with his conduct of the case.

2.10 The authors secured private legal representation on 4 December 1985. On 17 January 1986, the lawyer submitted an application to the court for the authors' release on

bail, mainly on the ground that their construction firm was in a state of bankruptcy owing to their detention. Upon the advice of the public prosecutor, bail was denied on 21 February 1986. The authors complained that, although they had paid large sums of money to the lawyer, no progress was being made in their case, as he was ignoring their instructions. On 31 July 1986, they dismissed the lawyer. As the authors did not hear from him again, they assumed that the lawyer had notified the relevant authorities of their decision and that a legal aid lawyer would be assigned to them. However, it was not until 22 October 1986 that the lawyer notified the court of his withdrawal from the case.

2.11 On 1 November 1986, a new legal aid lawyer was assigned to the authors. The trial was scheduled to start on 3 November 1986. The first question from the public prosecutor was what fuel their camper used. The authors again replied that it ran on petrol, which this time was translated as "*gasolina*". After having given the same reply three times, the authors requested an adjournment of the trial, so that the prosecution could verify their claim. They also asked for an adjournment on the ground that they had had only a 20-minute interview with their defence lawyer since he had been assigned to their case. The trial was postponed for two weeks.

3.1 The authors complain that the legal aid lawyer did not make much effort to prepare their defence. They state that, when he visited them on 1 November 1986, he was accompanied by an interpreter who spoke barely any English; the lawyer did not even have the case file with him. After the trial was adjourned, the lawyer only visited them on 14 November 1986, for 40 minutes, again without the case file, and this time without the interpreter. The authors further claim that, although the lawyer was assigned and paid by the State party, he demanded 500,000 pesetas from their father for alleged expenses prior to the hearing.

3.2 With the assistance of two bilingual inmates, the authors prepared their own defence. They decided that Michael would defend himself in court and that Brian would leave it to the lawyer, to whom they provided all the relevant material.

3.3 On 17 November 1986, the authors were tried in the Provincial High Court of Valencia. Through the interpreter, Michael Hill informed the judge of his intention to defend himself in person, pursuant to article 6, paragraph 3 (c), of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The judge asked him whether he spoke Spanish and whether he was a lawyer; when he replied in the negative, the judge told him to sit down and be quiet.

3.4 The prosecution's case was based solely on an alleged eyewitness, who had testified during the

preliminary investigations that he had met with the authors prior to the incident and that their camper was parked in front of his house. At about 4 a.m., he had seen two youths resembling the authors throw a flaming bottle into the bar and leave in a grey camper. He had immediately called the police. The authors submit that the statements made by the witness during the preliminary investigations are contradictory in a number of respects and that, during the trial, the witness could not identify them. He was asked three times by the judge to take a look at the accused, and each time the witness said that “he could not remember the youths”, that “he was an old man” and that “it had happened 16 months ago”. Furthermore, under cross-examination, he failed to give a clear description of the camper, and stated that “the vehicle used by the perpetrators could have been British, Austrian or even Japanese”.

3.5 The authors explain that, as the lawyer only asked the witness four irrelevant questions about the camper and did not take up the list of questions which they had prepared specially about the irregularities in the so-called identification parade, Michael Hill again requested the right to defend himself in person. He informed the judge that he wanted to cross-examine the prosecution witness and call a witness for the defence who was present in court. The judge allegedly replied that he would have the opportunity to do all those things on appeal, demonstrating clearly that at that point he had already decided to convict them in violation of their right to be presumed innocent. After a trial lasting barely 40 minutes, the authors were convicted as charged and sentenced to six years and one day of imprisonment and to the payment of 1,935,000 pesetas in damages to the owner of the bar.

3.6 The authors then wrote numerous letters to various offices, such as the British Embassy in Madrid, the Ministry of Justice, the Supreme Court, the King of Spain and the Ombudsman, and to their lawyer, complaining of an unfair trial and requesting information on how to proceed further. The lawyer replied that his legal aid services terminated upon the conclusion of the trial, and that if they required further assistance from him they would have to pay. The Ministry of Justice referred the authors to the court of first instance. By letter of 15 January 1987, they requested the High Court of Valencia for a retrial on the ground that their trial had been unconstitutional and in violation of the European Convention. In October 1987, they submitted for the sixth time a petition to the High Court of Valencia, complaining of unfair trial and this time requesting it to assign legal counsel to them. By note of 9 December 1987, the Court replied that their complaint was groundless and that it could not deal with the matter.

3.7 In the meantime, and on 29 January 1987, they submitted notification of their intention to appeal. Subsequently they appointed a private lawyer to represent them. On 24 March 1987 the Supreme Court rejected the appointment of the private lawyer because he was not registered in Madrid. On 24 July 1987 the authors forwarded their grounds of appeal to the Supreme Court. Since the authors were not allowed to defend themselves in person, the Court appointed a legal aid lawyer on 17 December 1987. On 28 March 1988, the lawyer submitted to the Court that he did not find grounds for appeal, after which the Court appointed a second legal aid lawyer, on 12 April 1988, who also stated that he found no grounds for appeal. On 6 June 1988, the Supreme Court, in conformity with article 876 of the Code of Criminal Procedure of Spain, did not hear the appeal, giving the authors 15 days to find a private lawyer. The authors then wrote to the Bar Association (Colegio de Abogados), in September 1987, requesting it to assign a lawyer and a solicitor for their appeal; no reply was received, however.

3.8 In March 1988, the Ministry of Justice informed the authors that they could initiate an action for *amparo* before the Constitutional Court, since the rights which they claimed had been violated were protected by the Spanish Constitution.

3.9 On 6 July 1988, the authors (formally) petitioned the court of first instance for their release, pursuant to article 504 of the Code of Criminal Procedure, which provides that a prisoner may be released pending the outcome of his or her appeal when he or she has served one half of the sentence imposed. On 14 July 1988, the authors were released and returned to the United Kingdom, having informed the Spanish authorities of their address in the United Kingdom and of their intention to pursue the case.

3.10 The authors appealed (remedy of *amparo*) to the Constitutional Court on 17 August 1988. Upon their return to the United Kingdom, the authors made several attempts to contact the lawyer and solicitor in Spain, in order to obtain information on the status of their appeal and the court documents, to no avail. Finally, in April or May 1990, they were informed through the British Embassy in Madrid that the Constitutional Court had decided not to allow the appeal to proceed. With this, it is submitted, all available domestic remedies were exhausted.

The complaint

4.1 The authors, who proclaim their innocence, express their indignation at the judicial and bureaucratic system in Spain. According to them, it was likely that they were the victims of a swindle by the bar owner, who could have had a motive for

setting the fire. They protest that the identification parade was not conducted in accordance with the law. They complain that the judge did not intervene when it became clear that the legal aid lawyer was not defending them properly. Moreover, by refusing to allow Michael Hill to conduct his own defence and to call a witness on their behalf, the judge violated the principle of equality of the parties. It is submitted that the use by the police investigating unit and the judge of Michael Hill's prior criminal record was unjust and prejudicial not only to Michael but also to Brian Hill.

4.2 As to article 14, paragraph 2, the authors claim that this principle was violated before, during and after the trial: before the trial, because of the judicial authorities' repeated refusal to grant bail; during the trial, when the judge told Michael Hill that he would have the opportunity on appeal to defend himself and to call a witness for the defence; and immediately after the trial, before the verdict had been pronounced, when the legal aid lawyer started to negotiate with their father about the handling of the appeal.

4.3 The authors claim that the lack of cooperation by the Spanish authorities, as a result of which they themselves had to translate every single document with the help of other, bilingual prisoners, the lack of information in prison on Spanish legislation and the lack of competent interpreters during the interrogation by the police and during the preliminary hearing, together with the inadequate conduct of the defence by the State-appointed lawyer, amount to a violation of article 14, paragraph 3 (b), of the Covenant.

4.4 Article 14, paragraph 3 (d), is said to have been violated in Michael Hill's case because, during the trial, he was twice denied the right to defend himself in person. As a consequence, article 14, paragraph 3 (e), was also violated, as he was also denied the opportunity to examine a witness on the brother's behalf who was waiting outside the courtroom.

State party's information and observations

5.1 In its statement of 11 April 1993, the State party argues that the authors abused the right of submission and that the communication should be declared inadmissible in accordance with article 3 of the Optional Protocol. From the information provided by the State party, including the texts of judgments and other documents, it appears that the latter raises no objection with respect to the exhaustion of domestic remedies.

5.2 The State party summarizes the situation in the case as follows:

Concerning the detention:

"1. On 16 July 1985, at around 4 a.m., two individuals, in a metallic grey camper with horizontal trim on the sides and rear and with a registration beginning with the letter A, arrived at the JM club, located in Grao de Gandía, and, after preparing a Molotov cocktail, threw it into the club, breaking several panes of glass above the door, then immediately fled the scene, having thereby started a fire in the premises.

"2. An eyewitness to the incident called the police.

"3. The police arrived at the scene, together with the fire brigade, and, after listening to the eyewitness, located the camper, registration A811 JAB, inside which they discovered a partly-empty plastic container with some four litres of petrol, and arrested the occupants of the camper, Messrs. Brian and Michael Hill.

"4. In the presence of an interpreter, the detainees were immediately informed of their rights.

"5. In the presence of the interpreter and with the assistance, at their request, of the legal aid lawyer on duty, the detainees made a statement to the police. They said that they had been in the club in the early hours of the day on which they were making their statement and had drunk 5 or 6 beers there before leaving at around 2.30 a.m. They admitted that the camper and the petrol container belonged to them, but denied having started the fire, acknowledging that 'they had in fact passed close by (the club) in the vehicle' after leaving the premises.

"6. During the identification parade, the police showed several persons to the eyewitness, and the said eyewitness recognized Messrs. Hill as 'the persons who had set fire to the JM club the previous night by throwing a flaming bottle against its door, and who had fled in a large camper with a foreign registration'."

5.3 Concerning the appearance before the examining magistrate:

"1. On 17 July 1985, the day after the incident occurred, the Hill brothers testified before the examining magistrate at Gandía, assisted by the legal aid lawyer on duty, reiterating the statement they had made to the police the day before.

"2. Magistrate No.1 ordered that various proceedings be conducted including an appraisal of the damage caused, which amounted to 1,935,000 pesetas. The other parties who had appeared before the police, including the eyewitness, reiterated their statements.

"3. On 19 July, Magistrate No.1 of Gandía issued an order to institute criminal proceedings against the Hill brothers for the crime of arson, ordering them to be imprisoned and bail to be set.

"4. Further statements by the accused, an additional police file containing photographs

and information provided by Interpol on the record of Michael John Hill, convicted in the United Kingdom for theft, breaking and entry, fraud, possession of stolen goods, forgery, traffic violations and arson.

“5. Impoundment of the camper in connection with the civil liability imposed during the pre-trial proceedings.

“6. Order terminating the pre-trial proceedings, issued by the court on 24 October 1985, and referral of the accused to the Provincial High Court of Valencia. Summons of the accused, who appointed a lawyer of their own choosing to conduct their defence.

“7. On 4 December 1985, the accused sent a statement to a subdivision of the Provincial High Court of Valencia, appointing Mr. Gunther Rudiger Jorda as their lawyer.”

5.4 Concerning the oral proceedings:

“1. The defence lawyer chosen freely by the accused called only one witness, the same witness as had been produced by the Public Prosecutor’s Office, Mr. P., the eyewitness to the alleged crime.

“2. On 22 October 1986, it was announced that the oral proceedings would take place on 3 November and the parties were duly notified.

“3. On 28 October 1986, a representative of the defence lawyer communicated to the Chamber of the High Court hearing the case that, ‘as differences had arisen between the accused and the defence lawyer, he was withdrawing from the case’.

“4. Court order for the accused to appoint a lawyer. The Hill brothers indicated that they wished to be assigned a legal aid lawyer.

“5. Having been assigned a legal aid lawyer, they were informed on 31 October 1986 that the date of the trial would be 3 November 1986. Legal record of the trial on that day, in which the Chamber hearing the case, in view of the lack of time given to prepare the defence, agreed to adjourn the trial and reschedule it for 17 November 1986.

“6. On 17 November 1986, oral proceedings took place. They opened with the defence submitting a statement by the accused on what had occurred, which was admitted by the Chamber; the direct opinion of the accused was thus made known. The trial was held, using the services of an interpreter, and the eyewitness was examined by both the prosecution and the defence.

“7. On 20 November 1986, the Provincial High Court of Valencia handed down its judgment, noting that the accused did not have a criminal record, and after examining the facts sentenced the Hill brothers to six years and one day in prison for the crime of arson and imposed civil liability for the damage caused by the fire.”

5.5 Concerning the appeal to annul the judgment of the High Court filed by the Hill brothers:

“(a) Only Mr. Brian Anthony Hill appeared at the appeal proceedings. He appointed Mr. Gunther Rudiger Jorda as his lawyer, the same lawyer whom he and his brother had previously appointed and then dismissed five days before the trial;

“(b) The two brothers submitted a statement to the Supreme Court which was included in their case file;

“(c) As Mr. Rudiger Jorda could not represent the brothers in the Supreme Court, he requested that a legal aid lawyer be assigned to Brian Anthony Hill;

“(d) A legal aid lawyer was assigned, but he did not find any grounds whatsoever to justify the appeal;

“(e) A second legal aid lawyer, also appointed in accordance with article 876 of the Code of Criminal Procedure, did not find grounds for appeal either;

“(f) Two lawyers in succession found that there were no legal grounds for appeal. The proceedings were then referred to the Public Prosecutor’s Office, to see whether it could find grounds for appeal. The Public Prosecutor’s Office did not find grounds for appeal either and referred the case back;

“(g) An order was issued dismissing the appeal as not properly made and granting the appellant the right to appoint a lawyer of his choosing in order to put the appeal into proper legal form;

“(h) After he had failed to do so within the required time period, the case was filed;

“(i) During that time, the accused had violated the conditions of their conditional release by abandoning the address in Spain which they had given and fleeing the country.”

5.6 Concerning the conditional release:

“On 14 July 1988, the Provincial High Court of Valencia, with the appeal to annul the judgment still pending, granted the Hill brothers a conditional release without bail and ordered them to appear on the first and fifteenth day of each month. The accused gave the British Embassy as their address, while they looked for an apartment.”

5.7 Concerning the remedy of *amparo*:

“On 16 August 1988, the Hill brothers initiated an action for *amparo* before the Constitutional Court, requesting that a legal aid lawyer be assigned to them. After a lawyer was appointed, the application for *amparo* was submitted. On 8 May 1989, the Constitutional Court issued a reasoned and substantiated ruling that the action for *amparo* was inadmissible.”

5.8 Regarding civil liability, the State reports that the camper, valued at 2.5 million pesetas, was offered at a public auction but remained unsold. It was then handed over to the owner of the bar as compensation for the damage caused in the fire.

5.9 The State party notes:

“That the accused were granted a conditional release on 14 July 1988 and, following the judgment of the Supreme Court in which the appeal was dismissed, in violation of the conditions of their provisional release, the Hill brothers left Spain, and that, ‘according to the statement by the British Vice-Consul, the brothers, once they got out of prison in July or August last year, left Spain and were not residing with their parents, and were currently believed to be in Portugal’. On 1 March 1989, the Provincial High Court of Valencia therefore declared Michael John and Brian Anthony Hill to be in contempt and ordered that they be sought and taken into custody.”

Authors’ comments

6.1 In their comments of 6 July 1993, the authors maintain that they are innocent and attribute their conviction to a series of misunderstandings during the trial caused by the lack of proper interpretation.

6.2 The authors reiterate that their rights were violated, in particular the right to a fair trial with guarantees of adequate time and facilities for the preparation of the defence, and the right to defend oneself in person and to examine witnesses. The authors reject the State party’s accusation that they fled Spain as soon as they were released, explaining that they fulfilled the conditions of their provisional release and then returned to their family in the United Kingdom, having informed the authorities of their address there and of their intention to pursue the case in order to prove their innocence. The Committee’s file shows that the Hill brothers did in fact write to the Constitutional Court in February 1990 to inquire about the outcome of their appeal.

6.3 The authors reject the presumption of guilt arrived at by the State party on the basis of an Interpol report on Michael Hill. Firstly, the report refers to events which took place in the United Kingdom more than 14 years ago and to a previous criminal record which had been expunged and was therefore not admissible in court. The use of the record by the Public Prosecutor’s Office was unfair and prejudicial and the authors had no opportunity to refute it at the oral proceedings, which lasted barely 40 minutes. They emphasize that Michael Hill was denied the right to defend himself in person against the presumption of guilt and that, furthermore, his legal aid lawyer failed to follow his instructions. For those reasons, no defence was put forward on the

matter of the prejudicial presumption of guilt. Furthermore, the information which the legal aid lawyer failed to refute also had a very harmful effect on Brian Hill, who had no previous criminal record in the United Kingdom.

Committee’s admissibility decision

7.1 Before examining a complaint contained in a communication, the Human Rights Committee decides, pursuant to rule 87 of its rules of procedure, whether or not it is admissible under the Optional Protocol to the Covenant.

7.2 The Committee ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the matter had not been submitted under another procedure of international investigation or settlement. Taking into account all the information submitted by the parties, the Committee concluded that the domestic remedies referred to in article 5, paragraph 2 (b), of the Optional Protocol had been exhausted.

7.3 The Committee considered the statement by the State party arguing that the Hill brothers had abused the right of submission, but concluded that only an examination of the merits of the case could clarify whether the Hill brothers had abused that right and whether the State party had violated the Covenant.

7.4 The Committee considered that the allegations made under article 14 had been sufficiently substantiated for purposes of admissibility and, accordingly, should be examined on the merits. The facts submitted to the Committee also appeared to raise questions regarding articles 9 and 10 (see paras. 2.3 and 2.7 *supra*).

8. On 22 March 1995, the Human Rights Committee found the communication admissible.

Merits observations by the State party

9.1 In its statement dated 9 November 1995, the State party refers to its previous observations and to the documents already submitted, and reiterates that the complaint is unfounded. In its submission dated 30 May 1996, the State party contends that the communication should be declared inadmissible on account of abuse of the right of submission. It argues that the authors were placed on provisional liberty on 14 July 1988 on condition that they would appear before the *Audiencia Provincial de Valencia* on the first of every month. Instead of doing so, the Hill brothers left Spain and returned to England. Because of their breach of the conditions of release and violation of Spanish law, they are estopped from claiming that Spain has violated its commitments under international law.

9.2 As to the merits of the communication, the State party explains that the interpreter was not a person selected *ad hoc* by the local police but a person designated by the *Instituto Nacional de Empleo* (INEM) upon agreement with the Ministry of Interior. Interpreters must have satisfied professional criteria before being employed by INEM. The records indicate that Isabel Pascual was properly designated interpreter for the Hill brothers in Gandía and include a statement from INEM with respect to the assignment of Ms. Pascual and Ms. Rieta.

9.3 As to the authors' desire to communicate with the British Consulate, the State party contends that the documents reveal that the Consulate was duly informed of their detention.

9.4 As to the identification parade, the State party rejects the authors' description of having been brought before the witness in handcuffs and next to uniformed policemen. The State party affirms that the procedural guarantees provided for in articles 368 and 369 of the Code of Criminal Procedure were duly observed. Moreover, the identification parade took place in the presence of the authors' attorney, Salvador Vicente Martínez Ferrer, whom the State party contacted and who, according to the State party's submission, rejects the authors' description of the events. A document sent by the State shows that the two other persons in the identification parade were "inspectores" and formed part of the Superior Police Corps, where no uniform is worn.

9.5 The State party rejects the allegation that the Hill brothers had been kept for 10 days without food and encloses a statement from the chief of the Gandía Police and receipts allegedly signed by the Hill brothers.

9.6 As to the duration of the criminal proceedings up to the oral hearing: from 16 July to 24 October 1985 investigations, including into Michael Hill's prior criminal record, were carried out. On 26 November the authors were notified and they designated their attorney. On 4 December 1985 the file was referred by the Gandía Court to the *Audiencia Provincial de Valencia*. On 28 December the case was referred to the State attorney, who presented his report and conclusions on 3 March 1986. On 10 September the Court fixed the date for oral hearing on 3 November. On 22 October 1986 defence counsel withdrew. On 28 October the Hill brothers asked for a legal aid lawyer. On 30 October Mr. Carbonell Serrano was appointed as legal aid lawyer. On 3 and 17 November oral hearings took place. The State party concludes that this chronology indicates that there was no undue delay on the part of the Spanish authorities.

9.7 The State party submits that the duration of 16 months of pretrial detention was not unusual. It

was justified in view of the complexities of the case; bail was not granted because of the danger that the authors would leave Spanish territory, which they did as soon as release was granted.

9.8 The State party contends that the authors had sufficient time and facilities to prepare their defence. First they had counsel of their own choosing, and when they dismissed him, legal aid counsel was appointed and the hearing postponed to allow the new counsel to familiarize himself with the case. It is not true that Mr. Carbonell, the legal aid attorney, demanded 500,000 pesetas from the authors before trial. He did demand 50,000 pesetas for the case that they would want to appeal to the Supreme Court, an amount that is altogether reasonable for counsel of one's choosing. The authors, however, did not use his services, but availed themselves of the services of two other legal aid lawyers. The State party denies the authors' claim that the documentation was not made available to them in English translation.

9.9 As to the oral hearing, it is stated that Ms. Rieta was a well qualified interpreter and that the authors' only witness, Mr. Pellicer, affirmed having recognized them and their pickup truck.

9.10 As to Michael Hill's right to defend himself, the records do not reveal that Michael Hill had demanded the right to defend himself and that this right was denied by the court. Moreover, Spanish law recognizes, pursuant to the Covenant and the European Convention, the right to defend oneself. Such defence should take place by competent counsel, which is paid by the State when necessary. Spain's reservation to articles 5 and 6 of the European Convention concern only a restriction of this right with respect of members of the Armed Forces.

9.11 As to the presumption of innocence, the authors admit their presence in the club and the number of beers consumed. In view of the evidence given by an eyewitness, there is no basis to claim that they were deemed guilty without evidence.

Authors' comments

10.1 By letters of 8 January and 5 July 1996 the authors contest the State party's arguments on admissibility and merits. As to the alleged abuse of the right of submission, the authors claim that the State party, in view of its manifold violations of their rights in the course of their detention and trial, does not come to the Committee with clean hands. They contend that they acted properly in leaving the territory of Spain, because they feared further violations of their rights. Moreover, they did not immediately leave Spanish territory upon their release from prison on 14 July 1988 but five weeks later, on 17 August, with no objection from the

British Consulate at Alicante. They refer to the transcript of their visit to the Consulate on 12 August 1988 in order to obtain a temporary passport. Moreover, the State party had made no provision for them to remain in Spain after release and all the release documentation was in Spanish.

10.2 As to the interpreter, they maintain their contention that Ms. Isabel Pascual made crucial mistakes of interpretation, which ultimately led to their conviction. They have no criticism of the other interpreter, Ms. Rieta, other than the mistake concerning to the fuel used by their truck.

10.3 As to the identification parade, they reaffirm their allegation contained in their submission of 6 July 1993.

10.4 They reaffirm that they did not receive any food or drink for a period of five days and very little thereafter, because the allocation of funds specifically for this purpose were misappropriated. They point out that the State party's list does not refer to the first five days, when they allege to have been totally deprived of subsistence. The lists presented by the State refer to 11 days, and only two of these, the 21st and 24th July, show their signature.

10.5 As to the necessary time and facilities to prepare their defence, the authors maintain that they spent but two brief periods with their legal aid attorney, Mr. Carbonell. They maintain their allegation that Mr. Carbonell demanded half a million pesetas from their parents on 1 November 1986.

10.6 Concerning the right of Michael Hill to defend himself, it is said that the letter from the Pro Consul at Alicante, dated 12 March 1987, substantiates their claim that the right under the Spanish Constitution to defend oneself in court was emphatically denied by the judiciary on two occasions. Michael Hill made his desire to defend himself clear well in advance of the Court proceedings via the official interpreter, Ms. Rieta.

10.7 With respect to the length of the hearings, the authors reiterate that the first hearing of 3 November lasted only 20 minutes, in which period the question as to what fuel was used by their vehicle was raised. There was no examination of the defendants or of the witness on this occasion. The second hearing on 17 November lasted 35 minutes, mainly devoted to formalities. Thus, the authors challenge the State party's assertion that the Court could properly examine both defendants and one witness, bearing in mind that every word had to be translated.

10.8 As to the presumption of innocence, they claim that not only at trial, but throughout the proceedings they were deemed to be guilty, although from the outset they always affirmed their innocence.

Examination of the merits

11. The Human Rights Committee has examined this 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.

12.1 With respect to the State party's allegation that the case should be declared inadmissible on account of abuse of the right of submission, because the authors had breached their conditions of release in violation of the Spanish law, the Committee considers that an author does not forfeit his right to submit a complaint under the Optional Protocol simply by leaving the jurisdiction of the State party against which the complaint is made, in breach of the conditions of his release.

12.2 With regard to the authors' allegations of violations of article 9 of the Covenant, the Committee considers that the authors' arrest was not illegal or arbitrary. Article 9, paragraph 2, of the Covenant requires that anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. The authors specifically allege that seven and eight hours, respectively, elapsed before they were informed of the reason for their arrest, and complain that they did not understand the charges because of the lack of a competent interpreter. The documents submitted by the State party show that police formalities were suspended from 6 a.m. until 9 a.m., when the interpreter arrived, so that the accused could be duly informed in the presence of legal counsel. Furthermore, from the documents sent by the State it appears that the interpreter was not an *ad hoc* interpreter but an official interpreter appointed according to rules that should ensure her competence. In these circumstances, the Committee finds that the facts before it do not reveal a violation of article 9, paragraph 2, of the Covenant.

12.3 As for article 9, paragraph 3, of the Covenant, which stipulates that it shall not be the general rule that persons awaiting trial shall be detained in custody, the authors complain that they were not granted bail and that, because they could not return to the United Kingdom, their construction firm was declared bankrupt. The Committee reaffirms its prior jurisprudence that pre-trial detention should be the exception and that bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party. The mere fact that the accused is a foreigner does not of itself imply that he may be held in detention pending trial. The State party has indeed argued that there was a well-founded concern that the authors would leave Spanish territory if released on bail. However, it has provided no information on what this concern was based and why it could not be

addressed by setting an appropriate sum of bail and other conditions of release. The mere conjecture of a State party that a foreigner might leave its jurisdiction if released on bail does not justify an exception to the rule laid down in article 9, paragraph 3, of the Covenant. In these circumstances, the Committee finds that this right in respect of the authors has been violated.

12.4 The authors were arrested on 15 July 1985 and formally charged on 19 July 1985. Their trial did not start until November 1986, and their appeal was not disposed of until July 1988. Only a minor part of this delay can be attributed to the authors' decision to change their lawyers. The State party has argued that the delay was due "to the complexities of the case" but has provided no information showing the nature of the alleged complexities. Having examined all the information available to it, the Committee fails to see in which respect this case could be regarded as complex. The sole witness was the eyewitness who gave evidence at the hearing in July 1985, and there is no indication that any further investigation was required after that hearing was completed. In these circumstances, the Committee finds that the State party violated the authors' right, under article 14, paragraph 3 (c), to be tried without undue delay.

13. With respect to the authors' allegations regarding their treatment during detention, particularly during the first 10 days when they were in police custody (para. 2.7), the Committee notes that the information and documents submitted by the State party do not refute the authors' claim that they were not given any food during the first five days of police detention. The Committee concludes that such treatment amounts to a violation of article 10 of the Covenant.

14.1 With regard to the right of everyone charged with a criminal offence to have adequate time and facilities for the preparation of his defence, the authors have stated that they had little time with their legal aid lawyer and that when the latter visited them for only 20 minutes two days before the trial, he did not have the case file or any paper for taking notes. The Committee notes that the State party contests this allegation and points out that the authors had counsel of their own choosing. Moreover, in order to allow the legal aid lawyer to prepare the case, the hearing was adjourned. The authors have also alleged that even though they do not speak Spanish, the State party failed to provide them with translations of many documents that would have helped them to better understand the charges against them and to organize their defence. The Committee refers to its prior jurisprudence¹ and recalls that the

¹ Views in case No. 451/1991, *Harward v. Norway*, adopted on 15 July 1994, paras. 9.4 and 9.5.

right to fair trial does not entail that an accused who does not understand the language used in Court, has the right to be furnished with translations of all relevant documents in a criminal investigation, provided that the relevant documents are made available to his counsel. Based on the records, the Committee finds that the facts do not reveal a violation of article 14, paragraph 3 (b), of the Covenant.

14.2 The Committee recalls that Michael Hill insists that he wanted to defend himself, through an interpreter, and that court denied this request. The State party has answered that the records of the hearing do not show such a request, and that Spain recognized the rights of "auto defence" pursuant to the Covenant and the European Convention of Human Rights, but that "such defence should take place by competent counsel, which is paid by the State when necessary", thereby conceding that its legislation does not allow an accused person to defend himself in person, as provided for under the Covenant. The Committee accordingly concludes that Michael Hill's right to defend himself was not respected, contrary to article 14, paragraph 3 (d), of the Covenant.

14.3 The Committee further observes that in accordance with article 876 of the Spanish Code of Criminal Procedure, the authors' appeal was not effectively considered by the Court of Appeal, since no lawyer was available to submit any grounds of appeal. Consequently, the authors' right to have their conviction and sentence reviewed, as required by the Covenant, was denied to them, contrary to article 14, paragraph 5, of the Covenant.

14.4 Given the Committee's conclusion that the authors' right to a fair trial under article 14 was violated, it need not deal with their specific allegations relating to the adequacy of their representation by a legal aid lawyer, the irregularities of the identification parade, the competence of the interpreters and the violation of the presumption of innocence.

15. The Human Rights Committee, acting in accordance with article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, finds that the facts before it reveal a violation of articles 9, paragraph 3; 10 and 14, paragraphs 3 (c) and 5, of the Covenant, in respect of both Michael and Brian Hill and of article 14, paragraph 3 (d), in respect of Michael Hill only.

16. Pursuant to article 2, paragraph 3 (a), of the Covenant, the authors are entitled to an effective remedy, entailing compensation.

17. Bearing in mind that by becoming a party to the Optional Protocol, the State has recognized the Committee's competence 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 guarantee to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in cases where a violation has been established, the Committee requests the State party to provide, within 90 days, information on the measures taken to give effect to the Committee's Views.

APPENDIX I

Individual opinion submitted by Mr. Nisuke Ando pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the Views of the Committee on communication No. 526/1993, Michael and Brian Hill v. Spain

I concur with the Committee's Views with respect to article 14. However, I am unable to concur with the Committee's finding with respect to article 10.

According to the authors, they were held in police custody for 10 days, for five of which they were allegedly left without food and with only warm water to drink (see para. 2.7). The State party rejects this allegation and encloses a statement from the chief of Gandía Police as well as receipts allegedly signed by the authors (see para. 9.5). The authors assert that the allocation of funds specifically for food was misappropriated and that the State party's lists do not refer to the first five days, when they allege to have been totally deprived of subsistence (see para. 10.4).

Nevertheless, as the Committee itself recognizes (see para. 10.4), the lists refer to 11 days from 16 to 26 July 1985 and, contrary to the Committee's finding that the lists show the authors' signatures only for 21 and 24 July, the authors' names with signatures appear on the lists for all 11 days. All the signatures do not seem exactly identical and it may be that the warders in charge of food supply may have signed on the authors' behalf.

In any event, the authors have not presented any evidence to refute the existence and content of the lists: that they were left without food for the first five days of their police detention remains a mere allegation. Under the circumstances, I am unable to concur with the Committee's finding that the State party has not provided sufficient elements to refute the authors' allegation and that it is in violation of article 10 of the Covenant (see para. 13).

APPENDIX II

Individual opinion submitted by Mr. Eckart Klein pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the Views of the Committee on communication No. 526/1993, Michael and Brian Hill v. Spain

I do not share the opinion expressed in paragraph 14.4 of the Views that the Committee need not deal with the authors' specific allegations relating to the adequacy of their representation by a legal aid lawyer, the irregularities of the identification parade, the competence of the court-appointed interpreters and the violation of the presumption of innocence.

The fact that the Committee found a violation of the authors' right to a fair trial under article 14 regarding certain aspects (article 14, paragraphs 3 (c) and (d) and 5, of the Covenant) does not release the Committee from its duty to examine whether other alleged violations of the rights enshrined in article 14 of the Covenant have occurred. According to the authors, violations of article 14, paragraphs 1, 2 and 3 (f), should have been considered.

The Committee is not in a position analogous to that of a national court which may and will, for grounds of time constraints, restrict itself to the most evident reasons that by themselves justify the nullification of the measure attacked. The authority of the Committee's Views rests, to a great extent, on a diligent examination of all allegations made by the authors and on a convincing *ratio decidendi*. The influence of the Committee's Views on State party behaviour will be strengthened only if all aspects of the matter have been thoroughly examined and all necessary conclusions have been argued clearly.

Apart from this objection of a general nature, I do not think that article 14 of the Covenant should be seen just as an umbrella provision of the right to a fair trial. It is true that all provisions of the article are connected with the issue. But the express formulation of the different aspects of the right to a fair trial is founded on many varied good reasons, based on historical experience. The Committee should not encourage any view that some rights enshrined in article 14 of the Covenant are less important than others.

I do not think that the facts presented by the authors in this case reveal a violation of Covenant rights beyond the findings of the Committee. But I feel obliged to make clear my own point of view on this matter of principle.

Communication No. 538/1993

Submitted by: Charles Stewart [represented by counsel]

Alleged victim: The author

State party: Canada

Declared admissible: 18 March 1994 (fiftieth session)

Date of adoption of Views: 1 November 1996 (fifty-eighth session)

Subject matter: Expulsion of long-term State party resident to country of birth on grounds of criminal conduct

Procedural issues: Interim measures of protection - State party challenge to justification for interim measures

Substantive issues: Arbitrary deprivation of right to enter one's own country - Interference with family life

Articles of the Covenant: 7, 9, 12 (4), 13, 17, and 23

Articles of the Optional Protocol and Rules of procedure: 2 and 5, paragraph 2 (b), and rule 86

Finding: No violation

1. The author of the communication is Charles Edward Stewart, a British citizen born in 1960. He has resided in Ontario, Canada, since the age of seven, and currently faces deportation from Canada. He claims to be a victim of violations by Canada of articles 7, 9, 12, 13, 17 and 23 of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as submitted by the author

2.1 The author was born in Scotland in December 1960. At the age of seven, he emigrated to Canada with his mother; his father and older brother were already, at the time, living in Canada. The author's parents have since separated, and the author lives together with his mother and with his younger brother. His mother is in poor health, and his brother is mentally disabled and suffers from chronic epilepsy. His older brother was deported to the United Kingdom in 1992, because of a previous criminal record. This brother apart, all of the author's relatives reside in Canada; the author himself has two young twin children, who live with their mother, from whom the author divorced in 1989.

2.2 The author claims that for most of his life, he considered himself to be a Canadian citizen. He claims that it was only when he was contacted by immigration officials because of a criminal conviction that he realized that, legally, he was only a permanent resident, as his parents had never requested Canadian citizenship for him during his youth. It is stated that between September 1978 and

May 1991, the author was convicted on 42 occasions, mostly for petty offences and traffic offences. Two convictions were for possession of marijuana seeds and of a prohibited martial arts weapon. One conviction was for assault with bodily harm, committed in September 1984, on the author's former girlfriend. Counsel indicates that most of her client's convictions are attributable to her client's substance abuse problems, in particular alcoholism. Since his release on mandatory supervision in September 1990, the author has participated in several drug and alcohol rehabilitation programmes. He has further received medical advice to control his alcohol abuse and, with the exception of one relapse, has remained alcohol-free.

2.3 It is stated that although the author cannot contribute much financially to the subsistence of his family, he does so whenever he is able to and helps his ailing mother and retarded brother around the home.

2.4 In 1990, an immigration enquiry was initiated against the author pursuant to Section 27, paragraph 1, of the *Immigration Act*. Under this provision, a permanent resident in Canada must be ordered deported from Canada if an adjudicator in an immigration enquiry is satisfied that the defendant has been convicted of certain specified offences under the *Immigration Act*. On 20 August 1990, the author was ordered deported on account of his criminal convictions. He appealed the order to the Immigration Appeal Division. The Board of the Appeal Division heard the appeal on 15 May 1992, dismissing it by judgment of 21 August 1992, which was communicated to the author on 1 September 1992.

2.5 On 30 October 1992, the author complained to the Federal Court of Appeal for an extension of the time limit for applying for leave to appeal. The Court first granted the request but subsequently dismissed the application for leave to appeal. There is no further appeal or application for leave to appeal from the Federal Court of Appeal to the Supreme Court of Canada, or to any other domestic tribunal. Thus, no further effective domestic remedy is said to be available.

2.6 If the author is deported, he would not be able to return to Canada without the express consent of the Canadian Minister of Employment and Immigration, under the terms of Sections 19 (1)(i) and 55 of the *Immigration Act*. A re-application for emigration to

Canada would not only require ministerial consent but also that the author fulfil all the other statutory admissibility criteria for immigrants. Furthermore, because of his convictions, the author would be barred from readmission to Canada under Section 19 (2) (a) of the Act.

2.7 As the deportation order against the author could now be enforced at any point in time, counsel requests the Committee to seek from the State party interim measures of protection, pursuant to rule 86 of the rules of procedure.

The complaint

3.1 The author claims that the above facts reveal violations of articles 7, 9, 12, 13, 17 and 23 of the Covenant. He claims that in respect of article 23, the State party has failed to provide for clear legislative recognition of the protection of the family. In the absence of such legislation which ensures that family interests would be given due weight in administrative proceedings such as, for example, those before the Immigration and Refugee Board, he claims, there is a *prima facie* issue as to whether Canadian law is compatible with the requirement of protection of the family.

3.2 The author also refers to the Committee's General Comment on article 17, according to which "interference [with home and privacy] can only take place on the basis of law, which itself must be compatible with the provisions, aims and objectives of the Covenant". He asserts that there is no law which ensures that his legitimate family interests or those of the members of his family would be addressed in deciding on his deportation from Canada; there is only the vague and general discretion given to the Immigration Appeal Division to consider all the circumstances of the case, which is said to be insufficient to ensure a balancing of his family interests and other legitimate State aims. In its decision, the Immigration Appeal Division allegedly did not give any weight to the disabilities of the author's mother and brother; instead, it ruled that "taking into account that the appellant does not have anyone depending on him and there being no real attachment to and no real support from anyone, the Appeal Division sees insufficient circumstances to justify the appellant's presence in this country".

3.3 According to the author, the term "home" should be interpreted broadly, encompassing the (entire) community of which an individual is a part. In this sense, his "home" is said to be Canada. It is further submitted that the author's privacy must include the fact of being able to live within this community without arbitrary or unlawful interference. To the extent that Canadian law does not protect aliens against such interference, the author claims a violation of article 17.

3.4 The author submits that article 12, paragraph 4, is applicable to his situation since, for all practical purposes, Canada is his own country. His deportation from Canada would result in an absolute statutory bar from reentering Canada. It is noted in this context that article 12 (4) does not indicate that everyone has the right to enter his country of nationality or of birth but only "his own country". Counsel argues that the U.K. is no longer the author's "own country", since he left it at the age of seven and his entire life is now centred upon his family in Canada - thus, although not Canadian in a formal sense, he must be considered *de facto* a Canadian citizen.

3.5 The author affirms that his allegations under articles 17 and 23 should also be examined in the light of other provisions, especially articles 9 and 12. While article 9 addresses deprivation of liberty, there is no indication that the *only* concept of liberty is one of physical freedom. Article 12 recognizes liberty in a broader sense: the author believes that his deportation from Canada would violate "his liberty of movement within Canada and within his community", and that it would not be necessary for one of the legitimate objectives enumerated in article 12, paragraph 3.

3.6 The author contends that the enforcement of the deportation order would amount to cruel, inhuman and degrading treatment within the meaning of article 7 of the Covenant. He concedes that the Committee has not yet decided whether the permanent separation of an individual from his/her family and/or close relatives and the effective banishment of a person from the only country he ever knew and in which he grew up may amount to cruel, inhuman and degrading treatment; he submits that this is an issue to be determined on its merits.

3.7 In this connection, the author recalls that (a) he has resided in Canada since the age of seven; (b) at the time of issue of the deportation order all members of his immediate family resided in Canada; (c) while his criminal record is extensive, it does by no means reveal that he is a danger to public safety; (d) he has taken voluntary steps to control his substance-abuse problems; (e) deportation from Canada would effectively and permanently sever all his ties in Canada; and (f) the prison terms served for various convictions already constitute adequate punishment and the reasoning of the Immigration Appeal Division, by emphasizing his criminal record, amounts to the imposition of additional punishment.

Special Rapporteur's request for interim measures of protection and State party's reaction

4.1 On 26 April 1993, the Special Rapporteur on New Communications transmitted the communication to the State party, requesting it, under rule 91 of the

rules of procedure, to provide information and observations on the admissibility of the communication. Under rule 86 of the rules of procedure, the State party was requested not to deport the author to the United Kingdom while his communication was under consideration by the Committee.

4.2 In a submission dated 9 July 1993 in reply to the request for interim measures of protection, the State party indicates that although the author would undoubtedly suffer personal inconvenience should he be deported to the United Kingdom, there are no special or compelling circumstances in the case that would appear to cause irreparable harm. In this context, the State party notes that the author is not being returned to a country where his safety or life would be in jeopardy; furthermore, he would not be barred once and for all from readmission to Canada. Secondly, the State party notes that although the author's social ties with his family may be affected, his complaint makes it clear that his family has no financial or other objective dependence on him: the author does not contribute financially to his brother, has not maintained contact with his father for seven or eight years and, after the divorce from his wife in 1989, apparently has not maintained any contact with his wife or children.

4.3 The State party submits that the application of rule 86 should *not* impose a general rule on States parties to suspend measures or decisions at a domestic level unless there are special circumstances where such a measure or decision might conflict with the effective exercise of the author's right of petition. The fact that a complaint has been filed with the Committee should not automatically imply that the State party is restricted in its power to implement a deportation decision. The State party argues that considerations of state security and public policy must be considered prior to imposing restraints on a State party to implement a decision lawfully taken. It therefore requests the Committee to clarify the criteria at the basis of the Special Rapporteur's decision to call for interim measures of protection and to consider withdrawing the request for interim protection under rule 86.

4.4 In her comments, dated 15 September 1993, counsel challenges the State party's arguments related to the application of rule 86. She contends that deportation would indeed bar the author's readmission to Canada forever. Furthermore, the test of what may constitute "irreparable harm" to the petitioner should not be considered by reference to the criteria developed by the Canadian courts where, it is submitted, the test for irreparable harm in relation to family has become one of almost exclusive financial dependency, but by reference to the Committee's own criteria.

4.5 Counsel submits that the communication was filed precisely *because* Canadian courts, including the Immigration Appeal Division, do not recognize family interests beyond financial dependency of family members. She adds that it is the very test applied by the Immigration Appeal Division and the Federal Court which is at issue before the Human Rights Committee: it would defeat the effectiveness of any order the Committee might make in the author's favour in the future if the rule 86 request were to be cancelled now. Finally, counsel contends that it would be unjustified to apply a "balance of convenience" test in determining whether or not to invoke rule 86, as this test is inappropriate where fundamental human rights are at issue.

State party's admissibility observations and counsel's comments

5.1 In its submission under rule 91, dated 14 December 1993, the State party contends that the author has failed to substantiate his allegations of violations of articles 7, 9, 12 and 13 of the Covenant. It recalls that international and domestic human rights law clearly states that the right to remain in a country and not to be expelled from it is confined to nationals of that state. These laws recognize that any such rights possessed by non-nationals are available only in certain circumstances and are more limited than those possessed by nationals. Article 13 of the Covenant "delineates the scope of that instrument's application in regard to the right of an alien to remain in the territory of a State party.... Article 13 directly regulates only the procedure and not the substantive grounds for expulsion. Its purpose is clearly to prevent *arbitrary* expulsions. [The provision] aims to ensure that the *process* of expelling such a person complies with what is laid down in the State's domestic law and that it is not tainted by bad faith or the abuse of power". Reference is made to the Committee's Views in case No. 58/1979, *Maroufidou v. Sweden*.

5.2 The State party submits that the application of the *Immigration Act* in the instant case satisfied the requirements of article 13. In particular, the author was represented by counsel during the inquiry before the immigration adjudicator, was given the opportunity to present evidence as to whether he should be permitted to remain in Canada, and to cross-examine witnesses. Based on evidence adduced during the inquiry, the adjudicator issued a deportation order against the author. The State party explains that the Immigration Appeal Board to which the author complained is an independent and impartial tribunal with jurisdiction to consider any ground of appeal that involved a question of law or fact, or mixed law and fact. It also has jurisdiction to consider an appeal on humanitarian grounds that an individual should not be removed from Canada. The

Board is said to have carefully considered and weighed all the evidence presented to it, as well as the circumstances of the author's case.

5.3 While the State party concedes that the right to remain in a country might exceptionally fall within the scope of application of the Covenant, it is submitted that there are no such circumstances in the case: the decision to deport Mr. Stewart is said to be “justified by the facts of the case and by Canada's duty to enforce public interest statutes and protect society. Canadian courts have held that the most important objective for a government is to protect the security of its nationals. This is consistent with the view expressed by the Supreme Court of Canada that the executive arm of government is pre-eminent in matters concerning the security of its citizens ... and that the most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country”.

5.4 The State party argues that both the decision to deport Mr. Stewart and to uphold the deportation order met with the requirements of the *Immigration Act*, and that these decisions were in accordance with international standards; there are no special circumstances which would “trigger the application of the Covenant to justify the complainant's stay in Canada”. Furthermore, there is no evidence of abuse of power by Canadian authorities and in the absence of such an abuse, “it is inappropriate for the Committee to evaluate the interpretation and application by those authorities of Canadian law”.

5.5 As to the alleged violation of articles 17 and 23 of the Covenant, the State party argues that its immigration laws, regulations and policies are compatible with the requirements of these provisions. In particular, Section 114(2) of the *Immigration Act* allows for the exemption of persons from *any* regulations made under the Act or the admission into Canada of persons where there exist compassionate or humanitarian considerations. Such considerations include the existence of family in Canada and the potential harm that would result if a member of the family were removed from Canada.

5.6 A general principle of Canadian immigration programs and policies is that dependants of immigrants into Canada are eligible to be granted permanent residence at the same time as the principal applicant. Furthermore, where family members remain outside Canada, the *Immigration Act* and ancillary regulations facilitate reunification through family class and assisted relative sponsorships: “[r]eunification in fact occurs as a result of such sponsorships in almost all cases”.

5.7 In the light of the above, the State party submits that any effects which a deportation may have on the author's family in Canada would occur further to the application of legislation that is

compatible with the provisions, aims and objectives of the Covenant: “In the case at hand, humanitarian and compassionate grounds, which included family considerations, were taken into account during the proceedings before the immigration authorities and were balanced against Canada's duty and responsibility to protect society and to properly enforce public interest statutes”.

5.8 In conclusion, the State party affirms that Mr. Stewart has failed to substantiate violations of rights protected under the Covenant and is in fact claiming a right to remain in Canada. He is said to be in fact seeking to establish an avenue under the Covenant to claim the right not to be deported from Canada: this claim is incompatible *ratione materiae* with the provisions of the Covenant and inadmissible under article 3 of the Optional Protocol.

6.1 In her comments, counsel notes that the State party wrongly conveys the impression that the author had two full hearings before the immigration authorities, which took into account all the specific factors in his case. She observes that the immigration adjudicator conducting the inquiry “has no equitable jurisdiction”. Once he is satisfied that the person is the one described in the initial report, that this person is a permanent resident of Canada, and that he has been convicted of a criminal offence, a removal order is mandatory. Counsel contends that the adjudicator “may not take into account any other factors and has no statutory power of discretion to relieve against any hardship caused by the issuance of the removal order”.

6.2 As to the discretionary power, under Section 114(2) of the *Immigration Act*, to exempt persons from regulatory requirements and to facilitate admission on humanitarian grounds, counsel notes that this power is *not* used to relieve the hardship of a person and his/her family caused by the removal of a permanent resident from Canada: “[T]he Immigration Appeal Division exercises a quasi-judicial statutory power of discretion after a full hearing, and it has been seen as inappropriate for the Minister or his officials to in fact 'overturn' a negative decision ... by this body”.

6.3 Counsel affirms that the humanitarian and compassionate discretion delegated to the Minister by the *Immigration Regulations* can in any event hardly be said to provide an effective mechanism to ensure that family interests are balanced against other interests. In recent years, Canada is said to have routinely separated families or attempted to separate families where the interests of young children were at stake: thus, “the best interests of children are not taken into account in this administrative process”.

6.4 Counsel submits that Canada ambiguously conveys the impression that family class and assisted

relative sponsorships are almost always successful. This, according to her, may be true of family class sponsorships, but it is clearly not the case for assisted relative sponsorships, since assisted relative applicants must meet all the selection criteria for independent applicants. Counsel further dismisses as “patently wrong” the State party's argument that the Court, upon application for judicial review of a deportation order, may balance the hardship caused by removal against the public interest. The Court, as it has articulated repeatedly, cannot balance these interests, is limited to strict judicial review, and cannot substitute its own decision for that of the decision maker(s), even if it would have reached a different conclusion on the facts: it is limited to quashing a decision because of jurisdictional error, a breach of natural justice or fairness, an error of law, or an erroneous finding of fact made in a perverse or in a capricious manner (Sec. 18 (1) *Federal Court Act*).

6.5 As to the compatibility of the author's claims with the Covenant, counsel notes that Mr. Stewart is not claiming an absolute right to remain in Canada. She concedes that the Covenant does not *per se* recognize a right of non-nationals to enter or remain in a state. Nonetheless, it is submitted that the Covenant's provisions cannot be read in isolation but are inter-related: accordingly, article 13 must be read in the light of other provisions.

6.6 Counsel acknowledges that the Committee has held that article 13 provides for procedural and not for substantive protection; however, procedural protection cannot be interpreted in isolation from the protection provided under other provisions of the Covenant. Thus, legislation governing expulsion cannot discriminate on any of the grounds listed in article 26; nor can it arbitrarily or unlawfully interfere with family, privacy and home (article 17).

6.7 As to the claim under article 17, counsel notes that the State party has only set out the provisions of the *Immigration Act* which provide for family reunification - provisions which she considers inapplicable to the author's case. She adds that article 17 imposes positive duties upon States parties, and that there is no law in Canada which would recognize family, privacy, or home interests in the context raised in the author's case. Furthermore, while she recognizes that there is a process provided by law which grants to the Immigration Appeal Division a general discretion to consider the personal circumstances of a permanent resident under order of deportation, this discretion does not recognize or encompass consideration of fundamental interests such as integrity of the family. Counsel refers to the case of *Sutherland* as an other example of the failure to recognize that integrity of the family is an important and protected interest. For counsel, there “can be no balancing of interests if ... family ... interests are not recognized as fundamental interests

for the purpose of balancing. The primary interest in Canadian law and jurisprudence is the protection of the public...”.

6.8 Concerning the State party's contention that a “right to remain” may only come within the scope of application of the Covenant under exceptional circumstances, counsel claims that the process whereby the author's deportation was decided and confirmed proceeded without recognition or cognizance of the author's rights under articles 7, 9, 12, 13, 17 or 23. While it is true that Canada has a duty to ensure that society is protected, this legitimate interest must be balanced against other protected individual rights.

6.9 Counsel concedes that Mr. Stewart was given an opportunity, before the Immigration Appeal Division, to present all the circumstances of his case. She concludes, however, that domestic legislation and jurisprudence do not recognize that her client will be subjected to a breach of his fundamental rights if he were deported. This is because such rights are not and need not be considered given the way immigration legislation is drafted. Concepts such as home, privacy, family or residence in one's own country, which are protected under the Covenant, are foreign to Canadian law *in the immigration context*. The overriding concern in view of removal of a permanent resident, without distinguishing long-term residents from recently arrived immigrants, is national security.

Committee's admissibility decision

7.1 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.

7.2 The Committee noted that it was uncontested that there were no further domestic remedies for the author to exhaust, and that the requirements of article 5, paragraph 2 (b), of the Optional Protocol had been met.

7.3 In as much as the author's claims under articles 7 and 9 of the Covenant are concerned, the Committee examined whether the conditions of articles 2 and 3 of the Optional Protocol were met. In respect of articles 7 and 9, the Committee did not find, on the basis of the material before it, that the author had substantiated, for purposes of admissibility, his claim that deportation to the United Kingdom and separation from his family would amount to cruel or inhuman treatment within the meaning of article 7, or that it would violate his right to liberty and security of person within the meaning of article 9, paragraph 1. In this respect, therefore, the Committee decided that the author had

no claim under the Covenant, within the meaning of article 2 of the Optional Protocol.

7.4 As to article 13, the Committee noted that the author's deportation was ordered pursuant to a decision adopted in accordance with the law, and that the State party had invoked arguments of protection of society and national security. It was not apparent that this assessment was reached arbitrarily. In this respect, the Committee found that the author had failed to substantiate his claim, for purposes of admissibility, and that this part of the communication was inadmissible under article 2 of the Optional Protocol.

7.5 Concerning the claim under article 12, the Committee noted the State party's contention that no substantiation in support of this claim had been adduced, as well as counsel's contention that article 12, paragraph 4, was applicable to Mr. Stewart's case. The Committee noted that the determination of whether article 12, paragraph 4, was applicable to the author's situation required a careful analysis of whether Canada could be regarded as the author's country" within the meaning of article 12, and, if so, whether the author's deportation to the United Kingdom would bar him from reentering "his own country", and, in the affirmative, whether this would be done arbitrarily. The Committee considered that there was no *a priori* indication that the author's situation could *not* be subsumed under article 12, paragraph 4, and therefore concluded that this issue should be considered on its merits.

7.6 As to the claims under articles 17 and 23 of the Covenant, the Committee observed that the issue whether a State was precluded, by reference to articles 17 and 23, from exercising a right to deport an alien otherwise consistent with article 13 of the Covenant, should be examined on the merits.

7.7 The Committee noted the State party's request for clarifications of the criteria that formed the basis of the Special Rapporteur's request for interim protection under rule 86 of the Committee's rules of procedure, as well as the State party's request that the Committee withdraw its request under rule 86. The Committee observed that what may constitute "irreparable damage" to the victim within the meaning of rule 86 cannot be determined generally. The essential criterion is indeed the irreversibility of the consequences, in the sense of the inability of the author to secure his rights, should there later be a finding of a violation of the Covenant on the merits. The Committee may decide, in any given case, not to issue a request under rule 86 where it believes that compensation would be an adequate remedy. Applying these criteria to deportation cases, the Committee would require to know that an author would be able to return, should there be a finding in his favour on the merits.

8. On 18 March 1994 the Committee declared the communication admissible in so far as it might raise issues under articles 12, paragraph 4, 17, and 23 of the Covenant.

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

9.1 By submission of 24 February 1995, the State party argues that Mr. Stewart has never acquired an unconditional right to remain in Canada as his country". Moreover, his deportation will not operate as an absolute bar to his reentry to Canada. A humanitarian review in the context of a future application to reenter Canada as an immigrant is a viable administrative procedure that does not entail a reconsideration of the judicial decision of the Immigration Appeal Board.

9.2 Articles 17 and 23 of the Covenant cannot be interpreted as being incompatible with a State party's right to deport an alien, provided that the conditions of article 13 of the Covenant are observed. Under Canadian law everyone is protected against arbitrary or unlawful interference with privacy, family and home as required by article 17. The State party submits that when a decision to deport an alien is taken after a full and fair procedure in accordance with law and policy, which are not themselves inconsistent with the Covenant, and in which the demonstrably important and valid interests of the State are balanced with the Covenant rights of the individual, such a decision cannot be found to be arbitrary. In this context the State party submits that the conditions established by law on the continued residency of non-citizens in Canada are reasonable and objective and the application of the law by Canadian authorities is consistent with the provisions of the Covenant, read as a whole.

9.3 The State party points out that the proposed deportation of Mr. Stewart is not the result of a summary decision by Canadian authorities, but rather of careful deliberation of all factors concerned, pursuant to full and fair procedures compatible with article 13 of the Covenant, in which Mr. Stewart was represented by counsel and submitted extensive argument in support of his claim that deportation would unduly interfere with his privacy and family life. The competent Canadian tribunals considered Mr. Stewart's interests and weighed them against the State's interest in protecting the public. In this context the State party refers to the Convention relating to the Status of Refugees, which gives explicit recognition to the protection of the public against criminals and those who are security risks; it is submitted that these considerations are equally relevant in interpreting the Covenant. Moreover, Canada refers to the Committee's General Comment No. 15 on "The

position of aliens under the Covenant”, which provides that “It is for the competent authorities of the State party, in good faith and in the exercise of their powers, to apply and interpret the domestic law, observing, however, such requirements under the Covenant as equality before the law”. It also refers to the Committee's Views on communication No. 58/1979, *Maroufidou v. Sweden*, in which the Committee held that the deportation of Ms Maroufidou did not entail a violation of the Covenant, because she was expelled in accordance with the procedure laid down by the State's domestic law and there had been no evidence of bad faith or abuse of power. The Committee held that in such circumstances, it was not within its competence to reevaluate the evidence or to examine whether the competent authorities of the State had correctly interpreted and applied its law, unless it was manifest that they had acted in bad faith or had abused their power. In this communication there has been no suggestion of bad faith or abuse of power. It is therefore submitted that the Committee should not substitute its own findings without some objective reason to think that the findings of fact and credibility by Canadian decision-makers were flawed by bias, bad faith or other factors which might justify the Committee's intervention in matters that are within the purview of domestic tribunals.

9.4 As to Canada's obligation under article 23 of the Covenant to protect the family, reference is made to relevant legislation and practice, including the Canadian Constitution and the Canadian Charter on Human Rights. Canadian law provides protection for the family which is compatible with the requirements of article 23. The protection required by article 23, paragraph 1, however, is not absolute. In considering his removal, the competent Canadian courts gave appropriate weight to the impact of deportation on his family in balancing these against the legitimate State interests to protect society and to regulate immigration. In this context the State party submits that the specific facts particular to his case, including his age and lack of dependents, suggest that the nature and quality of his family relationships could be adequately maintained through correspondence, telephone calls and visits to Canada, which he would be at liberty to make pursuant to Canadian immigration laws.

9.5 The State party concludes that deportation would not entail a violation by Canada of any of Mr. Stewart's rights under the Covenant.

10.1 In her submission dated 16 June 1995, counsel for Mr. Stewart argues that by virtue of his long residence in Canada, Mr. Stewart is entitled to consider Canada to be “his own country” for purposes of article 12, paragraph 4, of the Covenant. It is argued that this provision should not be subject to any restrictions and that the denial of entry to a

person in Mr. Stewart's case would be tantamount to exile. Counsel reviews and criticizes relevant Canadian case law, including the 1992 judgment in *Chiarelli v. M.E.I.*, in which the loss of permanent residence was likened to a breach of contract; once the contract is breached, removal can be effected. Counsel maintains that permanent residence in a country and family ties should not be dealt with as in the context of commercial law.

10.2 As to Mr. Stewart's ability to return to Canada following deportation, author's counsel points out that because of his criminal record, he would face serious obstacles in gaining readmission to Canada as a permanent resident and would have to meet the selection standards for admission to qualify as an independent immigrant, taking into account his occupational skills, education and experience. As to the immigration regulations, he would require a pardon from his prior criminal convictions, otherwise he would be barred from readmission as a permanent resident.

10.3 With regard to persons seeking permanent resident status in Canada, counsel refers to decisions of the Canadian immigration authorities that have allegedly not given sufficient weight to extenuating circumstances. Counsel further complains that the exercise of discretion by judges is not subject to review on appeal.

10.4 As to a violation of articles 17 and 23 of the Covenant, author's counsel points out that family, privacy and home are not concepts incorporated into the provisions of the Immigration Act. Therefore, although the immigration authorities can take into account family and other factors, they are not obliged by law to do so. Moreover, considerations of dependency have been limited to the aspect of financial dependency, as illustrated in decisions in the *Langner v. M.E.I.*, *Toth v. M.E.I.* and *Robinson v. M.E.I.* cases.

10.5 It is argued that the Canadian authorities did not sufficiently take into account Mr. Stewart's family situation in their decisions. In particular, counsel objects to the evaluation by Canadian courts that Mr. Stewart's family bonds were tenuous, and refers to the unofficial transcript of the deportation hearings, in which Mr. Stewart stressed the emotionally supportive relationship that he had with his mother and brother. Mr. Stewart's mother confirmed that he helped her in caring for her youngest son. Counsel further criticizes the reasoning of the Immigration Appeal Division in the Stewart decision, which allegedly put too much emphasis on financial dependency: “The appellant has a good relationship with his mother who has written in support of him. But the appellant's mother has always lived independently of him and has never been supported by him. The appellant's younger

brother is in a program for the disabled and is therefore taken care of by social services. As a matter of fact, there is no one depending on the appellant for sustenance and support...". Counsel argues that emphasis on the financial aspect of the relationship does not take into account the emotional family bond and submits in support of her argument the report of Dr. Irwin Silverman, a psychologist, summarizing the complexity of human relationships. Moreover counsel cites from a book by Johathan Bloom-Fesbach, *The Psychology of Separation and Loss*, outlining the long-term effects of breaking the family bond.

10.6 Counsel rejects the State party's argument that proper balancing has taken place between State interests and individual human rights.

Issues and proceedings before the Committee

11.1 This communication was declared admissible in so far as it appears to raise issues under articles 12, paragraph 4, 17 and 23 of the Covenant.

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

12.1 The question to be decided in this case is whether the expulsion of Mr. Stewart violates the obligations Canada has assumed under articles 12, paragraph 4, 17 and 23 of the Covenant.

12.2 Article 12, paragraph 4, of the Covenant provides: "No one shall be arbitrarily deprived of the right to enter his own country". This article does not refer directly to expulsion or deportation of a person. It may, of course, be argued that the duty of a State party to refrain from deporting persons is a direct function of this provision and that a State party that is under an obligation to allow entry of a person is also prohibited from deporting that person. Given its conclusion regarding article 12, paragraph 4, that will be explained below, the Committee does not have to rule on that argument in the present case. It will merely assume that if article 12, paragraph 4, were to apply to the author, the State party would be precluded from deporting him.

12.3 It must now be asked whether Canada qualifies as being Mr. Stewart's country". In interpreting article 12, paragraph 4, it is important to note that the scope of the phrase "his own country" is broader than the concept "country of his nationality", which it embraces and which some regional human rights treaties use in guaranteeing the right to enter a country. Moreover, in seeking to understand the meaning of article 12, paragraph 4, account must also be had of the language of article 13 of the Covenant. That provision speaks of "an alien lawfully in the territory of a State party" in

limiting the rights of States to expel an individual categorized as an "alien". It would thus appear that "his own country" as a concept applies to individuals who are nationals and to certain categories of individuals who, while not nationals in a formal sense, are also not "aliens" within the meaning of article 13, although they may be considered as aliens for other purposes.

12.4 What is less clear is who, in addition to nationals, is protected by the provisions of article 12, paragraph 4. Since the concept "his own country" is not limited to nationality in a formal sense, that is, nationality acquired on birth or by conferral, it embraces, at the very least, an individual who, because of his special ties to or claims in relation to a given country cannot there be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law and of individuals whose country of nationality has been incorporated into or transferred to another national entity whose nationality is being denied them. In short, while these individuals may not be nationals in the formal sense, neither are they aliens within the meaning of article 13. The language of article 12, paragraph 4, permits a broader interpretation, moreover, that might embrace other categories of long-term residents, particularly stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence.

12.5 The question in the present case is whether a person who enters a given State under that State's immigration laws, and subject to the conditions of those laws, can regard that State as his own country when he has not acquired its nationality and continues to retain the nationality of his country of origin. The answer could possibly be positive were the country of immigration to place unreasonable impediments on the acquiring of nationality by new immigrants. But when, as in the present case, the country of immigration facilitates acquiring its nationality, and the immigrant refrains from doing so, either by choice or by committing acts that will disqualify him from acquiring that nationality, the country of immigration does not become "his own country" within the meaning of article 12, paragraph 4, of the Covenant. In this regard it is to be noted that while in the drafting of article 12, paragraph 4, of the Covenant the term "country of nationality" was rejected, so was the suggestion to refer to the country of one's permanent home.

12.6 Mr. Stewart is a British national both by birth and by virtue of the nationality of his parents. While he has lived in Canada for most of his life he never applied for Canadian nationality. It is true that his criminal record might have kept him from acquiring Canadian nationality by the time he was old enough

to do so on his own. The fact is, however, that he never attempted to acquire such nationality. Furthermore, even had he applied and been denied nationality because of his criminal record, this disability was of his own making. It cannot be said that Canada's immigration legislation is arbitrary or unreasonable in denying Canadian nationality to individuals who have criminal records.

12.7 This case would not raise the obvious human problems Mr. Stewart's deportation from Canada presents were it not for the fact that he was not deported much earlier. Were the Committee to rely on this argument to prevent Canada from now deporting him, it would establish a principle that might adversely affect immigrants all over the world whose first brush with the law would trigger their deportation lest their continued residence in the country convert them into individuals entitled to the protection of article 12, paragraph 4.

12.8 Countries like Canada, which enable immigrants to become nationals after a reasonable period of residence, have a right to expect that such immigrants will in due course acquire all the rights and assume all the obligations that nationality entails. Individuals who do not take advantage of this opportunity and thus escape the obligations nationality imposes can be deemed to have opted to remain aliens in Canada. They have every right to do so, but must also bear the consequences. The fact that Mr. Stewart's criminal record disqualified him from becoming a Canadian national cannot confer on him greater rights than would be enjoyed by any other alien who, for whatever reasons, opted not to become a Canadian national. Individuals in these situations must be distinguished from the categories of persons described in paragraph 12.4 above.

12.9 The Committee concludes that as Canada cannot be regarded as Mr. Stewart's country", for the purposes of article 12, paragraph 4, of the Covenant, there could not have been a violation of that article by the State party.

12.10 The deportation of Mr. Stewart will undoubtedly interfere with his family relations in Canada. The question is, however, whether the said interference can be considered either unlawful or arbitrary. Canada's Immigration Law expressly provides that the permanent residency status of a non-national may be revoked and that that person may then be expelled from Canada if he or she is convicted of serious offences. In the appeal process the Immigration Appeal Division is empowered to revoke the deportation order "having regard to all the circumstances of the case". In the deportation proceedings in the present case, Mr. Stewart was given ample opportunity to present evidence of his family connections to the Immigration Appeal Division. In its reasoned decision the Immigration

Appeal Division considered the evidence presented but it came to the conclusion that Mr. Stewart's family connections in Canada did not justify revoking the deportation order. The Committee is of the opinion that the interference with Mr. Stewart's family relations that will be the inevitable outcome of his deportation cannot be regarded as either unlawful or arbitrary when the deportation order was made under law in furtherance of a legitimate state interest and due consideration was given in the deportation proceedings to the deportee's family connections. There is therefore no violation of articles 17 and 23 of the Covenant.

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

APPENDIX I

*Individual opinion submitted by Mr. Eckart Klein pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the Views of the Committee on communication No 538/1993,
Charles Stewart v. Canada*

Being in full agreement with the finding of the Committee that the facts of the case disclose neither a violation of article 12, paragraph 4, nor of articles 17 and 23 of the Covenant, for the reasons given in the view, I cannot accept the way how the relationship between article 12, paragraph 4, and article 13 has been determined. Although this issue is not decisive for the outcome of the present case, it could become relevant for the consideration of other communications, and I therefore feel obliged to clarify this point.

The view suggests that there is a category of persons who are not "nationals in the formal sense", but are also not "aliens within the meaning of article 13" (paragraph 12.4). While I clearly accept that the scope of article 12, paragraph 4, is not entirely restricted to nationals but may embrace other persons as pointed out in the view, I nevertheless think that this category of persons - not being nationals, but still covered by article 12, paragraph 4 - may be deemed to be "aliens" in the sense of article 13. I do not believe that article 13 deals only with *some* aliens. The wording of the article is clear and provides for no exceptions, and aliens are all non-nationals. The relationship between article 12, paragraph 4, and article 13 is not exclusive. Both provisions may come into play together.

I therefore hold that article 13 applies in all cases where an alien is to be expelled. Article 13 deals with the procedure of expelling aliens, while article 12, paragraph 4, and, under certain circumstances, also other provisions of the Covenant may bar deportation for substantive reasons. Thus, article 12, paragraph 4, may apply even though it concerns a person who is an "alien".

APPENDIX II

*Individual opinion submitted by
Mr. Laurel Francis pursuant to rule 94, paragraph 3, of
the Committee's rules of procedure, concerning the Views
of the Committee on communication No 538/1993,
Charles Stewart v. Canada*

This opinion is given against the background of my recorded views during the Committee's preliminary consideration of this case quite early in the session when I stated *inter alia* that (a) Mr. Stewart was an "own country" resident under article 12 of the Covenant and (b) his expulsion under article 13 was *not* in violation of article 12, paragraph 4.

I will as far as possible avoid a discursive format in relation to the Committee's decision adopted on November 1 with respect to the question whether the expulsion of Mr. Stewart from Canada (under article 13 of the Covenant) violates the State party's obligation under articles 12, paragraph 4, 17 and 23 of the Covenant.

I should like to submit that:

1. Firstly, I concur with the reasons given by the Committee at paragraph 12.10 and the decision taken that there was no violation of articles 17 and 23 of the Covenant.

2. But, secondly, I do not agree with the Committee's restricted application of his "own country" concept at the fourth sentence of paragraph 12.3 of the Committee's decision under reference ("That provision speaks of an 'alien lawfully in the territory of a State party' in limiting the rights of States to expel an individual categorized as an 'alien'.") Does it preclude the expulsion of *unlawful* aliens? Of course not -falling as they do under another legal regime. I have made this point in order to suggest that the legal significance in relation to "an alien lawfully in the territory of a State party" as appears in the first line of article 13 of the Covenant, is related to the first line of article 12: "everyone lawfully in the territory of a State", which includes aliens but, it may be borne in mind that in respect of a compatriot of Mr. Stewart lawfully in Canada on a visitor's visa (not being a permanent resident of Canada) he would not normally have acquired "own country" status as Mr. Stewart had, and would be indifferent to the application of article 12, paragraph 4. But Mr. Stewart would certainly be concerned as indeed he has been.

3. Thirdly, were it intended to restrict the application of article 13 to exclude aliens lawfully in the territory of a State party who had acquired "own country" status, such exclusion would have been specifically provided in article 13 itself and not left to the interpretation of the scope of article 12, paragraph 4, which incontestably applies to nationals and other persons contemplated in the Committee's text.

4. In regard to "own country" status in its submission of 24 February 1995 the State party argues that "Mr. Stewart has never acquired an *unconditional* Emphasis mine (see 9.1) right to remain in Canada as his 'own country'. Moreover his deportation will not operate as an absolute bar to his re-entry to Canada. A humanitarian review in the context of the future

application to re-enter Canada as an immigrant is a viable administrative procedure that does not entail reconsideration of the judicial decision of the Immigration Appeal Board" (see 9.1) See also paragraph 4.2, statements attributable to the State party, including the following "... furthermore, he would not be barred once and for all from re-admission to Canada".

Implicit in the foregoing is the admission that the State party recognizes Mr. Stewart's status as a permanent resident in Canada as his "own country". It is that *qualified* right applicable to such status which facilitated the decision to expel Mr. Stewart.

But for the foregoing statement attributable to the State party we could have concluded that the decision taken to expel Mr. Stewart terminated his "own country" status in regard to Canada but in light of such statement the "own country" status remains only suspended at the pleasure of the State party.

On the basis of the foregoing analysis, I am unable to support the decision of the Committee that Mr. Stewart had at no time acquired "own country" status in Canada.

APPENDIX III

*Individual opinion submitted by Ms. Elizabeth Evatt,
Ms. Cecilia Medina Quiroga and Mr. Francisco José
Aguilar Urbina pursuant to rule 94, paragraph 3, of the
Committee's rules of procedure, concerning the Views of
the Committee on communication No 538/1993,
Charles Stewart v. Canada*

1. We are unable to agree with the Committee's conclusion that the author cannot claim the protection of article 12, paragraph 4.

2. A preliminary issue is whether the arbitrary deportation of a person from his/her own country should be equated with arbitrary deprivation of the right to enter that country, in circumstances where there has as yet been no attempt to enter or re-enter the country. The Committee does not reach a conclusion on this issue; it merely assumes that if article 12, paragraph 4, were to apply to the author, the State would be precluded from deporting him (paragraph 12.2). The effect of the various proceedings taken by Canada, and the orders made, is that the author's right of residence has been taken away and his deportation ordered. He can no longer enter Canada as of right, and the prospects of his ever being able to secure permission to enter for more than a short period, if at all, seem remote. In our view, the right to enter a country is as much a prospective as a present right, and the deprivation of that right can occur, as in the circumstances of this case, whether or not there has been any actual refusal of entry. If a State party is under an obligation to allow entry of a person it is prohibited from deporting that person. In our opinion the author has been deprived of the right to enter Canada, whether he remains in Canada awaiting deportation or whether he has already been deported.

3. The author's communication under article 13 was found inadmissible, and no issue arises for consideration under that provision. The Committee's view is, however, that article 12, paragraph 4 applies only to persons who

are nationals, or who, while not nationals in a formal sense are also not aliens within the meaning of article 13 (paragraph 12.3). Two consequences appear to follow from this view. The first one is that the relationship between an individual and a State may be not only that of national or alien (including stateless) but may also fall into a further, undefined, category. We do not think this is supported either by article 12 of the Covenant or by general international law. As a consequence of the Committee's view it would also appear to follow that a person could not claim the protection of both article 13 and 12, paragraph 4. We do not agree. In our view article 13 provides a minimum level of protection in respect of expulsion for any alien, that is any non-national, lawfully in a State. Furthermore, there is nothing in the language of article 13 which suggests that it is intended to be the exclusive source of rights for aliens, or that an alien who is lawfully within the territory of a State may not also claim the protection of article 12, paragraph 4, if he or she can establish that it is his/her own country. Each provision should be given its full meaning.

4. The Committee attempts to identify the further category of individuals who could make use of article 12, paragraph 4, by stating that a person cannot claim that a State is his or her own country, within the meaning of article 12, paragraph 4, unless that person is a national of that State, or has been stripped of his or her nationality, or denied nationality by that State in the circumstances described (paragraph 12.4). The Committee is also of the view that unless unreasonable impediments have been placed in the way of an immigrant acquiring nationality, a person who enters a given State under its immigration laws, and who had the opportunity to acquire its nationality, cannot regard that State as his own country when he has failed to acquire its nationality (paragraph 12.5).

5. In our opinion, the Committee has taken too narrow a view of article 12, paragraph 4, and has not considered the *raison d'être* of its formulation. Individuals cannot be deprived of the right to enter "their own country" because it is deemed unacceptable to deprive any person of close contact with his family, or his friends or, put in general terms, with the web of relationships that form his or her social environment. This is the reason why this right is set forth in article 12, which addresses individuals lawfully within the territory of a State, not those who have formal links to that State. For the rights set forth in article 12, the existence of a formal link to the State is irrelevant; the Covenant is here concerned with the strong personal and emotional links an individual may have with the territory where he lives and with the social circumstances obtaining in it. This is what article 12, paragraph 4, protects.

6. The object and purpose of the right set forth in article 12, paragraph 4, are reaffirmed by its wording. Nothing in it or in article 12 generally suggests that its application should be restricted in the manner suggested by the Committee. While a person's 'own country' would certainly include the country of nationality, there are factors other than nationality which may establish close and enduring connections between a person and a country, connections which may be stronger than those of nationality. After all, a person may have several nationalities, and yet have only the slightest or no actual

connections of home and family with one or more of the States in question. The words 'his own country' on the face of it invite consideration of such matters as long standing residence, close personal and family ties and intentions to remain (as well as to the absence of such ties elsewhere). Where a person is not a citizen of the country in question, the connections would need to be strong to support a finding that it is his "own country". Nevertheless our view is that it is open to an alien to show that there are such well established links with a State that he or she is entitled to claim the protection of article 12, paragraph 4.

7. The circumstances relied on by the author to establish that Canada is his own country are that he had lived in Canada for over thirty years, was brought up in Canada from the age of seven, had married and divorced there. His children, mother, handicapped brother continue to reside there. He had no ties with any other country, other than that he was a citizen of the UK; his elder brother had been deported to the UK some years before. The circumstances of his offences are set out in paragraph 2.2; as a result of these offences it is not clear if the author was ever entitled to apply for citizenship. Underlying the connections mentioned is the fact that the author and his family were accepted by Canada as immigrants when he was a child and that he became in practical terms a member of the Canadian community. He knows no other country. In all the circumstances, our view is that the author has established that Canada is his own country.

8. Was the deprivation of the author's right to enter Canada arbitrary? In another context, the Committee has taken the view that "arbitrary" means unreasonable in the particular circumstances, or contrary to the aims and objectives of the Covenant (General Comment on article 17). That approach also appears to be appropriate in the context of article 12, paragraph 4. In the case of citizens, there are likely to be few if any situations when deportation would not be considered arbitrary in the sense outlined. In the case of an alien such as the author, deportation could be considered arbitrary if the grounds relied on to deprive him of his right to enter and remain in the country were, in the circumstances, unreasonable, when weighed against the circumstances which make that country his "own country".

9. The grounds relied on by the State party to justify the expulsion of the author are his criminal activities. It must be doubted whether the commission of criminal offences alone could justify the expulsion of a person from his own country, unless the State could show that there are compelling reasons of national security or public order which require such a course. The nature of the offences committed by the author do not lead readily to that conclusion. In any event, Canada can hardly claim that these grounds were compelling in the case of the author when it has in another context argued that the author might well be granted an entry visa for a short period to enable him to visit his family. Furthermore, while the deportation proceedings were not unfair in procedural terms, the issue which arose for determination in those proceedings was whether the author could show reasons against his deportation, not whether there were grounds for taking away his right to enter "his own country". The onus was put on the author rather than on the State. In these circumstances, we conclude that the

decision to deport the author was arbitrary, and thus a violation of his rights under article 12, paragraph 4.

10. We agree with the Committee that the deportation of the author will undoubtedly interfere with his family relations in Canada (paragraph 12.10), but we cannot agree that this interference is not arbitrary, since we have come to the conclusion that the decision to deport the author - which is the cause of the interference with the family - was arbitrary. We have to conclude, therefore, that Canada has also violated the author's rights under articles 17 and 23.

APPENDIX IV

*Individual opinion submitted
by Ms. Christine Chanet and Mr. Julio Prado Vallejo
pursuant to rule 94, paragraph 3, of the Committee's rules
of procedure, concerning the Views of the Committee on
communication No 538/1993,
Charles Stewart v. Canada*

We do not share the Committee's position with regard to the Stewart case, in which it concludes that, "as Canada cannot be regarded as Mr. Stewart's 'own country'", there has been no violation by Canada of article 12, paragraph 4, of the Covenant.

Our criticism concerns the approach taken to the case on this point:

– assuming that wrongful acts disqualified the author from acquiring nationality and that, as a consequence, Canada may consider that it is not his own country, that conclusion should have led the Committee to reject the communication at the admissibility stage, since its awareness of that impediment should have precluded any application of article 12, paragraph 4, of the Covenant.

– there is nothing either in the Covenant itself or in the travaux préparatoires about the "own country" concept; the Committee must, therefore, either decide the question on a case-by-case basis or establish criteria and make them known to States and authors, thus avoiding any contradiction with admissibility decisions; if a person is unable to acquire the nationality of a country owing to legal impediments, then regardless of any other criteria or factual circumstances, the communication should not be declared admissible under article 12, paragraph 4, of the Covenant.

We agree with the substance of the individual opinion formulated by Ms. Evatt, Ms. Medina Quiroga and Mr. Aguilar Urbina.

APPENDIX V

*Individual opinion submitted by Mr. Prafullachandra
Natwarlal Bhagwati pursuant to rule 94, paragraph 3, of the
Committee's rules of procedure, concerning the Views of the
Committee on communication No 538/1993,
Charles Stewart v. Canada*

I entirely agree with the separate opinion prepared by Mrs. Elizabeth Evatt and Mrs. Cecilia Medina Quiroga, but having regard to the importance of the issues involved

in the case, I am writing a separate opinion. This separate opinion may be read as supplementary to the opinion of Mrs. Evatt and Mrs. Medina Quiroga.

This is not a case of one single individual. Its decision will have an impact on the lives of tens of thousands of immigrants and refugees. This case has therefore caused me immense anxiety. If the view taken by the majority of the Committee is right, people who have forged close links with a country not only through long residence but having regard to various other factors, who have adopted a country as their own, who have come to regard a country as their home country, would be left without any protection. The question is: are we going to read human rights in a generous and purposive manner or in a narrow and constricted manner? Let us not forget that basically, human rights in the International Covenant are rights of the individual against the State; they are protections against the State and they must therefore be construed broadly and liberally. This backdrop must be kept in mind when we are interpreting article 12, paragraph 4.

First let me dispose of the argument with regard to article 13. The Committee has declared the communication under article 13 inadmissible and therefore it does not call for consideration. Coming to article 12, paragraph 4, it raises three issues. The first is whether article 12, paragraph 4, covers a case of deportation or is it confined only to right of entry; the second is as to what is the meaning and connotation of the words "his own country" and whether Canada could be said to be the author's own country; and the third is what are the criteria for determining whether an action alleged to be violative of article 12, paragraph 4, is arbitrary and whether the action of Canada in deporting the author was arbitrary. I may point out at the outset that if the action of Canada was, on the facts, not arbitrary, there would be no violation of article 12, paragraph 4, even if the other two elements were satisfied, namely, that article 12, paragraph 4, covers deportation and Canada was the author's own country within the meaning of article 12, paragraph 4, and it would in that event not be necessary to consider whether or not these two elements were satisfied. But since the majority of the members of the Committee have rested their opinion on the interpretation of the words "his own country" and taken the view, in my opinion wrongly, that Canada could not be said to be the author's own country, I think it necessary to consider all the three elements of article 12, paragraph 4.

I am of the view that on a proper interpretation, article 12, paragraph 4, protects everyone against arbitrary deportation from his own country. There are two reasons in support of this view. In the first place, unless article 12, paragraph 4, is read as covering a case of deportation, a national of a State would have no protection against expulsion or deportation under the Covenant. Suppose the domestic law of a State empowers the State to expel or deport a national for certain specific reasons which may be totally irrelevant, fanciful or whimsical. Can it be suggested for a moment that the Covenant does not provide protection to a national against expulsion or deportation under such domestic law? The only article of the Covenant in which this protection can be found is article 12, paragraph 4. It may be that under international law, a national cannot be expelled from his country of

nationality. I am not familiar with all aspects of international law and I am therefore not in a position to affirm or disaffirm this proposition. But, be as it may, a law can be made by a State providing for expulsion of a national. It may conflict with a principle of international law, but that would not invalidate the domestic law. The principle of international law would not afford protection to the person concerned against domestic law. The only protection such a person would have is under article 12, paragraph 4. We should not read article 12, paragraph 4, in a manner which would leave a national unprotected against expulsion under domestic law. In fact, there are countries where there is domestic law providing for expulsion even of nationals and article 12, paragraph 4, properly read, provides protection against arbitrary expulsion of a national. The same reasoning would apply also in a case where a non-national is involved. Article 12, paragraph 4, must therefore be read as covering expulsion or deportation.

Moreover, it is obvious that if a person has a right to enter his own country and he/she cannot be *arbitrarily* prevented from entering his/her own country, but he/she can be arbitrarily expelled, it would make non-sense of article 12, paragraph 4. Suppose a person is expelled from his own country arbitrarily because he/she has no protection under article 12, paragraph 4, and immediately after expulsion, he/she seeks to enter the country. Obviously he/she cannot be prevented because article 12, paragraph 4, protects his/her entry. Then what is the sense of expelling him? We must therefore read article 12, paragraph 4, as embodying, by necessary implication, protection against arbitrary expulsion from one's own country.

That takes me to the second issue. What is the scope and ambit of "his own country"? There is a general acceptance that "his own country" cannot be equated with "country of nationality" and I will not therefore spend any time on it. It is obvious that the expression "his own country" is wider than "country of nationality" and that is conceded by the majority view. "His own country" includes "country of nationality and something more". What is that "something more"? The majority view accepts that the concept "his own country" embraces, at the very least, "an individual who, because of his special ties to or claims in relation to a given country cannot there be considered to be a mere alien". I am in full agreement with this view. But then, the majority proceeds to delimit this concept by confining it to the following three illustrative cases:

- (1) where nationals of a country have been stripped of their nationality in violation of international law,
- (2) where the country of nationality of individuals has been incorporated into or transferred to another national entity whose nationality is being denied to them and
- (3) stateless persons arbitrarily deprived of their right to acquire the nationality of the country of their residence.

It is the view of the majority that "while these individuals may not be nationals in the formal sense, neither are they aliens within the meaning of article 13" and they fall within article 12, paragraph 4.

There are two observations I would like to make in connection with this view of the majority. The majority view argues that article 12, paragraph 4, and 13 are mutually exclusive. It is observed by the majority in the view of the Committee that "his own country" as a concept applies to individuals who are nationals and to certain categories of individuals who, while not nationals in a formal sense, are also not 'aliens' within the meaning of article 13, though they may be considered as aliens for other purposes". Thus, according to the majority view, an individual falling within article 12, paragraph 4, would not be an "alien" within the meaning of article 13. I too subscribe to the same view. But there my agreement with the view of the majority ends. The question is: who is protected by article 12, paragraph 4? Who falls within its protective wing? I may again repeat, in agreement with the majority view, that article 12, paragraph 4, embraces, at the very least, an individual who, because of his special ties to or claims in relation to a given country cannot there be considered to be an alien. This is a correct test but I fail to understand why its application should be limited to the three kinds of cases referred to by the majority. These three kinds of cases would certainly be covered by this test but there may be many more which would also answer this test. I do not see any valid reason why they should be excluded except a predetermination by the majority that they should not be regarded as fulfilling this test, because that would affect the immigration policies of the developed countries. Take for example, a large number of Africans or Latin Americans or Indians who are settled in U.K., but who have not acquired U.K. citizenship. Their children, born and brought up in U.K. would not have even visited their country of nationality. If you ask them: "which is your own country?", they would unhesitatingly say: "U.K.". Can you say that only India or some country in Africa or Latin America which they have never visited and with which they have no links at all is the only country which they can call their own country? I agree that mere length of residence would not be a determinative test but length of residence may be a factor coupled with other factors. The totality of factors would have to be taken into account for the purpose of determining whether the country in question is a country which the person concerned has adopted as his own country or is a country with which he has special ties or the most intimate connection or link in order to be regarded as "his own country" within the meaning of article 12, paragraph 4.

Before I part with the discussion of this point, I must refer to one other illogicality in which the majority appears to have fallen. The majority seems to suggest that where the country of immigration places unreasonable impediments on the acquiring of nationality by a new immigrant, it might be possible to say that for the new immigrant who has not acquired the nationality of the country of immigration and continues to retain the nationality of his country of origin, the country of immigration may be regarded as "his own country". There are at least two objections against the validity of this view. In the first place, it is the sovereign right of a State to determine under what conditions it will grant nationality to a non-national. It is not for the Committee to pass judgment whether the conditions are reasonable or not and whether the conditions are such as to impose unreasonable impediments on the acquisition of nationality by a new immigrant nor is the Committee competent to enquire

whether the action of the State in rejecting the application of a new immigrant for nationality is reasonable or not. Secondly, I fail to see what is the difference between the two situations: one, where an application for nationality is made and is unreasonably refused and the other, where an application for nationality is not made at all. In both cases, the new immigrant would continue to be a non-national and if in one case, special ties or intimate connection or link with the country of immigration would render such country "his own country", there is no logical or relevant reason why it should not have the same consequence or effect in the other case.

I fail to understand what is the basis on which the majority states that countries like Canada have a *right* to expect that immigrants within due course acquire all the rights and assume all the obligations that nationality entails. I agree that individuals who do not take advantage of the opportunity to apply for nationality, must bear the consequences of not being nationals. But the question is: what are these consequences? Do they entail exclusion from the benefit of article 12, paragraph 4? That is the question which has to be answered and it cannot be *assumed*, as the majority seems to have done, that the consequence is exclusion from the benefit of article 12, paragraph 4. Throughout the decision of the Committee, I find that the majority starts with the predetermination that in the case of the author, Canada cannot be regarded as "his own country" even though he has special ties and most intimate connection and link with Canada and he has always regarded Canada as his own country, and then tries to justify this conclusion by holding that there were no unreasonable impediments in the way of the author acquiring Canadian nationality but the author did not take advantage of the opportunity to apply for Canadian nationality and must therefore bear the consequence of Canada not being regarded as his own country and therefore of being deprived of the benefit of article 12, paragraph 4. If I may repeat, the fact that the author did not apply for Canadian nationality in a situation where there were no unreasonable impediments in such acquisition, cannot have any bearing on the question whether Canada could or could not be regarded as "his own country". It is because the author is not a Canadian national that the question has arisen and it is begging the question to say that Canada could not be regarded as "his own country" because he did not or could not acquire Canadian nationality.

It is undoubtedly true that on this view, both U.K. and Canada would be "his own country" for the author. One would be the country of nationality while the other would be, what I may call, the country of adoption. It is quite conceivable that an individual may have two countries which he can call his own: one may be a country of his nationality and the other, a country adopted by him

as his own country. I am therefore inclined to take the view, on the facts as set out in the communication, that Canada was the author's own country within the meaning of article 12, paragraph 4, and he could not be arbitrarily expelled or deported from Canada by the Government of Canada.

That leaves the question whether the expulsion or deportation of the author could be said to be arbitrary. On this question, I recall the Committee's jurisprudence that the concept of arbitrariness must not be confined to procedural arbitrariness but must include substantive arbitrariness as well and it must not be equated with "against the law" but must be interpreted broadly to include such elements as inappropriateness or excessiveness or disproportionateness. Where an action taken by the State party against a person is excessive or disproportionate to the harm sought to be prevented, it would be unreasonable and arbitrary. Here, in the present case, the author is sought to be expelled on account of his recidivist tendency. He has committed around 40 offences including theft and robbery for which he has been punished. The question is whether it is *necessary*, in all the circumstances of the case, to expel or deport him in order to protect the society from his criminal propensity or whether this object can be achieved by taking a lesser action than expulsion or deportation. The element of proportionality must be taken into account. I think that if this test is applied, the action of Canada in seeking to expel or deport the author would appear to be arbitrary, particularly in the light of the fact that the author has succeeded in controlling alcohol abuse and no offence appears to have been committed by him since May 1991. If the author commits any more offences, he can be adequately punished and imprisoned and if, having regard to his past criminal record, a sufficiently heavy sentence of imprisonment is passed against him, it would act as a deterrent against any further criminal activity on his part and in any event, he would be put out of action during the time that he is in prison. This is the kind of action which would be taken against a national in order to protect the society and *qua* a national, it would be regarded as adequate. I do not see why it should not be regarded as adequate *qua* a person who is not a national but who has adopted Canada as his own country or come to regard Canada as his own country. I am of the view that the action of expulsion or deportation of the author from Canada resulting in completely uprooting him from his home, family and moorings, would be excessive and disproportionate to the harm sought to be prevented and hence must be regarded as arbitrary.

I would therefore hold that in the present case, there is a violation of article 12, paragraph 4, of the Covenant. On this view, it becomes unnecessary to consider whether there is also a violation of articles 17 and 23 of the Covenant.

Communication No. 540/1993

Submitted by: Basilio Laureano Atachahua on behalf of his granddaughter [represented by counsel]

Alleged victim: Rosario Celis Laureano

State party: Peru

Declared admissible: 4 July 1994 (fifty-first session)

Date of adoption of Views: 25 March 1996 (fifty-sixth session)

Subject matter: Kidnapping and subsequent disappearance of a minor.

Procedural issues: Cases pending before another human rights mechanism.

Substantive issues: Enforced disappearance and right to life - Cruel and inhuman treatment - Arbitrary arrest and detention - Protection of minor

Articles of the Covenant: 2 (1) and (3), 6 (1), 7, 9, 10 (1), and 24 (1)

Article of the Optional Protocol and Rules of procedure: 5, paragraph 2 (a) and (b)

Finding: Violation [articles 6, paragraph 1; 7; 9, paragraph 1, all juncto article 2, paragraph 1; and 24, paragraph 1]

1. The author of the communication is Basilio Laureano Atachahua, a Peruvian citizen born in 1920. He submits the communication on behalf of his granddaughter, Ana Rosario Celis Laureano, a Peruvian citizen born in 1975. Her current whereabouts are unknown. The author claims that his granddaughter is a victim of violations by Peru of articles 2, paragraphs 1 and 3; 6, paragraph 1; 7; 9; 10, paragraph 1; and 24, paragraph 1, of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as presented by the author

2.1 The author, a farmer, lives with his family in the district of Ambar, Province of Huaura, Peru. In March 1992, his granddaughter, then 16 years old, was abducted by unknown armed men, presumably guerrillas of the Shining Path movement (Sendero Luminoso). She returned six days later and told the author that the guerrillas had threatened to kill her if she refused to join them, that she was forced to carry their baggage and to cook for them, but that she had finally been able to escape. In May 1992, she was once again forced by the guerrillas to accompany them; after a shoot-out between a unit of the Peruvian Army and the guerrillas, she again escaped. The author did not denounce these events to the authorities, firstly because he feared reprisals from the guerrilla group, and secondly because, at the time, the regular army was not yet stationed in the Ambar District.

2.2 On 23 June 1992, Ana R. Celis Laureano was detained by the military, on the ground of suspected collaboration with the Shining Path movement. For 16 days, she was held at the military base in Ambar (set up in the meantime). For the first eight days, her mother was allowed to visit her; for the remaining eight days, she allegedly was kept incommunicado. Upon inquiry about her whereabouts, Ana's mother was told that she had been transferred. The family then requested the provincial prosecutor of Huacho (Fiscal Provincial de la Primera Fiscalía de Huaura-Huacho) to help them locating Ana. After ascertaining that she was still detained at Ambar, the prosecutor ordered the military to transfer her to Huacho and to hand her over to the special police of the National Directorate against Terrorism (Dirección Nacional Contra el Terrorismo - DINCOTE).

2.3 During the transfer to Huacho, the truck in which Ana Celis Laureano was transported was involved in an accident. As she suffered from a fractured hip, she was brought to the local quarters of the Policía Nacional del Peru (PNP), where she was held from 11 July to 5 August 1992. On 5 August, a judge on the civil court of Huacho (Primer Juzgado Civil de Huaura-Huacho) ordered her release on the ground that she was a minor. He appointed the author as her legal guardian and ordered them not to leave Huacho, pending investigations into the charges against her.

2.4 On 13 August 1992, at approximately 1 a.m., Ms. Laureano was abducted from the house where she and the author were staying. The author testified that two of the kidnappers entered the building via the roof, while the others entered through the front door. The men were masked, but the author observed that one of them wore a military uniform, and that there were other characteristics, e.g., the type of their firearms and the make of the van into which his granddaughter was pulled, which indicated that the kidnappers belonged to the military and/or special police forces.

2.5 On 19 August 1992, the author filed a formal complaint with the Prosecutor of Huacho. The latter, together with members of a local human rights group, helped the author to inquire with the military and police authorities in Huaura province, to no avail.

2.6 On 24 August 1992, the Commander of the Huacho Police Station informed the prosecutor's office that he had received information from the DINCOTE headquarters in Lima according to which Ana Celis Laureano was suspected to be the person in charge of guerrilla activities in the Ambar District, and that she had participated in the attack on a military patrol in Parán.

2.7 On 4 September 1992, the author filed a request for habeas corpus with the Second Criminal Court (Segundo Juzgado Penal) of Huacho. This initial petition was not admitted by the judge, on the ground that the "petitioner should indicate the location of the police or military office where the minor is detained, and the exact name of the military officer in charge [of this office]".

2.8 On 8 September 1992, the Centro de Estudios y Acción para la Paz (CEAPAZ), intervening on behalf of the author, petitioned the National Minister of Defence, requesting him to investigate Ana Laureano's detention and/or her disappearance; it pointed out that she was a minor and invoked, in particular, the United Nations Convention on the Rights of the Child, ratified by Peru in September 1990. On 16 September 1992, the Secretary-General of the Ministry of Defence informed CEAPAZ that he had referred the case to the armed forces, with a view to carrying out investigations. No further information was received.

2.9 On 8 September 1992, CEAPAZ petitioned the Director of DINCOTE, asking him to verify whether Ana Celis Laureano had in fact been detained by its units and whether she had been brought to one of its quarters. On 15 September 1992, the Director of DINCOTE replied that her name was not listed in the registers of detained persons.

2.10 A request for information and an investigation of the case was also sent, on 8 and 9 September 1992, to the Director of the Human Rights Secretariat of the Ministry of Defence, to the Minister of the Interior and the commanders of the military bases in Andahuasi and Antabamba. No reply was given to these petitions.

2.11 On 30 September 1992, the author applied for habeas corpus with the presiding judge of the Second Criminal Chamber of the District High Court (Segundo Sala Penal de la Corte Superior del Distrito Judicial de Callao), asking him to admit the application and to direct the judge of the court in Huacho to comply with the habeas corpus order. It remains unclear whether any proceedings were instituted by the judicial authorities in respect of this application.

2.12 In the light of the above, it is contended that all available domestic remedies to locate Ana R.

Celis Laureano and to ascertain whether she is still alive have been exhausted.

2.13 On 18 September 1992, the case of Ms. Laureano was registered before the United Nations Working Group on Enforced or Involuntary Disappearances¹ (Case No. 015038, transmitted first to the Peruvian Government on 18 September 1992; retransmitted on 11 January 1993). In November 1992, the Peruvian Government notified the Working Group that the Prosecutor's Office in Huacho (Segunda Fiscalía Provincial Mixta de Huacho) was investigating the case, but that it had not yet located Ms. Laureano, nor those responsible for her disappearance. It added that it had requested information from the Ministry of Defence and the Ministry of the Interior. Similar notes dated 13 April and 29 November 1993 addressed to the Working Group reiterate that investigations into the case continue, but that they have been so far inconclusive.

The complaint

3.1 The unlawful detention of Ms. Laureano and her subsequent disappearance, which the author attributes to the armed forces of Peru, are said to amount to violations of articles 6, paragraph 1; 7; 9; and 10, paragraph 1, of the Covenant.

3.2 Furthermore, it is submitted that the State party violated article 24, paragraph 1, as it failed to provide Ana R. Celis Laureano with such measures of protection as are required by her status as a minor. The State party's failure to protect her rights, to investigate in good faith the violations of her rights and to prosecute and punish those held responsible for her disappearance is said to be contrary to article 2, paragraphs 1 and 3, of the Covenant.

State party's information and observations on the admissibility of the case and counsel's comments thereon

4.1 In a submission dated 10 June 1993, the State party draws on information provided by the Peruvian Ministry of Defence. The latter notes that in December 1992 investigations carried out by the security and armed forces confirmed that members of the military base in Ambar had arrested Ana R. Celis Laureano in June 1992. She allegedly had confessed her participation in an armed attack on a military patrol in Parán on 6 May 1992 and pointed out where the guerrillas had hidden arms and ammunition. In July 1992, she was handed over to the Chief of the PNP in Huacho and subsequently to the prosecuting authorities of the same town; she was charged, inter alia, with participation in a

¹ Established by the Commission on Human Rights in its resolution 20 (XXXVI) of 29 February 1980.

terrorist group. Her case was then referred to the judge of the Civil Court, who decreed her provisional release. On 8 September 1992, the commander of the military base in Ambar inquired with the judge about the status of the case; on 11 September 1992, the judge confirmed that the girl had been abducted one month earlier, and that the judicial authorities seized of the matter attributed responsibility for the event to members of the military. On 21 September 1992, the Attorney-General of the Second Prosecutor's Office (Fiscal de la Segunda Fiscalía de la Nación) reported on the action taken by his office until then; he issued a list of eight police and military offices and concluded that Ms. Laureano was not detained in any of these offices.

4.2 The State party reaffirms that Ms. Laureano was detained because of her terrorist activities or affinities, and that she was handed over to the competent judicial authorities. It submits that, in respect of her alleged disappearance, a guerrilla intervention should not be discarded for the following reasons: (a) to prevent her from being brought to justice and revealing the structure of the terrorist branch to which she belonged; and (b) it may have been that she was eliminated as a reprisal for having pointed out the location where the guerrillas had hidden arms and ammunition after the attack in Parán. Finally, it is submitted that any presumed responsibility of the Peruvian armed forces in this respect should be removed on the following grounds: the inquiries of the Ministry of Public Affairs with the military and the police offices in Huacho and Huaura, which confirmed that Ms. Laureano was not detained; and the vagueness of the claim inasmuch as the author only refers to "presumed perpetrators" ("la imprecisión de la denuncia por cuanto en ella se hace alusiones vagas sobre los presuntos autores").

5.1 In comments dated 19 September 1993, counsel notes that the Ministry of Defence is neither competent nor in the position to draw conclusions from investigations which should be undertaken by the judiciary. He points out that the State party admits the events which occurred prior to Ms. Laureano's disappearance, i.e., that she had been detained by the military, and that the judge on the Civil Court in Huacho himself held the military responsible for her abduction. By merely referring to the negative results of inquiries made by the Attorney-General of the Second Prosecutor's Office, the State party is said to display its unwillingness to investigate the minor's disappearance seriously, and to ignore the principal elements inherent in the practice of forced disappearances, i.e., the impossibility of identifying those responsible because of the way in which security forces operate in Peru. Counsel refers to

the author's evidence about the type of clothes and arms of the kidnappers, and the way in which the abduction was carried out.

5.2 Counsel contends that the State party merely speculates when it asserts that Ms. Laureano was detained because of her terrorist activities and that the guerrillas themselves may have intervened to kidnap her; he notes that it was the military which accused her of being a member of Shining Path, and that the courts have not yet found her guilty. Counsel further forwards a statement from Ms. Laureano's grandmother, dated 30 September 1992, which states that prior to, and subsequent to, the disappearance of her granddaughter, a captain of the Ambar military base had threatened to kill her and several other members of the family.

5.3 On the requirement of exhaustion of domestic remedies, counsel suggests that the President of the High Court, having decided on the admissibility of the petition for habeas corpus, referred it back to the court of first instance which, after hearing the evidence, concluded that military personnel were involved in the abduction and disappearance of Ana R. Celis Laureano. It is noted that, in spite of these findings, Ms. Laureano has not been located to date, that no criminal proceedings have been instituted and that her family has not been compensated.

6.1 By submission of 6 September 1993, the State party argues that the Committee has no competence to consider the case, which is already under examination by the United Nations Working Group on Enforced or Involuntary Disappearances. In this context, the State party invokes article 5, paragraph 2 (a), of the Optional Protocol.

6.2 In reply, counsel points out that the Working Group on Enforced or Involuntary Disappearances has a specific mandate, i.e. to examine allegations relevant to the phenomenon of disappearances, receiving information from Governments, non-governmental, intergovernmental or humanitarian organizations and other reliable sources and making general recommendations to the Commission on Human Rights. He argues that the Working Group's objectives are strictly humanitarian and its working methods are based on discretion; it does not identify those responsible for disappearances and does not deliver a judgement in a case which, to counsel, is an essential element of a "procedure of international investigation or settlement". He concludes that a procedure limited to the general human rights situation in a particular country, which does not provide for a decision on the specific allegations made in a particular case, or for an effective remedy for the alleged violations, does not constitute a procedure of investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.

Committee's admissibility decision

7.1 During its fifty-first session, the Committee considered the admissibility of the communication. As to the State party's argument that the case is inadmissible because it is pending before the United Nations Working Group on Enforced or Involuntary Disappearances, it observed that extra-conventional procedures or mechanisms established by the United Nations Commission on Human Rights or the Economic and Social Council, and whose mandates are to examine and publicly report on human rights situations in specific countries or territories or on major phenomena of human rights violations world wide, do not, as the State party should be aware, constitute a procedure of international investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol. The Committee recalled that the study of human rights problems of a more global character, although it might refer to or draw on information concerning individuals, could not be seen as being the same matter as the examination of individual cases within the meaning of article 5, paragraph 2 (a), of the Protocol. Accordingly, the Committee considered that the fact that Ms. Laureano's case was registered before the Working Group on Enforced or Involuntary Disappearances did not make it inadmissible under this provision.

7.2 Concerning the requirement of exhaustion of domestic remedies, the Committee noted that the State party had not provided any information on the availability and effectiveness of domestic remedies in the present case. On the basis of the information before it, it concluded that no effective remedies existed which the author should pursue on behalf of his granddaughter. The Committee therefore was not barred by article 5, paragraph 2 (b), of the Optional Protocol from considering the communication.

7.3 On 4 July 1994, the Committee declared the communication admissible. The State party was requested in particular to provide detailed information on what investigations had been carried out by the judicial authorities as a result of the author's application for habeas corpus, and what investigations are now being conducted with regard to the finding of the judge on the Court of First Instance in Huacho that military personnel were involved in the abduction of Ms. Laureano. The State party was further requested to provide the Committee with all court documents relevant to the case.

Examination on the merits

8.1 The deadline for the receipt of the State party's information under article 4, paragraph 2, of the Optional Protocol expired on 11 February 1995. No information about the results, if any, of further investigations in the case, nor any court documents

have been received from the State party, in spite of a reminder addressed to it on 25 September 1995. As of 1 March 1996, no further information on the status of the case had been received.

8.2 The Committee regrets the absence of cooperation on the part of the State party in respect of the merits of the communication. It is implicit in article 4, paragraph 2, of the Optional Protocol that a State party investigate thoroughly, in good faith and within the imparted deadlines, all the allegations of violations of the Covenant made against it, and to make available to the Committee all the information at its disposal. In the instant case, the State party has not furnished any information other than that Ms. Laureano's disappearance is being investigated. In the circumstances, due weight must be given to the author's allegations, to the effect that they have been substantiated.

8.3 In respect of the alleged violation of article 6, paragraph 1, the Committee recalls its General Comment 6 [16] on article 6 which states, *inter alia*, that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. States parties should also take specific and effective measures to prevent the disappearance of individuals and establish effective facilities and procedures to investigate thoroughly, by an appropriate and impartial body, cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.

8.4 In the instant case, the Committee notes that the State party concedes that Ms. Laureano remains unaccounted for since the night of 13 August 1992 and does not deny that military or special police units in Huaura or Huacho may have been responsible for her disappearance, a conclusion reached, *inter alia*, by a judge on the Civil Court in Huacho. No material evidence has been advanced to support the State party's contention that a unit of Shining Path may have been responsible for her abduction. In the circumstances of the case, the Committee finds that Ana R. Celis Laureano's right to life enshrined in article 6, read together with article 2, paragraph 1, has not been effectively protected by the State party. The Committee recalls in particular that the victim had previously been arrested and detained by the Peruvian military on charges of collaboration with Shining Path, and that the life of Ms. Laureano and of members of her family had previously been threatened by a captain of the military base at Ambar, who in fact confirmed to Ms. Laureano's grandmother that Ana R. Celis Laureano had already been killed.²

² This statement, contained in a deposition made by the victim's grandmother on 30 September 1992, indicates in graphic terms that Ana Celis Laureano had in fact been eliminated.

8.5 With regard to the claim under article 7, the Committee recalls that Ms. Laureano disappeared and had no contact with her family or, on the basis of the information available to the Committee, with the outside world. In the circumstances, the Committee concludes that the abduction and disappearance of the victim and prevention of contact with her family and with the outside world constitute cruel and inhuman treatment, in violation of article 7, *juncto* article 2, paragraph 1, of the Covenant.

8.6 The author has alleged a violation of article 9, paragraph 1, of the Covenant. The evidence before the Committee reveals that Ms. Laureano was violently removed from her home by armed State agents on 13 August 1992; it is uncontested that these men did not act on the basis of an arrest warrant or on orders of a judge or judicial officer. Furthermore, the State party has ignored the Committee's requests for information about the results of the author's petition for *habeas corpus*, filed on behalf of Ana R. Celis Laureano. The Committee finally recalls that Ms. Laureano had been provisionally released into the custody of her grandfather by decision of 5 August 1992 of a judge on the Civil Court of Huacho, i.e., merely eight days before her disappearance. It concludes that, in the circumstances, there has been a violation of article 9, paragraph 1, *juncto* article 2, paragraph 1.

8.7 The author has claimed a violation of article 24, paragraph 1, as the State party failed to protect his granddaughter's status as a minor. The Committee notes that during the investigations initiated after the author's initial detention by the military, in June 1992, the judge on the civil court of Huacho ordered her provisional release *because* she was a minor. However, subsequent to her disappearance in August 1992, the State party did not adopt any particular measures to investigate her

disappearance and locate her whereabouts to ensure her security and welfare, given that Ms. Laureano was under age at the time of her disappearance. It concludes that, in the circumstances, Ms. Laureano did not benefit from such special measures of protection she was entitled to on account of her status as a minor, and that there has been a violation of article 24, paragraph 1.

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 the Committee reveal violations of articles 6, paragraph 1; 7; and 9, paragraph 1, all *juncto* article 2, paragraph 1; and of article 24, paragraph 1, of the Covenant.

10. Under article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the victim and the author with an effective remedy. The Committee urges the State party to open a proper investigation into the disappearance of Ana Rosario Celis Laureano and her fate, to provide for appropriate compensation to the victim and her family, and to bring to justice those responsible for her disappearance, notwithstanding any domestic amnesty legislation to the contrary.

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

Communication No. 549/1993

Submitted by: Francis Hopu and Tepoaitu Bessert [represented by counsel]

Alleged victim: The authors

State party: France

Declared admissible: 30 June 1994 (fifty-first session)

Date of adoption of Views:* 29 July 1997 (sixtieth session)

Subject matter: Construction of hotel complex on ancestral grounds of indigenous group in French Polynesia

Procedural issues: Characterization of State party's declaration on article 27 as a reservation

Substantive issues: Effective remedy and access to independent tribunal - Arbitrary interference with privacy and family life - Principle of non-discrimination - Right to enjoy own culture

Articles of the Covenant: 2 (1) and (3) (a), 14, 17 (1), 23 (1), 26 and 27

Article of the Optional Protocol and Rules of procedure: 4 (2), and rule 93 (4)

Finding: Violation [articles 17, paragraph 1, and 23, paragraph 1]

1. The authors of the communication are Francis Hopu and Tepoaitu Bessert, both ethnic Polynesians and inhabitants of Tahiti, French Polynesia. They claim to be victims of violations by France of articles 2, paragraphs 1 and 3 (a), 14, 17, paragraph 1, 23, paragraph 1, and 27 of the International Covenant on Civil and Political Rights. They are represented by Messrs. James Lau, Alain Lestourneaud and François Roux, who have provided a duly signed power of attorney.

The facts as submitted by the authors

2.1 The authors are the descendants of the owners of a land tract (approximately 4.5 hectares) called Tetaitapu, in Nuuroa, on the island of Tahiti. They argue that their ancestors were dispossessed of their property by *jugement de licitation* of the *Tribunal civil d'instance* of Papeete on 6 October 1961. Under the terms of the judgment, ownership of the land was awarded to the *Société hôtelière du Pacifique sud* (SHPS). Since the year 1988, the Territory of Polynesia is the sole shareholder of this company.

2.2 In 1990, the SHPS leased the land to the *Société d'étude et de promotion hôtelière*, which in turn subleased it to the *Société hôtelière RIVNAC*. RIVNAC seeks to begin construction work on a luxury hotel complex on the site, which borders a lagoon, as soon as possible. Some preliminary work - such as the felling of some trees, cleaning the site of shrubs, fencing off of the ground - has been carried out.

2.3 The authors and other descendants of the owners of the land peacefully occupied the site in July 1992, in protest against the planned construction of the hotel complex. They contend that the land and the lagoon bordering it represent an important place in their history, their culture and their life. They add that the land encompasses the site of a pre-European burial ground and that the lagoon remains a traditional fishing ground and provides the means of subsistence for some thirty families living next to the lagoon.

2.4 On 30 July 1992, RIVNAC seized the *Tribunal de première instance* of Papeete with a request for an interim injunction; this request was granted on the same day, when the authors and occupants of the site were ordered to leave the ground immediately and to pay 30,000 FPC (Francs Pacifique) to RIVNAC. On 29 April 1993, the Court of Appeal of Papeete confirmed the injunction and reiterated that the occupants had to leave the site immediately. The authors were notified of the possibility to appeal to the Court of Cassation within one month of the notification of the order. Apparently, they have not done so.

2.5 The authors contend that the pursuit of the construction work would destroy their traditional burial ground and ruinously affect their fishing activities. They add that their expulsion from the land is now imminent, and that the High Commissioner of the Republic, who represents France in Polynesia, will soon resort to police force to evacuate the land and to make the start of the construction work possible. In this context, the authors note that the local press reported that up to 350 police officers (including CRS -*Corps républicain de sécurité*) have been flown into Tahiti for that purpose. The authors therefore ask the Committee to request interim measures of protection, pursuant to rule 86 of the Committee's rules of procedure.

* Pursuant to rule 85 of the Committee's rules of procedure, Ms. Christine Chanet did not participate in the examination of the case.

The complaint

3.1 The authors allege a violation of article 2, paragraph 3 (a), *juncto* 14, paragraph 1, on the ground that they have not been able to petition lawfully established courts for an effective remedy. In this connection, they note that land claims and disputes in Tahiti were traditionally settled by indigenous tribunals ("*tribunaux indigènes*"), and that the jurisdiction of these tribunals was recognized by France when Tahiti came under French sovereignty in 1880. However, it is submitted that since 1936, when the so-called High Court of Tahiti ceased to function, the State party has failed to take appropriate measures to keep these indigenous tribunals in operation; as a result, the authors submit, land claims have been haphazardly and unlawfully adjudicated by civil and administrative tribunals.

3.2 The authors further claim a violation of articles 17, paragraph 1, and 23, paragraph 1, on the ground that their forceful removal from the disputed site and the realization of the hotel complex would entail the destruction of the burial ground, where members of their family are said to be buried, and because such removal would interfere with their private and their family lives.

3.3 The authors claim to be victims of a violation of article 2, paragraph 1. They contend that Polynesians are not protected by laws and regulations (such as articles R 361 (1) and 361 (2) of the *Code des Communes*, concerning cemeteries, as well as legislation concerning natural sites and archaeological excavations) which have been issued for the *territoire métropolitain* and which are said to govern the protection of burial grounds. They thus claim to be victims of discrimination.

3.4 Finally, the authors claim a violation of article 27 of the Covenant, since they are denied the right to enjoy their own culture.

The Committee's admissibility decision

4.1 During its 51st session, the Committee examined the admissibility of the communication. It noted with regret that the State party had failed to put forth observations in respect of the admissibility of the case, in spite of three reminders addressed to it between October 1993 and May 1994.

4.2 The Committee began by noting that the authors *could* have appealed the injunction of the Court of Appeal of 29 April 1993 to the Court of Cassation. However, had this appeal been lodged, it would have related to the obligation to vacate the land the authors held occupied, and the possibility to oppose construction of the planned hotel complex, but *not* to the issue of ownership of the land. In the latter context, the Committee noted that so-called

"indigenous tribunals" would be competent to adjudicate land disputes in Tahiti, pursuant to the decrees of 29 June 1880 ratified by the French Parliament on 30 December 1880. There was no indication that the jurisdiction of these courts had been formally repudiated by the State party; rather, their operation appeared to have fallen into disuse, and the authors' claim to this effect had not been contradicted by the State party. Nor had the authors' contention that land claims in Tahiti are adjudicated "haphazardly" by civil or administrative tribunals been contradicted. In the circumstances, the Committee found that there were no effective domestic remedies for the authors to exhaust.

4.3 In respect of the claim under article 27 of the Covenant, the Committee recalled that France, upon acceding to the Covenant, had declared that "in the light of article 2 of the Constitution of the French Republic, ... article 27 is not applicable as far as the Republic is concerned". It confirmed its previous jurisprudence that the French "declaration" on article 27 operated as a reservation and, accordingly, concluded that it was not competent to consider complaints directed against France under article 27 of the Covenant.

4.4 The Committee considered the claims made under the other provisions of the Covenant to have been substantiated, for purposes of admissibility, and on 30 June 1994, declared the communication admissible in so far as it appeared to raise issues under articles 14, paragraph 1, 17, paragraph 1, and 23, paragraph 1, of the Covenant.

State party's request for review of admissibility and information on the merits

5.1 In two submissions under article 4 paragraph 2, of the Optional Protocol dated 7 October 1994 and 3 April 1995, the State party contends that the communication is inadmissible and requests the Committee to review its decision on admissibility, pursuant to rule 93, paragraph 4, of the rules of procedure.

5.2 The State party contends that the authors failed to exhaust domestic remedies considered by the State party to be effective. Thus, concerning the authors' argument that they were illegally dispossessed of the land subleased to RIVNAC and that only indigenous tribunals are competent to hear their complaint, it notes that *no* French tribunal has at *any* moment been seized of *any* of the claims formulated by Messrs. Hopu and Bessert. Thus, they could have, at the time of the sale of the contested grounds and of the proceedings leading to the judgment of the Tribunal of Papeete of 6 October 1961, challenged the legality of the procedure initiated or else the competence of the tribunal. Any decision made on such a challenge

would have been susceptible of appeal. However, the judgment of 6 October 1961 was never challenged, and therefore has become final.

5.3 Furthermore, at the time of the occupation of the grounds in 1992-1993, it was fully open to the authors, according to the State party, to intervene in the proceedings between RIVNAC and the Association "IA ORA O NU'UROA". This procedure, known as "*tierce opposition*", enables every individual to oppose a judgment which affects/infringes his or her rights, even if he/she is not a party to the proceedings. The procedure of "*tierce opposition*" is governed by articles 218 *et seq.* of the Code of Civil Procedure of French Polynesia. The State party notes that the authors could have intervened ("*... auraient pu former tierce opposition*") both against the decision of the Tribunal of First Instance of Papeete and the judgment of the Court of Appeal of Papeete, by challenging the title of RIVNAC to the contested grounds and by refuting the competence of these courts.

5.4 The State party emphasizes that the competence of a tribunal can always be challenged by a complainant. Article 65 of the Code of Civil Procedure of French Polynesia stipulates that a complainant challenging the jurisdiction of the court must indicate the jurisdiction he considers to be competent ("*s'il est prétendu que la juridiction saisie est incompétente..., la partie qui soulève cette exception doit faire connaître en même temps et à peine d'irrecevabilité devant quelle juridiction elle demande que l'affaire soit portée*").

5.5 According to the State party, the authors could equally, in the context of "*tierce opposition*", have argued that the expulsion from the grounds claimed by RIVNAC constituted a violation of their right to privacy and their right to a family life. The State party recalls that the provisions of the Covenant are directly applicable before French tribunals; articles 17 and 23 could well have been invoked in the present case. In respect of the claims under articles 17 and 23, paragraph 1, therefore, the State party also argues that domestic remedies have not been exhausted.

5.6 Finally, the State party argues that judicial decisions made in the context of "*tierce opposition*" proceedings can be appealed in the same way as judgments of the same court ("*... les jugements rendus sur tierce opposition sont susceptibles des mêmes recours que les décisions de la juridiction dont ils émanent*"). If the authors had challenged the judgment of the Court of Appeal of Papeete of 29 April 1993 on the basis of "*tierce opposition*", any decision adopted in respect of their challenge could have been appealed to the Court of Cassation. In this context, the State party notes that pursuant to

article 55 of the French Constitution of 4 June 1958, the Covenant provisions are incorporated into the French legal order and are given priority over simple laws. Before the Court of Cassation, the authors could have raised the same issues they argue before the Human Rights Committee.

5.7 In the State party's opinion, the authors do not qualify as "victims" within the meaning of article 1 of the Protocol. Thus, in respect of their claim under article 14, they have failed to adduce the slightest element of proof of title to the grounds, or of a right to occupancy of the grounds. As a result, their expulsion from the grounds cannot be said to have violated any of their rights. According to the State party, similar considerations apply to the claims under articles 17 and 23 (1). Thus, the authors failed to show that the human remains excavated on the disputed grounds in January 1993 or before were in any way the remains of members of their family or of their ancestors. Rather, forensic tests undertaken by the Polynesian Centre for Human Sciences have revealed that the skeletons are very old and pre-date the arrival of Europeans in Polynesia.

5.8 Finally, the State party contends that the communication is inadmissible *ratione materiae* and *ratione temporis*. It considers that the authors' complaint relates in reality to a dispute over property. The right to property not being protected by the Covenant, the case is considered inadmissible under article 3 of the Optional Protocol. Furthermore, the State party observes that the sale of the grounds occupied by the authors was procedurally correct, as decided by the Tribunal of First Instance of Papeete on 6 October 1961. The case thus is based on facts which precede the entry into force both of the Covenant and of the Optional Protocol for France, and therefore considered to be inadmissible *ratione temporis*.

5.9 Subsidiarily, the State party offers the following comments on the merits of the authors' allegations: on the claim under article 14, the State party recalls that King Pomare V who, on 29 June 1880, had issued a proclamation concerning the maintenance of indigenous tribunals for land disputes, himself co-signed declarations on 29 December 1887 relating to the abolition of these tribunals. The declarations of 29 December 1887 were in turn ratified by article 1 of the Law of 10 March 1891. Since then, the State party argues, the *ordinary* tribunals are competent to adjudicate land disputes. Contrary to the authors' allegations, land disputes are given specialized attention by the Tribunal of First Instance of Papeete, where two judges specialized in the adjudication of land disputes each preside over two court sessions reserved for such disputes each month. Furthermore, it is argued that the right of access to a tribunal does not imply a right to unlimited choice of the

appropriate judicial forum for the complainant - rather, the right to access to a tribunal must be understood as a right to access to the tribunal competent to adjudicate a given dispute.

5.10 As to the claims under articles 17 and 23, paragraph 1, the State party recalls that not even the authors claim that the skeletons discovered on the disputed grounds belong to their respective families or their relatives, but rather to their "ancestors" in the broadest sense of the term. To subsume the remains from a grave, however old and unidentifiable they are, under the notion of "family", would be an abusively extensive and unpracticable interpretation of the term.

Authors' comments

6.1 In their comments, the authors refute the State party's argument that effective domestic remedies remain available to them. They request that the Committee dismiss the State party's challenge to the admissibility of the communication as belated.

6.2 The authors reiterate that they are not invoking a right to property but the right to access to a tribunal and their right to a private and family life. They therefore reject the State party's argument related to inadmissibility *ratione materiae* and add that their rights were violated at the time of submission of their communication, i.e. in June 1993 and *after* the entry into force of the Covenant and the Optional Protocol for France.

6.3 The authors submit that they must be regarded as "victims" within the meaning of article 1 of the Optional Protocol, since they consider that they have the right to be heard before the indigenous tribunal competent for land disputes in French Polynesia, a right denied to them by the State party. They contend that the State party is estopped from criticizing them for not having invoked their right to property or a right to occupancy of the disputed grounds when precisely their access to the indigenous tribunal competent for adjudication of such disputes was impossible. Similarly, they consider themselves to be "victims" in respect of claims under articles 17 and 23 (1), arguing that it would have been for the courts and not the French Government to prove the existence or absence of family or ancestral links between the human remains discovered on the disputed site and the authors respectively their families.

6.4 On the requirement of exhaustion of domestic remedies, the authors recall that they were not parties to the procedure between the *Société hôtelière RIVNAC* and the Association IA ORA O NU'UROA; not being parties to the proceedings, they were not in the position to raise the question of the tribunal's competence. They reiterate that they

are faced with a situation in which their claims are not justiciable, given that the French Government has abolished the indigenous tribunals which it had agreed to maintain in the Treaty of 1881. The same argument is said to apply to the possibility of cassation: as the authors were not parties to the procedure before the Court of Appeal of Papeete of 29 April 1993, they could not apply for cassation to the Court of Cassation. Even assuming that they would have had the possibility of appealing to the Court of Cassation, they argue, this would not have been an *effective* remedy, since that court could only have concluded that the tribunals seized of the land dispute had no competence in the matter.

6.5 The authors reconfirm that *only* the indigenous tribunals remain competent to adjudicate land disputes in French Polynesia. Rather than refuting this conclusion, the declarations of 29 September 1887 are said to confirm it, since they stipulate that the indigenous tribunals were to be abolished once the disputes for which they had been established had been settled ("*Les Tribunaux indigènes, dont le maintien avait été stipulé à l'acte d'annexion de Tahiti à la France, seront supprimés dès que les opérations relatives à la délimitation de la propriété auxquelles elles donnent lieu auront été vidées*"). The authors question the validity of the declarations of 29 December 1887 and add that as land disputes continue to exist in Tahiti, a fact conceded by the State party itself (paragraph 5.9 above), it must be assumed that the indigenous tribunals remain competent to adjudicate them. Only thus can it be explained that the *Haute Cour de Tahiti* continued to hand down judgments in these disputes until 1934.

Post - admissibility considerations

7.1 During its 55th session, the Committee further examined the communication, and took note of the State party's request that the decision on admissibility be reviewed pursuant to rule 93, paragraph 4, of the rules of procedure. It took note of the State party's argument that the Government had not filed its admissibility observations in time because of the complexity of the case and the short deadlines imparted to the State party; it observed, however, that the Government had not reacted to three reminders and that it had taken the State party 16 months, instead of two, to reply to the admissibility of the authors' claims, and that the State party's first submission had been made three months *after* the adoption of the decision on admissibility. The Committee considered that as there had been no submissions from the State party by the time of the adoption of the decision on admissibility, it had to rely on the authors' information; furthermore, silence on the part of the State party militated in favour of concluding that the

State party agreed that all admissibility requirements had been fulfilled. In the circumstances, the Committee was not precluded from considering the authors' claims on their merits.

7.2 On the basis of the State party's observations the Committee took, however, the opportunity to reconsider its admissibility decision. It noted in particular the authors' claim that they are discriminated against because French Polynesians are not protected by laws and regulations which apply to the *territoire métropolitain*, especially as far as protection of burial grounds is concerned. This claim could raise issues under article 26 of the Covenant but was not covered by the terms of the admissibility decision of 30 June 1994; the Committee was of the opinion, however, that it should be declared admissible and considered on its merits. The State party was invited to submit to the Committee information in respect of the authors' claim of discrimination. If the State party intended to challenge the admissibility of the claim, it was invited to join its observations in this respect to those on the substance of the claim, and the Committee would address them when examining the merits of the complaint.

7.3 On 30 October 1995, therefore, the Committee decided to amend its decision on admissibility of 30 June 1994.

8.1 By submission of 27 February 1996, counsel informs the Committee that on 16 January 1996, the High Commissioner of the French Republic for French Polynesia called in the forces of order to evacuate the (archaeological) site of Nuuroa, so as to enable the immediate start of construction of the hotel complex. At 5:30 a.m., a large number of police, later joined by a military detachment, occupied the grounds and put up a fence around the site. On 19 January, approximately 100 residents of the area protested on the beach of the site to express their opposition to the hotel complex, as well as the violation of the supposedly sacred nature of the site, on which human remains pointing to the existence of an ancient burial ground had been found in 1993. According to the association "Paruru Ia Tetaitapu Eo Nuuroa", poles for the fence were placed directly onto the old grave sites.

8.2 The authors forward a copy of an affidavit sworn on 22 January 1996 by a lawyer acting upon instructions of Mr. G. Bennett, the president of the association "Paruru Ia Tetaitapu Eo Nuuroa". The affidavit states, *inter alia*, that along parts of the beach of the grounds on which the hotel is to be built, human remains have been discovered. To demonstrate the presence of human bones, Mr. Bennett dug into the sand of a little sandy elevation, upon which extremities of several human bones appeared. Mr. Bennett then covered them

again with sand. No more than one meter from this sandy elevation, fence poles had been planted. Mr. Bennett expressed his fear that during the construction of the fence, human remains might inadvertently have been exposed.

8.3 The authors reaffirm that they are victims of discrimination within the meaning of article 26, since French legislation governing the protection of burial sites is not applicable to French Polynesia.

9.1 In a submission dated 6 June 1996, the State party once again challenges the admissibility of the authors' claim in as much as it relates to article 26 on the ground that they cannot pretend to be "victims" of a violation of this provision. Reference is made to the Committee's jurisprudence in this respect, especially to the inadmissibility decision in case No. 187/1985 (*J.H. v. Canada*), adopted 12 April 1985. It submits that the authors have failed to show that the human remains discovered on the disputed grounds in January 1993 are in fact those of their ancestors, or that the burial ground was that in which their ancestors had been buried. The State party reiterates that according to forensic tests carried out by the Polynesian Centre of Human Sciences, the skeletons discovered predate the arrival of Europeans in Polynesia. Accordingly, the authors have no personal, direct and current interest in invoking the application of legislation governing the protection of burial grounds, as they fail to establish a kinship link between the remains discovered and themselves.

9.2 In this context, the State party points out that respect for the deceased does not necessarily extend to individuals buried long ago and whose memory has been lost for centuries. *E contrario*, it would be necessary to conclude that each time human remains are found on a site cleared for construction, this site becomes inconstructible because the remains are hypothetically those of the ancestors of a family which still exists. Accordingly, the State party concludes that French legislation governing the existence of burial grounds is not applicable to the authors, and that their claim under article 26 should be deemed inadmissible under article 1 of the Optional Protocol.

9.3 Subsidiarily, the State party contends that there can be no question of a violation of article 26 in the present case. In effect, the relevant provisions of the French Criminal Code¹ are also applicable to French Polynesia since Ordinance No. 96267 of 28 March 1996, relative to the entry into force of the new Criminal Code in the French overseas territories and in Mayotte. Therefore, the authors are ill advised

¹ Articles 225-17 and 225-18 of the French Criminal Code.

to complain about discriminatory application of criminal legislation governing protection of burial sites. The State party adds that the authors had never, up to mid-1996, filed any action complaining about a violation of burial grounds.

9.4 In additional observations, the State party argues that the existence of different legislative texts in metropolitan France and overseas territories does not necessarily imply a violation of the non-discrimination principle enshrined in article 26. It explains that pursuant to article 74 of the French Constitution and implementing legislation, legislative texts adopted for metropolitan France is not automatically and fully applicable to overseas territories, given the geographic, social and economic particularities of these territories. Thus, legislative texts applicable to French Polynesia are either adopted by State organs, or by the competent authorities of French Polynesia.

9.5 Recalling the Committee's jurisprudence, the State party notes that article 26 does not prohibit all difference in treatment, if such difference in treatment is based on reasonable and objective criteria. It submits that the legislative and regulatory differences between metropolitan France and overseas territories is based on such objective and reasonable criteria, as stipulated in article 74 of the Constitution, which explicitly refers to the "specific interests" of the overseas territories. The notion of "specific interests" is designed to protect the particularities of overseas territories and justifies the attribution of particular competencies to the authorities of French Polynesia. This said, the regulations governing the protection of burial sites are very similar in metropolitan France and in French Polynesia.

9.6 In the latter context, the State party observes that article L.131 al.2 of the *Code des Communes* actually applies both in metropolitan France and in Polynesia. The implementation regulations based on this provision may not be based on the same texts in metropolitan France and in French Polynesia, but in practice the differences are insignificant. Thus, the prohibition to exhume the body of a deceased person without prior authorization is contained both in article 28 of Decision (*Arrêté*) No. 583 S of 9 April 1953, which is applicable in French Polynesia, and in article R. 361-15 of the *Code des Communes*.

9.7 The State party further observes that in 1989, French Polynesia adopted legislation governing the urbanization of its territory (*Code d'aménagement du territoire*). Chapter Five of this legislation governs the protection of historical sites, monuments, as well as archaeological activities. The provisions of this legislation are largely inspired by the laws of 2 May 1930 and of 27 September 1941

(the latter governing archaeological excavations), and which apply in metropolitan France. The State party provides copies of the texts of these laws. Reference is made by the State party to article D. 151-2, paragraph 1, of the *Code de l'aménagement de la Polynésie française*, which provides, *inter alia*, that sites and monuments the preservation of which is of historical, artistic, scientific or other interest may be placed under partial or complete protection ("... peuvent faire l'objet d'un classement en totalité ou en partie"). This provision, it is argued, would apply to the protection of sites presenting a particular interest. Article D. 151-8 of the same Code stipulates that the objects and sites or monuments which are placed under protection cannot be destroyed or displaced, or be restored, without prior authorization of the chief administrative officer of French Polynesia "... les biens, les sites et les monuments naturels classés et les parcelles de ceux-ci ne peuvent être détruits et déplacés ni être l'objet d'un travail de restauration ... sans l'autorisation du chef de territoire suivant les conditions qu'il aura fixées..." (this provision is similar to article 12 of the Law of 2 May 1930 applying in metropolitan France). Finally, article D. 154-8 of the same Code specifically covers the accidental discovery of burial sites: under this provision, the discovery of burial sites must be notified immediately to the competent administrative authority.

9.8 The State party contends that the above provisions fully protect the authors' interests and may provide a remedy to their concerns. Contrary to the authors' affirmation, there *does* exist in French Polynesia legislation which provides for the protection of historical sites and burial grounds and of archaeological sites presenting a particular interest.

9.9 By submission of 26 August 1996, counsel informs the Committee of the death of Mr. Hopu, and indicates that his heirs have signalled their wish to pursue the examination of the communication.

Examination of the merits

10.1 The Human Rights Committee has examined the present communication in the light of all the information presented to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

10.2 The authors claim that they were denied access to an independent and impartial tribunal, in violation of article 14, paragraph 1. In this context, they claim that the only tribunals that could have had competence to adjudicate land disputes in French Polynesia are indigenous tribunals and that these tribunals ought to have been made available to them. The Committee observes that the authors could have brought their case before a French tribunal, but that

they deliberately chose not to do so, claiming that French authorities should have kept indigenous tribunals in operation. The Committee observes that the dispute over ownership of the land was disposed of by the Tribunal of Papeete in 1961 and that the decision was not appealed by the previous owners. No further step was made by the authors to challenge the ownership of the land, nor its use, except by peaceful occupation. In these circumstances, the Committee concludes that the facts before it do not disclose a violation of article 14, paragraph 1.

10.3 The authors claim that the construction of the hotel complex on the contested site would destroy their ancestral burial grounds, which represent an important place in their history, culture and life, and would arbitrarily interfere with their privacy and their family lives, in violation of articles 17 and 23. They also claim that members of their family are buried on the site. The Committee observes that the objectives of the Covenant require that the term “family” be given a broad interpretation so as to include all those comprising the family as understood in the society in question. It follows that cultural traditions should be taken into account when defining the term “family” in a specific situation. It transpires from the authors’ claims that they consider the relationship to their ancestors to be an essential element of their identity and to play an important role in their family life. This has not been challenged by the State party; nor has the State party contested the argument that the burial grounds in question play an important role in the authors’ history, culture and life. The State party has disputed the authors’ claim only on the basis that they have failed to establish a kinship link between the remains discovered in the burial grounds and themselves. The Committee considers that the authors’ failure to establish a direct kinship link cannot be held against them in the circumstances of the communication, where the burial grounds in question pre-date the arrival of European settlers and are recognized as including the forbears of the present Polynesian inhabitants of Tahiti. The Committee therefore concludes that the construction of a hotel complex on the authors’ ancestral burial grounds did interfere with their right to family and privacy. The State party has not shown that this interference was reasonable in the circumstances, and nothing in the information before the Committee shows that the State party duly took into account the importance of the burial grounds for the authors, when it decided to lease the site for the building of a hotel complex. The Committee concludes that there has been an arbitrary interference with the authors’ right to family and privacy, in violation of articles 17, paragraph 1, and 23, paragraph 1.

10.4 As set out in paragraph 7.3 of the decision of 30 October 1995, the Committee has further

considered the authors’ claim of discrimination, in violation of article 26 of the Covenant, on account of the alleged absence of specific legal protection of burial grounds in French Polynesia. The Committee has noted the State party’s challenge to the admissibility of this claim, as well as the subsidiary detailed arguments relating to its merits.

10.5 On the basis of the information placed before it by the State party and the authors, the Committee is not in a position to determine whether or not there has been an independent violation of article 26 in the circumstances of the instant communication.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights is of the view that the facts before it disclose violations of articles 17, paragraph 1, and 23, paragraph 1, of the Covenant.

12. The Human Rights Committee is of the view that the authors are entitled, under article 2, paragraph 3 (a), of the Covenant, to an appropriate remedy. The State party is under an obligation to protect the authors’ rights effectively and 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.

APPENDIX I

*Individual opinion submitted by Ms. Elizabeth Evatt,
Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar,
Mr. Martin Scheinin and Mr. Maxwell Yalden pursuant to
rule 94, paragraph 3, of the Committee’s rules of
procedure, concerning the Views of the Committee on
communication No. 549/1993,
Francis Hopu and Tepoaitu Bessert v. France*

We do not share the Committee’s decision of 30 June 1994 to declare the authors’ complaint inadmissible in relation to article 27 of the Covenant. Whatever the legal relevance of the declaration made by France in relation to the applicability of article 27 may be in relation to the territory of metropolitan France, we do not consider the justification given in said declaration to be of relevance in relation to overseas territories under French sovereignty. The text of said declaration makes reference to article 2 of the French Constitution of 1958,

understood to exclude distinctions between French citizens before the law. Article 74 of the same Constitution, however, includes a special clause for overseas territories, under which they shall have a special organization which takes into account their own interests within the general interests of the Republic. That special organization may entail, as France has pointed out in its submissions in the present communication, a different legislation given the geographic, social and economic particularities of these territories. Thus, it is the Declaration itself, as justified by France, which makes article 27 of the Covenant applicable in so far as overseas territories are concerned.

In our opinion, the communication raises important issues under article 27 of the Covenant which should have been addressed on their merits, notwithstanding the declaration made by France under article 27.

After the Committee decided not to reopen the issue of admissibility of the authors' claim under article 27, we are able to associate ourselves with the Committee's Views on the remaining aspects of the communication.

APPENDIX II

Individual opinion submitted by Mr. David Kretzmer, Mr. Thomas Buergenthal, Mr. Nisuke Ando and Lord Colville pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the Views of the Committee on communication No. 549/1993, Francis Hopu and Teopaitu Bessert v. France

1. We are unable to join the Committee's view that violations of article 17 and 23 of the Covenant have been substantiated in the present communication.

2. This Committee has held in the past (communication Nos. 220/1987 and 222/1987, declared inadmissible on 8 November 1989) that the French declaration upon ratification of the Covenant regarding article 27, must be read as a reservation, according to which France is not bound by this article. Relying on this decision, the Committee held in its decision an admissibility of 30 June 1994, that the authors' communication was not admissible as regards an alleged violation of article 27. This decision, which was phrased in general terms, precludes us from examining whether the French declaration applies not only in Metropolitan France, but also in Overseas Territories, in which the State party itself concedes that special conditions may apply.

3. The authors' claim is that the State party has failed to protect an ancestral burial ground, which plays an important role in their heritage. It would seem that this claim could raise the issue of whether such failure by a State party involves denial of the right of religious or ethnic minorities, in community with other members of their group, to enjoy their own culture or to practise their own religion. However, for the reasons set out above, the Committee was precluded from examining this issue. Instead the Committee holds that allowing the building on the burial ground constitutes arbitrary interference with

the authors' family and privacy. We cannot accept these propositions.

4. In reaching the conclusion that the facts in the instant case do not give rise to an interference with the authors' family and privacy, we do not reject the view, expressed in the Committee's General Comment 16 on article 17 of the Covenant, that the term "family" should "be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned." Thus, the term "family", when applied to the local population in French Polynesia, might well include relatives, who would not be included in a family, as this term is understood in other societies, including metropolitan France. However, even when the term "family" is extended, it does have a discrete meaning. It does not include all members of one's ethnic or cultural group. Nor does it necessarily include all one's ancestors, going back to time immemorial. The claim that a certain site is an ancestral burial ground of an ethnic or cultural group, does not, as such, imply that it is the burial ground of members of the authors' family. The authors have provided no evidence that the burial ground is one that is connected to their family, rather than to the whole of the indigenous population of the area. The general claim that members of their families are buried there, without specifying in any way the nature of the relationship between themselves and the persons buried there, is insufficient to support their claim, even on the assumption that the notion of family is different from notions that prevail in other societies. We therefore cannot accept the Committee's view that the authors have substantiated their claim that allowing building on the burial ground amounted to interference with their family.

5. The Committee mentions the authors' claim "that they consider the relationship to their ancestors to be an essential element of their identity and to play an important role in their family life." Relying on the fact that the State party has challenged neither this claim nor the authors' argument that the burial grounds play an important part in their history, culture and life, the Committee concludes that the construction of the hotel complex on the burial grounds interferes with the authors' right to family and privacy. The reference by the Committee to the authors' history, culture and life, is revealing. For it shows that the values that are being protected are not the family, or privacy, but cultural values. We share the concern of the Committee for these values. These values, however, are protected under article 27 of the Covenant and not the provisions relied on by the Committee. We regret that the Committee is prevented from applying article 27 in the instant case.

6. Contrary to the Committee, we cannot accept that the authors' claim of an interference with their right to privacy has been substantiated. The only reasoning provided to support the Committee's conclusion in this matter is the authors' claim that their connection with their ancestors plays an important role in their identity. The notion of privacy revolves around protection of those aspects of a person's life, or relationships with others, which one chooses to keep from the public eye, or from outside intrusion. It does not include access to public property, whatever the nature of that property, or the purpose of the access. Furthermore, the mere fact that

visits to a certain site play an important role in one's identity, does not transform such visits into part of one's right to privacy. One can think of many activities, such as participation in public worship or in cultural activities, that play important roles in persons' identities in different societies. While interference with such activities may involve violations of articles 18 or 27, it does not constitute interference with one's privacy.

7. We reach the conclusion that there has been no violation of the authors' rights under the Covenant in the

present communication with some reluctance. Like the Committee we too are concerned with the failure of the State party to respect a site that has obvious importance in the cultural heritage of the indigenous population of French Polynesia. We believe, however, that this concern does not justify distorting the meaning of the terms family and privacy beyond their ordinary and generally accepted meaning.

Communication No. 552/1993

Submitted by: Wieslaw Kall

Alleged victim: The author

State party: Poland

Declared admissible: 5 July 1995 (fifty-fourth session)

Date of adoption of Views: 14 July 1997 (sixtieth session)

Subject matter: Dismissal from employment of former civil servant

Procedural issues: Exhaustion of domestic remedies - Admissibility *ratione materiae*

Substantive issues: Discrimination in access to public service

Articles of the Covenant: 25 (c)

Article of the Optional Protocol and Rules of procedure: 5, paragraph 2 (a) and (b), and rule 91

Finding: No violation

1. The author of the communication, dated 31 March 1993, is Wieslaw Kall, a Polish citizen, residing in Herby, Poland. He claims to be a victim of a violation of articles 2, paragraph 1, and 25 (c) of the International Covenant on Civil and Political Rights. The Covenant entered into force for Poland on 18 March 1977. The Optional Protocol entered into force for Poland on 7 February 1992.

The facts as submitted by the author

2.1 The author was employed in various positions in the Civic Militia of the Ministry of Internal Affairs for 19 years, and from 1982 to 1990 as a cadre officer of the political and educational section, at the senior inspector level. He stresses that the Civic Militia was not identical with the Security Police, and that he never wore the uniform of the Security Police but only that of the Civic Militia. On 2 July 1990, he was retroactively reclassified as a security police officer, and on 31 July 1990, he was dismissed from his post, pursuant to the 1990 Protection of State Office Act, which dissolved the Security Police and replaced it by a new department.

2.2 Under the Act, a special Committee was established to decide on the applications of former members of the Security Police for positions with the new department. The author claims that he should not have been subjected to "verification" proceedings, because he had never been a security officer. In view of his leftist opinions and membership in the Polish United Workers' Party, his application was dismissed by the Provincial Qualifying Committee in Czestochowa. The Committee considered that the author did not meet the requirements stipulated for officers of the Ministry of Internal Affairs. The author appealed to the Central Qualifying Committee in Warsaw, which quashed the decision, on 21 September 1990, and held that the author could apply for employment within the Ministry of Internal Affairs.

2.3 The author's subsequent application for re-employment at the Provincial Police in Czestochowa, however, was rejected on 24 October 1990. The author then complained to the Minister of Internal Affairs by letter of 11 March 1991. The Minister replied that the author had lawfully been dismissed from service, in the context of the reorganization of the department. In this connection, the Minister referred to regulation No. 53 of 2 July 1990, according to which officers who performed service on the Political and Educational Board were considered to be members of the Security Police.

2.4 On 16 December 1991, the author applied to the Administrative Court alleging unjustified dismissal and error in subjecting him to verification proceedings. On 6 March 1992, the Court dismissed his application, considering that it was not within its competence to hear appeals from Provincial Qualifying Committees.

The complaint

3. The author claims that he was dismissed without justification. He claims that his reclassification as a member of the Security Police was only implemented to facilitate his dismissal, as the law did not stipulate the termination of contracts of officers working in the Civic Militia. Moreover, he claims that he was subsequently denied access to public service only because of his political opinions, since he has been an active member of the Polish United Workers' Party and refused to hand back his membership card during the period of political changes within the Ministry. He claims that this constitutes discrimination in contravention of article 25 (c) of the Covenant.

Committee's admissibility decision

4. On 25 October 1993, the communication was 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 on 7 December 1994. By letter of 11 May 1995, the author confirmed that his situation remains unchanged.

5.1 At its fifty-fourth session, the Committee considered the admissibility of the communication. The Committee noted with regret the State party's failure to provide information and observations on the question of the admissibility of the communication.

5.2 As required by article 5, paragraph 2 (a), of the Optional Protocol, the Committee ascertained that the same matter was not being examined under another procedure of international investigation or settlement. With respect to the exhaustion of domestic remedies, the Committee found that the author met the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

5.3 The Committee observed that the author alleged that he was denied access, on general terms of equality, to public service in his country, a claim which is admissible *ratione materiae*, in particular under article 25 (c) of the Covenant.

6. On 5 July 1995, the Human Rights Committee declared the communication admissible.

State party's submission and author's comments

7.1 By submission of 11 March 1996, the State party apologizes for its failure to provide observations in time on the admissibility of the communication. According to the State party, the delay was attributable to extensive consultations concerning the matter. The State party undertakes to

cooperate fully with the Committee in the consideration of communications submitted under the Optional Protocol.

7.2 The State party provides information concerning the legal background of the facts of the communication. It explains that, following profound political transformation towards restoring representative democracy, it was necessary to reorganize the Ministry of Internal Affairs, in particular its political service sector. Parliament thus adopted a Police Act and a Protection of State Office Act, both of 6 April 1990. The Protection of State Office Act provided for the dissolution of the Security Police and the *ex lege* dismissal of its officers. The Police Act provided for the dissolution of the Civic Militia, but provided that its officers became *ex lege* officials of the Police. However, article 149 (2) makes exception for those Militia officers who until 31 July 1989 were Security Police officers posted in the Militia. These officers were *ex lege* dismissed from their post. The changes became effective on 1 August 1990.

7.3 Under article 132 (2) of the Protection of State Office Act, the Council of Ministers issued ordinance No. 69 of 21 May 1990, providing for "verification proceedings" of the *ex lege* dismissed officers before a Qualifying Committee. An appeal was provided from negative assessments by the Regional Qualifying Committees to the Central Qualifying Committee. Upon application, the Committees examined whether the applicant fulfilled the requirements for officers of the Ministry of Internal Affairs as well as whether (s)he was a person of a high moral character. Those positively assessed were free to apply for a post within the Ministry. According to the State party, 10,349 of the former Security Police officers who applied for verification were positively assessed, while 3,595 received a negative assessment. The State party explains that the reorganization of the Ministry led to a substantial reduction of posts and a positive verification assessment was merely a condition necessary to apply for employment but did not guarantee placement.

7.4 On 2 July 1990, the Minister of Internal Affairs issued an order confirming which categories of posts were recognized as forming part of the Security Police. According to the order, officers employed until 31 July 1989 on posts of, *inter alia*, Head and Deputy Head of the Political and Educational Board were considered officers of the Security Police.

7.5 The State party further points out that employment under the Police Act and the Protection of the State Office Act is not regulated by the Labour Code, but by the Code of Administrative Procedure, an appointment being

based on a special nomination and not on a labour contract. Interested parties can thus appeal decisions concerning their employment to the higher administrative authority. A decision on either admission or non-admission to the service of the Ministry of Internal Affairs may be appealed in highest instance to the High Administrative Court.

8.1 As regards the author's case, the State party points out that he started his public service in September 1971 in the Civic Militia, attended the Militia College from 1972 to 1977 and then served at the Regional Militia Headquarters at Czestochowa. On 16 January 1982, he became Deputy Head of the Regional Office of Internal Affairs in Lubliniec, responsible for the Political and Educational Board. Since 1 February 1990 he had served as senior inspector at the Regional Office of Internal Affairs at Czestochowa.

8.2 On 17 July 1990, the author submitted his application to the Regional Qualifying Board in Czestochowa with a request for employment in the police. According to the State party, this already shows that the author considered himself a Security Police officer, since if he had just been a member of the militia he would have had his employment automatically extended. The Regional Qualifying Committee issued a negative assessment of the author's case. However, on appeal, the Central Qualifying Committee quashed the assessment and stated that the author was eligible for employment in the Police or in other units of the Ministry of Internal Affairs.

8.3 Consequently, on 3 October 1990, the author submitted his application for employment to the Regional Police Headquarters in Czestochowa. On 24 October 1990, the Regional Police Commander informed him that "he did not avail himself" of his employment offer. The State party points out that the author could have appealed this refusal to nominate him to the Police Chief Commander. The author failed to do so, but instead, on 11 March 1991, complained to the Minister of Internal Affairs that he had been unjustly subjected to the "verification procedure". The Minister replied that the procedure had been legal and that his dismissal could not be reviewed. Further, on 16 December 1991, the author complained to the High Administrative Court to request a change of the assessment done by the Regional Qualifying Committee. On 6 March 1992, the Court rejected the author's claim, since it was incompetent to hear complaints against the Qualifying Committees as they were not administrative organs.

9.1 The State party requests the Committee to reconsider its decision declaring the communication admissible. The State party submits that the Covenant entered into force for Poland on

18 March 1977 and its Optional Protocol on 7 February 1992 and thus contends that the Committee can only consider communications concerning alleged violations of human rights which occurred after the Protocol's entry into force for Poland. Since the author's verification procedure was terminated on 21 September 1990 with the decision by the Central Qualifying Committee that he was eligible for employment in the Ministry, and the author was refused employment on 24 October 1990, the State party argues that his communication is inadmissible *ratione temporis*. In this connection, the State party explains that the author could have appealed the refusal of employment within 14 days to a higher authority. Since he failed to do so, the decision of 24 October 1990 became final. The State party argues that the author's complaints to the Minister and to the High Administrative Court should not be taken into account, since they were not legal remedies to be exhausted.

9.2 The State party is of the opinion that there is no reason in the present case to resort to retroactive application of the Optional Protocol, as elaborated by the Committee's jurisprudence. The State party denies that the alleged violations have a continuing character, and refers to the Committee's decision in communication No. 520/1992¹ that a continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or clear implication, of the previous violations of the State party.

9.3 As regards the exhaustion of domestic remedies, the State party refers to rule 90 (1) (f) of the Committee's rules of procedure that the Committee shall ascertain that the individual has exhausted all available domestic remedies. The State party refers to the legal background to the case and argues that the remedy available to the author for the refusal of employment was an appeal to the Police Chief Commander and, if necessary, subsequently to the High Administrative Court. The author chose not to avail himself of these remedies and instead submitted a complaint to the Minister of Internal Affairs. According to the State party, this complaint cannot be considered a remedy, since it did not concern the refusal of employment, but the qualifying procedure. Similarly, the appeal to the High Administrative Court concerning the qualification by the Regional Qualifying Committee was not the proper remedy to be exhausted by the author. The State party therefore argues that the communication is inadmissible for non-exhaustion of domestic remedies.

¹ *E. and A.K. v. Hungary*, declared inadmissible on 7 April 1994.

10.1 As regards the merits of the communication, the State party notes that the author claims that he was groundlessly denied employment in the new Police and that his classification as a former Security Police officer was but a pretext to dismiss him on the ground of his political opinions. The State party contends that the author has not substantiated that his party membership and political opinions were the reason for his dismissal or his denial of employment. The State party refers to the applicable legislation and notes that the author was dismissed *ex lege* from his post together with others holding similar posts. The State party emphasizes that it was a lawful and legitimate decision of Parliament to dissolve the Security Police. It adds that the Minister's order of 2 July 1990 was no more than a specification of posts required under the legislation, and did not change the existing classification of posts.

10.2 The State party explains that both the Security Police and the Civic Militia were part of the Ministry of Internal Affairs. According to the State party, at regional and district levels of the administration for internal affairs special sections of the Security Police existed headed by an officer with rank of Deputy Head of Regional or District Office for Internal Affairs. The author held a post of Deputy Head of the Regional Office of Internal Affairs responsible for the Political and Educational Board. According to the State party, there is no doubt that this post was a component part of the Security Police. The Protection of State Office Act was thus correctly applied to him and consequently the author lost his post *ex lege*. The State party adds that the type of education or the uniform worn by officers are not decisive for their classification.

10.3 As regards the refusal to re-employ the author in the Police, the State party argues that decisions regarding employment remain largely within the discretion and appreciation of the employer. Further, the employer is dependent on the number of available vacant posts. The State party refers to the *travaux préparatoires* of article 25 (c) and notes that its intention was to prevent the monopolization of the State apparatus by privileged groups, but that it was agreed that States must have possibilities of establishing certain criteria of admitting its citizens to public service. The State party points out that in dissolving the Security Police, ethical and political reasons played a role. In this connection, it refers to the view expressed by the Committee of Experts of the Council of Europe that the selection of public servants for key administrative positions could be made according to political aspects.

10.4 The State party further notes that the rights in article 25 are not absolute, but allow reasonable

restrictions compatible with the purpose of the law. The State party is of the opinion that organizational changes in the Police and the Protection of State Office, combined with the number of available posts, sufficiently justifies the reasons for denying the author employment in the Police. Moreover, the State party argues that article 25 (c) does not oblige the State to guarantee a post in public service. In the State party's view, the article obliges States to establish transparent guarantees, especially of a procedural nature, for equal opportunities of access to public service. The State party submits that Polish law has established these guarantees, as outlined above. The State party contends therefore that the author's right under article 25 (c) has not been violated.

11.1 In his reply to the State party's submission, the author reiterates that he has never been a member of the Security Police but that he has always served in the structures of the Civic Militia. He maintains that there is no order in his personal file to show that he became a member of the Security Police. In the author's opinion the Minister's Order of 2 July 1990 was arbitrary and retroactively classified him as a Security Police officer. In this connection, the author points out that according to the circular of the Ministry of Internal Affairs, before the Order of 2 July 1990, the following posts were considered to belong to the Security Police: all those in Departments I and II, the Security Police staff operations group, Ministry advisers, intelligence and counter-intelligence secretariat, Deputy Chiefs of Provincial Security Police, and Chiefs and Senior Specialists for the Security Police in the Provincial Offices of the Ministry of Internal Affairs. The author submits that it is clear from this that his post was not part of the Security Police.

11.2 The author refers to a report from the Ombudsman of 1993, where the Ombudsman found that the retroactive classification of officers as members of the Security Police had been illegal. He also refers to remarks made by Members of Parliament in 1996, that it had been a mistake if militiamen who had never been members of the Security Police had been forced to undergo the verification procedures.

11.3 The author does not challenge the State party's assertion that the Security Police was abolished lawfully. However, he claims that the verification procedures established by the Act and by the Minister's order were illegal and arbitrary.

11.4 As regards the exhaustion of domestic remedies, the author states that until now he has not received any legally binding documents which would ascertain on what grounds he was dismissed from service. He did not receive a dismissal order,

nor was he instructed about the possibilities of appeal. He states that he submitted a complaint to the Minister of Internal Affairs, because he did not know to whom to turn, and expected the Minister to redirect his complaint to the appropriate authority, pursuant to article 65 of the Code of Administrative Proceedings. He further submits that he complained to the High Administrative Court as soon as he learned from the press that such a recourse was possible. Because of lack of legal advice, however, he filed the complaint against the Qualifying Committee's decision, not against the refusal to employ him.

11.5 As regards the verification procedure, the author states that he was given the choice between participating in it or being dismissed. He contests that by submitting himself to the verification procedure he showed that he considered himself a Security Police member. In this connection, he points out that on the form, where it said "application by a former Security Police functionary", he crossed out the words "Security Police" and replaced them with "Civic Militia".

11.6 As to the merits, the author states that he is convinced that if he had been a good Catholic, he would certainly be a police officer now. Since he was considered eligible by the Central Qualifying Committee, he does not see why he was not offered a job with the Police, if not for his service in the communist party and his political opinions. In this context, he states that a colleague was recommended by the Bishop of Czestochowa to the position of Police Regional Commander and was accepted.

Review of admissibility

12. The Committee notes the State party's claim that the communication is inadmissible *ratione temporis* and also for non-exhaustion of domestic remedies. The Committee has examined the relevant information made available by the State party. However, the Committee has also examined the information submitted by the author in this respect and concludes that the facts and arguments as advanced by the State party in support of its claim do not justify the revision of the Committee's decision on admissibility.

Examination of the merits

13.1 The question before the Committee is whether the author's dismissal, the verification proceedings and the subsequent failure to employ him in the Police Force violated his rights under article 25 (c) of the Covenant.

13.2 The Committee notes that article 25 (c) provides every citizen with the right and the

opportunity, without any distinctions based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and without unreasonable restrictions to have access, on general terms of equality, to public service in his country. The Committee further observes, however, that this right does not entitle every citizen to obtain guaranteed employment in the public service.

13.3 The Committee notes that the author has claimed that he was unlawfully dismissed, since he was not a member of the Security Police. The Committee observes, however, that the author was retroactively reclassified as a Security Police officer on 2 July 1990; it was as a consequence of the dissolution of the Security Police effected by the Protection of State Office Act that the author's post as Security Police officer was eliminated, resulting in his dismissal on 31 July 1990. The Committee notes that the author was not singled out for retroactive reclassification of his post, but that posts of others in positions similar to the author in different regional districts were also retroactively reclassified in the same manner. The reclassification was part of a process of comprehensive reorganization of the Ministry of Internal Affairs, with a view to restoring democracy and the rule of law in the country.

13.4 The Committee notes that the termination of the author's post was the result of the dissolution of the Security Police by the Protection of State Office Act and by reason of the dissolution of the Security Police, the posts of all members of the Security Police were abolished without distinction or differentiation.

13.5 Moreover, as regards the author's complaint about the verification procedure to which he was subjected, the Committee notes that, on appeal, the author was found to be eligible for a post in the Police. Thus, the facts reveal that the author was not precluded from access to the public service at that stage.

13.6 The question remains whether the fact that the author was not given a post in the Police constitutes sufficient evidence to conclude that he was refused because of his political opinions or whether said refusal was a consequence of the limited number of posts available. As reflected above, article 25 (c) does not entitle every citizen to employment within the public service, but to access on general terms of equality. The information before the Committee does not sustain a finding that this right was violated in the author's case.

14. The Committee concludes that the facts before it do not disclose a violation of any of the provisions of the Covenant.

APPENDIX

*Individual opinion submitted by Ms. Elizabeth Evatt,
Ms. Cecilia Medina Quiroga and Ms. Christine Chanet
pursuant to rule 94, paragraph 3, of the Committee's rules
of procedure, concerning the Views of the Committee on
communication No. 552/1993,
Wieslaw Kall v. Poland*

In this case, the author has argued a violation of article 25 (c) of the Covenant because he was unreasonably dismissed from the Civic Militia. The Committee has found that the State did not violate the Covenant. We cannot agree with this finding on the basis of the following facts and reasons:

1. A Polish law of 6 April 1990 dissolved the Security Police and de lege dismissed all its members. It is a fact that the dissolution of the Security Police was made because of ethical and political reasons, as stated by the State itself (para. 10.3). This law did not affect the author, since he was not a member of the Security Police.

By further Ordinance No. 69 of 21 May 1990 all members of the dissolved Security Police were subjected to a process of verification which, if approved, would enable them to apply for new jobs in units of the Ministry of Internal Affairs.

A subsequent Order of 2 July 1990 of the Minister of Internal Affairs gave a list of positions which would be considered to belong to the Security Police, among which the author's position was found. There was no domestic remedy to appeal that order (para. 8.3).

2. The State argues that the author was dismissed from his post *ex lege*, since there was no doubt that the author's post was a component part of the Security Police (paras. 10.1 and 10.2). However, the law was not enough to dismiss the author from his post, as a further Ministerial Order was needed. It is hardly conceivable, thus, that there was no doubt that the author belonged to the Security Police, what leads us to conclude that the author was not dismissed from his post *ex lege*.

This being the case, we must start from the premise that the author was dismissed by the Ministerial Order of 2 July 1990, and consequently it has to be examined whether the classification of the author's position as part of the Security Police was both a necessary and proportionate means for securing a

legitimate objective, namely the re/establishment of internal law enforcement services free of the influence of the former regime, as the State party claims, or whether it was unlawful or arbitrary and or discriminatory, as the author claims. It is clear from the mere enunciation of the issue that there is a significant issue here, arising under article 25 (c) and that it was a question the author should have been able to raise through the exercise of a remedy allowing him to challenge the Order.

3. This leads to the examination of whether article 2.3 of the Covenant was complied with by Poland with regard to the author. Under article 2 (3) of the Covenant States parties undertake to ensure that any person whose rights are violated shall have an effective remedy for that violation. The Committee has taken the view so far that this article cannot be found to have been violated by a State unless a corresponding violation of another right under the Covenant has been determined. We do not think this is the proper way to read article 2 (3).

It has to be taken into account that article 2 is not directed to the Committee, but to the States; it spells out the obligations the States undertake to ensure that rights are enjoyed by the people under their jurisdiction. Read that way it does not seem to make sense that the Covenant should tell the States parties that only when the Committee has found that a violation has occurred they should have provided for a remedy. This interpretation of article 2 (3) would render it useless. What article 2 intends is to set forth that whenever a human right recognized by the Covenant is affected by the action of a State agent there must be a procedure established by the State allowing the person whose right has been affected to claim before a competent body that there has been a violation. This interpretation is in accordance with the whole rationale underlying the Covenant, namely that it is for the States parties thereto to implement the Covenant and to provide suitable ways to remedy possible violations committed by States organs. It is a basic principle of international law that international supervision only comes into play when the State has failed in its duty to comply with its international obligations.

Consequently, since the author had no possibility to have his claim heard that he had been dismissed arbitrarily and on the basis of political considerations, a claim which on the face of it raised an issue on the merits, we are of the opinion that in this case his rights under article 2, paragraph 3, were violated.

Communication No. 554/1993

Submitted by: Robinson LaVende [represented by Interights, London]

Alleged victim: The author

State party: Trinidad and Tobago

Declared admissible: 12 October 1995 (fifty-fifth session)

Date of adoption of Views: 29 October 1997 (sixty-first session)

Subject matter: Prolonged detention of individual under sentence of death on death row

Procedural issues: None.

Substantive issues: Death row phenomenon

Articles of the Covenant: 7, 10 (1), and 14 (3) (d) and (5)

Article of the Optional Protocol and Rules of procedure: 4 (2), and rule 91

Finding: Violation [article 14, paragraph 3 (d), and 5]

1. The author of the communication is Robinson LaVende, a Trinidadian citizen who, at the time of submission of his communication, was awaiting execution at the State Prison of Port-of-Spain, Trinidad and Tobago. He claims to be a victim of violations by Trinidad of articles 7, 10, paragraph 1, and 14, paragraph 3 (d), of the International Covenant on Civil and Political Rights. On 31 December 1993, the author's death sentence was commuted to life imprisonment, in accordance with the Guidelines laid down in the judgment of the Judicial Committee of the Privy Council of 2 November 1993 in the case of *Pratt and Morgan v. Attorney General of Jamaica*. He is represented by Interights, a London-based organization.

The facts as submitted by the author

2.1 The author was tried for murder, found guilty as charged and sentenced to death in July 1975; no information is provided about the facts of the case or the conduct of the trial. The Court of Appeal of Trinidad and Tobago dismissed the author's appeal on 28 November 1977.

2.2 In early 1978, the author applied for legal aid to the Minister of National Security of Trinidad, so as to allow him to prepare and file a further appeal with the Judicial Committee of the Privy Council; the application for legal aid was refused. As a result, the author argues, he was unable to petition the Judicial Committee for special leave to appeal.

2.3 On 30 September 1993, a warrant for the author's execution on 5 October 1993 was read to him. A constitutional motion on his behalf was filed in the High Court of Trinidad and Tobago on

1 October 1993. A stay of execution was granted during the night of 4 to 5 October 1993.

2.4 The author argues that he has exhausted domestic remedies within the meaning of the Optional Protocol, and that the fact that a constitutional motion was filed on his behalf does not preclude his recourse to the Human Rights Committee. As to the denial of legal aid for the purpose of petitioning the Judicial Committee of the Privy Council, it is argued that the State party is now estopped from arguing that he was obliged to pursue this matter further before the domestic courts before bringing it before the Committee.

2.5 Counsel further contends that because of the very nature of her client's situation, he will necessarily invoke all available procedures, possibly until the scheduled time of execution. To require that all last minute procedures be exhausted before allowing a recourse to the Human Rights Committee would imply that the applicant either wait until a moment dangerously close in time to his execution, or that he refrain from invoking all potentially available domestic remedies. It is submitted that neither option is within the letter or the spirit of the Optional Protocol.

The complaint

3.1 The author, who was confined to death row from the time of his conviction in July 1975 until the commutation of his death sentence on 31 December 1993, i.e. over 18 years, alleges a violation of article 7, on the ground that the period of time spent on death row amounts to cruel, inhuman and degrading treatment. He further contends that the time spent on death row is contrary to his right, under article 10, paragraph 1, to be treated with humanity and respect for the inherent dignity of his person. It is argued that the execution of a sentence of death after so many years on death row would amount to a violation of the above-mentioned provisions. In support of her arguments, counsel refers to recent jurisprudence, *inter alia* a recent judgment of the Supreme Court of Zimbabwe¹, the judgment of the European Court of Human Rights in

¹ Supreme Court of Zimbabwe, judgment No. S.C. 73/93 of June 1993.

the case of *Soering*², and the arguments of counsel for the applicants in the case of *Pratt and Morgan v. Attorney General of Jamaica*.

3.2 It is submitted that the State party violated article 14, paragraph 3 (d), by denying the author legal aid for the purpose of petitioning the Judicial Committee for special leave to appeal. Counsel relies on the Committee's jurisprudence, pursuant to which legal aid must be made available to convicted prisoners under sentence of death, and that this applies to all stages of the criminal proceedings"³ Reference is also made to judgments of the Supreme Court of the U.S.⁴

The Committee's admissibility decision

4.1 During the 55th session, the Committee considered the admissibility of the communication. It noted that the State party had forwarded a note dated 9 February 1994, stating that the author's death sentence had been commuted to life imprisonment on 31 December 1993; the State party observed that the commutation was the consequence of the judgment of the Judicial Committee of the Privy Council in *Pratt and Morgan v. Attorney-General of Jamaica*⁵. No further information under rule 91 of the Committee's rules of procedure was received from the State party, despite a reminder addressed to it on 7 December 1994.

4.2 The Committee welcomed the information of 9 February 1994 but noted that the State party had not provided information and observations relating to the admissibility of the author's claims, which had not been made moot by the commutation of sentence. Due weight had thus to be given to the author's allegations, to the extent that they had been substantiated.

4.3 As to the claims under articles 7 and 10, paragraph 1, the Committee observed that the State party had itself commuted the author's death sentence, so as to comply with the Guidelines formulated by the Judicial Committee of the Privy Council in the above-mentioned case. The Government had not informed the Committee of the existence of any further remedies available to the author in respect of the above claims; indeed, the State party's silence in this respect constituted an admission that no such remedies existed.

² *Soering v. United Kingdom*, 11 EHRR 439 (1989).

³ Views on communication No. 250/1987 (*C. Reid v. Jamaica*), adopted 20 July 1990, paragraph 11.4; Views on communication No. 230/1987 (*Henry v. Jamaica*), adopted 1 November 1991, paragraph 8.3.

⁴ E.g. *Lane v. Brown*, 372 U.S. 477 (1963).

⁵ Privy Council Appeal No. 10 of 1993, judgment of 2 November 1993.

4.4 Regarding the claim under article 14, paragraph 3 (d), the Committee noted that the author was refused legal aid for the purpose of petitioning the Judicial Committee of the Privy Council for special leave to appeal. There being no indication that the author was not entitled to pursue such an appeal, the Committee concluded that this claim, which also appeared to raise issues under article 14, paragraph 5, should be considered on the merits.

4.5 On 12 October 1995, the Committee declared the communication admissible in so far as it appeared to raise issues under articles 7, 10, paragraph 1, and 14, paragraphs 3 (d) and 5, of the Covenant.

Examination of the merits

5.1 The State party's deadline for the submission of information and observations under article 4, paragraph 2, of the Optional Protocol expired on 16 May 1996. No submission was received from the State party, in spite of a reminder addressed to it on 11 March 1997. The Committee regrets the lack of cooperation on the part of the State party. It has examined the present communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

5.2 The Committee must first determine whether the length of the author's detention on death row - from July 1975 to December 1993 (over 18 years) - amounts to a violation of articles 7 and 10, paragraph 1, of the Covenant. Counsel claims a violation of these provisions merely by reference to the length of detention the author was confined to death row at the State Prison in Port-of-Spain. The length of detention on death row in this case is unprecedented and a matter of serious concern. However, it remains the jurisprudence of the Committee that the length of detention on death row does not, *per se*, amount to a violation of articles 7 or 10, paragraph 1. The Committee's detailed Views on this issue were set out in the Views on communication No. 588/1994 (*Errol Johnson v. Jamaica*)⁶. Because of the importance of the issue, the Committee deems it appropriate to reiterate its position.

5.3 In assessing whether the mere length of detention on death row may constitute a violation of articles 7 and 10, the following factors must be considered:

(a) The Covenant does not prohibit the death penalty, though it subjects its use to severe restrictions. As detention on death row is a

⁶ Views on communication No. 588/1994 (*Errol Johnson v. Jamaica*), adopted 22 March 1996, paragraphs 8.1 to 8.6.

necessary consequence of imposing the death penalty, no matter how cruel, degrading and inhuman it may appear to be, it cannot, *of itself*, be regarded as a violation of articles 7 and 10 of the Covenant.

(b) While the Covenant does not prohibit the death penalty, the Committee has taken the view, which has been reflected in the Second Optional Protocol to the Covenant, that article 6 "refers generally to abolition in terms which strongly suggest that abolition is desirable". Reducing recourse to the death penalty may therefore be seen as one of the objects and purposes of the Covenant.

(c) The provisions of the Covenant must be interpreted in the light of the Covenant's objects and purposes (article 31 of the Vienna Convention on the Law of Treaties). As one of these objects and purposes is to promote reduction in the use of the death penalty, an interpretation of a provision in the Covenant that may encourage a State party that retains the death penalty to make use of that penalty should, where possible, be avoided.

5.4 In light of these factors, the Committee must examine the implications of holding the length of detention on death row, *per se*, to be in violation of articles 7 and 10. The first, and most serious, implication is that if a State party executes a condemned prisoner after he has spent a certain period of time on death row, it will not be in violation of its obligations under the Covenant, whereas if it refrains from doing so, it will violate the Covenant. An interpretation of the Covenant leading to this result cannot be consistent with the Covenant's object and purpose. The above implication cannot be avoided by refraining from determining a definite period of detention on death row, after which there will be a presumption that detention on death row constitutes cruel and inhuman punishment. Setting a cut-off date certainly exacerbates the problem and gives the State party a clear deadline for executing a person if it is to avoid violating its obligations under the Covenant. However, this implication is not a function of fixing the maximum permissible period of detention on death row, but of making the time factor, *per se*, the determining one. If the maximum acceptable period is left open, States parties which seek to avoid overstepping the deadline will be tempted to look to the decisions of the Committee in previous cases so as to determine what length of detention on death row the Committee has found permissible in the past.

5.5 The second implication of making the time factor *per se* the determining one, i.e. the factor that turns detention on death row into a violation of the Covenant, is that it conveys a message to States parties retaining the death penalty that they should

carry out a capital sentence as expeditiously as possible after it was imposed. This is not a message the Committee would wish to convey to States parties. Life on death row, harsh as it may be, is preferable to death. Furthermore, experience shows that delays in carrying out the death penalty can be the necessary consequence of several factors, many of which may be attributable to the State party. Sometimes a moratorium is placed on executions while the whole question of the death penalty is under review. At other times the executive branch of government delays executions even though it is not feasible politically to abolish the death penalty. The Committee would wish to avoid adopting a line of jurisprudence which weakens the influence of factors that may very well lessen the number of prisoners actually executed. It should be stressed that by adopting the approach that prolonged detention on death row cannot, *per se*, be regarded as cruel and inhuman treatment or punishment under the Covenant, the Committee does not wish to convey the impression that keeping condemned prisoners on death row for many years is an acceptable way of treating them. It is not. However, the cruelty of the death row phenomenon is first and foremost a function of the permissibility of capital punishment under the Covenant. This situation has unfortunate consequences.

5.6 To accept that prolonged detention on death row does not *per se* constitute a violation of articles 7 and 10, paragraph 1, does not imply that other circumstances connected with detention on death row may not turn that detention into cruel, inhuman or degrading treatment or punishment. The Committee's jurisprudence has been that where further compelling circumstances relating to the detention are substantiated, that detention may constitute a violation of articles 7 and/or 10, paragraph 1, of the Covenant.

5.7 In this case, counsel has not alleged the existence of circumstances, over and above the mere length of detention, which would have turned the author's detention on death row at the State Prison into a violation of articles 7 and 10, paragraph 1. As the Committee must, under article 5, paragraph 1, of the Optional Protocol, consider the communication in the light of all the information of the parties, the Committee cannot, in the absence of information on additional factors, conclude that there has been a violation of these provisions.

5.8 Regarding the claim under article 14, paragraph (d), the State party has not denied that the author was denied legal aid for the purpose of petitioning the Judicial Committee of the Privy Council for special leave to appeal. The Committee recalls that it is imperative that legal aid be available to a convicted prisoner under sentence of death, and that this applies to all stages of the legal

proceedings⁷. Section 109 of the Constitution of Trinidad and Tobago provides for appeals to the Judicial Committee of the Privy Council. It is uncontested that in the present case, the Ministry of National Security denied the author legal aid to petition the Judicial Committee *in forma pauperis*, thereby effectively denying him legal assistance for a further stage of appellate judicial proceedings which is provided for constitutionally; in the Committee's opinion, this denial constituted a violation of article 14, paragraph 3 (d), whose guarantees apply to all stages of appellate remedies. As a result, his right, under article 14, paragraph 5, to have his conviction and sentence reviewed "by a higher tribunal according to law" was also violated, as the denial of legal aid for an appeal to the Judicial Committee effectively precluded the review of Mr. LaVende's conviction and sentence by that body.

6. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights is of the view that the facts before the Committee reveal a violation of article 14, paragraphs 3 (d) *juncto* 5, of the Covenant.

7. Under article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy. While the Committee welcomes the commutation of the author's death sentence by the State party's authorities on 31 December 1993, it considers that an effective remedy in the instant case should include a further measure of clemency.

8. 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, and while reiterating its satisfaction over the commutation of the author's death sentence, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views.

⁷ See Views on communication No. 230/1987 (*Raphael Henry v. Jamaica*), adopted 1 November 1991, paragraph 8.3.

APPENDIX

Individual opinion submitted by Mr. Fausto Pocar, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Ms. Pilar Gaitan de Pombo and Mr. Julio Prado Vallejo pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the Views of the Committee on communication No. 554/1993, Robinson LaVende v. Trinidad and Tobago

The Committee reiterates in the present cases the views that prolonged detention on death row cannot *per se* constitute a violation of article 7 of the Covenant. This view reflects a lack of flexibility that would not allow the Committee to examine the circumstances of each case, in order to determine whether, in a given case, prolonged detention on death row constitutes cruel, inhuman or degrading treatment within the meaning of the above-mentioned provision. This approach leads the Committee to conclude, in the present cases, that detention on death row for almost sixteen/eighteen years after the exhaustion of local remedies does not allow a finding of violation of article 7. We cannot agree with this conclusion. Keeping a person detained on death row for so many years, after exhaustion of domestic remedies, and in the absence of any further explanation of the State party as to the reasons thereof, constitutes in itself cruel and inhuman treatment. It should have been for the State party to explain the reasons requiring or justifying such prolonged detention on death row; however, no justification was offered by the State party in the present cases.

Even assuming, as the majority of the Committee does, that prolonged detention on death row cannot *per se* constitute a violation of article 7 of the Covenant, the circumstances of the present communication would in any case reveal a violation of the said provision of the Covenant. The facts of the communication, as submitted by the author and uncontested by the State party, show that "on 30 September 1993 a warrant for the author's execution on 5 October 1993 was read to him... A stay of execution was granted during the night of 4 to 5 October 1993". In our view, reading a warrant of execution to a detainee remaining confined to death row for such a long time, and attempting to proceed to his execution after so many years - at a time when the State party had raised in the detainee a legitimate expectation that the execution would never be carried out - constitute in themselves cruel and inhuman treatment within the meaning of article 7 of the Covenant, to which the author was subjected. Moreover, they constitute such further "compelling circumstances" that should have led the Committee, even if it wanted to reaffirm its previous jurisprudence, to find that prolonged detention on death row revealed, in the present cases, a violation of article 7 of the Covenant.

Communication No. 555/1993

Submitted by: Ramcharan Bickaroo [represented by Interights, London]

Alleged victim: The author

State party: Trinidad and Tobago

Declared admissible: 12 October 1995 (fifty-fifth session)

Date of adoption of Views: 29 October 1997 (sixty-first session)

Subject matter: Prolonged detention of individual under sentence of death on death row

Procedural issues: None

Substantive issues: Death row phenomenon

Articles of the Covenant: 7 and 10 (1)

Articles of the Optional Protocol and Rules of procedure: n.a.

Finding: No violation

1. The author of the communication is Ramcharan Bickaroo, a Trinidadian citizen who, at the time of submission of his complaint, was awaiting execution at the State Prison in Port-of-Spain, Trinidad and Tobago. He claims to be a victim of violations by Trinidad of articles 7 and 10, paragraph 1, of the International Covenant on Civil and Political Rights. On 31 December 1993, his death sentence was commuted to life imprisonment by the President of Trinidad and Tobago, in accordance with the Guidelines laid down in the judgment of the Judicial Committee of the Privy Council of 2 November 1993 in the case of *Pratt and Morgan v. Attorney General of Jamaica*. He is represented by Interights, a London-based organization.

The facts as submitted by the author

2.1 The author was arrested in 1975 and charged with murder. No information is provided about the circumstances or facts of the crime with which he was charged. He was tried for murder in the Port-of-Spain Assizes Court, found guilty as charged and sentenced to death on 5 April 1978. His appeal was dismissed by the Court of Appeal of Trinidad and Tobago on 21 June 1979.

2.2 On an unspecified date after the dismissal of the appeal, the author was informed by his counsel that there were no grounds on which a further appeal to the Judicial Committee of the Privy Council could be argued with any prospect of success. On 30 September 1993,¹ a warrant was issued for the execution of the author on 5 October 1993. A

¹ The date does not appear clearly in the communication; it appears, however, that the warrant was issued on the same day as the warrant for the execution of Robinson LaVende (see communication No. 554/1993).

constitutional motion was filed on his behalf in the High Court of Trinidad and Tobago, and a stay of execution was granted during the night of 4 to 5 October 1993.

2.3 The author argues that he has exhausted domestic remedies within the meaning of the Optional Protocol, and that the fact that a constitutional motion was filed on his behalf in the High Court of Trinidad and Tobago should not preclude his recourse to the Human Rights Committee. He contends that because of the very nature of his situation, an individual on death row whose warrant of execution has been read will necessarily invoke all available procedures, possibly until the scheduled time of execution.

2.4 Counsel adds that to require that all last minute procedures be exhausted before allowing a recourse to the Human Rights Committee would imply that the applicant either wait until a moment dangerously close in time to his execution, or that he refrain from invoking all potentially available domestic remedies. It is submitted that neither option is within the letter or the spirit of the Optional Protocol.

The complaint

3.1 The author, who was confined to the death row section of the State Prison from the time of his conviction in April 1978 to 31 December 1993, i.e. close to 16 years, alleges a violation of article 7 of the Covenant, on the ground that the length of time spent on death row amounts to cruel, inhuman and degrading treatment. He further argues that the period of time spent on death row runs counter to his right, under article 10, paragraph 1, to be treated with humanity and respect for the inherent dignity of his person.

3.2 It is argued that the execution of the sentence after so many years on death row would amount to a violation of the above-mentioned provisions. In support of his argument, counsel refers to recent jurisprudence, *inter alia* a judgment of the Supreme Court of Zimbabwe², and the arguments of counsel

² Supreme Court of Zimbabwe, Judgment No. S.C. 73/93 of June 1993; also the judgment of the European Court of Human Rights in the case of *Soering, Soering v. United Kingdom*, 11 EHRR 439 (1989).

for the applicants in the case of *Pratt and Morgan v. Attorney-General of Jamaica*.

Committee's admissibility decision

4.1 During its 55th session, the Committee considered the admissibility of the communication. It noted that no submission under rule 91 had been received from the State party, in spite of a reminder addressed to it on 6 December 1994. The State party had merely forwarded a list with the names of individuals whose death sentences were commuted following the judgment of the Judicial Committee of the Privy Council in the case of *Pratt and Morgan*; the author's name had been included in that list. While welcoming this information, the Committee noted that the author's claims under the Covenant had not been made moot by the commutation of the death sentence. As the State party had failed to provide information under rule 91, due weight had to be given to the author's allegations, to the extent that they had been sufficiently substantiated.

4.2 As to the claims under articles 7 and 10, paragraph 1, the Committee observed that the State party had itself commuted the author's death sentence, so as to comply with the guidelines formulated by the Judicial Committee of the Privy Council in the case of *Pratt and Morgan v. Attorney-General*. The State party had not informed the Committee of the existence of any further remedies in respect of these claims; indeed, its silence in this respect constituted an admission that no such remedies existed.

4.3 On 12 October 1995, the Committee declared the communication admissible in so far as it appeared to raise issues under articles 7 and 10, paragraph 1, of the Covenant.

Examination of the merits

5.1 The State party's deadline for the submission of information and observations under article 4, paragraph 2, of the Optional Protocol expired on 16 May 1996. No submission was received from the State party, in spite of a reminder addressed to it on 11 March 1997. The Committee regrets the lack of cooperation on the part of the State party. It has examined the present communication in the light of all the information made available by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

5.2 The Committee must determine whether the length of the author's detention on death row - between April 1978 and December 1993 - amounts to a violation of articles 7 and 10 of the Covenant. Counsel alleges a violation of these provisions merely by reference to the length of detention the author was confined to death row at the State Prison

in Port-of-Spain. The length of detention on death row in this case is unprecedented and a matter of serious concern. However, it remains the jurisprudence of the Committee that the length of detention on death row does not, *per se*, amount to a violation of articles 7 or 10, paragraph 1. The Committee's detailed Views on this issue were set out in the Views on communication No. 588/1994 (*Errol Johnson v. Jamaica*)³. Because of the importance of the issue, the Committee deems it appropriate to reiterate its position.

5.3 In assessing whether the mere length of detention on death row may constitute a violation of articles 7 and 10, the following factors must be considered:

(a) The Covenant does not prohibit the death penalty, though it subjects its use to severe restrictions. As detention on death row is a necessary consequence of imposing the death penalty, no matter how cruel, degrading and inhuman it may appear to be, it cannot, *of itself*, be regarded as a violation of articles 7 and 10 of the Covenant.

(b) While the Covenant does not prohibit the death penalty, the Committee has taken the view, which has been reflected in the Second Optional Protocol to the Covenant, that article 6 "refers generally to abolition in terms which strongly suggest that abolition is desirable". Reducing recourse to the death penalty may therefore be seen as one of the objects and purposes of the Covenant.

(c) The provisions of the Covenant must be interpreted in the light of the Covenant's objects and purposes (article 31 of the Vienna Convention on the Law of Treaties). As one of these objects and purposes is to promote reduction in the use of the death penalty, an interpretation of a provision in the Covenant that may encourage a State party that retains the death penalty to make use of that penalty should, where possible, be avoided.

5.4 In light of these factors, the Committee must examine the implications of holding the length of detention on death row, *per se*, to be in violation of articles 7 and 10. The first, and most serious, implication is that if a State party executes a condemned prisoner after he has spent a certain period of time on death row, it will not be in violation of its obligations under the Covenant, whereas if it refrains from doing so, it will violate the Covenant. An interpretation of the Covenant leading to this result cannot be consistent with the Covenant's object and purpose. The above implication cannot be avoided by refraining from

³ Views on communication No. 588/1994 (*Errol Johnson v. Jamaica*), adopted 22 March 1996, paragraphs 8.1 to 8.6.

determining a definite period of detention on death row, after which there will be a presumption that detention on death row constitutes cruel and inhuman punishment. Setting a cut-off date certainly exacerbates the problem and gives the State party a clear deadline for executing a person if it is to avoid violating its obligations under the Covenant. However, this implication is not a function of fixing the maximum permissible period of detention on death row, but of making the time factor, *per se*, the determining one. If the maximum acceptable period is left open, States parties which seek to avoid overstepping the deadline will be tempted to look to the decisions of the Committee in previous cases so as to determine what length of detention on death row the Committee has found permissible in the past.

5.5 The second implication of making the time factor *per se* the determining one, i.e. the factor that turns detention on death row into a violation of the Covenant, is that it conveys a message to States parties retaining the death penalty that they should carry out a capital sentence as expeditiously as possible after it was imposed. This is not a message the Committee would wish to convey to States parties. Life on death row, harsh as it may be, is preferable to death. Furthermore, experience shows that delays in carrying out the death penalty can be the necessary consequence of several factors, many of which may be attributable to the State party. Sometimes a moratorium is placed on executions while the whole question of the death penalty is under review. At other times the executive branch of government delays executions even though it is not feasible politically to abolish the death penalty. The Committee would wish to avoid adopting a line of jurisprudence which weakens the influence of factors that may very well lessen the number of prisoners actually executed. It should be stressed that by adopting the approach that prolonged detention on death row cannot, *per se*, be regarded as cruel and inhuman treatment or punishment under the Covenant, the Committee does not wish to convey the impression that keeping condemned prisoners on death row for many years is an acceptable way of treating them. It is not. However, the cruelty of the death row phenomenon is first and foremost a function of the permissibility of capital punishment under the Covenant. This situation has unfortunate consequences.

5.6 To accept that prolonged detention on death row does not, *per se*, constitute a violation of articles 7 and 10, does not imply that other circumstances connected with detention on death row may not turn that detention into cruel, inhuman or degrading treatment or punishment. The Committee's jurisprudence has been that where further compelling circumstances relating to the detention are

substantiated, that detention may constitute a violation of articles 7 and/or 10, paragraph 1, of the Covenant.

5.7 In this case, counsel has not alleged the existence of circumstances, over and above the mere length of detention, which would have turned the author's detention on death row at the State Prison into a violation of articles 7 and 10, paragraph 1. As the Committee must, under article 5, paragraph 1, of the Optional Protocol, consider the communication in the light of all the information of the parties, the Committee cannot, in the absence of information on additional factors, conclude that there has been a violation of these provisions.

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

7. The Committee welcomes the commutation of Mr. Bickaroo's death sentence by the State party's authorities in December 1993.

APPENDIX

Individual opinion submitted by Mr. Fausto Pocar, Mr. Prafullchandra Natwarlal Bhagwati, Ms. Christine Chanet, Ms. Pilar Gaitan de Pombo and Mr. Julio Prado Vallejo and Mr. Maxwell Yalden pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the Views of the Committee on communication No. 555/1993,

Ramcharan Bickaroo v. Trinidad and Tobago

The Committee reiterates in the present cases the views that prolonged detention on death row cannot *per se* constitute a violation of article 7 of the Covenant. This view reflects a lack of flexibility that would not allow the Committee to examine the circumstances of each case, in order to determine whether, in a given case, prolonged detention on death row constitutes cruel, inhuman or degrading treatment within the meaning of the above-mentioned provision. This approach leads the Committee to conclude, in the present cases, that detention on death row for almost sixteen/eighteen years after the exhaustion of local remedies does not allow a finding of violation of article 7. We cannot agree with this conclusion. Keeping a person detained on death row for so many years, after exhaustion of domestic remedies, and in the absence of any further explanation of the State party as to the reasons thereof, constitutes in itself cruel and inhuman treatment. It should have been for the State party to explain the reasons requiring or justifying such prolonged detention on death row; however, no justification was offered by the State party in the present cases.

Even assuming, as the majority of the Committee does, that prolonged detention on death row cannot *per se* constitute a violation of article 7 of the Covenant, the circumstances of the present communication would in any

case reveal a violation of the said provision of the Covenant. The facts of the communication, as submitted by the author and uncontested by the State party, show that "on 30 September 1993 a warrant for the author's execution on 5 October 1993 was read to him... A stay of execution was granted during the night of 4 to 5 October 1993". In our view, reading a warrant of execution to a detainee remaining confined to death row for such a long time, and attempting to proceed to his execution after so many years - at a time when the State party had raised in

the detainee a legitimate expectation that the execution would never be carried out - constitute in themselves cruel and inhuman treatment within the meaning of article 7 of the Covenant, to which the author was subjected. Moreover, they constitute such further "compelling circumstances" that should have led the Committee, even if it wanted to reaffirm its previous jurisprudence, to find that prolonged detention on death row revealed, in the present cases, a violation of article 7 of the Covenant.

Communication No. 560/1993

Submitted by: A. [represented by counsel]

Alleged victim: The author

State party: Australia

Declared admissible: 4 April 1995 (fifty-third)

Date of adoption of Views: 3 April 1997 (sixty-first session)

Subject matter: Mandatory immigration detention of asylum seekers

Procedural issues: Admissibility *ratione temporis* - Concession by State party of admissibility of one claim - Scope of claims under articles 9, paragraph 4, and 14, paragraph 1, held over to merits - Inadmissibility for failure to exhaust domestic remedies of two claims - Failure to substantiate, for purposes of admissibility

Substantive issues: "Arbitrariness" of detention - Right to and scope of judicial review of lawfulness of detention - Compensation for unlawful detention

Articles of the Covenant: 9 (1) (4) and (5), 14 (1) and (3) (b), (c) and (d) *juncto* article 2 (1)

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

Finding: Violation [articles 9, paragraphs 1 and 4, *juncto* 2, paragraph 3]

1. The author of the communication is A., a Cambodian citizen who, at the time of submission of his communication on 20 June 1993, was detained at the Department of Immigration Port Hedland Detention Centre, Cooke Point, Western Australia. He was released from detention on 27 January 1994. He claims to be the victim of violations by Australia of article 9, paragraphs 1, 4 and 5, and article 14, paragraphs 1 and 3 (b), (c) and (d), *juncto* article 2, paragraph 1, of the International Covenant on Civil and Political Rights. He is represented by counsel. The Optional Protocol entered into force for Australia on 25 December 1991.

The facts as submitted by the author

2.1 A., a Cambodian national born in 1934, arrived in Australia by boat, code-named "Pender Bay", together with 25 other Cambodian nationals, including his family, on 25 November 1989. Shortly after his arrival, he applied for refugee status under the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol thereto. His application was formally rejected in December 1992.

2.2 Counsel provides a detailed chronology of the events in the case. The author's initial application for refugee status was filed on 9 December 1989, with the assistance of a Khmer interpreter and an immigration official. Legal assistance was not offered during the preparation of the application. On 13 December 1989, the author and other occupants of the boat were interviewed separately by the same immigration official. On 21 December 1989, the author and other Pender Bay occupants were flown to Villawood Detention Centre in Sydney. On 27 April 1990, the author was again interviewed by immigration officials regarding his application for refugee status. The application was rejected by the Federal Government's Determination of Refugee Status Committee on 19 June 1990; the decision was not communicated to the author. Counsel notes that, on that day, none of the Pender Bay detainees had yet seen a lawyer.

2.3 Following intercession by concerned parties, the Minister for Immigration allowed the New South Wales Legal Aid Commission to review the Pender Bay cases. Upon conclusion of its review, the Commission was authorized to provide further statements and material to the Immigration Department. Commission lawyers first visited the

author at Villawood in September 1990. The Commission filed formal submissions on his behalf on 24 March and on 13 April 1991 but, because of new Determination of Refugee Status Committee regulations in force since December 1990, all applications had to be reassessed by Immigration Department desk officers. On 26 April 1991, the Commission was given two weeks to reply to the new assessments; replies were filed on 13 May 1991. On 15 May 1991, the Minister's delegate rejected the author's application.

2.4 On 20 May 1991, the author and other detainees were told that their cases had been rejected, that they had 28 days to appeal, and that they would be transferred to Darwin, several thousand kilometres away in the Northern Territory. A copy of the rejection letter was given to them, but interpretation was not made available. At this moment, the detainees believed that they were being returned to Cambodia. During the transfer, no one was allowed to talk to the other detainees, and permission to make telephone calls was refused. At no time was the New South Wales Legal Aid Commission informed of the removal of its clients from its jurisdiction.

2.5 The author was then transferred to Curragundi Camp, located 85 km outside Darwin. The site has been described as "totally unacceptable" for a refugee detention centre by the Australian Human Rights and Equal Opportunity Commissioner, as it is flood-prone during the wet season. More importantly, as a result of the move to the Northern Territory, contact between the author and the New South Wales Legal Aid Commission was cut off.

2.6 On 11 June 1991, the Northern Territory Legal Aid Commission filed an application with the Refugee Status Review Committee (which had replaced the Determination of Refugee Status Commission), requesting a review of the refusal to grant refugee status to the author and the other Pender Bay detainees. On 6 August 1991, the author was moved to Berrimah Camp, closer to Darwin, and from there, on 21 October 1991, to Port Hedland Detention Centre, approximately 2,000 km away in Western Australia. As a result of the latter transfer, the author lost contact with his legal representatives in the Northern Territory Legal Aid Commission.

2.7 On 5 December 1991, the Refugee Status Review Committee rejected all of the Pender Bay applications for refugee status, including the author's. The detainees were not informed of the decisions until letters dated 22 January 1992 were transmitted to their former representatives on the Northern Territory Legal Aid Commission. On 29 January, the Commission addressed a letter to the Committee, requesting it to reconsider its decision

and to allow reasonable time for the Pender Bay detainees to obtain legal representation to enable them to comment on the decision.

2.8 Early in 1992, the Federal Immigration Department contracted the Refugee Council of Australia to act as legal counsel for asylum-seekers held at Port Hedland. On 4 February 1992, Council lawyers started to interview inmates and, on 3 March 1992, the Council transmitted a response to the Refugee Status Review Committee's decision on the author's behalf to the Minister's delegate. On 6 April 1992, the author and several other Pender Bay detainees were informed that the Minister's delegate had refused their refugee status applications. Undertakings were immediately sought from the Immigration Department that none of the detainees would be deported until they had had the possibility of challenging the decision in the Federal Court of Australia; such undertakings were refused. Later on 6 April, however, the author obtained an injunction in the Federal Court, Darwin, which prevented the implementation of the decision. On 13 April 1992, the Minister for Immigration ordered the delegate's decision to be withdrawn, on account of an alleged error in the decision-making process. The effect of that decision was to remove the case from the jurisdiction of the Federal Court.

2.9 On 14 April 1992, Federal Court proceedings were abandoned, and lawyers for the Immigration Department assured the court that a revised report on the situation in Cambodia would be made available to the Refugee Council of Australia by the Department of Foreign Affairs and Trade within two weeks. Meanwhile, the author had instructed his lawyer to continue with an application to the Federal Court, to seek release from detention; a hearing was scheduled for 7 May 1992 in the Federal Court at Melbourne.

2.10 On 5 May 1992, the Australian Parliament passed the Migration Amendment Act (1992), which amended the 1958 Migration Act by insertion of a new division 4B, which defined the author and others in situations similar to his as "designated persons". Section 54R stipulated: "a court is not to order the release from custody of a designated person". On 22 May 1992, the author instituted proceedings in the High Court of Australia, seeking a declaratory judgement that the relevant provisions of the Migration Amendment Act were invalid.

2.11 The revised report of the Department of Foreign Affairs and Trade, promised for the end of April 1992, was not finalized until 8 July 1992; on 27 July 1992, the Refugee Council of Australia forwarded a response to the update to the Immigration Department and, on 25 August 1992, the Refugee Status Review Committee once more recommended dismissal of the author's application

for refugee status. On 5 December 1992, the Minister's delegate rejected the author's claim.

2.12 The author once more sought a review of the decision in the Federal Court of Australia, and since the Immigration Department refused to give assurances that the author would not be deported immediately to Cambodia, an injunction restraining the Department from removing the author was obtained in the Federal Court. In the meantime, by judgement of 8 December 1992, the High Court of Australia upheld the validity of major portions of the Migration Amendment Act, which meant that the author would remain in custody.

The complaint

3.1 Counsel argues that his client was detained "arbitrarily" within the meaning of article 9, paragraph 1. He refers to the Human Rights Committee's General Comment on article 9, which extends the scope of article 9 to cases of immigration control, and to the Views of the Committee on communication No. 305/1988, *Van Alphen v. the Netherlands*¹, where arbitrariness was defined as not merely being against the law, but as including elements of "inappropriateness, injustice and lack of predictability". By reference to article 31 of the Convention Relating to the Status of Refugees and to conclusion No. 44 (1986) of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees on detention of refugee and asylum-seekers, it is argued that international treaty law and customary international law require that detention of asylum-seekers be avoided as a general rule. Where such detention may become necessary, it should be strictly limited (see conclusion No. 44, para. (b)). Counsel provides a comparative analysis of immigration control and legislation in several European countries as well as Canada and the United States of America. He notes that, under Australian law, not all illegal entrants are subject to detention, nor all asylum-seekers. Those who arrive at Australian borders without a valid visa are referred to as "prohibited entrants" and may be detained under section 88 or 89 of the Migration Act 1958. Section 54B classifies individuals who are intercepted before or on arrival in Australia as "unprocessed persons". Such persons are deemed not to have entered Australia, and are taken to a "processing area".

3.2 The author and others arriving in Australia before 1992 were held by the Federal Government under section 88 as "unprocessed persons", until the entry into force of division 4B of the Migration Amendment Act. Counsel argues that, under these provisions, the State party has established a harsher

regime for asylum-seekers who have arrived by boat, without documentation ("boat people") and who are designated under the provision. The practical effect of the amendment is said to be that persons designated under division 4B automatically remain in custody unless or until removed from Australia or granted an entry permit.

3.3 It is contended that the State party's policy of detaining boat people is inappropriate, unjustified and arbitrary, as its principal purpose is to deter other boat people from coming to Australia, and to deter those already in the country from continuing with applications for refugee status. The application of the new legislation is said to amount to "human deterrence", based on the practice of rigidly detaining asylum-seekers under such conditions and for periods so prolonged that prospective asylum-seekers are deterred from even applying for refugee status, and current asylum-seekers lose all hope and return home.

3.4 No valid grounds are said to exist for the detention of the author, as none of the legitimate grounds of detention referred to in conclusion No. 44 (see para. 3.1 above) applies to his case. Furthermore, the length of detention - 1,299 days or three years and 204 days as at 20 June 1993 - is said to amount to a breach of article 9, paragraph 1.

3.5 Counsel further contends that article 9, paragraph 4, has been violated in the author's case. The effect of division 4B of the Migration Amendment Act is that once a person is qualified as a "designated person", there is no alternative to detention, and the detention may not be reviewed effectively by a court, as the courts have no discretion to order the person's release. This was conceded by the Minister for Immigration in a letter addressed to the Senate Standing Committee for the Scrutiny of Bills, which had expressed concern that the legislative amendment was to deny designated persons access to the courts and might raise problems in the light of Australia's obligations under the Covenant. The Australian Human Rights Commissioner, too, commented that the absence of court procedures to test either reasonableness or necessity of such detention was in breach of article 9, paragraph 4.

3.6 It is further contended that persons such as the author have no effective access to legal advice, contrary to article 16 of the Convention Relating to the Status of Refugees. That individuals like the author are kept in prolonged custody is said to make access to lawyers all the more important. With respect to the author's case, counsel contends that the State party breached article 9, paragraph 4, and article 14 in the following situations:

(a) Preparation of application for refugee status;

¹ Views adopted on 23 July 1990, paragraph 5.8.

(b) Access to lawyers during the administrative stage of the refugee process;

(c) Access to lawyers during the judicial review stage of the refugee process; in this context, it is noted that the frequent transfers of the author to detention facilities far away from major urban centres vastly compounded the difficulties in providing legal advice to him. Thus, Port Hedland, where A. was held for over two years, is expensive to reach by air, and the nearest major town, Perth, is over 2,000 km away. Because of the costs and logistical problems involved, it was difficult to find competent Refugee Council of Australia lawyers to take up the case.

3.7 Counsel contends that the serious delays on the part of the State party in determining the author's application for refugee status constitute a breach of article 14, paragraph 3 (c), particularly given the fact that he remained in detention for much of the process.

3.8 It is contended that, as A. was detained arbitrarily, he qualifies for compensation under article 9, paragraph 5, of the Covenant. Counsel submits that "compensation" in this provision must be understood to mean "just and adequate" compensation, but adds that the State party has removed any right to compensation for illegal detention by a legislative amendment to the Migration Act. He notes that as a result of the judgement of the High Court of Australia in A's case, further proceedings were filed in the High Court on behalf of the Pender Bay detainees - including the author - seeking damages for unlawful detention. On 24 December 1992, Parliament added Section 54RA(1)-(4) to division 4B of the Migration Act according to counsel in direct response to the High Court's findings in A.'s case and the imminence of the filing of possible claims for compensation for illegal detention. In paragraph 3, the new provision restricts compensation for unlawful detention to the symbolic sum of one dollar per day. It is submitted that the author is entitled to just and adequate compensation for (a) pecuniary losses, namely, the loss of the boat in which he arrived in Australia; (b) non-pecuniary losses, including injury to liberty, reputation, and mental suffering; and (c) aggravated and exemplary damages based, in particular, on the length of the detention and its conditions. The symbolic sum the author might be entitled to under Section 54RA (3) of division 4B would not meet the criteria for compensation under article 9, paragraph 5.

3.9 Finally, counsel argues that the automatic detention of boat people of primarily Asian origin, on the sole basis that they meet all the criteria of division 4B of the Migration Act 1958, constitutes discrimination on the basis of "other status" under article 2, paragraph 1, of the Covenant, "other status" being the status of boat people.

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

4.1 In its submission under rule 91, the State party supplements the facts as presented by the author, and provides a chronology of the litigation in which the author has been, and continues to be, involved. It notes that, after the final decision to reject the author's application for refugee status was taken in December 1992, the author continued to take legal proceedings challenging the validity of that decision. Detention after December 1992 is said to have been exclusively the result of legal challenges by the author. In this context, the State party recalls that, by a letter of 2 November 1993, the Minister for Immigration offered the author the opportunity, in the event of his voluntary return to Cambodia, of applying for (re)entry to Australia after 12 months, on a permanent visa under the Special Assistance Category. The State party further adds that the author's wife's application for refugee status has been approved and that, as a result, the author was released from custody on 21 January 1994 and will be allowed to remain in Australia.

4.2 The State party concedes the admissibility of the communication in so far as it alleges that the author's detention was "arbitrary" within the meaning of article 9, paragraph 1. It adds, however, that it strongly contests on the merits that the author's detention was "arbitrary", and that it contained elements of "inappropriateness, injustice and lack of predictability".

4.3 The State party challenges the admissibility of other elements of the complaint relating to article 9, paragraph 1. In this context, it notes that the communication is inadmissible *ratione materiae*, to the extent that it seeks to rely on customary international law or provisions of other international instruments such as the 1951 Convention Relating to the Status of Refugees. The State party argues that the Committee is competent only to determine whether there have been breaches of any of the rights set forth in the Covenant; it is not permissible to rely on customary international law or other international instruments as the basis of a claim.

4.4 Similarly, the State party claims that counsel's general claim that Australian policy of detaining boat people is contrary to article 9, paragraph 1, is inadmissible, as the Committee is not competent to review *in abstracto* particular government policies or to rely on the application of such policies to find breaches of the Covenant. Therefore, the communication is considered inadmissible to the extent that it invites the Committee to determine generally whether the policy of detaining boat people is contrary to article 9, paragraph 1.

4.5 The State party contests the admissibility of the allegation under article 9, paragraph 4, and argues that existing avenues for review of the lawfulness of detention under the Migration Act are compatible with article 9, paragraph 4. It notes that counsel does not allege that there is no right under Australian law to challenge the lawfulness of detention in court. *Habeas corpus*, for instance, a remedy available for this purpose, has never been invoked by the author. It is noted that the author did challenge the constitutional validity of division 4B of part 2 of the Migration Act in the Australian High Court, which upheld the relevant provision under which, from 6 May 1992, the author had been detained. In its judgement, the High Court confirmed that, if a person was unlawfully detained, he could request release by a court. Prior to his release, no proceedings to challenge the lawfulness of his detention were initiated by A, despite the possibility of such proceedings. Other detainees, however, successfully instituted proceedings which led to their release on the ground that they were held longer than allowed under division 4B of the Migration Act². After this action, another 36 detainees were released from custody. The State party submits that, on the basis of the material submitted by counsel, there is "no basis whatsoever on which the Committee could find a breach of article 9, paragraph 4, on the ground that the author was unable to challenge the lawfulness of his detention". A violation has not been sufficiently substantiated, as required under rule 90 (b) of the rules of procedure. The State party adds that the allegations relating to article 9, paragraph 4, could be deemed an abuse of the right of submission and that, in any event, the author failed to exhaust domestic remedies in this respect, as he did not test the lawfulness of his detention.

4.6 To the extent that the communication seeks to establish a violation of article 9, paragraph 4, on the ground that the reasonableness or appropriateness of detention cannot be challenged in court, the State party considers that the absence of discretion for a court to order a person's release falls in no way within the scope of application of article 9, paragraph 4, which only concerns review of lawfulness of detention.

4.7 To the extent that the communication claims a breach of article 9, paragraph 4, because of absence of effective access to legal representation, the State party notes that this issue is not covered by the provision: access to legal representation cannot, in the State party's opinion, be read into the provision as in any way related to or a necessary right which

² *Tang Jia Xin v. Minister for Immigration and Ethnic Affairs No. 1* (1993), 116 ALR 329; *Tang Jia Xin v. Minister for Immigration and Ethnic Affairs No. 2* (1993), 116 ALR 349.

flows from the guarantee that an individual is entitled to take proceedings before a court. It confirms that the author had access to legal advisers. Thus, the funding for legal assistance was provided through all the stages of the administrative procedure; subsequently, he had access to legal advice to pursue judicial remedies. For these reasons, the State party argues that there is insufficient substantiation of facts which might establish a violation of article 9, paragraph 4, by virtue of absence of access to legal advisers. To the extent that the claim concerning access to legal advisers seeks to rely on article 16 of the 1951 Convention Relating to the Status of Refugees, the State party refers to its arguments in paragraph 4.3 above.

4.8 The State party disputes that the circumstances of the author's detention give rise to any claim for compensation under article 9, paragraph 5, of the Covenant. It notes that the Government itself conceded in legal proceedings brought by the author and others that the applicants in this case had been detained without the statutory authority under which boat people had been held prior to the enactment of division 4B of part 2 of the Migration Act: this was merely the result of a *bona fide* but mistaken interpretation of the legislation under which the author had been held. On account of the inadvertent basis for the unlawful detention of individuals in the author's situation, the Australian Parliament enacted special compensation legislation. The State party considers this legislation compatible with article 9, paragraph 5.

4.9 The State party points out that a number of boat people have instituted proceedings challenging the constitutional validity of the relevant legislation. As the author is associated with those proceedings, he cannot be deemed to have exhausted domestic remedies in respect of his claim under article 9, paragraph 5.

4.10 The State party refutes the author's claim that article 14 applies to immigration detention and considers the communication inadmissible to the extent that it relies on article 14. It recalls that article 14 only applies to criminal charges; detention for immigration purposes is not detention under criminal law, but administrative detention, to which article 14, paragraph 3, is clearly inapplicable. This part of the communication is therefore considered inadmissible *ratione materiae*.

4.11 Finally, the State party rejects the author's allegation of discrimination based on articles 9 and 14 *juncto* article 2, paragraph 1, on the ground that there is no evidence to sustain a claim of discrimination on the ground of race. It further submits that the quality of "boat person" cannot be approximated to "other status" within the meaning of

article 2. Accordingly, this aspect of the case is deemed inadmissible *ratione materiae*, as incompatible with the provisions of the Covenant.

4.12 In relation to the allegation of discrimination on the basis of race, the State party affirms that there is no substance to this claim, as the law governing detention of illegal boat arrivals applies to individuals of all nationalities, regardless of their ethnic origin or race. The State party proceeds to an analysis of the meaning of the term "other status" in articles 2 and 26 of the Covenant and, by reference to the Committee's jurisprudence on this issue, recalls that the Committee itself has held that there must be limits to the term "other status". In order to be subsumed under this term, the State party argues, a communication must point to some status based on the personal characteristics of the individual concerned. Under Australian law, the only basis may be seen to be the fact of illegal arrival of a person by boat: "Given that a State is entitled under international law to determine whom it admits to its territory, it cannot amount to a breach of articles 9 and 14 in conjunction of article 2, paragraph 1, for a State to provide for illegal arrivals to be treated in a certain manner based on their method of arrival". For the State party, there is no basis in the Committee's jurisprudence relating to discrimination under article 26 under which "boat person" could be regarded as "other status" within the meaning of article 2.

5.1 In his comments, counsel takes issue with some of the State party's arguments. He disputes that the three-year period necessary for the final decision of the author's application for refugee status was largely attributable to delays in making submissions and applications by lawyers, with a view to challenging the decision-making process. In this context, he notes that of the 849 days which the administrative process lasted, the author's application was with the Australian authorities for 571 days - two thirds of the time. He further recalls that during this period the author was moved four times and had to rely on three unrelated groups of legal representatives, all of whom were funded with limited public resources and needed time to acquaint themselves with the file.

5.2 Counsel concedes that the author was given a domestic Protection (Temporary) Entry Permit on 21 January 1994 and released from custody, after his wife was granted refugee status because of her Vietnamese ethnic origin. It is submitted that the author could not have brought his detention to an end by leaving Australia voluntarily and returning to Cambodia, first because he genuinely feared persecution if he returned to Cambodia and, secondly, because it would have been unreasonable to expect him to return to Cambodia without his wife.

5.3 Counsel reaffirms that his reliance on article 31 of the 1951 Convention Relating to the Status of Refugees or other instruments to support his allegation of a breach of article 9, paragraph 1, is simply for the purpose of interpreting and elaborating on the State party's obligations under the Covenant. He contends that other international instruments may be relevant in the interpretation of the Covenant, and in this context draws the Committee's attention to a statement made by the Attorney-General's Department before the Joint Committee on Migration, in which it was conceded that treaty bodies such as the Human Rights Committee may rely on other international instruments for the purpose of interpreting the scope of the treaty of which they monitor the implementation.

5.4 Counsel reiterates that he does not challenge the State party's policy *vis-à-vis* boat people *in abstracto*, but submits that the purpose of Australian policy, namely, deterrence, is relevant inasmuch as it provides a test against which "arbitrariness" within the meaning of article 9, paragraph 1, can be measured: "It is not possible to determine whether detention of a person is appropriate, just or predictable without considering what was in fact the purpose of the detention". The purpose of detention in the author's case was enunciated in the Minister for Immigration's introduction to the Migration Legislation Amendment Bill 1992; this legislation, it is submitted, was passed in direct response to an application by the author and other Cambodian nationals for release by the Federal Court, which was due to hear the case two days later.

5.5 Concerning the claim under article 9, paragraph 4, counsel submits that, where discretion under division 4B of the Migration Act 1958 to release a designated person does not exist, the option to take proceedings for release in court is meaningless.

5.6 Counsel concedes that, after the decision of the High Court in December 1992, no further challenge was indeed made to the lawfulness of the author's detention. This was because A. clearly came within the scope of division 4B and not within the scope of the 273-day provisions in Section 54Q, so that any further challenge to his continued detention would have been futile. It is submitted that the author is not required to pursue futile remedies to establish a breach of article 9, paragraph 4, or to establish that domestic remedies have been exhausted under article 5, paragraph 2 (b), of the Optional Protocol.

5.7 Counsel insists that an entitlement to take proceedings before a court under article 9, paragraph 4, necessarily requires that an individual have access to legal advice. Wherever a person is under

detention, access to the courts can generally only be achieved through assistance of counsel. In this context, counsel disputes that his client had adequate access to legal advice: no legal representation was afforded to him from 30 November 1989 to 13 September 1990, when the New South Wales Legal Aid Commission began to represent him. It is submitted that the author, who was unaware of his right to legal assistance and who spoke no English, should have been advised of his right to legal advice, and that there was a positive duty upon the State party to inquire of the author whether he sought legal advice. This positive duty is said to be consistent with principle 17 (1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and rule 35 (1) of the Standard Minimum Rules for the Treatment of Prisoners.

5.8 Author's counsel adds that on two occasions his client was forcibly removed from a State jurisdiction and therefore from access to his lawyers. On neither occasion was adequate notice of his removal given to his lawyers. It is submitted that these events constitute a denial of the author's access to his legal advisers.

5.9 Concerning the State party's observations on the claim under article 9, paragraph 5, counsel observes that the author is not a party to proceedings currently under way which challenge the validity of the legislation restricting damages for unlawful detention to one dollar per day. Rather, the author is plaintiff in a separate action which has not proceeded beyond initial procedural stages and will not be heard for at least a year. Counsel contends that his client is not required to complete these proceedings in order to comply with the requirements of article 5, paragraph 2 (b), of the Optional Protocol. In this context, he notes that, in June 1994, the Australian Parliament introduced new legislation to amend retrospectively the Migration Act 1958, thereby foreclosing any rights which the plaintiffs in the case of *Chu Kheng Lim* (concerning unlawful detention of boat people) may have to damages for unlawful detention. On 21 September 1994, the Government introduced Migration Legislation Amendment Act (No. 3) 1994 ("Amendment No. 3"), which intended to repeal the original "dollar a day" legislation. As a direct result of this legislation, the High Court proceedings in the case of *Ly Sok Pheng v. Minister for Immigration, Local Government and Ethnic Affairs* were adjourned from October 1994 until at least April 1995. If Amendment No. 3 is enacted into law, which remains the intention of the Federal Government, any action introduced by the author seeking damages for unlawful detention would be made meaningless.

5.10 Counsel disputes the State party's argument that article 14, paragraph 3, is not applicable to

individuals in administrative detention and refers in this context to rule 94 of the Standard Minimum Rules for the Treatment of Prisoners, which equates the rights of persons detained for criminal offences with those of "civil prisoners".

5.11 Finally, counsel reaffirms that "boat people" constitute a cohesive group which may be subsumed under the term "other status" within the meaning of article 2, paragraph 1, of the Covenant: "all share the common characteristic of having arrived in Australia within a set time period, not having presented a visa, and having been given a designation by the Department of Immigration". Those matching this definition must be detained. To counsel, it is "this immutable characteristic which determines that this group will be treated differently to other asylum seekers in Australia".

The Committee's admissibility decision

6.1 During its 53rd session, the Committee considered the admissibility of the communication. It noted that several of the events complained of by the author had occurred prior to the entry into force of the Optional Protocol for Australia; however, as the State party had not wished to contest the admissibility of the communication on this ground, and as the author had remained in custody after the entry into force of the Optional Protocol for Australia, the Committee was satisfied that the complaint was admissible *ratione temporis*. It further acknowledged that the State party had conceded the admissibility of the author's claim under article 9, paragraph 1.

6.2 The Committee noted the author's claim there was no way to obtain an effective review of the lawfulness of his detention, contrary to article 9, paragraph 4, and the State party's challenge of the author's argument. The Committee considered that the question of whether article 9, paragraph 4, had been violated in the author's case and whether this provision encompasses a right of access to legal advice was a question to be examined on the merits.

6.3 The Committee specifically distinguished this finding from its earlier decision in the case of *V.M.R.B. v. Canada*³ since, in the present case, the author's entitlement to refugee status remained to be determined at the time of submission of the communication, whereas in the former case an exclusion order was already in force.

6.4 On the claim under article 9, paragraph 5, the Committee noted that proceedings challenging the constitutional validity of Section 54RA of the Migration Act were under way. The author had

³ Communication No. 236/1987 (*V.M.R.B. v. Canada*), inadmissibility decision of 18 July 1988, paragraph 6.3.

argued that it would be too onerous to challenge the constitutionality of this provision and that it would be meaningless to pursue this remedy, owing to long delays in court and because of the Government's intention to repeal said remedy. The Committee noted that mere doubts about the effectiveness of local remedies or the prospect of financial costs involved did not absolve an author from pursuing such remedies. As to counsel's reference to draft legislation which would eliminate the remedy sought, the Committee noted that this had not yet been enacted into law, and that counsel therefore relied on hypothetical developments in Australia's legislature. This part of the communication was accordingly deemed inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

6.5 As to the claim under article 14, the Committee recalled the State party's claim that detention of boat people qualified as "administrative detention" which cannot be subsumed under article 14, paragraph 1, let alone paragraph 3. The Committee observed that the author's detention, as a matter of Australian law, neither related to criminal charges against him nor to the determination of his rights and obligations in a suit at law. It considered, however, that the issue of whether the proceedings relating to the determination of the author's status under the Migration Amendment Act nevertheless fell within the scope of article 14, paragraph 1, was a question to be considered on the merits.

6.6 Finally, with respect to the claim under article 2, paragraph 1, *juncto* articles 9 and 14, the Committee observed that it had not been substantiated, for purposes of admissibility, that A. was discriminated against on account of his race and/or ethnic origin. It was further clear that domestic remedies in this respect had not been exhausted, as the matter of alleged race- or ethnic origin-based discrimination had never been raised before the courts. In the circumstances, the Committee held this claim to be inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

6.7 On 4 April 1995, therefore, the Committee declared the communication admissible in so far as it appeared to raise issues under articles 9, paragraphs 1 and 4, and 14, paragraph 1.

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

7.1 In its submission under article 4, paragraph 2, of the Optional Protocol, dated May 1996, the State party supplements the facts of the case and addresses the claims under articles 9, paragraphs 1 and 4, and 14, paragraph 1. It recalls that Australia's policy of detention of unauthorised arrivals is part of its immigration policy. Its rationale is to ensure that unauthorized entrants do not enter the Australian

community until their alleged entitlement to do so has been properly assessed and found to justify entry. Detention seeks to ensure that whoever enters Australian territory without authorization can have any claim to remain in the country examined and, if the claim is rejected, will be available for removal. The State party notes that from late 1989, there was a sudden and unprecedented increase of applications for refugee status from individuals who had landed on the country's shores. This led to severe delays in the length of detention of applicants, as well as to reforms in the law and procedures for determination of on-shore applications for protection visas.

7.2 As to the necessity of detention, the State party recalls that unauthorised arrivals who landed on Australian shores in 1990 and early 1991 were held in unfenced migrant accommodation hostels with a reporting requirement. However, security arrangements had to be upgraded, as a result of the number of detainees who absconded and the difficulty in obtaining cooperation from local ethnic communities to recover individuals who had not met their reporting obligations; 59 persons who had arrived by boat escaped from detention between 1991 and October 1993. Of the individuals who were allowed to reside in the community while their refugee status applications were being determined, it is noted that out of a group of 8,000 individuals who had been refused refugee status, some 27% remained unlawfully on Australian territory, without any authority to remain.

7.3 The State party points out that its policy of mandatory detention for certain border claimants should be considered in the light of its full and detailed consideration of refugee claims, and its extensive opportunities to challenge adverse decisions on claims to refugee status. Given the complexity of the case, the time it took to collect information on the continuously changing situation in Cambodia and for A.'s legal advisers to make submissions, the duration of the author's detention was not abusively long. Furthermore, the conditions of detention of A. were not harsh, prison-like or otherwise unduly restrictive.

7.4 The State party reiterates that the author was informed, during his first interview after landing in Australia, that he was entitled to seek legal advice and legal aid. He had continued contact with community support groups which could have informed him of his entitlement. According to the State party, legal expertise is unnecessary to make an application for refugee status, as entitlement is primarily a matter of fact. The State party underlines that throughout his detention, reasonable facilities for obtaining legal advice or initiating proceedings would have been available to the author, had he sought them. After 13 September 1990, the author was a party to several court actions; according to the

State party, there is no evidence that at any time A. failed to obtain legal advice or representation when he sought it. On balance, the conditions under which the author was detained did not obstruct his access to legal advice (see below, paragraphs 7.8 to 7.11). The State party maintains that contrary to counsel's assertion, long delays did *not* result from any change in legal advisors after A.'s consecutive moves between detention centres.

7.5 As to the claim under article 9, paragraph 1, the State party argues that the author's detention was lawful and not arbitrary on any ground. A. entered Australia without authorization, and subsequently applied for the right to remain on refugee status basis. Initially, he was held pending examination of his application. His subsequent detention was related to his appeals against the decisions refusing his application, which made him liable to deportation. Detention was considered necessary primarily to prevent him from absconding into the Australian community.

7.6 The State party notes that the *travaux préparatoires* to article 9, paragraph 1, show that the drafters of the Covenant considered that the notion of "arbitrariness" included "incompatibility with the principles of justice or with the dignity of the human person". Furthermore, it refers to the Committee's jurisprudence according to which the notion of arbitrariness must not be equated with "against the law", but must be interpreted more broadly as encompassing elements of inappropriateness, injustice and lack of predictability⁴. Against this background, the State party contends, detention in a case such as the author's was not disproportionate nor unjust; it was also predictable, in that the applicable Australian law had been widely publicized. To the State party, counsel's argument that it is inappropriate *per se* to detain individuals entering Australia in an unauthorized manner is not borne out by *any* of the provisions of the Covenant.

7.7 The State party asserts that the argument that there is a rule of public international law, be it derived from custom or conventional law, against the detention of asylum seekers, is not only erroneous and unsupported by prevailing State practice, but also irrelevant to the considerations of the Human Rights Committee. The instruments and practice invoked by counsel -*inter alia* the 1951 Refugee Convention, Conclusion 44 of the Executive Committee of the UNHCR, the Convention on the Rights of the Child, the practice of 12 Western states - are said to fall far short from proving the existence of a rule of customary international law. In

⁴ See Views on communication No. 305/1988 (*Hugo van Alphen v. The Netherlands*), adopted on 23 July 1990, paragraph 5.8.

particular, the State party disagrees with the suggestion that rules or standards which are said to exist under customary international law or under other international agreements may be imported into the Covenant. The State party concludes that detention for purposes of exclusion from the country, for the investigation of protection claims, and for handling refugee or entry permit applications and protecting public security, is entirely compatible with article 9, paragraph 1.

7.8 As to the claim under article 9, paragraph 4, the State party reaffirms that it was always open to the author to file an action challenging the lawfulness of his detention, e.g. by seeking a ruling from the courts as to whether his detention was compatible with Australian law. The courts *had* the power to release A, if they determined that he was being unlawfully detained. In that respect, the State party takes issue with the Committee's admissibility considerations relating to article 9, paragraph 4. For the State party, this provision does not require that State party courts must always be free to substitute their discretion for the discretion of Parliament, in as much as detention is concerned: "[T]he Covenant does not require that a court must be able to order the release of a detainee, even if the detention was according to law".

7.9 Furthermore, the State party specifically rejects the notion that article 9, paragraph 4, implicitly includes the same (procedural) guarantees for provision of legal assistance as are set out in article 14, paragraph 3: in its opinion, a distinction must be drawn between the provision of free legal assistance in terms of article 14, paragraph 3, and allowing access to legal assistance. In any event, it continues, there is no substance to the author's allegation that his rights under article 9, paragraph 4, were impeded by an alleged absence of effective access to legal advice. The author "had ample access to legal advice and representation for the purpose of challenging the lawfulness of his detention", and was legally represented when he brought such a challenge.

7.10 In support of its argument, the State party provides a detailed chronology of attempts to inform A. of his right to legal advice:

(a) The form used for applications for refugee status advises applicants of their right to have a legal advisor present during interview and to ask for legal aid assistance. The application form was read to the author on 9 December 1989 at Willie's Creek in the Kampuchean language by an interpreter, completed and signed by the author. The author did not request legal advice or access to a lawyer at this time;

(b) During his first six months of detention, the author had contact with members of

the Australian community, as well as with the Cambodian, Khmer and Indo-Chinese communities in Sydney, which provided some support to the Pender Bay detainees. These groups would have been able to provide access to legal advisers;

(c) In June/July 1990, the Jesuit Refugee Service approached the Legal Aid Commission of New South Wales (LACNSW) to represent the Pender Bay detainees. On 11 September 1990, A. authorised LACNSW to represent him. Prior to LACNSW's involvement, the Department of Immigration and Ethnic Affairs (DIEA) had planned to move the Pender Bay detainees from Sydney in early October 1990. To ensure continued access to their legal representatives, the group was not moved to Darwin until 20 May 1991;

(d) At the time of the move to Darwin, LACNSW advised the Northern Territory Legal Aid Commission (NTLAC) that the group was being relocated. NTLAC lawyers were at the Curragundi camp (near Darwin) approximately one week after the Pender Bay group's arrival. When A. was moved to Port Hedland on 21 October 1991, NTLAC continued to act on his behalf until 29 January 1992, when it advised DIEA that it could no longer represent the Pender Bay detainees. On 3 February 1992, the Refugee Council of Australia (RCoA) took over the function of representatives of *all* Pender Bay detainees;

(e) The NTLAC was retained by members of the Pender Bay group for Federal Court proceedings in April 1992. RCoA continued to provide advice in relation to the refugee status applications.

7.11 The State party points out that prior to 1991/92, funds for legal assistance were not specifically earmarked for asylum seekers in detention, but individual applicants had access to legal aid through the normal channels, with NGOs also providing support. Since 1992, legal assistance is provided to applicants through contractual agreements between DIEA and RCoA and Australian Lawyers for Refugees (ALR). The State party notes that in the proceedings seeking to overturn the decision which refused him refugee status, A. was legally represented. His advisers included not only the NSWLAC and the NTLAC, but also Refugee Advice Casework and two large law firms.

7.12 The State party contests that delays in the hearing of A.'s case were attributable to his losing contact with legal advisers after each move between detention centres. When the author was removed from Sydney to Curragundi on 21 May 1991, the NSWLAC immediately advised the NTLAC, and on 11 June, NTLAC forwarded to the Refugee Status Review Committee (RSRC) an application for

review of refusal to grant refugee status to members of the group. When the author was removed to Port Hedland on 21 October 1991, the application for review was under consideration by the RSRC, and there was no need for immediate action by the author's legal advisers. When RSRC's recommendation to refuse the application was notified to NTLAC on 22 January 1992, NTLAC requested a reasonable time for the author to get legal assistance. The RCoA arrived in Port Hedland on 3 February 1992 to represent the author, and lodged a response to RSRC's recommendation on 3 March 1992. The State party contends that nothing suggests that requests for review in these two cases would have been lodged much earlier had there been no change in legal representation.

7.13 Finally, the State party denies that there is any evidence that the remote location of the Port Hedland Detention Centre was such as to obstruct access to legal assistance. There are forty-two flights to and from Perth each week, with a flight time of 130 to 140 minutes; early morning flights would enable lawyers to be in Port Hedland before 9 a.m. The State party notes that a team of six lawyers and six interpreters, contracted by RCoA with funding from DIEA, lived in Port Hedland for most of 1992 to provide legal advice to the detainees.

7.14 As to article 14, paragraph 1, the State party contends that no argument can be made that there was a breach of the author's right to equality before the courts: in particular, he was not subject to any form of discrimination on the grounds that he was an alien. It notes that *if* the Committee were to consider that equality before the courts encompasses a right to (obligatory) legal advice and representation, it must be recalled that the author's access to such advice was never, at any stage during his detention, impeded (see paragraphs 7.9 and 7.10 above).

7.15 The State party affirms that the second and third sentences of article 14, paragraph 1, do not apply to refugee status determination proceedings. Such proceedings cannot be described as a "determination ... of his rights and obligations in a suit at law". Reference is made in this context to decisions of the European Commission of Human Rights, which are said to support this conclusion⁵. The State party fully accepts that aliens subject to its jurisdiction may enjoy the protection of Covenant rights: "However, in determining which provisions of the Covenant apply in such circumstances, it is necessary to examine their terms. This interpretation is supported by the terms of the second and third sentences of article 14, paragraph 1, which are

⁵ See *X, Y, Z and W v. United Kingdom* (Application No. 3325/67); and *Agee v. United Kingdom* (Application No. 7729/76).

limited to certain types of proceedings determining certain types of rights, which are not those involved in [the] case". *If the Covenant lays down procedural guarantees for the determination of entitlement to refugee status, those in article 13 appear more appropriate to the State party than those in article 14, paragraph 1.*

7.16 *If the Committee were to consider that the second and third sentences of article 14, paragraph 1, are applicable to the author's case, then the State party notes that*

- Hearings in all cases to which A. was a party were conducted by competent, independent and impartial tribunals;

- Judicial hearings on review were conducted in public, and such decisions as were rendered were made public;

- The administrative proceedings to determine whether the Minister for Immigration, Local Government and Ethnic Affairs should grant refugee status were held *in camera*, but the State party argues that privacy of these administrative proceedings was justified by considerations of *ordre public*, because it would be harmful to refugee status applicants for their cases to be made public;

- Such decision of administrative tribunals as were handed down in the author's case were not made public. To the Australian Government, the limited exceptions to the rule of publicity of judgments enunciated in article 14, paragraph 1, indicate that the notion of "suit at law" was not intended to apply to the administrative determination of applications for refugee status;

- A. had at all times access to legal representation and advice;

- Finally, given the complexity of the case and of the legal proceedings involving the author, the State party reiterates that the delays encountered in the case were not such as to amount to a breach of the right to a fair hearing.

8.1 In his comments, dated 22 August 1996, counsel takes issue with the State party's explanation of the rationale for immigration detention. At the time of the author's detention, the only category of unauthorized border arrivals in Australia who were mandatorily detained were so-called "boat people". He submits that the Australian authorities had an unjustified fear of a flood of unauthorized boat arrivals, and that the policy of mandatory detention was used as a form of deterrence. As to the argument that there was an "unprecedented influx" of boat people into Australia from the end of 1989, counsel notes that the 33,414 refugee applications from 1989 to 1993 must be put into perspective - the figure pales in comparison to the number of refugee

applications filed in many Western European countries over the same period. Australia remains the only Western asylum country with a policy of mandatory, non-reviewable detention.

8.2 In any way, counsel adds, lack of preparedness and adequate resources cannot justify a continued breach of the right to be free from arbitrary detention; he refers to the Committee's jurisprudence that lack of budgetary appropriations for the administration of criminal justice does not justify a four-year period of pre-trial detention. It is submitted that the 77-week period it took for the primary processing of the author's asylum application, while he was detained, was due to inadequate resources.

8.3 Counsel rejects the State party's attempts to attribute some of the delays in the handling of the case to the author and his advisers. He reiterates that Australia mishandled A.'s application, and maintains that there was no excuse for the authorities to take seven months for a primary decision on his application, which was not even notified to him, another eight months for a new primary decision, six months for a review decision, and approximately five months for a final rejection, which could not be defended in court. Counsel suggests that it is less important to determine *why* delays occurred, but to ask why the author was detained throughout the period when his application was being considered: when the original decision was referred back to immigration authorities after Australia could not defend it in court, the State party took the unprecedented step of passing special legislation (*Migration Amendment Act 1992*), with the sole purpose of keeping the author and other asylum seekers in detention.

8.4 As to the question of the author's access to legal advice, counsel affirms that contrary to the State party's assertion, legal expertise *is* necessary when applying for refugee status, as well as for any appeal processes - had the author had no access to lawyers, he would have been deported from Australia in early 1992. Counsel considers it relevant that the *current* practice is for Australian authorities to assign legal assistance to asylum seekers immediately when they indicate that they wish to seek asylum. It is submitted that A. should have been provided with a lawyer when he requested asylum in December 1989.

8.5 Counsel reiterates that the author had no contact with a representative for nearly 10 months after his arrival, i.e. until September 1990, although a final decision had been made on his claim in June 1990. When, in 1992, he *did* seek legal aid to obtain judicial review of the decision rejecting his application for refugee status, his request was refused. Resort to *pro bono* representation was only

obtained when legal assistance was refused, and in counsel's opinion, it is erroneous to argue that state-sponsored legal assistance was unnecessary because *pro bono* assistance was available; in fact, *pro bono* assistance *had* to be found because legal aid had already been refused.

8.6 Counsel acknowledges that many flights are indeed available to and from Port Hedland, but points out that these connections are expensive. He maintains that the isolation of Port Hedland *did* in fact restrict access to legal advice; this factor was raised repeatedly before the Joint Standing Committee on Migration which, while conceding that there were some difficulties, rejected any recommendation that the detention facility be moved.

8.7 On the issue of the "arbitrariness" of the author's detention, counsel notes that the State party incorrectly seeks to blame the author for the prolongation of his detention. In this context, he argues that A. should not have been penalized by prolonged detention for the exercise of his legal rights. He further denies that the detention was justified because of a perceived likelihood that the author might abscond from the detention centre; he points out that the State party has been unable to make more than generalized assertions on this issue. Indeed, he submits, the consequences of long-term custody are so severe that the burden of proof for the justification of detention lies with the State authority in the particular circumstances of each case; the burden of proof is not met on the basis of generalised claims that the individual may abscond if released.

8.8 Counsel reaffirms that there *is* a rule of customary international law to the effect that asylum seekers should not be detained for prolonged periods, and that the pronouncements of authoritative international bodies, such as UNHCR, and the practice of other states, all point to the existence of such a rule.

8.9 Concerning the State party's claim that the author always had the opportunity to challenge the lawfulness of his detention, and that such a challenge was not necessarily bound to fail, counsel observes the following:

– While the High Court held Section 54R to exceed the State party's legislative power and therefore unconstitutional, the unenforceability of the provision does *not* mean that, once a person is a "designated person" within the meaning of the Migration Act, he can realistically challenge the detention. It simply means that Parliament does not have the power, by virtue of Section 54R, to direct the Judiciary not to release a designated person. In practice, however, if someone fits the definition of a "designated person", there still is no possibility of obtaining release by the courts.

– By reference to Section 54Q of the Act (now Section 182), under which detention provisions cease to apply to a designated person who has been in immigration detention for more than 273 days, it is submitted that a period of 273 days during which there is no possibility of release by the courts is *per se* arbitrary within the meaning of article 9, paragraph 1. According to counsel, it is virtually impossible for a designated person to be released even after the 273 calendar days since, under Section 54Q, the countdown towards the 273 day cut-off date ceases where the Department of Immigration is awaiting information from individuals outside its control.

8.10 Counsel rejects the argument that since the guarantees of article 14, paragraph 3 (d), are not spelled out in article 9, paragraph 4, A. had no right to access to state-funded legal aid. He argues that immigration detention is a quasi-criminal form of detention which in his opinion requires the procedural protection spelled out in article 14, paragraph 3. In this context, he notes that other international instruments, such as the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Principle 17) recognize that all persons subjected to any form of detention are entitled to have access to legal advice, and be assigned legal advisers without payment where the interests of justice so require.

8.11 Finally, counsel reaffirms that the proceedings concerning A.'s status under the Migration Amendment Act can be subsumed under article 14, paragraph 1: (even) during its administrative stage, the author's application for refugee status came within the scope of article 14. The exercise of his rights to judicial review in relation to his application for refugee status, as well as his challenge to detention in the local courts gave rise to a "suit at law". In this connection, counsel contends that by initiating proceedings against the Department of Immigration, with a view to reviewing the decisions to refuse his application for refugee status, the proceedings went beyond any review on the merits of his application and became a civil dispute about the Department's failure to guarantee him procedural fairness. And by filing proceedings seeking his release, the author disputed the constitutionality of the Migration Act's new provisions under which he was held - again, this is said to have been a civil dispute.

Examination of the merits

9.1 The Human Rights Committee has examined the present communication in the light of all the information placed before it by the parties, as it is required to do under article 5, paragraph 1, of the Optional Protocol to the Covenant. Three questions are to be determined on their merits:

(a) whether the prolonged detention of the author, pending determination of his entitlement to refugee status, was "arbitrary" within the meaning of article 9, paragraph 1;

(b) whether the alleged impossibility to challenge the lawfulness of the author's detention and his alleged lack of access to legal advice was in violation of article 9, paragraph 4; and

(c) whether the proceedings concerning his application for refugee status fall within the scope of application of article 14, paragraph 1 and whether, in the affirmative, there has been a violation of article 14, paragraph 1.

9.2 On the first question, the Committee recalls that the notion of "arbitrariness" must not be equated with "against the law" but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context. The State party however, seeks to justify the author's detention by the fact that he entered Australia unlawfully and by the perceived incentive for the applicant to abscond if left in liberty. The question for the Committee is whether these grounds are sufficient to justify indefinite and prolonged detention.

9.3 The Committee agrees that there is no basis for the author's claim that it is *per se* arbitrary to detain individuals requesting asylum. Nor can it find any support for the contention that there is a rule of customary international law which would render all such detention arbitrary.

9.4. The Committee observes, however, that every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal. In the instant case, the State party has not advanced any grounds particular to the author's case, which would justify his continued detention for a period of four years, during which he was shifted around between different detention centres. The Committee therefore concludes that the author's detention for a period of over four years was arbitrary within the meaning of article 9, paragraph 1.

9.5 The Committee observes that the author could, in principle, have applied to the court for review of the grounds of his detention before the enactment of the Migration Amendment Act of 5 May 1992; after that date, the domestic courts retained that power with a view to ordering the release of a person if they found the detention to be unlawful under Australian law. In effect, however, the courts' control and power to order the release of an individual was limited to an assessment of whether this individual was a "designated person" within the meaning of the Migration Amendment Act. If the criteria for such determination were met, the courts had no power to review the continued detention of an individual and to order his/her release. In the Committee's opinion, court review of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law. While domestic legal systems may institute differing methods for ensuring court review of administrative detention, what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effects, real and not merely formal. By stipulating that the court must have the power to order release "if the detention is not lawful", article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant. This conclusion is supported by article 9, paragraph 5, which obviously governs the granting of compensation for detention that is "unlawful" either under the terms of domestic law or within the meaning of the Covenant. As the State party's submissions in the instant case show that court review available to A. was, in fact, limited to a formal assessment of the self-evident fact that he was indeed a "designated person" within the meaning of the Migration Amendment Act, the Committee concludes that the author's right, under article 9, paragraph 4, to have his detention reviewed by a court, was violated.

9.6 As regards the author's claim that article 9, paragraph 4, encompasses a right to legal assistance in order to have access to the courts, the Committee notes from the material before it that the author was entitled to legal assistance from the day he requested asylum and would have had access to it, had he requested it. Indeed, the author was informed on 9 December 1989, in the attachment to the form he signed on that day, of his right to legal assistance. This form was read in its entirety to him in Kampuchean, his own language, by a certified interpreter. That the author did not avail himself of this possibility at that point in time cannot be held against the State party. Subsequently (as of 13 September 1990), the author sought legal advice and received legal assistance whenever requesting it.

That A. was moved repeatedly between detention centres and was obliged to change his legal representatives cannot detract from the fact that he retained access to legal advisers; that this access was inconvenient, notably because of the remote location of Port Hedland, does not, in the Committee's opinion, raise an issue under article 9, paragraph 4.

9.7 In the circumstances of the case and given the above findings, the Committee need not consider whether an issue under article 14, paragraph 1, of the Covenant arises.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the Covenant, concludes that the facts as found by the Committee reveal a breach by Australia of article 9, paragraphs 1 and 4, and article 2, paragraph 3, of the Covenant.

11. Under article 2, paragraph 3, of the Covenant, the author is entitled to an effective remedy. In the Committee's opinion, this should include adequate compensation for the length of the detention to which A. was subjected.

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 its Views.

APPENDIX

Individual opinion submitted by Mr. Prafullachandra Natwarlal Bhagwati pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the Views of the Committee on communication No 569/1993

A. v. Australia

I am in agreement with the opinion rendered by the Committee save and except that in regard to paragraph 9.5, I would prefer the following formulation:

"9.5 The Committee observes that the author could, in principle, have applied to the court for review of the grounds of his detention before the enactment of the Migration Amendment Act on 5 May 1992; after that date, the domestic courts retained the power of judicial review of detention with a view to ordering the release of a person if they found the detention to be unlawful. But with regard to a particular category of persons falling within the meaning of the expression 'designated person' in the Migration Amendment Act, the

power of the courts to review the lawfulness of detention and order release of the detention was found unlawful, was taken away by Section 54R of the Migration Amendment Act. If the detained person was a 'designated person' the courts had no power to review the continued detention of such person and order his/her release. The only judicial review available in such a case was limited to a determination of the fact whether the detained person was a 'designated person' and if he was, the court could not proceed further to review the lawfulness of his detention and order his/her release. The author in the present case, being admittedly a 'designated person', was barred by Section 54R of the Migration Amendment Act from challenging the lawfulness of his continued detention and seeking his release by the courts."

But it was argued on behalf of the State that all that article 9, paragraph 4, of the Covenant requires is that the person detained must have the right and opportunity to take proceedings before a court for review of lawfulness of his/her detention and lawfulness must be limited merely to compliance of the detention with domestic law. The only inquiry which the detained person should be entitled to ask the court to make under article 9, paragraph 4, is whether the detention is in accordance with domestic law, whatever the domestic law may be. But this would be placing too narrow an interpretation on the language of article 9, paragraph 4, which embodies a human right. It would not be right to adopt an interpretation which will attenuate a human right. It must be interpreted broadly and expansively. The interpretation contended for by the State will make it possible for the State to pass a domestic law virtually negating the right under article 9, paragraph 4, and making non-sense of it. The State could, in that event, pass a domestic law validating a particular category of detentions and a detained person falling within that category would be effectively deprived of his/her right under article 9, paragraph 4. I would therefore place a broad interpretation on the word "lawful" which would carry out the object and purpose of the Covenant and in my view, article 9, paragraph 4, requires that the court be empowered to order release "if the detention is not lawful", that is, the detention is arbitrary or incompatible with the requirement of article 9, paragraph 1, or with other provisions of the Covenant. It is no doubt true that the drafters of the Covenant have used the word "arbitrary" along with "unlawful" in article 17 while the word "arbitrary" is absent in article 9, paragraph 4. But it is elementary that detention which is arbitrary is unlawful or in other words, unjustified by law. Moreover the word "lawfulness" which calls for interpretation in article 9, paragraph 4, occurs in the Covenant and must therefore be interpreted in the context of the provisions of the Covenant and having regard to the object and purpose of the Covenant. This conclusion is furthermore supported by article 9, paragraph 5, which governs the granting of compensation for detention "unlawful" either under the terms of the domestic law or within the meaning of the Covenant or as being arbitrary. Since the author in the present case was totally barred by Section 54R of the Migration Amendment Act from challenging the "lawfulness" of his detention and seeking his release, his right under article 9, paragraph 4, was violated.

Communication No. 563/1993

Submitted by: Federico Andreu (representing the family of Nydia Erika Bautista de Arellana)

Alleged victim: Nydia Erika Bautista de Arellana

State party: Colombia

Declared admissible: 11 October 1994 (fifty-second session)

Date of adoption of Views: 27 October 1995 (fifty-fifth session)

Subject matter: Abduction, detention incommunicado and subsequent disappearance of victim - State party's responsibility for disappearance

Procedural issues: Exhaustion of domestic remedies

Substantive issues: Enforced disappearance and right to life - Arbitrary arrest - Torture - Fair trial - Duty to prosecute crime of enforced disappearance

Articles of the Covenant: 2 (3), 6 (1), 7, 9, 10 and 14 (3) (c)

Articles of the Optional Protocol and Rules of procedure: 4, paragraph 2; 5, paragraph 2 (a) and (b), and rule 93 (3)

Finding: Violation [articles 6, paragraph 1; 7; 9, paragraph 1]

1. The author of the communication is Federico Andreu, a Colombian lawyer residing in Brussels. He is instructed by the relatives and the family of Nydia Erika Bautista de Arellana, a Colombian citizen who disappeared on 30 August 1987, and whose body was subsequently recovered. It is submitted that she is the victim of violations by Colombia of articles 2, paragraph 3; 6, paragraph 1; 7 and 14 of the International Covenant on Civil and Political Rights.

The facts as submitted by the author

2.1 On 25 August 1986, N.E. Bautista de Arellana, a member of the 19 April Movement ("M 19"), was detained in Cali, Colombia, by a military unit of the Third Brigade. She was kept *incommunicado* for three weeks and allegedly tortured during this period. Upon signing a statement that she had been well treated during detention, she was released. Reference is made to other cases of forced disappearances of M-19 activists, which took place prior and subsequent to Nydia Bautista's arrest.

2.2 On 30 August 1987, Nydia Bautista was abducted from the family home in Bogota. According to eyewitnesses, she was pulled into a Suzuki jeep by eight men, who were armed but dressed as civilians. An eyewitness identified the jeep's license plate.

2.3 Ms. Bautista's abduction was immediately brought to the attention of the local authorities by the

Association of Solidarity with Political Prisoners. On 3 September 1987, her father filed a formal complaint with the Human Rights Division of the Attorney-General's Office (*Procuraduría Delegada para los Derechos Humanos*). Together with the Division's director, her father enquired about Nydia's whereabouts in various police and military offices, as well as with the intelligence services, to no avail. On 14 September 1987, an official in the Attorney-General's Office assigned to investigate the case, recommended that the information he had obtained during the investigation should be sent to the competent judge.

2.4 On 25 September 1987, the case was referred to the Magistrate's Court No. 53. A preliminary hearing was held in November 1987. On 10 February 1988, the examining magistrate discontinued the proceedings and referred the case to the Technical Corps of the Judicial Police (*Cuerpo Técnico de la Policía Judicial*).

2.5 In the meantime, on 12 September 1987, the body of a woman had been found in the municipality of Guayabetal, Cundinamarca, Colombia. The death certificate, which had been drawn up before the body was buried at the cemetery of Guayabetal, indicated that it concerned a 35-year old woman "wearing a white dress with blue spots and a white hand-bag, blindfolded, the hands tied together, face mutilated". According to the autopsy, the deceased had been shot in the head. No other efforts were made to identify the body. On 14 September 1987, the mayor of Guayabetal gave the death certificate to the municipality's examining magistrate; on 8 October 1987, the latter started his own investigations in the case.

2.6 On 22 December 1987, the examining magistrate of Guayabetal referred the case to the District's section of the Technical Corps of the Judicial Police. On 30 June 1988, the chief of the Preliminary Inquiry Unit of this authority ordered all potential witnesses to be heard. On 8 July 1988, he instructed the commander of the district's police force to take the necessary steps to clarify the events and to identify the perpetrators of the crime. Two police officers were assigned to carry out the investigations. On 17 August 1988, these two officers reported to the Preliminary Inquiry Unit that they "had been unsuccessful in tracking the perpetrators, or in establishing a motive for the

crime, since the place where the body was discovered lent itself to the purpose of such offence ..". They were further unable to establish the victim's identity, as no fingerprints had been taken in September 1987, and concluded that the perpetrators and the victim came from another region, i.e. Bogota or Villavencio. The case was then suspended.

2.7 Early in 1990, Nydia Bautista's family learned about the unidentified woman buried in Guayabetal whose known characteristics corresponded to those of Nydia. After much pressure from the family, the Special Investigations Division of the Attorney-General's Office ordered the exhumation of the body on 16 May 1990, which was carried out on 26 July 1990. Nydia's sister identified the pieces of cloth, bag and earring and, on 11 September 1990, a detailed report of forensic experts confirmed that the remains were those of Nydia Bautista.

2.8 On 22 February 1991, a sergeant of the 20th Brigade of the military's Intelligence and Counterintelligence Unit, Bernardo Alfonso Garzón Garzón, testified before the chief of the Special Investigations Division that Nydia Bautista had been abducted by members of the 20th Brigade, acting either with the consent or on order of the highest commanding officer, one (then) Colonel Alvaro Velandia Hurtado. He further revealed that Sgt. Ortega Araque drove the jeep in which Nydia Bautista was abducted, and added that she had been held for two days in a farm before taken to Quebradablanca, where she was killed.

2.9 Nydia Bautista's father filed a request for institution of disciplinary proceedings against those held to be responsible for the disappearance of his daughter. For a year thereafter, the family was kept unaware whether the Special Investigations Division or the Division of Human Rights had in fact initiated criminal or disciplinary proceedings in the case. Counsel for the family wrote numerous letters to the Minister of Defence and the Attorney-General, requesting information on the outcome of the investigations, if any, and on the status of the case before the courts. On 29 January 1992, a prosecutor in the Division of Human Rights informed him that the case had been referred back to the competent prosecutor's office, so as to complete investigations in the case. On 3 February 1992, the Secretary-General of the Ministry of Defence indicated that the case was not under investigation before the military courts.

2.10 Counsel argued that at the time of Nydia's abduction, her family could not file for *amparo*, as one of the requirements for a petition for *amparo* is that the petitioner must indicate where and by which authority the person is detained. The family was also unable to join the proceedings as a civil party, as the examining magistrates in charge of the case had

referred it to the Technical Corps of the Judicial Police, where it was kept pending.

2.11 Counsel contends that the Colombian authorities displayed serious negligence in the handling of Nydia Bautista's case. He observes that the authorities at no time adequately investigated the events, and that coordination between the different authorities involved was either poor or non-existent. Thus, once the Chief of the Special Investigations Division was removed from office, no follow-up was given to the case, in spite of the testimony of Mr. Garzón Garzón. For several years, Nydia Bautista's family relied on non-governmental organizations to obtain information about any steps taken to prosecute the perpetrators. In this context, it is noted that in February 1992, a non-governmental organization received information to the effect that the case had been reopened, that disciplinary and criminal proceedings against Colonel Velandia Hurtado had started, and that investigations into the alleged involvement of other people had also been initiated.

2.12 Finally, counsel notes that Nydia Bautista's family, and he himself, have received death threats and are subject to intimidation, because of their insistence in pursuing the case.

The complaint

3. It is submitted that the facts outlined above amount to violations by Colombia of articles 2, paragraph 3; 6, paragraph 1; 7 and 14 of the Covenant.

State party's admissibility information and observations

4.1 The State party submits that its authorities have been doing, and are doing, their utmost to bring to justice those held responsible for the disappearance and death of Nydia Bautista. It adds that available domestic remedies in the case have not been exhausted.

4.2 The state of disciplinary proceedings in the case is presented as follows:

– Disciplinary proceedings were first initiated by the Division of Special Prosecutions, Office of the Attorney-General (*Procuraduría General*). This office appointed an investigator of the Judicial Police (*Policía Judicial*). When the net result of his investigations proved inconclusive, the case was placed before the ordinary tribunals.

– In 1990, the Division of Special Investigations took up the case again, after the victim's body had been found. On 22 February 1991, this office heard the testimony of Mr. Garzón Garzón, then a member of the Colombian National

Army. According to the State party, his testimony could never be corroborated. The State party notes that Mr. Garzón Garzón's whereabouts are currently unknown. The file reveals that Mr. Garzón Garzón requested special police protection for himself and his family after giving his testimony..

– After this deposition, the Special Investigations Division sent three communications to Nydia Bautista's sister, to which no reply was given.

– Given the lack of evidence, the Division then filed the case, but nevertheless referred the file to the National Delegate for Human Rights (*Delegado para los Derechos Humanos*). This office examined the possibility of instituting disciplinary proceedings against Mr. Velandia Hurtado and Sergeant Ortega Araque, both of whom had been heavily implicated by Mr. Garzón Garzón's testimony.

4.3 The State party gives the following summary of so-called administrative proceedings in the case: On 24 July 1992, the Bautista family filed an administrative complaint against the Ministry of Defence, claiming compensation before the Administrative Tribunal of Cundinamarca. The case was registered under file No. 92D-8064, in compliance with article 86 of the Code of Administrative Procedure (*Código Contencioso Administrativo*). On 18 August 1992, this complaint was declared admissible, and the Ministry presented oral replies to the charges on 3 November 1992. On 27 November 1992, the Administrative Tribunal ordered the gathering of further evidence; according to the State party, this evidence is still being sought, more than 18 months after the order.

4.4 The State party affirms that measures will be taken to prevent the practice of forced disappearances. In particular, it notes that it is now considering to introduce legislation punishing this crime under the Colombian Criminal Code.

The Committee's admissibility decision

5.1 During its 52nd session, the Committee examined the admissibility of the communication. With respect to the exhaustion of available domestic remedies, it noted that immediately after Ms. Bautista's disappearance, her father had filed a complaint with the Human Rights Division of the Attorney-General's Office. Recapitulating the chronology of events after the discovery of the victim's body and the activities of the various judicial bodies involved in the case, the Committee noted that more than seven years after the victim's disappearance, no criminal proceedings had been instituted, nor had those responsible for Ms. Bautista's disappearance been identified, arrested or tried. The Committee deemed this delay

in the judicial proceedings "unreasonable" within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

5.2 The Committee considered the author's claims under articles 6, 7 and 14 of the Covenant to have been sufficiently substantiated, for purposes of admissibility, and noted that the facts as submitted also appeared to raise issues under articles 9 and 10.

5.3 On 11 October 1994, therefore, the Committee declared the communication admissible in so far as it appeared to raise issues under articles 6, paragraph 1, 7, 9, 10 and 14, paragraph 3 (c), of the Covenant.

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

6.1 In its initial submission under article 4, paragraph 2, of the Optional Protocol, dated 30 May 1995, the State party observes that the proceedings in the case remain pending and requests the Committee to take this situation into account in the adoption of any final decision.

6.2 As far as disciplinary proceedings are concerned, the State party indicates that the case against Messrs. Velandia Hurtado and Ortega Araque is pending under file No. 008-147452 before the National Delegate for Human Rights. The formal procedure was initiated on 3 March 1994. According to the National Delegate, the case was still proceeding as of 17 April 1995.

6.3 As to criminal proceedings, the State party notes that the prosecutor's office of Caqueza (Cundinamarca) (*Unidad de Fiscalías de Caqueza*) was (initially) handling the case, under the authority of prosecutor Myriam Aida Saha Hurtado. A formal criminal investigation was only launched by decision of 17 March 1995 (*Resolución de Apertura de la Instrucción*) of a prosecutor in the Cundinamarca District (*Fiscal Seccional 2ª de la Unidad Delegada ante los Jueces del Circuito de Caqueza (Cundinamarca)*), who considered that the file contained sufficient evidence to indict Mr. Velandia Hurtado and others. However, by decision of 5 April 1995, the file, consisting of twelve folders, was transmitted to the Joint Secretariat of the Regional Prosecutors' Directorate in Bogota (*Secretaría Común de la Dirección Regional de Fiscalías de Santafé de Bogota*), considered to be competent in the case.

6.4 Finally, concerning the administrative proceedings initiated by Nydia Bautista's family against the Ministry of Defence, the State party observes that they are in their final stages before the Administrative Tribunal of Cundinamarca. After two procedural decisions of 27 February and 4 April 1995

(".. se decretaron pruebas de oficio mediante autos del 27 de febrero y 4 de abril de 1995"), the matter has been reserved for judgment.

6.5 In a further submission dated 14 July 1995, the State party forwards copies of the decision of the National Delegate for Human Rights of 5 July 1995, as well as of the judgment of the Administrative Tribunal of Cundinamarca of 22 June 1995.

6.6 The salient points of the decision of the National Delegate for Human Rights (entitled "*Resolución 13 de Julio 5 de 1995 mediante la cual se falla el proceso disciplinario 008-147452*"), after recalling the facts and the procedure from 3 March 1994 to the spring of 1995, are the following:

– The Delegate rejects Col. (now Brigadier General) Velandia Hurtado's defence that disciplinary action against him falls under the applicable statute of limitations, and that the National Delegate for Human Rights was not competent to hear the case. Similar defence arguments put forth by Sgt. Ortega Araque are equally rejected.

– The Delegate characterizes the phenomenon of forced disappearance in general as a violation of the most basic human rights enshrined in international human rights instruments, such as the right to life and the right to liberty and personal physical integrity, considered to be part of *ius cogens* and/or of customary international law.

– On the basis of the evidence placed before it, the Delegate considers the abduction and subsequent detention of Nydia Bautista as illegal ("*la captura de Nydia E. Bautista fue abiertamente ilegal por cuanto no existía orden de captura en su contra y no fue sorprendida en flagrancia cometiendo delito alguno*").

– The disappearance must be attributed to State agents, who failed to inform about the victim's apprehension and her whereabouts, in spite of investigations of the military authorities to locate Ms. Bautista: "The victim's abduction was not brought to the attention of any authority and is not certified in any register" ("*... sobre su retención no se informó a ninguna autoridad y tampoco apareció registrada in ningún libro*").

– The Delegate qualifies as credible and beyond reasonable doubt the evidence of Nydia Bautista's violent death, after being subjected to ill-treatment, in particular on the basis of the report prepared by the Office of Special Investigations (*Oficina de Investigaciones Especiales*) after the exhumation of her remains (pp. 18 to 20 of the decision).

– Despite the challenges to the testimony of Bernardo Garzón Garzón put forward by

Messrs. Velandia Hurtado and Ortega Araque, the Delegate attaches full credibility to the deposition of Mr. Garzón Garzón made on 22 February 1991 (pp. 21 to 26 of decision).

– The Delegate rejects as unfounded the defendants' charge that the disciplinary procedure did not meet all the requirements of due process. In particular, she dismisses Mr. Velandia's Hurtado's defence that since he did not give the order for the victim's disappearance and death, he should not be held responsible. Rather, the Delegate concludes that as the commanding officer for intelligence and counterintelligence activities of his military unit, Mr. Velandia Hurtado "had both the duty, the power and the opportunity to prevent this crime against humanity" (... "*tenía el deber, y poder y la oportunidad de evitar que se produjera este crimen contra la humanidad*").

– The Delegate concludes that by virtue of his failure to prevent Nydia Bautista's disappearance and assassination, Mr. Velandia Hurtado violated her rights under articles 2, 5, 11, 12, 16, 28, 29 and 30 of the Colombian Constitution, under articles 3, 4, 6, 7 and 17 of the American Convention on Human Rights and articles 6, 9, 14 and 16 of the International Covenant on Civil and Political Rights. By his action, Mr. Velandia Hurtado further violated his duties as a military official and contravened article 65, Section B) lit. a) and article 65, Section F) lit. a) of the Rules of Military Discipline of the Armed Forces (*Reglamento Disciplinario para las Fuerzas Armadas*).

– Similar conclusions are reached for the responsibility of Sgt. Ortega Araque. In particular, the Delegate rejects Mr. Ortega's defence that he was only carrying out the orders of a superior, since obedience "cannot be blind" ("*la obediencia no puede ser ciega*").

6.7 As the Delegate found no mitigating circumstances for the acts respectively omissions of Messrs. Velandia Hurtado and Ortega Araque, she requested their summary dismissal from the Armed Forces. The decision was transmitted to the Minister for the Armed Forces.

6.8 The principal points made in the Judgment of the Administrative Tribunal of Cundinamarca of 22 June 1995 may be summarized as follows:

– The Tribunal considers the complaint filed by Nydia Bautista's family admissible in its form. It rejects the argument of the Ministry of Defence that the charges fall under the applicable statute of limitations (five years), since the case concerns not only the victim's disappearance but also her torture and death; on the latter, there could only have been certainty after exhumation of the body in July 1990.

– The Tribunal considers it established that Nydia Bautista was abducted on 30 August 1987, and that she was tortured and assassinated thereafter. It concludes that the evidence before it firmly establishes the responsibility of the armed forces in the events leading to the victim's death. Reference is made in this context to the procedure pending before the National Delegate for Human Rights.

– Like the National Human Rights Delegate, the Tribunal attaches full credibility to the deposition made by Mr. Garzón Garzón on 22 February 1991, which corroborates, in all essential points, the claims made by Nydia Bautista's family since August 1987 (pages 9 to 12 of the judgment); this relates, for example, to the make and the license plate of the jeep in which Nydia Bautista was abducted. The Tribunal notes that Mr. Garzón Garzón requested police protection for himself and his family after his deposition.

– The Tribunal concludes that the State party's authorities involved in the victim's illegal disappearance and death are fully responsible. As a result, it awards the equivalent of 1000 grams in gold to both parents, the husband and the son of Nydia Bautista, and the equivalent of 500 grams in gold to her sister. The Ministry of Defence is further directed to pay a total of 1,575,888.20 pesos plus interest and inflation-adjustment to Nydia Bautista's son for the moral prejudice suffered.

6.9 Under cover of a Note dated 2 October 1995, the State party forwards a copy of Presidential Decree No. 1504 dated 11 September 1995, which stipulates that Mr. Velandia Hurtado is dismissed from the armed forces with immediate effect. In an explanatory press communiqué, it is noted that it remains open to Mr. Velandia Hurtado to challenge the decree or to take such other action as he considers appropriate before the competent administrative tribunal.

7.1 In his initial comments, counsel notes that Mr. Velandia Hurtado sought to challenge the competence of the National Delegate for Human Rights handling the case, Dr. Valencia Villa, in March 1995, and that he sought to file criminal charges against her, presumably for defamation. On the basis of recent reports about further instances of intimidation of Nydia Bautista's sister by agents of the military's intelligence service, counsel expresses concern about the physical integrity of the National Delegate for Human Rights.

7.2 In further comments dated 27 July 1995, counsel notes that efforts to notify Resolution No. 13 of 5 July 1995 personally to Mr. Velandia Hurtado or Mr. Ortega Araque have so far failed, as neither they nor their lawyers replied to the convocation issued by the Ministry of Defence. Faced with this

situation, the Office of the National Delegate for Human Rights sent the notification by registered mail, requesting the Ministry of Defence to comply with the law and respect the terms of Resolution No. 13. Mr. Velandia Hurtado, in turn, filed a request for protection of his constitutional rights (*acción de tutela*) with the Tribunal Superior of Cundinamarca, on the ground that due process guarantees had not been respected in his case. Counsel adds that the family of Nydia Bautista and in particular her sister continue to be subjected to acts of intimidation and harassment. In this context, he notes that the family's first lawyer, Dr. A. de Jesus Pedraza Becerra, disappeared in Bogota on 4 July 1990, a disappearance which was condemned by the Inter-American Commission on Human Rights seized of the case.

7.3 Counsel acknowledges receipt of the judgment of the Administrative Tribunal of Cundinamarca of 22 June 1995 and notes that this judgment, together with Resolution No. 13 handed down by the National Human Rights Delegate, constitute irrefutable proof of the responsibility of State agents in the disappearance and subsequent death of Nydia Bautista.

7.4 As to the state of criminal investigations, counsel notes that the case still remains with the Regional Prosecutors' Directorate of Bogota (*Dirección Regional de Fiscalías de Santafé de Bogota*), where the case has been assigned to one of the - recently created - human rights units of the Chief Prosecutor's office. According to counsel, these human rights units are still inoperative - thus, when Nydia Bautista's family sought to obtain information about the state of criminal proceedings, it learned that the building supposed to house the human rights units was still unoccupied. Counsel further observes that in accordance with article 324 of the Colombian Code of Criminal Procedure, preliminary investigations must be initiated once the identity of those presumed to be responsible of a criminal offence is known, and formal investigations following an indictment must start within two months. In the instant case, since the identity of those responsible for Nydia Bautista's disappearance and death were known at the very latest after the deposition of Mr. Garzón Garzón on 22 February 1991, counsel concludes that the terms of article 324 have been disregarded.

7.5 In the latter context, counsel once again points to what he perceives as unacceptable negligence and delays in the criminal investigations. At least once, on 30 June 1992, the office of Examining Magistrate 94 (*Juzgado 94 de Instrucción Criminal*) ordered the closure of the investigation, in spite of the deposition of Mr. Garzón Garzón. The magistrate justified his decision under the terms of Law 23 of 1991 ("*Ley de Decongestión de Despachos Judiciales*"), whose

article 118 provides for the closure of those preliminary enquiries in which more than two years have gone by without the identification of a suspect. This decision, counsel notes, had no basis in reality, given the evidence of Mr. Garzón Garzón. Counsel concludes that almost eight years have passed since the date - 5 November 1987 - on which Magistrate's Court 53 (*Juzgado 53 de Instrucción Criminal*) first opened preliminary criminal investigations (*Indagación Preliminar No. 280*). Over a period of almost eight years, the order to dismiss Messrs. Velandia Hurtado and Ortega Araque constitute the first true sanction, a sanction which has still not been implemented.

7.6 By letter of 29 August 1995, counsel complains that the State party's government continues to stall in implementing the order of dismissal pronounced against Mr. Velandia Hurtado. The latter indeed appealed against the decision of the National Human Rights Delegate to notify the decision of 5 July 1995 by registered mail (*Acción de tutela*, see paragraph 7.2 above). On 2 August 1995, the Administrative Tribunal of Cundinamarca decided in his favour, on the ground that the mode of notification chosen by the Human Rights Delegate's Office had been illegal. It ordered the Office to notify Resolution No. 13 *personally* to Mr. Velandia Hurtado.

7.7 With this decision of the Administrative Tribunal, counsel contends, Resolution No. 13 of 5 July 1995 cannot be implemented. Since the remains of Nydia Bautista were recovered on 26 July 1990 and under the terms of the applicable disciplinary procedure, a statute of limitations of five years begins to run from the day of the "final constituent act of the offence" ("*último acto constitutivo de la falta*" - Law No. 24 of 1975, article 12), it is now likely that the case will be filed because of prescription of the offences attributed to Messrs. Velandia Hurtado and Ortega Araque.

7.8 Counsel further points out that far from ordering the dismissal of Mr. Velandia Hurtado from the armed forces, the authorities promoted him to Brigadier General and, during the first week of August 1995, awarded him the Order for Military Merit "José María Cordova" - this award was made pursuant to a decree signed by the President of the Republic. This award, according to counsel, constitutes an act of defiance vis-à-vis the Colombian judicial organs and a reward for Mr. Velandia Hurtado's past activities. In short, it can only be interpreted in the sense that the Colombian Executive is prepared to tolerate and let go unpunished even serious human rights violations. This attitude is said to have been confirmed by the so-called *Defensor del Pueblo* in his second report to the Colombian Congress, in which he criticizes that human rights violators in Colombia can expect to benefit from total impunity.

7.9 Finally, counsel refers to an incident on 31 August 1995, which is said to confirm that nothing is, or will be, done to bring those responsible for Nydia Bautista's death to justice. On this day, Ms. Bautista's family and members of the Association of Relatives of Disappeared Prisoners (ASFADDES) met in a popular restaurant in Bogota, to demonstrate on the occasion of the 8th anniversary of Nydia's disappearance. Soon after their arrival, an individual in civilian clothes entered the restaurant and occupied a table next to theirs. All those present identified Brigadier General Velandia Hurtado, who continued to monitor the group throughout the meeting. The presence of Mr. Velandia Hurtado, who otherwise commands the Third Army Brigade in Cali, on those particular premises on that particular day, is considered to be yet another instance of intimidation of Nydia Bautista's family.

Examination of the merits

8.1 The Human Rights Committee has examined the present case on the basis of the material placed before it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

8.2 In its submission of 14 July 1995, the State party indicates that Resolution 13 of 5 July 1995 pronounced disciplinary sanctions against Messrs. Velandia Hurtado and Ortega Araque, and that the judgment of the Administrative Tribunal of Cundinamarca of 22 June 1995 granted the claim for compensation filed by the family of Nydia Bautista. The State party equally reiterates its desire to guarantee fully the exercise of human rights and fundamental freedoms. These observations would appear to indicate that, in the State party's opinion, the above-mentioned decisions constitute an effective remedy for the family of Nydia Bautista. The Committee does not share this view, because purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of article 2, paragraph 3, of the Covenant, in the event of particularly serious violations of human rights, notably in the event of an alleged violation of the right to life.

8.3 In respect of the alleged violation of article 6, paragraph 1, the Committee recalls its General Comment 6 [16] on article 6 which states, *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 and impartial body, cases of missing and disappeared persons in circumstances that may involve a violation of the right to life. In the instant case, the Committee notes that both Resolution No. 13 of the National Delegate for Human Rights of 5 July 1995

and the judgment of the Administrative Tribunal of Cundinamarca of 22 June 1995 clearly establish the responsibility of State agents for the disappearance and subsequent death of Nydia Bautista. The Committee concludes, accordingly, that in these circumstances the State party is directly responsible for the disappearance and subsequent assassination of Nydia E. Bautista de Arellana.

8.4 As to the claim under article 7, the Committee has noted the conclusions contained in Resolution No. 13 of 5 July 1995 and in the judgment of the Administrative Tribunal of Cundinamarca of 22 June 1995, to the effect that Nydia Bautista was subjected to torture prior to her assassination. Given the findings of these decisions and the circumstances of Ms. Bautista's abduction, the Committee concludes that Nydia Bautista was tortured after her disappearance, in violation of article 7.

8.5 The author has alleged a violation of article 9. Both decisions referred to above conclude that Nydia Bautista's abduction and subsequent detention were "illegal" (see paragraphs 6.6 and 6.8 above), as no warrant for her arrest had been issued and no formal charges against her were known to exist. There has, accordingly, been a violation of article 9, paragraph 1.

8.6 The author has finally claimed a violation of article 14, paragraph 3 (c), on account of the unreasonable delays in the criminal proceedings instituted against those responsible for the death of Nydia Bautista. As the Committee has repeatedly held, the Covenant does not provide a right for individuals to require that the State criminally prosecute another person¹. The Committee nevertheless considers that the State party is under a duty to investigate thoroughly alleged violations of human rights, and in particular forced disappearances of persons and violations of the right

¹ See the decisions on cases No. 213/1986 (*H.C.M.A. v. the Netherlands*), adopted 30 March 1989, paragraph 11.6; No. 275/1988 (*S.E. v. Argentina*), adopted 26 March 1990, paragraph 5.5; Nos. 343-345/1988 (*R.A., V.N. et al. v. Argentina*), adopted 26 March 1990, paragraph 5.5.

to life, and to prosecute criminally, try and punish those held responsible for such violations. This duty applies *a fortiori* in cases in which the perpetrators of such violations have been identified.

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 by the State party of articles 6, paragraph 1, 7, and 9, paragraph 1, of the Covenant.

10. Under article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the family of Nydia Bautista with an appropriate remedy, which should include damages and an appropriate protection of members of N. Bautista's family from harassment. In this regard, the Committee expresses its appreciation for the content of Resolution 13, adopted by the National Delegate for Human Rights on 5 July 1995, and of the judgment of the Administrative Tribunal of Cundinamarca of 22 June 1995, which provide an indication of the measure of damages that would be appropriate in the instant case. Moreover, although the Committee notes with equal appreciation the promulgation of Presidential Decree No. 1504 of 11 September 1995, the Committee urges the State party to expedite the criminal proceedings leading to the prompt prosecution and conviction of the persons responsible for the abduction, torture and death of Nydia Bautista. The State party is further under an obligation to ensure that similar events do not occur in the future.

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

Communication No. 574/1994

Submitted by: Keun-Tae Kim [represented by counsel]

Alleged victim: The author

State party: Republic of Korea

Declared admissible: 14 March 1996 (fifty-sixth session)

Date of adoption of Views: 3 November 1998 (sixty-fourth session)

Subject matter: Compatibility of State party's national security law with provisions of the Covenant

Procedural issues: Admissibility *ratione temporis* - Continued effect of a Covenant violation - Substantiation of claim - Exhaustion of domestic remedies

Substantive issues: Freedom of expression - Permissible limitations on right to freedom of expression

Articles of the Covenant: 2 (3) and 19

Articles of the Optional Protocol and Rules of Procedure: 4, paragraph 2, and rule 93 (3)

Finding: Violation [article 19]

1. The author of the communication is Mr. Keun-Tae Kim, a Korean citizen residing in Dobong-Ku, Seoul, Republic of Korea. He claims to be a victim of violations 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 is a founding member of the National Coalition for Democratic Movement (Chunminryum; hereinafter NCDM). He was the Chief of the Policy Planning Committee and Chairman of the Executive Committee of that organization. Together with other NCDM members, he prepared documents which criticized the Government of the Republic of Korea and its foreign allies, and appealed for national reunification. At the inaugural meeting of the NCDM on 21 January 1989, these documents were distributed and read out to approximately 4,000 participants; the author was arrested at the conclusion of the meeting.

2.2 On 24 August 1990, a single judge on the Criminal District Court of Seoul found the author guilty of offences against article 7, paragraphs 1 and 5, of the National Security Law, the Law on Assembly and Demonstrations and the Law on Repression of Violent Activities, and sentenced him to three years' imprisonment and one year of suspension of eligibility. The Appeal Section of the

same tribunal dismissed Mr. Kim's appeal on 11 January 1991, but reduced the sentence to two years' imprisonment. On 26 April 1991, the Supreme Court dismissed a further appeal. It is submitted that as the Constitutional Court had held, on 2 April 1990, that article 7, paragraphs 1 and 5, of the National Security Law, are not inconsistent with the Constitution, the author has exhausted all available domestic remedies.

2.3 The present complaint only relates to the author's conviction under article 7, paragraphs 1 and 5, of the National Security Law. Paragraph 1 provides that "any person who assists an anti-State organization by praising or encouraging the activities of this organization, shall be punished". Paragraph 5 stipulates that "any person who produces or distributes documents, drawings or any other material(s) to the benefit of an anti-State organization, shall be punished". On 2 April 1990, the Constitutional Court held that these provisions are compatible with the Constitution as they are applied [only] when the security of the State is endangered, or when the incriminated activities undermine the basic democratic order.

2.4 The author has provided English translations of the relevant parts of the Courts' judgements, which show that the first instance trial court found that North Korea is an anti-State organization, with the object of violently changing the situation in South Korea. According to the Court, the author, despite knowledge of these aims, produced written material which reflected the views of North Korea and the Court concluded therefore that the author produced and distributed the written material with the object of siding with and benefiting the anti-State organization.

2.5 The author appealed the judgement of 24 August 1990 on the following grounds:

- Although the documents produced and distributed by him contain ideas resembling those which the regime of North Korea advocates, the judge misinterpreted the facts, as the overall message in the documents was "the accomplishment of reunification through independence and democratization". It thus cannot be said that the author either praised or encouraged the activities of North Korea, or that the contents of the documents were of direct benefit to the North Korean regime;

– The prohibited acts and the concepts spelled out in paragraphs 1 and 5 of article 7 of the National Security Law are defined in such broad and ambiguous terms that these provisions violated the principle of legality, that is, article 21, paragraph 1, of the Constitution, which provides that freedoms and rights of citizens may be restricted by law only when absolutely necessary for national security, maintenance of law and order, public welfare, and that such restrictions may not violate essential aspects of fundamental rights; and

– In light of the findings of the Constitutional Court, the application of these provisions should be suspended for activities which carry no obvious danger for national security or the survival of democratic order. Since the incriminated material was not produced and distributed with the purpose of praising North Korea, and further does not contain any information which would obviously endanger either survival or security of the Republic of Korea, or its democratic order, the author should not be punished.

2.6 The appellate court upheld the conviction on the basis that the evidence showed that the author's written materials, which he read out at a large convention, argued that the Republic of Korea was under influence of foreign powers, defined the Government as a military dictatorship and contained other views which corresponded to North Korean propaganda. According to the Court the materials therefore advocated the policy of North Korea, and the first instance court had thus sufficient grounds to acknowledge that the author was siding with and benefiting an anti-State organization.

2.7 On 26 April 1991, the Supreme Court held that the relevant provisions of the National Security Law did not violate the Constitution so long as they were applied to a case where an activity puts national survival and security at stake or endangers basic liberal democratic order. Thus under article 7 (1) "activity which sides with ... and benefits" an anti-State organization means that if such activity could be beneficial to that organization objectively, the prohibition applies. The prohibition is applicable, if a person with normal mentality, intelligence and common sense acknowledges that the activity in question could be beneficial to the anti-state organization, or if there is wilful recognition that it could be beneficial. According to the Supreme Court, this implies that it is not necessary for the person concerned to have intentional acknowledgement or motivation to be "beneficial". The court went on to hold that the author and his colleagues had produced material which can be recognised, as a whole and objectively, to side with North Korean propaganda and that the author, who has normal intelligence and common sense, read it out and supported it, thereby objectively

acknowledging that his activities could be beneficial to North Korea.

2.8 On 10 May 1991, the National Assembly passed a number of amendments to the National Security Law; paragraphs 1 and 5 of article 7 were amended by the addition of the words "with the knowledge that it will endanger national security or survival, or the free and democratic order" to the previous provisions.

The complaint

3.1 Counsel contends that although article 21, paragraph 1, of the Korean Constitution provides that "all citizens shall enjoy freedom of speech, press, assembly and association", article 7 of the National Security Law has often been applied to restrict freedom of thought, conscience or expression through speech or publication, by acts, association, etc. Under this provision, anyone who supports or thinks in positive terms about socialism, communism or the political system of North Korea is liable to punishment. It is further argued that there have been numerous cases in which this provision was applied to punish those who criticized government policies, because their criticism happened to be similar to that proffered by the North Korean regime against South Korea. In counsel's view, the author's case is a model of such abusive application of the National Security Law, in violation of article 19, paragraph 2, of the Covenant.

3.2 It is further argued that the courts' reasoning clearly shows how the National Security Law is manipulated to restrict freedom of expression, on the basis of the following considerations contrary to article 19 of the Covenant. First, the courts found that the author held opinions which were critical of the policies of the Government of the Republic of Korea; secondly, North Korea has criticized the Government of South Korea in that it distorts South Korean reality; thirdly, North Korea is characterized as an anti-State organization, which has been formed for the purpose of upstaging the government of South Korea (article 2 of the National Security Law); fourthly, the author wrote and published material containing criticism similar to that voiced by North Korea *vis-à-vis* South Korea; fifthly, the author must have known about that criticism; and, finally, the author's activities must have been undertaken for the benefit of North Korea and therefore amount to praise and encouragement of that country's regime.

3.3 Counsel refers to the observations of the Human Rights Committee, which were adopted after consideration of the initial report of the Republic of Korea under article 40 of the Covenant. CCPR/C/79/Add.6, adopted during the Committee's 45th session (Oct.-Nov. 1992), paragraphs 6 and 9.

Here, the Committee observed that:

"[Its] main concern relates to the continued operation of the National Security Law. Although the particular situation in which the Republic of Korea finds itself has implications on public order in the country, its influence ought not to be overestimated. The Committee believes that ordinary laws and specifically applicable criminal laws should be sufficient to deal with offences against national security. Furthermore, some issues addressed by the National Security Law are defined in somewhat vague terms, allowing for broad interpretation that may result in sanctioning acts that may not truly be dangerous for State security [...] [T]he Committee recommends that the State party intensify its efforts to bring its legislation more into line with the provisions of the Covenant. To that end, a serious attempt ought to be made to phase out the National Security Law, which the Committee perceives as a major obstacle to the full realization of the rights enshrined in the Covenant and, in the meantime, not to derogate from certain basic rights [...]."

3.4 Finally, it is contended that although the events for which the author was convicted and sentenced occurred before the entry into force of the Covenant for the Republic of Korea on 10 July 1990, the courts delivered their decisions in the case after that date and therefore should have applied article 19, paragraph 2, of the Covenant in the case.

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

4.1 In its submission under rule 91 of the rules of procedure, the State party argues that as the communication is based on events which occurred prior to the entry into force of the Covenant for the Republic of Korea, the complaint is inadmissible *ratione temporis* inasmuch as it is based on these events.

4.2 The State party acknowledges that the author was found guilty on charges of violating the National Security Law from January 1989 to May 1990. It adds, however, that the complaint fails to mention that Mr. Kim was also convicted for organizing illegal demonstrations and instigating acts of violence on several occasions during the period from January 1989 to May 1990. During these demonstrations, according to the State party, participants "threw thousands of Molotov cocktails and rocks at police stations, and other government offices. They also set 13 vehicles on fire and injured 134 policemen". These events all took place before 10 July 1990, date of entry into force of the Covenant for the State party: they are thus said to be outside the Committee's competence *ratione temporis*.

4.3 For events occurring *after* 10 July 1990, the question is whether the rights protected under the Covenant were guaranteed to Mr. Kim. The State

party contends that all rights of Mr. Kim under the Covenant, in particular his rights under article 14, were observed between the date of his arrest (13 May 1990) and that of his release (12 August 1992).

4.4 Concerning the alleged violation of article 19, paragraph 2, of the Covenant, the State party argues that the author has failed to identify clearly the basis of his claim and that he has merely based it on the assumption that certain provisions of the National Security Law are incompatible with the Covenant, and that criminal charges based on these provisions of the National Security Law violate article 19, paragraph 2. The State party submits that such a claim is outside the Committee's scope of jurisdiction; it argues that under the Covenant and the Optional Protocol, the Committee cannot consider the (abstract) compatibility of a particular law, or the provisions of a State party's law, with the Covenant. Reference is made to the Views of the Human Rights Committee on communication No. 55/1979¹, which are said to support the State party's conclusions.

4.5 On the basis of the above, the State party requests the Committee to declare the communication inadmissible both *ratione temporis*, inasmuch as events prior to 10 July 1990 are concerned, and because of the author's failure to substantiate a violation of his rights under the Covenant for events which occurred *after* that date.

5.1 In his comments, the author notes that what is at issue in his case are not the events (i.e. before 10 July 1990) which initiated the violations of his rights, but the subsequent judicial procedures which led to his conviction by the courts. Thus, he was punished, *after* the entry into force of the Covenant for the Republic of Korea for having contravened the National Security Law. He notes that as his activities were only the peaceful expression of his opinions and thoughts within the meaning of article 19, paragraph 2, of the Covenant, the State party had a duty to protect the peaceful exercise of this right. In this context, the State authorities and in particular the courts were duty-bound to apply the relevant provisions of the Covenant according to their ordinary meaning. In the instant case, the courts did not consider article 19, paragraph 2, of the Covenant when trying and convicting the author. In short, to punish the author for exercising his right to freedom of expression *after* the Covenant became effective for the Republic of Korea entailed a violation of his right under article 19, paragraph 2.

5.2 Counsel observes that the so-called illegal demonstrations and acts of violence referred to by

¹ Case No. 55/1979 (*Alexander MacIsaac v. Canada*), Views adopted on 14 October 1982, paragraphs 10 to 12.

the State party are irrelevant to the instant case; what he raises before the Committee does not concern the occasions on which he was punished for having organized demonstrations. This does not mean, counsel adds, that his client's conviction under the Law on Demonstrations and Assembly were reasonable and proper: it is said to be common that leaders of opposition groups in the Republic of Korea are convicted for each and every demonstration staged anywhere in the country, under an "implied conspiracy theory".

5.3 The author reiterates that he has *not* raised the issue of the National Security Law's compatibility with the Covenant. He does indeed express his view that, as the Committee acknowledged in its Concluding Observations on the State party's initial report, the said law remains a serious obstacle to the full realization of Covenant rights. However, he stresses that his communication concerns "solely the fact that he was punished for his peaceful exercise of the right to freedom of expression, in violation of article 19, paragraph 2, of the Covenant".

The Committee's admissibility decision

6.1 At its 56th session, the Committee considered the admissibility of the communication.

6.2 The Committee took note of the State party's argument that as the present case was based on events which occurred prior to the entry into force of the Covenant and the Optional Protocol for the Republic of Korea, it should be deemed inadmissible *ratione temporis*. In the instant case the Committee did not have to refer to its jurisprudence under which the effects of a violation that continued after the Covenant entered into force for the State party might themselves constitute a violation of the Covenant, since the violation alleged by the author was his *conviction* under the National Security Law. As this conviction took place after the entry into force of the Covenant on 10 July 1990 (24 August 1990 for conviction; 11 January 1991 for the appeal, and 26 April 1991 for the Supreme Court's judgement), the Committee was not precluded *ratione temporis* from considering the author's communication.

6.3 The State party had argued that the author's rights were fully protected during the judicial procedures against him, and that he was challenging in general terms the compatibility of the National Security Law with the Covenant. The Committee did not share this assessment. The author claimed that he had been convicted under article 7, paragraphs 1 and 5, of the National Security Law, for mere acts of expression. He further claimed that no proof was presented either of specific intention to endanger state security, or of any actual harm caused thereto. These claims did not amount to an abstract challenge of the compatibility of the National Security Law

with the Covenant, but to an argument that the author had been the victim of a violation by the State party of his right to freedom of expression under article 19 of the Covenant. This argument had been sufficiently substantiated to require an answer by the State party on the merits.

6.4 The Committee was satisfied, on the basis of the material before it, that the author had exhausted all available domestic remedies within the meaning of article 5, paragraph 2, of the Optional Protocol; it noted in this context that the State party had not objected to the admissibility of the case on this ground.

7. On 14 March 1996, the Human Rights Committee therefore decided that the communication was admissible inasmuch as it appeared to raise issues under article 19 of the Covenant.

State party's merits submission and counsel's comments

8.1 In its submission, dated 21 February 1997, the State party explains that its Constitution guarantees its citizens fundamental rights and freedoms, including the right to freedom of conscience, freedom of speech and the press and freedom of assembly and association. These freedoms and rights may be restricted by law only when necessary for national security, the maintenance of law and order or for public welfare. The Constitution stipulates further that even when such restriction is imposed, no essential aspect of the freedom or right shall be violated.

8.2 The State party submits that it maintains the National Security Law as a minimal legal means of safeguarding its democratic system which is under a constant security threat from North Korea. The law contains some provisions which partially restrict freedoms or rights for the protection of national security, in accordance with the Constitution Article 1 of the National Security Law reads: "The purpose of this law is to control anti-State activities which endanger the national security, so that the safety of the State as well as the existence and freedom of the citizens may be secured." Article 7, paragraph 1, reads "Any person who has praised or has encouraged or sided with the activities of an anti-State organization or its members or a person who has been under instruction from such an organization, or who has benefited an anti-State organization by other means shall be punished by penal servitude for a term not exceeding seven years." Paragraph 5 of article 7 reads: "Any person who has, for the purpose of committing the actions as stipulated in the above paragraphs, produced, imported, duplicated, kept in custody, transported, disseminated, sold or acquired documents, drawings

or other similar means of expression shall be punished by the same penalty as set forth in each paragraph."

8.3 According to the State party, the author overstepped the limits of the right to freedom of expression. In this context, the State party refers to the reasoning by the Appeals Section of the Seoul Criminal District Court in its judgement of 11 January 1991, that there was enough evidence to conclude that the author was engaged in anti-State activities for the benefit of North Korea, and that the materials which he distributed and the demonstrations which he sponsored and which resulted in serious public disorder, posed a clear danger to the existence of the State and its free-democratic public order. In this connection, the State party argues that the exercise of freedom of expression should not only be conducted in a peaceful manner but also be directed towards a peaceful aim. The State party points out that the author produced and disseminated materials to the public by which he encouraged and propagandized the North Korean ideology of making the Korean Peninsula communist by force. Furthermore, the author organized illegal demonstrations with massive violence against the police. The State party submits that these acts caused a serious threat to the public order and security and resulted in a number of casualties.

8.4 In conclusion, the State party submits that it is firmly of the view that the Covenant does not condone any acts of violence or violence-provoking acts committed in the name of the exercise of the right to freedom of expression.

9.1 In his comments on the State party's submission, counsel reiterates that the author's conviction under the Law on Demonstration and Assembly and the Law on Punishment of Violent Activities is not the issue in this communication. Counsel argues that the author's conviction under those laws cannot justify his conviction under the National Security Law for his allegedly enemy-benefiting expressions. Counsel therefore submits that if the expressions in question did not put the security of the country in danger, the author should not have been punished under the NSL.

9.2 Counsel notes that the author's electoral rights have been restored by the State party, and that the author was elected as a member of the National Assembly in the general election in April 1996. Because of this, counsel questions the grounds of the author's conviction for allegedly encouraging and propagandizing the North Korean ideology of making the Korean Peninsula communist by force.

9.3 According to counsel, the State party, through the NSL, has been stifling democracy under the banner of protecting it. In this connection, counsel

argues that the essence of a democratic system is the guarantee of peaceful exercise of freedom of expression.

9.4 Counsel submits that the State party has not proved beyond reasonable doubt that the author had put the security of the country in danger by disseminating documents. According to counsel, the State party has failed to establish any relation between North Korea and the author and has failed to show what kind of threat the author's expressions had posed to the security of the country. Counsel submits that the author's use of his freedom of expression was not only peaceful but also directed towards a peaceful aim.

9.5 Finally, counsel refers to the ongoing process towards democracy in Korea, and claims that the present democratization is due to sacrifices of many people like the author. He points out that many of the country's activists who had been convicted as communists under the NSL are now playing important roles as members of the National Assembly.

10.1 In a further submission, dated 21 February 1997, the State party reiterates that the author was also convicted for organizing violent demonstrations, and emphasizes that the reasons for convicting him under the NSL were that he had aligned himself with the unification strategy of North Korea by arguing for unification in printed materials which were disseminated to about 4000 participants at the Founding Convention of the National Democratic Movement Coalition and that activities such as helping to implement North Korea's strategy constitute subversive acts against the State. In this connection, the State party notes that it has technically been at war with North Korea since 1953 and that North Korea continues to try to destabilize the country. The State party therefore argues that defensive measures designed to safeguard democracy are necessary, and maintains that the NSL is the absolute minimal legal means necessary to protect liberal democracy in the country.

10.2 The State party explains that the author's electoral rights were restored because he did not commit a second offence for a given period of time after having completed his prison term, and to facilitate national reconciliation. The State party submits that the fact that the author's rights were restored does not negate his past criminal activities.

10.3 The State party agrees with counsel that freedom of expression is one of the essential elements of a free and democratic system. It emphasizes, however, that this freedom of expression cannot be guaranteed unconditionally to people who wish to destroy and subvert the free and democratic system itself. The State party explains that the simple expression of ideologies, or academic

research on ideologies, is not punishable under the NSL, even if these ideologies are incompatible with the liberal democratic system. However, acts committed under the name of freedom of speech but undermining the basic order of the liberal democratic system of the country are punishable for reasons of national security.

10.4 With regard to counsel's argument that the State party has failed to establish that a relation between the author and North Korea existed and that his actions were a serious threat to national security, the State party points out that North Korea has attempted to destabilize the country by calling for the overthrow of South Korea's "military-fascist regime" in favour of a "people's democratic government", which would bring about "unification of the fatherland" and "liberation of the people". In the documents, distributed by the author, it was argued that the Government of South Korea was seeking the continuation of the country's division and dictatorial regime; that the Korean people had been struggling for the last half century against US and Japanese neo-colonial influence, which aims at the continued division of the Korean peninsula and the oppression of the people; that nuclear weapons and American soldiers should be withdrawn from South Korea, since their presence posed a great threat to national survival and to the people; and that joint military exercises between South Korea and the USA should be stopped.

10.5 The State party submits that it is seeking peaceful unification, and not the continuation of the division as argued by the author. The State party further takes issue with the author's subjective conviction about the presence of US forces and US and Japanese influence. It points out that the presence of US forces has been an effective deterrent to prevent North Korea from making the peninsula communist through military force.

10.6 According to the State party, it is obvious that the author's arguments are the same as that of North Korea, and that his activities thus both helped North Korea and followed its strategy and tactics. The State party agrees that democracy means allowing different voices to be heard but argues that there should be a limit to certain actions so as not to cause damage to the basic order necessary for national survival. The State party submits that it is illegal to produce and distribute printed materials that praise and promote North Korean ideology and further its strategic objective to destroy the free and democratic system of the Republic of Korea. It argues that such activities, directed at furthering these violent aims, cannot be construed as peaceful.

11. Counsel for the author, by letter of 1 June 1998, informs the Committee that he has no further comments to make.

Examination of the merits

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

12.2 The Committee observes that, in accordance with article 19 of the Covenant, any restriction on the right to freedom of expression must cumulatively meet the following conditions: it must be provided by law, it must address one of the aims set out in paragraph 3 (a) and (b) of article 19 (respect of the rights and reputation of others; protection of national security or of public order, or of public health or morals), and it must be necessary to achieve a legitimate purpose.

12.3 The restriction of the author's right to freedom of expression was indeed provided by law, namely the National Security Law as it is then stood; it is clear from the courts' decisions that in this case the author would also be likely to have been convicted if he had been tried under the law as it was amended in 1991, although this is not an issue in this case. The only question before the Committee is whether the restriction on freedom of expression, as invoked against the author, was necessary for one of the purposes set out in article 19, paragraph 3. The need for careful scrutiny by the Committee is emphasised by the broad and unspecific terms in which the offence under the National Security Law is formulated.

12.4 The Committee notes that the author was convicted for having read out and distributed printed material which were seen as coinciding with the policy statements of the DPRK (North Korea), with which country the State party was in a state of war. He was convicted by the courts on the basis of a finding that he had done this with the intention of siding with the activities of the DPRK. The Supreme Court held that the mere knowledge that the activity could be of benefit to North Korea was sufficient to establish guilt. Even taking that matter into account, the Committee has to consider whether the author's political speech and his distribution of political documents were of a nature to attract the restriction allowed by article 19 (3), namely the protection of national security. It is plain that North Korean policies were well known within the territory of the State party and it is not clear how the (undefined) "benefit" that might arise for the DPRK from the publication of views similar to their own created a risk to national security, nor is it clear what was the nature and extent of any such risk. There is no indication that the courts, at any level, addressed those questions or considered whether the contents of the speech or the documents had any additional effect upon the audience or readers such as to

threaten public security, the protection of which would justify restriction within the terms of the Covenant as being *necessary*.

12.5 The Committee considers, therefore, that the State party has failed to specify the precise nature of the threat allegedly posed by the author's exercise of freedom of expression, and that the State party has not provided specific justifications as to why over and above prosecuting the author for contraventions of the Law on Assembly and Demonstration and the Law on Punishment of Violent Activities (which forms no part of the author's complaint), it was necessary for national security, also to prosecute the author for the exercise of his freedom of expression. The Committee considers therefore that the restriction of the author's right to freedom of expression was not compatible with the requirements of article 19, paragraph 3, of the Covenant.

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

14. Under article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy.

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

APPENDIX

Individual opinion submitted by Mr. Nisuke Ando pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the Views of the Committee on communication No.574/1994, Keun-Tae Kim v. the Republic of Korea

I am unable to agree with the Committee's Views in this case that "the restriction of the author's right to freedom of expression was not compatible with the

requirements of article 19, paragraph 3, of the Covenant". (para. 12.5)

According to the Committee, "there is no indication that the courts ... considered whether the contents of the speech [by the author] or the documents [distributed by him] had any additional effect upon the audience or readers such as to threaten public security" (para.12.4) and "the State party has not provided specific justifications as to why over and above prosecuting the author for contraventions of the Law on Assembly and Demonstration and the Law on Punishment of Violent Activities (which forms no part of the author's complaint), it was necessary for national security, also to prosecute the author for the exercise of his freedom of expression". (para. 12.5)

However, as noted by the State party, the author was "convicted for organizing illegal demonstrations and instigating acts of violence on several occasions during the period from January 1989 to May 1990. During these demonstrations ... participants "threw thousands of Molotov cocktails and rocks at police stations, and other government offices. They also set vehicles on fire and injured 134 policemen". (para.4.2) In this connection the Committee itself "notes that the author was convicted for having read out and distributed printed material which expressed opinions ... coinciding with the policy statements of DPRK (North Korea), with which country the State party was formally in a state of war". (para. 12.4. See also the explanation of the State party in paras. 10.4 and 10.5)

The author's counsel argues that "the author's conviction under the Law on Demonstration and Assembly and the Law on Punishment of Violent Activities is not the issue in this communication" and that "the author's conviction under those laws cannot justify his conviction under the National Security Law for his allegedly enemy-benefiting expressions". (para. 9.1)

Nevertheless, the author's reading out and distributing the printed material in question, for which he was convicted under these laws, were the very acts for which he was convicted under the National Security law and which lead to the breach of public order as described by the State party. In fact, counsel fails to refute that the author's reading out and distributing the printed material in question did lead to the breach of public order, which might have been perceived by the State party as threatening national security.

I do share the concern of counsel that some provisions of the National Security Law are too broadly worded to prevent their abusive application and interpretation. Unfortunately, however, the fact remains that South Korea was invaded by North Korea in the 1950's and the East-West détente has not fully blossomed on the Korean Peninsula yet. In any event the Committee has no information to prove that the afore-mentioned acts of the author did not entail the breach of public order, and under article 19, paragraph 3, of the Covenant the protection of "public order" as well as the protection of "national security" are legitimate grounds to restrict the exercise of the right to freedom of expression.

Communication No. 577/1994

Submitted by: Rosa Espinoza de Polay

Alleged victim: Victor Alfredo Polay Campos

State party: Peru

Declared admissible: 15 March 1996 (fifty-sixth session)

Date of adoption of Views: 6 November 1997 (sixty-first session)

Subject matter: Trial and conditions of detention of convicted leader of terrorist group

Procedural issues: Complaint pending before another international instance

Substantive issues: Trial before “faceless courts” and breach of due process guarantees - Inhuman and degrading treatment and conditions of detention

Articles of the Covenant: 2 (1), 7, 10 (1), 14 (1) (2) and (3) (b) and (d)

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

Finding: Violation [articles 7, 10, paragraph 1, 14, paragraphs 1, 2 and 3 (b) and (d)]

1. The author of the communication is Rosa Espinoza de Polay, a Peruvian citizen currently residing in Nantes, France. She submits the communication on behalf of her husband, Victor Alfredo Polay Campos, a Peruvian citizen currently detained at the Maximum Security Prison in the Callao Naval Base, Lima, Peru. She claims that he is the victim of violations by Peru of articles 2, paragraph 1; 7; 10; 14 and 16, of the International Covenant on Civil and Political Rights.

The facts as submitted by the author

2.1 The author's husband is the leader of the “Revolutionary Movement Túpac Amaru” (*Movimiento Revolucionario Túpac Amaru*). On 9 June 1992, he was arrested in Lima. On 22 July 1992, he was transferred to the “Miguel Castro Castro” prison in Yanamayo, near the city of Puno which is situated at an altitude of 4,000 metres. Conditions of detention at this prison are said to be inhuman. The author submits that for a period of nine months her husband was in solitary detention for 23 and a half hours a day, in a cell measuring 2 by 2 metres, without electricity or water; he was not allowed to write or to speak to anyone and was only allowed out of his cell once a day, for 30 minutes. The author further submits that the temperature in the prison is constantly between 0 and minus 5 degrees, and that the food is deficient.

2.2 On 3 April 1993, Victor Alfredo Polay Campos was tried in the Yanamayo prison by a so-called “tribunal of faceless judges” established under

special anti-terrorist legislation. Such a body consists of judges who are allowed to cover their faces, so as to guarantee their anonymity and prevent them from being targeted by active members of terrorist groups. Mr. Polay Campos was convicted and sentenced to life imprisonment; it is claimed that his access to legal representation and the preparation of his defence were severely restricted. While the author does not specify the crime(s) of which her husband is convicted, it transpires from the file that he was convicted of “aggravated terrorism”.

2.3 On 26 April 1993, he was transferred to the Callao Naval Base Prison near Lima. In this connection, the author forwarded a newspaper clipping showing Victor Polay Campos handcuffed and locked up in a cage. The author claims that, during the journey from Yanamayo to Callao, her husband was beaten and administered electric shocks.

2.4 The author further submits that her husband is held in a subterranean cell where sunlight only penetrates for 10 minutes a day, through a small opening in the ceiling. During the first year of his prison sentence, he was not permitted visits by any friends or relatives, nor was he allowed to write to anyone or to receive correspondence. A delegation of the International Committee of the Red Cross has been allowed to visit him.

2.5 As to the requirement of exhaustion of domestic remedies, the author submits that her husband's lawyer appealed against conviction and sentence, but that the Tribunal's Appeal Section confirmed the decision taken at first instance. The author further submits that the lawyer, Dr. Eduardo Diaz Canales, was himself imprisoned in June 1993 solely for having her husband and that since then “everything has been paralysed”. On 3 June 1994, Mr. Polay Campos' mother filed with the Constitutional Court a *recurso de amparo* (request for habeas corpus) on his behalf with respect to his ill-treatment. This action was dismissed, according to the author, on an unspecified date.

2.6 On 3 August 1993, the Constituent Assembly of Peru re-established the death penalty for acts of terrorism. The author fears that this new provision will be applied with retroactive effect to her husband and that, accordingly, he might well be sentenced to death.

2.7 The author does not state whether the same matter has been submitted to another instance of international investigation or settlement. The Committee has ascertained, however, that another case concerning the author's husband was submitted to the Inter-American Commission on Human Rights, where it is registered as case 11.048 but is not currently under examination.

The complaint

3. The author submits that the above situation reveals that her husband is a victim of violations by Peru of article 2, paragraph 1, and articles 7, 10, 14 and 16 of the Covenant.

State party's information and observations and counsel's comments

4.1 By submission of 1 February 1995, the State party asked the Committee to cease considering the communication, observing that the author had been tried in accordance with the legislation relating to acts of terrorism, in total respect of his human rights. It added that the author was being treated correctly by the prison authorities, as attested to by the periodic visits carried out by delegates of the International Committee of the Red Cross.

4.2 The State party further submitted, in a note verbale dated 1 February 1995, that, with respect to the alleged ill-treatment of the author's husband, he had been visited by delegates of the Red Cross and on 20 December 1994 by the District Attorney and a court-registered doctor. Neither had found any traces of ill-treatment of Mr. Polay Campos, and the muscular contraction condition and the emotional stress he was suffering were described as normal symptoms of incarceration.

4.3 In a further submission dated 21 March 1995, the State party stated that the author had not submitted any new arguments and did not challenge the State party's submission. The State party did not, however, specifically address or refute the author's allegations of ill-treatment and torture of her husband.

5. The author commented on this submission but did not provide new evidence.

The Committee's admissibility decision

6.1 During its 56th session in March 1996, the Committee considered the admissibility of the communication. It noted that a case concerning Mr. Polay Campos had been referred to the Inter-American Commission on Human Rights, where it had been registered as case No. 11.048 in August 1992, but that the Commission had indicated that it had no plans to prepare a report on the case within

the next 12 months. In the circumstances, the Committee did not find that it was precluded, under article 5, paragraph 2 (a), of the Optional Protocol, from considering the communication. As of October 1997, the situation remained the same.

6.2 As to the complaint that Mr. Polay Campos had been tortured and subjected to treatment in violation of articles 7 and 10, the Committee considered that the facts as submitted appeared to raise issues under the Covenant, notably under articles 7 and 10 thereof.

6.3 Concerning the claim that the death penalty might be applied retroactively to Mr. Polay Campos, no evidence had been adduced to the effect that the provisions of new Peruvian legislation expanding the application of the death penalty had been retroactively applied to him. Accordingly, the Committee deemed this allegation inadmissible pursuant to article 2 of the Optional Protocol.

6.4 The Committee noted that the author had formulated detailed allegations about her husband's conditions of detention and the alleged incompatibility of the procedure before the Special Military Tribunal with article 14. It took further note of the State party's contention that the criminal proceedings against Mr. Polay Campos had followed established procedures under current Peruvian anti-terrorist legislation. It concluded that this contention was to be examined on the merits.

6.5 On 15 March 1996, therefore, the Committee declared the communication admissible. The State party was requested, in particular, to forward to the Committee copies of the relevant reports of delegates of the International Committee of the Red Cross on their visits to Mr. Polay Campos and of the District Attorney and the doctor who had visited and examined Mr. Polay Campos on 20 December 1994, as well as reports of subsequent visits. The State party was urged to provide Mr. Polay Campos with adequate medical treatment at his place of detention. The State party was further requested to provide detailed information about the operation of special tribunals established under Peruvian anti-terrorist legislation, and about the victim's current conditions of detention.

The State party's merits observations

7.1 In three submissions dated 27 August, 12 and 28 November 1996, the State party provided copies of some of the reports requested by the Committee, as well as information about the medical treatment given to Mr. Polay Campos and his current conditions of detention. It did not, however, provide information about Mr. Polay Campos' conditions of detention at the Castro Castro prison at Yanamayo, or about the allegation that he was ill-treated during

his transfer from Yanamayo to the maximum security detention facility at the Callao naval base.

7.2 The State party noted that two documents concerning Mr. Polay Campos had been submitted upon his transfer to the Callao Naval Base. One was a psychological evaluation, done on 23 July 1992 in Puno (close to the Yanamayo prison), in which the alleged victim's appearance and health were described as 'normal'; the other was Mr. Polay Campos' file as prepared by a department of the Ministry of Justice.

7.3 As to Mr. Polay Campos' state of health, the State party forwarded copies of three reports. The first, dated 26 April 1993, concluded that his general appearance and health were normal (*apreciación general: ... despierto, ... orientado en tiempo, espacio y persona. Algo ansioso, no refiere molestia ninguna*). It also noted that Mr. Polay Campos' body bore no scars or other signs of ill-treatment ("*... piel y anexos: no signos de lesiones primarias y secundarias*").

7.4 The second report provided by the State party concerned the visit to Mr. Polay Campos on 20 December 1994 by the District Attorney and a court-registered doctor (see paragraph 4.2 above). It noted that Mr. Polay Campos was indeed suffering from muscular contraction, due primarily to the psychological stress caused by the conditions of his incarceration. It further stated that Mr. Polay Campos was experiencing pain in his left shoulder, to be treated with medication (Piroxican). The report observed that the emotional stress to which the author was subjected would require the prescription of sedatives so that Mr. Polay Campos might sleep properly and, ideally, continued psychological treatment. Otherwise, Mr. Polay Campos was described as being in good health, and the clinical tests carried out on him had not revealed any signs of physical abuse or pressure. Mr. Polay Campos had confirmed that he had received medical attention every two weeks, and that on the last occasion the drug Piroxican had been prescribed; he had further confirmed that every time he experienced health problems he was treated by a doctor and received the appropriate medication. He also received whatever dental treatment was required.

7.5 The third report, drawn up on an unspecified date in 1996, again concluded that Mr. Polay Campos' health was normal (*buen estado general, lucido, orientado en espacio, persona y tiempo, comunicativo, entímico asintomática - peso 76 kgs*), and that there were no signs that, as his mother had reported, his eyesight was deteriorating ("*visión y campo visual conservados ...*"). This last report includes a summary of all medical visits and lists the medications prescribed for Mr. Polay

Campos' treatment. The State party re-emphasized that since his transfer to the Callao naval base, Victor Polay Campos had been receiving medical examinations approximately every two weeks and whenever his condition required. He had received, and continued to receive, psychiatric and dental examinations.

7.6 The State party reiterated that Mr. Polay Campos had also received regular visits from delegates of the International Committee of the Red Cross, who had corroborated the reports on his health given by the doctors of the Callao naval base. It added that it never received any written reports from the Red Cross delegates, as the visits to Mr. Polay Campos were carried out on a confidential basis. According to a list furnished by the State party, Mr. Polay Campos was visited by Red Cross delegates on 21 occasions between early December 1993 and the end of August 1996; from that list, it transpires that the longest lapse of time between two such visits was three months and 28 days (between 25 October 1994 and 22 February 1995).

7.7 As to the current conditions of detention of Victor Polay Campos, the State party provided the following information about his entitlements:

- 30 minutes of daily walk or sport in the prison courtyard;
- One 30-minute visit by two family members per month;
- Three hours weekly to listen to cassettes on a walk-man;
- Laundry once a week;
- One haircut every two weeks;
- Three meals per day;
- Access to reading material and books;
- And possibility to correspond with family members (*familiares cercanos*).

7.8 The State party did not provide any information about Mr. Polay Campos' trial or about the general procedures followed by the so-called "tribunals of faceless judges". It merely forwarded a copy of the legal opinion of the Prosecutor General (*Fiscal supremo*) dated 21 April 1993 to the effect that the verdict handed down by the Special Chamber of the Superior Court of Lima (of 3 April 1993) had been arrived at in accordance with procedural requirements, and was therefore valid. The Supreme Court endorsed this conclusion on 24 May 1993. The State party confirmed that the judgment of the Special Chamber of the Superior Court of Lima had become final, and that there was no record of any request for review of the sentence (*recurso de revisión*) having been filed on behalf of Victor Polay Campos.

Examination on the merits

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

8.2 Two issues arise in the present case: first, whether the conditions of detention of Mr. Polay Campos, and the ill-treatment he allegedly has been subjected to, amount to a violation of articles 7 and 10 of the Covenant, and, secondly, whether his trial before a panel of anonymous judges (“faceless judges”) constituted a violation of article 14, paragraph 1, of the Covenant.

8.3 As to the first issue, the Committee notes that the State party did not provide any information about Mr. Polay Campos' detention at the Castro Castro prison in Yanamayo from 22 July 1992 to 26 April 1993 or on the circumstances of his transfer to the Callao Naval Base, whereas it did provide information on the victim's conditions of detention subsequent to his incarceration at Callao. The Committee deems it appropriate to deal separately with these two distinct periods of detention.

Detention from 22 July 1992 to 26 April 1993 and transfer from Yanamayo to Callao

8.4 The author claims that Victor Polay Campos was detained incommunicado from the time of his arrival at the prison in Yanamayo until his transfer to the Callao Naval Base detention centre. The State party has not refuted this allegation; nor has it denied that Mr. Polay Campos was not allowed to speak or to write to anyone during that time, which also implies that he would have been unable to talk to a legal representative, or that he was kept in his unlit cell for 23 and a half hours a day in freezing temperatures. In the Committee's opinion, these conditions amounted to a violation of article 10, paragraph 1, of the Covenant.

8.5 The author contends that her husband was beaten and subjected to electric shocks during his transfer to the Callao Naval Base facility, and that he was displayed to the media in a cage on that occasion. Although this allegation was not addressed by the State party, the Committee considers that the author did not adequately substantiate her allegation concerning the beating and the administration of electric shocks during the transfer to Callao. It accordingly makes no finding on articles 7 and 10, paragraph 1, of the Covenant on this count. On the other hand, it is beyond dispute that during his transfer to Callao Mr. Polay Campos was displayed to the press in a cage: this, in the Committee's opinion, amounted to degrading

treatment contrary to article 7 and to treatment incompatible with article 10, paragraph 1, since it failed to respect Mr. Polay Campos' inherent and individual human dignity.

Detention at Callao from 26 April 1993 to the present

8.6 As to the detention of Victor Polay Campos at Callao, it transpires from the file that he was denied visits by family and relatives for one year following his conviction, i.e. until 3 April 1994. Furthermore, he was unable to receive and to send correspondence. The latter information is corroborated by a letter dated 14 September 1993 from the International Committee of the Red Cross to the author, which indicates that letters from Mr. Polay Campos' family could not be delivered by Red Cross delegates during a visit to him on 22 July 1993, since delivery and exchange of correspondence were still prohibited. In the Committee's opinion, this total isolation of Mr. Polay Campos for a period of a year and the restrictions placed on correspondence between him and his family constitute inhuman treatment within the meaning of article 7 and are inconsistent with the standards of human treatment required under article 10, paragraph 1, of the Covenant.

8.7 As to Mr. Polay Campos' general conditions of detention at Callao, the Committee has noted the State party's detailed information about the medical treatment Mr. Polay Campos has received and continues to receive, as well as his entitlements to recreation and sanitation, personal hygiene, access to reading material and ability to correspond with relatives. No information has been provided by the State party on the claim that Mr. Polay Campos continues to be kept in solitary confinement in a cell measuring two metres by two, and that apart from his daily recreation, he cannot see the light of day for more than 10 minutes a day. The Committee expresses serious concern over the latter aspects of Mr. Polay Campos' detention. The Committee finds that the conditions of Mr. Polay Campos' detention, especially his isolation for 23 hours a day in a small cell and the fact that he cannot have more than 10 minutes' sunlight a day, constitute treatment contrary to article 7 and article 10, paragraph 1, of the Covenant.

The trial of Mr. Polay Campos

8.8 As to Mr. Polay Campos' trial and conviction on 3 April 1993 by a special tribunal of “faceless judges”, no information was made available by the State party, in spite of the Committee's request to this effect in the admissibility decision of 15 March 1996. As indicated by the Committee in its preliminary comments of 25 July 1996 on the Third

Periodic Report of Peru and its Concluding Observations of 6 November 1996,¹ such trials by special tribunals composed of anonymous judges are incompatible with article 14 of the Covenant. It cannot be held against the author that she furnished little information about her husband's trial: in fact, the very nature of the system of trials by “faceless judges” in a remote prison is predicated on the exclusion of the public from the proceedings. In this situation, the defendants do not know who the judges trying them are and unacceptable impediments are created to their preparation of their defence and communication with their lawyers. Moreover, this system fails to guarantee a cardinal aspect of a fair trial within the meaning of article 14 of the Covenant: that the tribunal must be, and be seen to be, independent and impartial. In a system of trial by “faceless judges”, neither the independence nor the impartiality of the judges is guaranteed, since the tribunal, being established ad hoc, may comprise serving members of the armed forces. In the Committee’s opinion, such a system also fails to safeguard the presumption of innocence, which is guaranteed by article 14, paragraph 2. In the circumstances of the case, the Committee concludes that paragraphs 1, 2 and 3 (b) and (d) of article 14 of the Covenant were violated.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the

¹ See the annual report of the Committee for 1996 (A/51/40), paragraphs 350 and 363 on the same report. See document CCPR/C/79/Add.72 (18 November 1996), paragraph 11.

International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee constitute violations of article 7 and article 10, paragraph 1, of the Covenant as regards Mr. Polay Campos' detention at Yanamayo, public display in a cage during his transfer to Callao and detention in total isolation during his first year of incarceration at Callao and the conditions of his continuing detention at Callao, and of article 14, paragraph 1, as regards his trial by a tribunal of “faceless judges”.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Victor Polay Campos with an effective remedy. The victim was sentenced on the basis of a trial that failed to provide the basic guarantees of a fair trial. The Committee considers that Mr. Polay Campos should be released unless Peruvian law provides for the possibility of a fresh trial that does offer all the guarantees required by article 14 of the Covenant.

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

Communication No. 586/1994

Submitted by: Joseph Frank Adam [represented by counsel]

Alleged victim: The author

State party: Czech Republic

Declared admissible: 16 March 1995 (fifty-third session)

Date of adoption of Views: 23 July 1996 (fifty-seventh session)

Subject matter: Alleged discrimination in the application of law on restitution of confiscated property

Procedural issues: Admissibility *ratione materiae* and *ratione temporis* – Continuing effect of the alleged violation – Exhaustion of domestic remedies

Substantive issues: Prohibition of discrimination

Articles of the Covenant: 2 (3) (a), and 26

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

Finding: Violation [article 26]

1. The author of the communication is Joseph Frank Adam, an Australian citizen, born in Australia of Czech parents, residing in Melbourne, Australia. He submits the communication on his own behalf and on that of his two brothers, John and Louis. He claims that they are victims of a violation of

article 26 of the International Covenant on Civil and Political Rights by the Czech Republic. The Optional Protocol entered into force for the Czech Republic on 12 June 1991.¹

The facts as submitted by the authors

2.1 The author's father, Vlatislav Adam, was a Czech citizen, whose property and business were confiscated by the Czechoslovak Government in 1949. Mr. Adam fled the country and eventually moved to Australia, where his three sons, including the author of the communication, were born. In 1985, Vlatislav Adam died and, in his last will and testament, left his Czech property to his sons. Since then, the sons have been trying in vain to have their property returned to them.

2.2 In 1991, the Czech and Slovak Republic enacted a law rehabilitating Czech citizens who had left the country under Communist pressure and providing for restitution of their property or compensation for the loss thereof. On 6 December 1991, the author and his brothers, through Czech solicitors, submitted a claim for restitution of their property. Their claim was rejected on the grounds that they did not fulfil the then applicable dual requirement of Act 87/91 that applicants have Czech citizenship and be permanent residents in the Czech Republic.

2.3 Since the rejection of their claim, the author has on several occasions petitioned the Czech authorities, explaining his situation and seeking a solution, all to no avail. The authorities in their replies refer to the legislation in force and argue that the provisions of the law, limiting restitution and compensation to Czech citizens are necessary and apply uniformly to all potential claimants.

The complaint

3. The author claims that the application of the provision of the law, that property be returned or its loss be compensated only when claimants are Czech citizens, makes him and his brothers victims of discrimination under article 26 of the Covenant.

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

4.1 On 23 August 1994, the communication was transmitted to the State party under rule 91 of the Committee's rules of procedure.

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.

4.2 In its submission dated 17 October 1994, the State party states that the remedies in civil proceedings such as that applicable in the case of Mr. Adam are regulated by Act No. 99/1963, by the Code of Civil Procedure as amended, in particular by Act No. 519/1991 and Act No. 263/1992.

4.3 The State party quotes the texts of several sections of the law, without, however, explaining how the author should have availed himself of those provisions. It concludes that since 1 July 1993, Act No. 182/1993, on the Constitutional Court, stipulates the citizens' right to appeal also to the Constitutional Court of the Czech Republic. Finally, Mr. Adam did not make use of the possibility of filing a claim before the Constitutional Court.

5.1 By letter of 7 November 1994, the author informs the Committee that the State party is trying to circumvent his rights by placing his property and business on sale.

5.2 By letter of 5 February 1995, the author contests the relevance of the State party's general information and reiterates that his lawyers in Czechoslovakia have been trying to obtain his property since his father died in 1985. He submits that as long as Czech law requires claimants to be Czech citizens, there is no way that he can successfully claim his father's property in the Czech courts.

Committee's decision on admissibility

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

6.2 The Committee observed *ratione materiae* that although the author's claims relate to property rights, which are not themselves protected in the Covenant, he also alleged that the confiscations under prior Czechoslovak governments were discriminatory and that the new legislation of the Czech Republic discriminates against persons who are not Czech citizens. Therefore, the facts of the communication appeared to raise an issue under article 26 of the Covenant.

6.3 The Committee also considered whether the violations alleged can be examined *ratione temporis*. It noted that although the confiscations took place before the entry into force of the Covenant and of the Optional Protocol for the Czech Republic, the new legislation that excludes claimants who are not Czech citizens has continuing consequences subsequent to the entry into force of the Optional Protocol for the Czech Republic, which could entail discrimination in violation of article 26 of the Covenant.

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

6.5 With respect to the requirement of exhaustion of domestic remedies, the Committee recalled that only such remedies have to be exhausted which are both available and effective. The applicable law on confiscated property does not allow for restoration or compensation to the author. Moreover, the Committee noted that the author has been trying to recover his property since his father died in 1985 and that the application of domestic remedies can be deemed, in the circumstances, unreasonably prolonged.

7. Based on those considerations, the Human Rights Committee decided on 16 March 1995 that the communication was admissible inasmuch as it appeared to raise issues under article 26 of the Covenant.

Observations of the State party

8.1 By note verbale of 10 November 1995, the State party reiterates its objections to the admissibility of the communication, in particular that the author has not availed himself of all national legal remedies.

8.2 It argues that the author is an Australian citizen permanently resident in Australia. As to the alleged confiscation of his father's property in 1949, the State party explains that the Decree of the President of the Republic No. 5/1945 did not represent the conveyance of the ownership title to the State but only restricted the owner in exercising his ownership right.

8.3 The author's father, Vlatislav Adam, was a citizen of Czechoslovakia and left the country for Australia, where the author was born. If indeed Vlatislav Adam willed his Czech property to his sons by virtue of his testament, it is not clear whether he owned any Czech property in 1985, and the author has not explained what steps, if any, he has taken to acquire the inheritance.

8.4 In 1991 the Czech and Slovak Federal Republic adopted a law (Act No. 87/1991) on extrajudicial rehabilitations which rehabilitates Czech citizens who left the country under Communist oppression, and stipulates the restitution of their property and compensation for their loss. On 6 December 1991, the author and his brothers claimed the restitution of their property. Their claim was rejected because they were not persons entitled to the recovery of property pursuant to the Extrajudicial

Rehabilitation Act, since they did not satisfy the conditions of citizenship of the Czech Republic and of permanent residence there. The author failed to invoke remedies available against the decision denying him restitution. Moreover, the author failed to observe the legal six-month term to claim his property, the statute of limitations having ended on 1 October 1991. Nevertheless, pursuant to article 5, paragraph 4, of the Extrajudicial Rehabilitation Act, the author could have filed his claims in court until 1 April 1992, but he did not do so.

8.5 The author explains that his attorney felt that there were no effective remedies and that was why they did not pursue their appeals. That subjective assessment is irrelevant to the objective existence of remedies. In particular, he could have lodged a complaint with the Constitutional Court.

8.6 Czech constitutional law, including the Charter of Fundamental Rights and Freedoms, protects the right to own property and guarantees inheritance. Expropriation is possible only in the public interest and on the basis of law, and is subject to compensation.

8.7 The Extrajudicial Rehabilitation Act was amended in order to eliminate the requirement of permanent residence; that occurred pursuant to a finding of the Constitutional Court of the Czech Republic of 12 July 1994. Moreover, in cases in which the real estate cannot be surrendered, financial compensation is available.

8.8 Articles 1 and 3 of the Charter of Fundamental Rights and Freedoms stipulate equality in the enjoyment of rights and prohibits discrimination. The right to judicial protection is regulated in article 36 of the Charter. The Constitutional Court decides about the abrogation of laws or of their individual provisions if they are in contradiction with a constitutional law or international treaty. A natural person or legal entity is entitled to file a constitutional complaint.

8.9 The author not only failed to invoke the relevant provisions of the Extrajudicial Rehabilitation Act in a timely fashion. He could also have lodged a claim to domestic judicial authorities based on the direct applicability of the International Covenant on Civil and Political Rights, with reference to article 10 of the Constitution, article 36 of the Charter of Fundamental Rights and Freedoms, articles 72 and 74 of the Constitutional Court Act, and article 3 of the Civil Procedure Code. If the author had availed himself of those procedures and if he had not been satisfied with the result, he could still have sought review of legal regulations pursuant to the Constitutional Court Act.

9.1 The State party also endeavours to explain the broader political and legal circumstances of the case

and contends that the author's presentation of the facts is misleading. After the democratization process begun in November 1989, the Czech and Slovak Republic, and subsequently the Czech Republic, made a considerable effort to remove some of the property injustices caused by the communist regime. The endeavour to return property, as stipulated in the Rehabilitation Act, was in part a voluntary and moral act of the Government and not a duty or legal obligation. "It is also necessary to point out the fact that it was not possible and, with regard to the protection of the justified interests of the citizens of the present Czech Republic, even undesirable, to remove all injuries caused by the past regime over a period of forty years."

9.2 The precondition of citizenship for restitution or compensation should not be interpreted as a violation of the prohibition of discrimination pursuant to article 26 of the Covenant. "The possibility of explicit restriction to acquiring the ownership of certain property by only some persons is contained in article 11, paragraph 2, of the Charter of Fundamental Rights and Freedoms. This article states that the law may determine that certain property may only be owned by citizens or legal entities having their seat in the Czech and Slovak Federal Republic. In this respect, the Charter speaks of citizens of the Czech and Slovak Federal Republic, and after January 1, 1993, of citizens of the Czech Republic."

9.3 The Czech Republic considers the restriction to exercising rights of ownership by imposing the condition of citizenship to be legitimate. In this connection, it refers not only to article 3, paragraph 1, of the Charter of Fundamental Rights and Freedoms, containing the non-discrimination clause, but above all to the relevant clauses of international human rights treaties.

The author's comments

10.1 As to the facts of the claim, the author explains that in January 1949 his father was ordered out of his business, which was confiscated. He had to hand over the books and the bank accounts and was not even able to take his own personal belongings. As to his departure from Czechoslovakia, he was not able to emigrate legally but had to cross the border illegally into West Germany, where he remained in a refugee camp for a year before being able to emigrate to Australia.

10.2 He disputes the State party's contention that he did not avail himself of domestic remedies. He reiterates that he himself and his attorneys in Prague have tried to assert the claim to inheritance since his father died, in 1985, without success. In December 1991, he and his brothers submitted their claim,

which was rejected for lack of citizenship and permanent residence. Moreover, their claim was by virtue of inheritance. He further complains about unreasonably prolonged proceedings in the Czech Republic, in particular that whereas their letters to the Czech Government reached the Czech authorities within a week, the replies took 3 to 4 months.

10.3 As to their Czech citizenship, they claim that the consulate in Australia informed them that if both mother and father were Czech citizens, the children were automatically Czech citizens. However, the Czech Government subsequently denied that interpretation of the law.

Review of admissibility

11.1 The State party has requested that the Committee revise its decision on admissibility on the grounds that the author has not exhausted domestic remedies. The Committee has taken into consideration all arguments presented by the State party and the explanations given by the author. In the circumstances of this case, considering that the author is abroad and that his lawyers are in the Czech Republic, it would seem that the imposition of a strict statute of limitations for lodgings claims by persons abroad is unreasonable. In the author's case, the Committee has taken into account the circumstance that he has been trying to assert his inheritance claim since 1985 and that his Prague attorneys have been unsuccessful, ultimately not because of the statute of limitations but because the Rehabilitation Act, as amended, stipulates that only citizens can claim restitution or compensation. Since the author, according to his last submission, which has not been disputed by the State party (para. 10.3) is not a Czech citizen, he cannot invoke the Rehabilitation Act in order to obtain the return of his father's property.

11.2 In the absence of legislation enabling the author to claim restitution, recourse to the Constitutional Court cannot be considered an available and effective remedy for purposes of article 5, paragraph 2 (b), of the Optional Protocol. In the circumstances of this case, such a remedy must be considered as an extraordinary remedy, since the right being challenged is not a constitutional right to restitution as such, bearing in mind that the Czech and Slovak legislature considered the 1991 Rehabilitation Act to be a measure of moral rehabilitation rather than a legal obligation (para. 9.1). Moreover, the State party has argued that it is compatible with the Czech Constitution and in keeping with Czech public policy to restrict the ownership of property to citizens.

11.3 Under these circumstances, the Committee finds no reason to set aside its decision on admissibility of 16 March 1995.

Examination of the merits

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

12.2 The communication was declared admissible only insofar as it may raise issues under article 26 of the Covenant. As the Committee has already explained in its decision on admissibility (para. 6.2 above), the right to property, as such, is not protected under the Covenant. However, a confiscation of private property or the failure of 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.

12.3 The issue before the Committee is whether the application of Act 87/1991 to the author and his brothers entailed a violation of their right to equality before the law and to the equal protection of the law. The Committee observes that the confiscations themselves are not here at issue but rather the denial of restitution to the author and his brothers, whereas other claimants under the Act have recovered their properties or received compensation therefor.

12.4 In the instant case, the author has been affected by the exclusionary effect of the requirement in Act 87/1991 that claimants be Czech citizens. The question before the Committee, therefore, is whether the precondition to restitution or compensation is 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 Covenant². 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.

12.5 In examining whether the conditions for restitution or compensation are compatible with the Covenant, the Committee must consider all relevant factors, including the original entitlement of the author's father to the property in question and the nature of the confiscation. The State party itself has acknowledged that the confiscations under the Communist governments were injurious and that is why specific legislation was enacted to provide for a

² See *Official Records of the General Assembly, Forty-second Session, Supplement No. 40 (A/42/40)*, annex VIII.D, communication No. 182/1994, (*Zwaan-de Vries v. the Netherlands*), Views adopted on 9 April 1987, para. 13.

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 author's original entitlement to his property by virtue of inheritance was not predicated on citizenship, the Committee finds that the condition of citizenship in Act 87/1991 is unreasonable.

12.6 In this context, the Committee recalls its rationale in its views on communication No. 516/1992 (*Simunek et al. v. the Czech Republic*)³, in which it considered that the authors in that case and many others in analogous situations had left Czechoslovakia because of their political opinions and had sought refuge from political persecution in other countries, where they eventually established permanent residence and obtained a new citizenship. Taking into account that the State party itself is responsible for the departure of the author's parents in 1949, it would be incompatible with the Covenant to require the author and his brothers to obtain Czech citizenship as a prerequisite for the restitution of their property or, alternatively, for the payment of appropriate compensation.

12.7 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 dispositive in determining a breach of article 26 of the Covenant, but rather the consequences of the enacted legislation. Whatever the motivation or intent of the legislature, a law may still contravene article 26 of the Covenant if its effects are discriminatory.

12.8 In the light of the above considerations, the Committee concludes that Act 87/1991 and the continued practice of non-restitution to non-citizens of the Czech Republic have had effects upon the author and his brothers that violate their rights under article 26 of the Covenant.

13.1 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 author and his brothers constitutes a violation of article 26 of the International Covenant on Civil and Political Rights.

13.2 In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author and his brothers with an effective remedy, which may be compensation if the property in question cannot be

³ *Ibid.*, *Fiftieth Session, Supplement No. 40 (A/50/40)*, vol. II, annex X.K.

returned. The Committee further encourages the State party to review its relevant legislation to ensure that neither the law itself nor its application is discriminatory.

13.3 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 90 days, information about the measures taken to give effect to the Committee's views.

APPENDIX

*Individual opinion submitted
by Mr. Nisuke Ando pursuant to rule 94, paragraph 3, of
the Committee's rules of procedure,
concerning the Views of the Committee on communication
No. 586/1994,*

Joseph Frank Adam v. the Czech Republic

Considering the Human Rights Committee's Views on communication No. 586/1994, I do not oppose the adoption by the Committee of the Views in the instant case. However, I would like to point to the following:

First, under current rules of general international law, States are free to choose their economic system. As a matter of fact, when the United Nations adopted the International Covenant on Civil and Political Rights in 1966, the then Socialist States were managing planned economies under which private ownership was largely restricted or prohibited in principle. Even nowadays not a few States parties to the Covenant, including those adopting market-oriented economies, restrict or prohibit foreigners from private ownership of immovable properties in their territories.

Second, consequently, it is not impossible for a State party to limit the ownership of immovable properties in its territory to its nationals or citizens, thereby precluding their wives or children of different nationality or citizenship from inheriting or succeeding to those properties. Such inheritance or succession is regulated by rules of private international law of the States concerned, and I am not aware of any universally recognized "absolute right of inheritance or of succession to private property".

Third, while the International Covenant on Civil and Political Rights enshrines the principle of non-discrimination and equality before the law, it does not prohibit "legitimate distinctions" based on objective and reasonable criteria. Nor does the Covenant define or protect economic rights as such. This means that the Human Rights Committee should exercise utmost caution in dealing with questions of discrimination in the economic field. For example, restrictions or prohibitions of certain economic rights, including the right of inheritance or succession, which are based on nationality or citizenship, may well be justified as legitimate distinctions.

Communication No. 588/1994

Submitted by: Errol Johnson [represented by counsel]

Alleged victim: The author

State party: Jamaica

Declared admissible: 22 March 1996 (fifty-sixth session)

Date of adoption of Views:* 22 March 1996 (fifty-sixth session)

Subject matter: Prolonged detention on death row of individual under sentence of death

Procedural issues: n.a.

Substantive issues: Death Row Phenomenon - Inhuman and degrading treatment - Respect of due process guarantees in a capital case

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

Article of the Optional Protocol and Rules of Procedure: 4, paragraph 2, and rule 85

Finding: Violation [article 14, paragraphs 3 (c) and 5; 6]

1. The author of the communication is Errol Johnson, a Jamaican citizen who, at the time of submission of his communication, was awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of articles 6, 7, 10, paragraph 1, and 14, paragraphs 1, 3 (c), (g) and 5, of the International Covenant on Civil and Political Rights. The author is represented by counsel. In early 1995, the offence of which the author was convicted was classified as non-capital

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

murder, and his death sentence was commuted to life imprisonment on 16 March 1995.

The facts as presented by the author

2.1 The author was, together with a co-defendant, Irvine Reynolds, convicted of the murder of one Reginald Campbell and sentenced to death on 15 December 1983 in the Clarendon Circuit Court. His application for leave to appeal was dismissed by the Court of Appeal on 29 February 1988; a reasoned appeal judgment was issued on 14 March 1988. On 9 July 1992, at separate hearings, the Judicial Committee of the Privy Council dismissed the petitions for special leave to appeal of the author and of Mr. Reynolds.

2.2 Reginald Campbell, a shopkeeper, was found dead in his shop at around 9:00 a.m. on 31 October 1982. The post mortem evidence showed that he died from stab wounds to the neck. A witness for the prosecution testified that, earlier in the morning at approximately 6:00 a.m., he had seen Mr. Campbell in his garden, as well as two men who were waiting in the vicinity of the shop. At an identification parade held on 11 November 1982, this witness identified Mr. Reynolds but not the author as one of the men who had been waiting near the shop. Another prosecution witness testified that about one hour later on the same morning, he met Irvine Reynolds, whom he knew, and the author, whom he identified at an identification parade, coming from the direction of Campbell's shop. He walked with them for about two miles, observing that Reynolds played with a knife, that both men were carrying travel bags, and that both were behaving in a suspicious way. Thus, when a mini-bus was approaching them from the opposite direction, Reynolds scurried up the road embankment, as if trying to hide.

2.3 The prosecution further relied on evidence discovered by the police during a search of the rooms in which the author and Mr. Reynolds were living, in particular four cheques signed by Mr. Campbell, as well as items (running shoes, detergent, etc.) similar to those stolen from the shop. Furthermore, a caution statement allegedly made by Mr. Johnson to the police on 12 November 1982 was admitted into evidence after the *voir dire*; in it, the author declared that Reynolds had walked into the store to buy cigarettes, while he was waiting outside. He then heard a noise, went into the shop and saw Mr. Campbell bleeding on the ground, with Reynolds carrying a knife standing aside.

2.4 During the trial, the author and Reynolds presented an alibi defence. During the *voir dire*, the author denied under oath that he had dictated the above-mentioned statement to the police and claimed that he had been forced to sign a prepared statement.

He further testified that, after he had told the investigating officer that he refused to sign the statement until his legal representative had seen it, he was taken to the guards' room. There, an investigating officer, Inspector B., hit him four times on his knees with a baton; when he bent over, he was kicked in the stomach and hit on his head. He stated that blood was trickling down his ear when he signed the statement. This evidence was corroborated by Reynolds who, in an unsworn statement from the dock, noted that he had seen the author with blood running down the side of his head when walking past the guards' room. The investigating officers were cross-examined on the issue of ill-treatment by the defence during the *voir dire*, as well as in the presence of the jury.

2.5 At the close of the prosecution's case, the author's lawyer, a Queen's Counsel, argued that there was no case to answer, as the evidence went no further than showing that Errol Johnson had been present in the vicinity of the shop at the time of the murder. The judge rejected the no-case submission.

2.6 On appeal, the author's lawyer argued that the judge had failed to adequately direct the jury on the caution statement, so that the possibility of reaching a verdict of manslaughter was not left for its consideration. In counsel's opinion, the caution statement showed that, while the author was present at the scene, he was not a party to the crime. The Court of Appeal dismissed the argument, stating that "[t]he value of the statement was to rebut his alibi and to put him on the scene of the crime".

2.7 The main grounds on which the author's further petition for special leave to appeal to the Judicial Committee of the Privy Council was based were that:

– The trial judge erred in law in rejecting the "no case to answer" submission, where evidence produced by the prosecution was not capable of proving either that the author had himself committed the murder, or that he had participated in a joint enterprise which would have made him guilty of murder or manslaughter; and

– The direction of the judge on the nature of joint enterprise was confused, and that he failed to direct the jury properly as to which findings of fact arising in the case could give rise to a verdict of manslaughter.

2.8 Counsel notes that the author did not apply to the Supreme (Constitutional) Court of Jamaica for constitutional redress, as a constitutional motion would fail in the light of the precedents in the case law of the Judicial Committee, notably in the cases of *D.P.P. v. Nasralla*¹ and *Riley et al. v. Attorney-*

¹ 2 All E.R. 161 (1967).

*General of Jamaica*², where it held that the Constitution of Jamaica intended to prevent the enactment of unjust laws and not merely, as claimed by the applicants, unfair treatment under the law. Furthermore, even if it were considered that a constitutional remedy were available to the author in theory, it would be unavailable to him in practice since he lacks the resources to secure private legal representation, and no legal aid is made available for the purpose of constitutional motions. Reference is made in this context to the established jurisprudence of the Committee.

The complaint

3.1 It is argued that the author was detained on death row for over 10 years, and that if he were to be executed after such a delay, this would amount to cruel and degrading treatment and/or punishment, in violation of article 7 of the Covenant. In substantiation of his claim, counsel refers to the findings of the Judicial Committee of the Privy Council in *Pratt and Morgan v. Attorney-General of Jamaica* and of the Supreme Court of Zimbabwe in a recent case. The fact that the author was held on death row for so long under the appalling conditions of detention at St. Catherine District Prison is said to amount in itself to a violation of article 7.

3.2 Counsel contends that the beatings to which his client was subjected during police interrogation amount to a violation of articles 7 and 10, paragraph 1, of the Covenant. He recalls that the author did inform his lawyer about the beatings, that the lawyer raised the issue during the trial, that the author himself repeated his claim in a sworn and an unsworn statement during the trial, and that his co-defendant corroborated his version. By reference to the Committee's jurisprudence³ counsel argues that the physical and psychological pressure exercised by the investigating officers on the author, with a view to obtaining a confession of guilt, violates article 14, paragraph 3 (g), of the Covenant.

3.3 Counsel further alleges that the delay of 51 months between the author's trial and the dismissal of his appeal constituted a violation of article 14, paragraphs 3 (c) and 5, of the Covenant, and refers to the Committee's jurisprudence on this issue⁴. He forwards a copy of a letter from the author's lawyer in Jamaica, who indicates that there

² 2 All E.R. 469 (1982).

³ See Views on communication No. 253/1987 (*Paul Kelly v. Jamaica*), adopted on 8 April 1991.

⁴ e.g. Views on case No. 230/1987 (*Henry v. Jamaica*), adopted 1 November 1991, para. 8.4; case No. 282/1988 (*Leaford Smith v. Jamaica*), Views adopted 31 March 1993, para. 10.5; and case No. 203/1986 (*Muñoz Hermosa v. Peru*), Views adopted 4 November 1988, para. 11.3.

was a long delay in the preparation of the trial transcript. It further transpires from correspondence between the author and the Jamaica Council for Human Rights that the Council was informed on 26 June 1986 that the author's appeal was still pending. On 10 June 1987, the Council asked the Registrar of the Court of Appeal to forward the Notes of Evidence in the case. This request was reiterated in November and in December 1987. On 23 February 1988, the Council informed the author that it was unable to assist him, as it had still not received the trial transcript. The delays encountered in making available to the author the trial transcript and a reasoned summing up of the judge are said to have effectively denied him his right to have conviction and sentence reviewed by a higher tribunal according to law.

3.4 It is further submitted that the trial judge's failure to direct the jury adequately as to which findings of facts arising in the case might have allowed a verdict of manslaughter, amounted to a violation of article 14, paragraph 1, of the Covenant.

3.5 Finally, counsel argues that the imposition of a capital sentence upon completion of a trial in which the provisions of the Covenant were violated amounts to a violation of article 6, paragraph 2, of the Covenant, if no further appeal against the sentence is available.

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

4.1 In its observations of 13 February 1995, the State party does not formulate objections to the admissibility of the case and offers, "in the interest of expedition and in the spirit of cooperation", comments on the merits of the communication.

4.2 With regard to the claim that the length of time spent on death row constitutes a violation of article 7, the State party contends that the judgment of the Judicial Committee of the Privy Council of 2 November 1993 in *Pratt and Morgan v. Attorney-General of Jamaica* is not necessarily dispositive of all other cases where a prisoner has been held on death row for over five years. Rather, each case must be considered on its merits. In support of its argument, the State party refers to the Committee's Views in the case of *Pratt and Morgan*, where it was held that delays in the judicial proceedings did not *per se* constitute cruel, inhuman and degrading treatment within the meaning of article 7.

4.3 The State party notes that it is investigating the author's allegations of ill-treatment during interrogation and promises to transmit its findings "as soon as the investigations are complete". As of 16 October 1995, the results of said investigations had not been forwarded to the Committee.

4.4 As to the delay of 51 months between the author's trial and the dismissal of his appeal, the State party equally states that it is investigating the reasons for the delay. As of 16 October 1995, it had not forwarded to the Committee the result of said investigations.

4.5 The State party denies a violation of article 14, paragraph 1, on account of the inadequacy of the judge's instructions to the jury, and contends that this allegation relates to questions of facts and evidence in the case the examination of which, under the Committee's own jurisprudence, is not generally within its competence. It further denies a violation of article 6, paragraph 2, without giving reasons.

5.1 In his comments on the State party's submission, counsel agrees to the joint examination of the admissibility and the merits of the case. He reaffirms that his client is a victim of a violation of articles 7 and 10 (1), because of the length of time he remained confined to death row. He claims that the judgment of the Judicial Committee of the Privy Council of 2 November 1993 in *Pratt and Morgan* does constitute a relevant judicial precedent.

5.2 In the latter context, counsel submits that any execution that would take place more than five years after conviction would undoubtedly raise the "strong grounds" adduced by the Judicial Committee for believing that the delay would amount to inhuman and degrading treatment and punishment. He argues that on the basis of the Guidelines developed by the Judicial Committee, after a period of 3 1/2 to 5 years from conviction, an assessment of the circumstances of each case, with reference to the length of delay, the prison conditions and the age and mental state of the applicant, could amount to inhuman and degrading treatment. He further contends that incarceration on death row for over five years would *per se* constitute cruel and degrading treatment.

Admissibility considerations and examination of merits

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

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

6.3 The Committee observes that with the dismissal of the author's petition for special leave to appeal by the Judicial Committee of the Privy Council in July 1992, the author has exhausted domestic remedies for purposes of the Optional

Protocol. The Committee notes that the State party has not raised objections to the admissibility of the complaint and has forwarded comments on the merits so as to expedite the procedure. The Committee recalls that article 4, paragraph 2, of the Optional Protocol stipulates that the receiving State shall submit its written observations on the merits of a communication within six months of the transmittal of the communication to it for comments on the merits. The Committee reiterates that this period may be shortened, in the interest of justice, if the State party so wishes⁵. The Committee further notes that counsel for the author has agreed to the examination of the case on the merits at this stage.

7. The Committee, accordingly, decides that the case is admissible and proceeds, without further delay, to an examination of the substance of the author's claims, in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

8.1 The Committee first has to determine whether the length of the author's detention on death row since December 1983, i.e. over 11 years, amounts to a violation of articles 7 and 10, paragraph 1, of the Covenant. Counsel has alleged a violation of these articles merely by reference to the length of time Mr. Johnson has spent confined to the death row section of St. Catherine District Prison. While a period of detention on death row of well over 11 years is certainly a matter of serious concern, it remains the jurisprudence of this Committee that detention for a specific period of time does not amount to a violation of articles 7 and 10 (1) of the Covenant in the absence of some further compelling circumstances. The Committee is aware that its jurisprudence has given rise to controversy and wishes to set out its position in detail.

8.2 The question that must be addressed is whether the mere length of the period a condemned person spends confined to death row may constitute a violation by a State party of its obligations under articles 7 and 10 not to subject persons to cruel, inhuman and degrading treatment or punishment and to treat them with humanity. In addressing this question, the following factors must be considered:

(a) The Covenant does not prohibit the death penalty, though it subjects its use to severe restrictions. As detention on death row is a necessary consequence of imposing the death penalty, no matter how cruel, degrading and inhuman it may appear to be, it cannot, *of itself*, be regarded as a violation of articles 7 and 10 of the Covenant.

⁵ See Views on communication No. 606/1994 (*Clement Francis v. Jamaica*), adopted 25 July 1995, paragraph 7.4.

(b) While the Covenant does not prohibit the death penalty, the Committee has taken the view, which has been reflected in the Second Optional Protocol to the Covenant, that article 6 "refers generally to abolition in terms which strongly suggest that abolition is desirable⁶." Reducing recourse to the death penalty may therefore be seen as one of the objects and purposes of the Covenant.

(c) The provisions of the Covenant must be interpreted in the light of the Covenant's objects and purposes (article 31 of the Vienna Convention on the Law of Treaties). As one of these objects and purposes is to promote reduction in the use of the death penalty, an interpretation of a provision in the Covenant that may encourage a State party that retains the death penalty to make use of that penalty should, where possible, be avoided.

8.3 In light of these factors, the Committee must examine the implications of holding the length of detention on death row, *per se*, to be in violation of articles 7 and 10. The first, and most serious, implication is that if a State party executes a condemned prisoner after he has spent a certain period of time on death row, it will not be in violation of its obligations under the Covenant, whereas if it refrains from doing so, it will violate the Covenant. An interpretation of the Covenant leading to this result cannot be consistent with the Covenant's object and purpose. The above implication cannot be avoided by refraining from determining a definite period of detention on death row, after which there will be a presumption that detention on death row constitutes cruel and inhuman punishment. Setting a cut-off date certainly exacerbates the problem and gives the State party a clear deadline for executing a person if it is to avoid violating its obligations under the Covenant. However, this implication is not a function of fixing the maximum permissible period of detention on death row, but of making the time factor, *per se*, the determining one. If the maximum acceptable period is left open, States parties which seek to avoid overstepping the deadline will be tempted to look to the decisions of the Committee in previous cases so as to determine what length of detention on death row the Committee has found permissible in the past.

8.4 The second implication of making the time factor *per se* the determining one, i.e. the factor that turns detention on death row into a violation of the Covenant, is that it conveys a message to States parties retaining the death penalty that they should carry out a capital sentence as expeditiously as possible after it was imposed. This is not a message the Committee would wish to convey to States parties.

Life on death row, harsh as it may be, is preferable to death. Furthermore, experience shows that delays in carrying out the death penalty can be the necessary consequence of several factors, many of which may be attributable to the State party. Sometimes a moratorium is placed on executions while the whole question of the death penalty is under review. At other times the executive branch of government delays executions even though it is not feasible politically to abolish the death penalty. The Committee would wish to avoid adopting a line of jurisprudence which weakens the influence of factors that may very well lessen the number of prisoners actually executed. It should be stressed that by adopting the approach that prolonged detention on death row cannot, *per se*, be regarded as cruel and inhuman treatment or punishment under the Covenant, the Committee does not wish to convey the impression that keeping condemned prisoners on death row for many years is an acceptable way of treating them. It is not. However, the cruelty of the death row phenomenon is first and foremost a function of the permissibility of capital punishment under the Covenant. This situation has unfortunate consequences.

8.5 Finally, to hold that prolonged detention on death row does not, *per se*, constitute a violation of articles 7 and 10, does not imply that other circumstances connected with detention on death row may not turn that detention into cruel, inhuman and degrading treatment or punishment. The jurisprudence of the Committee has been that where compelling circumstances of the detention are substantiated, that detention may constitute a violation of the Covenant. This jurisprudence should be maintained in future cases.

8.6 In the present case, neither the author nor his counsel have pointed to any compelling circumstances, over and above the length of the detention on death row, that would turn Mr. Johnson's detention into a violation of articles 7 and 10. The Committee therefore concludes that there has been no violation of these provisions.

8.7 Regarding the claim under articles 7 and 14, paragraph 3(g) - i.e. that the author was beaten during police interrogation with a view to extracting a confession of guilt - the Committee reiterates that the wording of article 14, paragraph 3(g), namely that no one shall "be compelled to testify against himself or to confess guilt", must be understood in terms of the absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt⁷. Although the

⁶ See General Comment 6 [16] of 27 July 1982; also see Preamble to the Second Optional Protocol to the Covenant Aiming at the Abolition of the Death Penalty.

⁷ e.g. Views on communication No. 248/1987 (*G. Campbell v. Jamaica*), adopted 30 March 1992, paragraph 6.7

author's claim has not been refuted by the State party, which promised to investigate the allegation but failed to forward its findings to the Committee, the Committee observes that the author's contention was challenged by the prosecution during the trial and his confession statement admitted by the judge. The Committee recalls that it must consider allegations of violations of the Covenant in the light of all the written information made available to it by the parties (article 5, paragraph 1, of the Optional Protocol); in the instant case, this material includes the trial transcript. The latter reveals that the author's allegation was thoroughly examined by the court in a *voir dire*, 28 pages of the trial transcript being devoted to this issue, and that his statement was subsequently admitted by the judge after careful weighing of the evidence; similarly, the jury concluded to the voluntariness of the statement, thereby endorsing the judge's ruling that the author had not been ill-treated. There is no element in the file which allows the Committee to question the decision of the judge and the jury. It must further be noted that on appeal, author's counsel accepted the voluntariness of Mr. Johnson's statement and used it to secure a reduction of the charge against his client from murder to manslaughter. On the basis of the above, the Committee concludes that there has been no violation of articles 7 and 14, paragraph 3 (g).

8.8 The author has alleged a violation of article 14, paragraphs 3 (c) and 5, because of an unreasonably long delay of 51 months between his conviction and the dismissal of his appeal. The State party has promised to investigate the reasons for this delay but failed to forward to the Committee its findings. In particular, it has not shown that the delay was attributable to the author or to his legal representative. Rather, author's counsel has provided information which indicates that the author sought actively to pursue his appeal, and that responsibility for the delay in hearing the appeal must be attributed to the State party. In the Committee's opinion, a delay of four years and three months in hearing an appeal in a capital case is, barring exceptional circumstances, unreasonably long and incompatible with article 14, paragraph 3 (c), of the Covenant. No exceptional circumstances which would justify the delay are discernible in the present case. Accordingly, there has been a violation of article 14, paragraphs 3 (c) and 5, in as much as the delay in making the trial transcript available to the author prevented him from having his appeal determined expeditiously.

8.9 The Committee reiterates that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected, and which could no longer be remedied by appeal, constitutes a violation of article 6 of the Covenant. As the Committee noted in its General

Comment 6 [16], the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed...". Since the final sentence of death in the instance case was passed without having met the requirements for a fair trial set out in article 14, it must be concluded that the right protected by article 6 of the Covenant has been violated.

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

10. Pursuant to article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy. Aware of the commutation of the author's death sentence on 16 March 1995, the Committee considers that a further measure of clemency would be appropriate. 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 and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

APPENDIX I

Individual opinion submitted by Ms. Christine Chanet pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the Views of the Committee on communication No. 588/1994, Errol Johnson v. Jamaica

The development of the Committee's jurisprudence by a majority of its members in connection with the present communication prompts me not only to maintain the position I expressed in the *Barrett and Sutcliffe* case (Nos. 270 and 271/1988) through my individual opinion but also to explain it in greater detail.

The Views adopted in the present case (No. 588/1994) have led the Committee, which wishes to remain consistent, to conclude that detention on death row does not in itself constitute a violation of article 7; in other words, it does not constitute cruel, inhuman or degrading treatment – irrespective of the length of time spent

awaiting execution of the sentence, which may be 15 to 20 years or more.

There is nothing in the grounds for the decision that would enable the Committee, short of a complete reversal of its jurisprudence, to reach a different conclusion concerning an indefinite wait or a wait of several years.

The factors adduced in support of this position are as follows:

- The Covenant does not prohibit the death penalty;
- If the Covenant does not prohibit the death penalty, execution of this penalty cannot be prohibited;
- Before the execution can be carried out, some time must be allowed to elapse, in the interests of the convicted prisoner, who must have the opportunity to exhaust the relevant remedies;
- For the Committee to set a limit on this length of time would be to run the risk of provoking hasty execution. The Committee even goes so far as to state that life on death row is preferable to death.

However, the Committee, conscious of the risks of maximalist application of such a view by States, recognizes that keeping a person under death sentence on death row for a number of years is not a good way of treating him.

The position is very debatable for the following reasons:

- It is true that the Covenant does not prohibit the death penalty;
- It logically follows from this that execution of the penalty is also not forbidden and that the detention on death row, i.e. a certain period of time prior to execution, is in this sense inevitable;

On the other hand, one cannot rule out the conclusion that no time-lag can constitute cruel, inhuman or degrading treatment by postulating that awaiting death is preferable to death itself and that any sign to the contrary emanating from the Committee would encourage the State to proceed with a hasty execution.

This reasoning may be considered excessively subjective on two counts. In an analysis of human behaviour, it is not exceptional to find that a person suffering from an incurable illness, for example, prefers to take his own life rather than await the inevitably fatal outcome, thereby opting for immediate death rather than the psychological torture of a death foretold.

As to the "message" which the Committee refuses to send to States lest the setting of a time-limit provoke hasty execution, this again is a subjective analysis in that the Committee is anticipating a supposed reaction by the State.

In my view, we should revert to basic considerations of humanity and bring the discussion back to the strictly legal level of the Covenant itself.

There is no point in trying to find what is preferable in this area. Unquestionably, the fact of

knowing that one is to undergo the death penalty constitutes psychological torture. But is that a violation of article 7 of the Covenant? Is detention on death row in itself cruel, inhuman or degrading treatment?

Some authors maintain that it is. However, this argument comes up against the fact that the death penalty is not prohibited in the Covenant, even though the Covenant's silence on this point can give rise to interpretations which are excluded under the European Convention on Human Rights, article 2, paragraph 1, of which explicitly provides for capital punishment as an admissible derogation from the right to life. The very existence of the Optional Protocol contradicts this argument.

I therefore believe that being on death row cannot in itself be considered as cruel, inhuman or degrading treatment. However, it must be assumed that the psychological torture inherent in this type of waiting must, if it is not to constitute a violation of article 7 of the Covenant, be reduced by the State to the minimum length of time necessary for the exercise of remedies.

Consequently, the State must:

- Institute remedies;
- Prescribe reasonable time-limits for exercising and examining them;
- Execution can only be concomitant with exhaustion of the last remedy; thus, in the system obtaining in France before the Act of 9 October 1981 abolishing the death penalty, the announcement of the execution was conveyed to the convicted prisoner at the actual time of execution, when he was told "Your application for pardon has been refused".

This is not some kind of formula, since I believe there is no good way in which a State can deliberately end the life of a human being, coldly, and when that human being is aware of the fact. However, since the Covenant does not prohibit capital punishment, its imposition cannot be prohibited, but it is incumbent on the Human Rights Committee to ensure that the provisions of the Covenant as a whole are not violated on the occasion of the execution of the sentence.

Inevitably, each case must be judged on its merits: the physical and psychological treatment of the prisoner, his age and his health must be taken into consideration in order to evaluate the State's behaviour in respect of articles 7 and 10 of the Covenant. Similarly, the judicial procedure and the remedies available must meet the requirements of article 14 of the Covenant. Lastly, in the particular case, the State's legislation and behaviour and the conduct of the prisoner are elements providing a basis for determining whether or not the time-lag between sentencing and execution is of a reasonable character.

These are the limits to the subjectivity available to the Committee when exercising its control functions under the Covenant and the Optional Protocol, excluding factors such as what is preferable from the supposed standpoint of the prisoner, death or awaiting death, or fear of a possible misinterpretation by the State of the message contained in the Committee's decisions.

APPENDIX II

Individual opinion submitted by Mr. Prafullachandra N. Bhagwati, Mr. Marco T. Bruni Celli, Mr. Fausto Pocar and Mr. Julio Prado Vallejo pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the Views of the Committee on communication No. 588/1994,

Errol Johnson v. Jamaica

The development in the jurisprudence of the Committee with regard to the present communication obliges us to express views dissenting from those of the Committee majority. In several cases, the Committee decided that prolonged detention on death row does not *per se* constitute a violation of article 7 of the Covenant, and we could accept these decisions in the light of the specific circumstances of each communication under consideration.

The Views adopted by the Committee in the present case reveal, however, a lack of flexibility that would not allow to examine any more the circumstances of each case, so as to determine whether, in a given case, prolonged detention on death row constitutes cruel, inhuman or degrading treatment within the meaning of article 7 of the Covenant. The need of a case by case appreciation leads us to dissociate ourselves from the position of the majority, and to associate ourselves to the opinion of other members of the Committee who were not able to accept the majority views, in particular to the individual opinion formulated by Ms. Chanet.

APPENDIX III

Individual opinion submitted by Mr. Francisco José Aguilar Urbina pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the Views of the Committee on communication No. 588/1994,

Errol Johnson v. Jamaica

The Human Rights Committee has established in its jurisprudence that the death row phenomenon does not, *per se*, constitute a violation of article 7 of the International Covenant on Civil and Political Rights. The Committee has repeatedly maintained that the mere fact of being sentenced to death does not constitute cruel, inhuman or degrading treatment or punishment. On some occasions, I have agreed with this position, subject to the proviso that, as I also wish to make clear in this individual opinion, I believe that capital punishment in itself constitutes inhuman, cruel and degrading punishment.

In my opinion, the Committee is wrong to seek inflexibly to maintain its jurisprudence without clarifying, analysing and appraising the facts before it on a case-by-case basis. In the communication concerned (*Johnson v. Jamaica*), the Human Rights Committee's wish to be consistent with its previous jurisprudence has led it to rule that the length of detention on death row *is not in any case* contrary to article 7 of the Covenant.

The majority opinion seems to be based on the supposition that only a total reversal of the Committee's jurisprudence would allow it to decide that an excessively

long stay on death row could entail a violation of that provision. In arriving at that conclusion, the majority made a number of assumptions:

1. That the International Covenant on Civil and Political Rights does not prohibit the death penalty, though it subjects its use to severe restrictions;

2. That detention on "death row" is a necessary consequence of imposing the death penalty and that, no matter how cruel, degrading and inhuman it may appear to be, it cannot, *of itself*, be regarded as a violation of articles 7 and 10 of the Covenant;

3. That, while the Covenant does not prohibit the death penalty, it refers to its abolition in terms which strongly suggest that abolition is desirable;

4. That the provisions of the Covenant must be interpreted in the light of the objects and purposes of that instrument and that, as one of these objects and purposes is to promote reduction in the use of the death penalty, an interpretation that may encourage a State to make use of that penalty should be avoided.

On the basis of these assumptions, a majority of the members of the Human Rights Committee have arrived at certain conclusions which entail, in their opinion, a finding that there has been no violation of articles 7 and 10 of the Covenant on the part of the State that is the subject of the communication:

1. That a State party which executes a condemned person after he has spent a certain period of time awaiting execution would not be in violation of the provisions of the Covenant, whereas one which does not execute the prisoner would violate those provisions. This implies that the problem of length of detention on death row can be dealt with only by setting a cut-off date after which the Covenant would have been violated;

2. That making the time factor the one that determines a violation of the Covenant conveys a message to States parties that they should carry out a death sentence as expeditiously as possible after it is imposed;

3. That to hold that prolonged detention on death row does not, *per se*, constitute a violation of articles 7 and 10 of the Covenant does not imply that other circumstances connected with such detention may not turn it into cruel, inhuman or degrading punishment.

While subscribing to several of the arguments put forward by the majority, I agree with only the last of their conclusions. I consider the majority opinion debatable:

1. I agree that, while the International Covenant on Civil and Political Rights does not prohibit the death penalty, it does subject its use to severe restrictions;

2. I also agree that, since capital punishment is not prohibited, States parties which still include it among their penalties are not prevented from applying it - within the strict limits set by the Covenant - and that the existence of "death row" (in other words, a certain period of time between the handing down of a death sentence and the execution of the condemned person) is, therefore, inevitable

3. I also consider that there is no doubt that the Covenant suggests that abolition of the death penalty is desirable;

4. In any event, it cannot be denied that the provisions of the Covenant should be interpreted in the light of the object and purpose of this treaty. However, while I agree that one of the objects and purposes of the Covenant is to reduce the use of the death penalty, I believe that that is precisely as a consequence of a greater purpose, which is to limit the grounds for death sentences and, ultimately, to abolish the death penalty.

In the case of the present communication, and of the many which have been submitted against Jamaica during the last decade, it is regrettable that the State party, by refusing for the past 10 years to comply with its obligation to report to the Human Rights Committee under article 40 of the Covenant, has denied the Committee the opportunity to pronounce on the application of the death penalty in Jamaica as part of the procedure for consideration of reports. Jamaica was to have submitted its second periodic report on 1 August 1986 and 3 August 1991.

This means that, for 15 years, the Human Rights Committee has been prevented from considering whether the death penalty is imposed in Jamaica in accordance with the strict limits imposed by the Covenant.

I do not, however, agree with the conclusion, at which the majority have arrived, that it is, therefore, preferable for a condemned person to endure being on death row, regardless in any case of the length of time spent there. The arguments of the majority are, in any case, subjective and do not represent an objective analysis of treaty norms.

In the first place, it is stated as a basic assumption that awaiting execution is preferable to execution itself. This argument cannot be valid since, as I have said, communications such as the one under consideration can be viewed only in the light of the attendant circumstances; in other words, they can be decided only on a case-by-case basis.

Furthermore, a claim such as that of the majority is completely subjective. It represents an analysis of human behaviour which expresses the feelings of the members of the Committee, but which cannot be applied across the board. For example, it would not be surprising if a person condemned to death who was suffering from a terminal or degenerative illness preferred to be executed rather than remain on death row. It is not surprising that some people commit murder for the purpose of having the death penalty imposed on them; for them, every day spent on death row constitutes real torture.

5. I also disagree with the position that, in this case, to rule that the excessive length of time which Errol Johnson spent on death row constitutes a violation of the Covenant would be to convey a "message" to States parties that they should execute those condemned to death expeditiously. This, again, is a subjective opinion of the majority and represents the feelings of the Committee members rather than a legal analysis. Moreover, it presents the additional problem of defining a priori how States parties will behave.

In that regard, I also regret that the State party has not allowed the Committee to weigh its position on the imposition of the death penalty. Indeed, this is one of the facts which leads me to dissent from the majority opinion:

(a) I do not believe that it is possible to project the future behaviour of a State which has repeatedly refused to comply with its obligations under article 40 (submission of periodic reports), since the Committee has been unable to question the Government authorities on that specific point;

(b) The ultimate result has been to benefit a State which, for at least a decade, has refused to comply with its treaty obligations, giving it the benefit of the doubt with regard to behaviour which should have been clarified under the procedure set forth in article 40.

The Committee is not competent to decide what would be preferable in cases like that of the communication under consideration. Neither should it transform this communication into a mere hypothetical case in order to induce unspecified State officials to behave in a particular manner. Any opinion should be based on the concrete circumstances of Mr. Johnson's imprisonment.

Furthermore, any decision regarding this communication should be taken on a strictly legal basis. There is no doubt that the certainty of death constitutes torture for the majority of people; the majority of those sentenced to death are in a similar position. Independently of the fact that it is my philosophical conviction that the death penalty, and therefore its corollaries (being sentenced to death and awaiting execution) constitute inhuman, cruel and degrading punishment, I must ask myself whether those facts - and, in a case such as this one, the phenomenon of death row - are in violation of the International Covenant on Civil and Political Rights.

Any opinion comes up against the fact that the Covenant does not prohibit the death penalty. It cannot, therefore, be maintained that the death row phenomenon, *per se*, constitutes cruel, inhuman or degrading treatment. Nor can implementation of the death penalty be prohibited.

However, all States parties must minimize the psychological torture involved in awaiting execution. This means that the State must guarantee that the suffering to be endured by those awaiting execution will be reduced to the necessary minimum.

In that regard, the following guarantees are required:

1. The legal proceedings establishing the guilt of the person condemned to death must meet all the requirements laid down by article 14 of the Covenant;

2. The accused must have effective access to all necessary remedies until his guilt has been demonstrated beyond a doubt;

3. Reasonable time-limits must be set for the exercise of these remedies and for their review by independent courts;

4. Execution cannot take place until the condemned person's last remedy has been exhausted and until the death sentence has acquired final binding effect;

5. While awaiting execution, the condemned person must at all times be duly accorded humane

treatment; *inter alia*, he must not be subjected unnecessarily to the torture entailed by the fact of awaiting death.

The Human Rights Committee is responsible for ensuring that the provisions of the International Covenant on Civil and Political Rights are not violated as a consequence of the execution of a sentence. I therefore emphasize that the Committee must examine the circumstances on a case-by-case basis. The Committee must establish the physical and psychological conditions to which the condemned person has been subjected in order to determine whether the behaviour of the Government authorities is

in accordance with the provisions of articles 7 and 10 of the Covenant.

The Committee must therefore establish whether the laws and actions of the State, and the behaviour and conditions of the condemned person, make it possible to determine whether the time elapsed between sentencing and execution is reasonable and, on that basis, that it does not constitute a violation of the Covenant. These are the limits of the Human Rights Committee's competence to determine whether there has been compliance with, or violation of, the provisions of the International Covenant on Civil and Political Rights.

Communication No. 612/1995

Submitted by: José Vicente and Amado Villafañe Chaparro, Dioselina Torres Crespo, Hermes Enrique Torres Solis and Vicencio Chaparro Izquierdo [represented by counsel]

Alleged victims: José Vicente and Amado Villafañe Chaparro, Luís Napoleón Torres Crespo, Angel María Torres Aroyo and Antonio Hugues Chaparro Torres

State party: Colombia

Declared admissible: 14 March 1996 (fifty-sixth session)

Date of adoption of Views:* 29 July 1997 (sixtieth session)

Subject matter: Arrest and subsequent disappearance of indigenous community leaders by State party's military forces

Procedural issues: Exhaustion of domestic remedies

Substantive issues: Enforced disappearances and right to life - Unlawful and arbitrary detention
- Duty to investigate enforced disappearances
- Torture

Articles of the Covenant: 2 (3), 6 (1), 7, 9, 14 and 27

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

Finding: Violation [articles 6, 7 and 9]

1. The authors of the communication are José Vicente Villafañe Chaparro and Amado Villafañe Chaparro, filing a complaint on their own behalf, and Dioselina Torres Crespo, Hermes Enrique Torres Solis and Vicencio Chaparro Izquierdo, acting on behalf of their respective deceased fathers, Luís Napoleón Torres Crespo, Angel María Torres Aroyo and Antonio Hugues Chaparro Torres. The authors

are all members of the Arhuaco community, a Colombian indigenous group, residing in Valledupar, Department of Cesar, Colombia. It is submitted that they are victims of violations by Colombia of articles 2, paragraph 3; 6, paragraph 1; 7; 9; 14; and 27 of the International Covenant on Civil and Political Rights. They are represented by a lawyer, Mr. Federico Andreu Guzmán.

The facts as submitted by the authors

2.1 On 28 November 1990, at about 1 p.m., Luís Napoleón Torres Crespo, Angel María Torres Aroyo and Antonio Hugues Chaparro Torres boarded a bus in Valledupar for Bogotá, where they were scheduled to attend various meetings with government officials. The same day, at about 11 p.m., José Vicente Villafañe and his brother, Amado Villafañe, were arrested by soldiers from the No. 2 Artillery Battalion "La Popa" stationed in Valledupar. Lieutenant-Colonel Luís Fernando Duque Izquierdo, Commander of the Battalion, had issued a warrant to search the Villafañe brothers' houses, ordering that the search be carried out by Lieutenant Pedro Fernández Ocampo and four soldiers. The search warrant had been authorized on the basis of military intelligence to the effect that the two men were members of a support unit for the Guerrilla Group ELN ("Ejército de Liberación Nacional"), and that they were storing arms and

* In accordance with rule 85 of the rules of procedure, one member of the Committee, Mrs. Pilar Gaitan de Pombo, did not take part in the adoption of the Views.

material reserved exclusively for the use of the armed forces. The brothers were released on 4 December 1990, after considerable pressure had been brought to bear by the Arhuaco community.

2.2 Manuel de la Rosa Pertuz Pertuz was also arrested on 28 November 1990, when he left his house to help the Villafañe brothers; he was taken to the “La Popa” barracks, where he was allegedly ill-treated, blindfolded and interrogated by military officers. He was released on 29 November at about 7.15 p.m. Amarilys Herrera Araujo, the common-law wife of Amado Villafañe Chaparro, was also arrested on the night of 28 November 1990, taken to “La Popa” and interrogated. She was released at about 1 a.m. on 29 November 1990. In the last two cases, there was no arrest warrant, but both were deprived of the possibility of obtaining legal assistance.

2.3 It soon transpired that the Arhuaco leaders never reached their destination in Bogotá. On 12 December 1990, a delegation of the Arhuacos went to Curumani to verify the information they had received regarding the abduction of their leaders. It appeared that on 28 November 1990, the driver of the bus (on which the Arhuaco leaders had travelled) had reported to the police in Curumani that, at about 4 p.m., after stopping at a restaurant in Curumani, four armed men had forced three indigenous passengers to board a car; the police, however, had not followed up on the complaint.

2.4 On 13 December 1990, in the municipality of Bosconia, the Arhuaco delegation was informed that, on 2 December 1990, three corpses had been recovered in the vicinity of Bosconia; one in Bosconia itself, a second in the municipality of El Paso, and a third in Loma Linda near the river Arguari. No attempt had been made to identify the bodies, but the clothes and other characteristics listed on the death certificates indicated that the bodies were those of Luis Napoleon Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres. The death certificates further revealed that the three bodies showed traces of torture. The examining magistrate of Valledupar ordered the exhumation of the bodies. The first two bodies were exhumed on 14 December 1990, the third on 15 December. Members of the Arhuaco community called to identify the bodies confirmed that they were those of Luis Napoleon Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres. The necropsy revealed that they had been tortured and then shot in the head.

2.5 Still on 14 December 1990, the Arhuaco community arranged a meeting with government officials and the media in Valledupar. At this meeting, José Vicente Villafañe testified that when he and his brother were being held by the Battalion “La Popa”,

they were subjected to psychological and physical torture, and interrogated about the abduction, by a guerrilla group, of a landowner, one Jorge Eduardo Mattos. José Vicente Villafañe identified the commander of “La Popa”, Lieutenant-Colonel Luis Fernando Duque Izquierdo, and the chief of the battalion Intelligence Unit, Lieutenant Pedro Antonio Fernández Ocampo, as those responsible for his and his brother's ill-treatment. He further testified that, during interrogation and torture, they (the officers) claimed that “three other persons had been detained who had already confessed”, and threatened him that “if he did not confess they would kill other Indians”. Furthermore, on one day he was interrogated by the brother of Jorge Eduardo Mattos, Eduardo Enrique Mattos, who first offered him money in exchange for information on his brother's whereabouts, and then threatened that if he did not confess within 15 days they would kill more individuals of Indian origin. According to José Vicente Villafañe, it was clear from the fact that his arrest and the disappearance of the Arhuaco leaders took place on the same day, and from the threats he received, that Lieutenant Fernández Ocampo and Lieutenant-Colonel Duque Izquierdo were responsible for the murders of the three Arhuaco leaders, and that Eduardo Enrique Mattos had paid them to do so.

2.6 The Arhuaco community further accused the Director of the Office of Indigenous Affairs in Valledupar, Luis Alberto Uribe, of being an accessory to the crime, as he had accompanied the Arhuaco leaders to the bus station and was one of the very few who knew of the purpose and destination of the journey; furthermore, he had allegedly obstructed the community's efforts to obtain the immediate release of the Villafañe brothers.

2.7 As to the exhaustion of domestic remedies, it transpires that preliminary investigations in the case were first carried out by the examining magistrate of Court No. 7 of Valledupar (Juzgado 7° de Instrucción Criminal Ambulante de Valledupar); on 23 January 1991, the case was referred to the examining magistrate of Court No. 93 in Bogotá (Juzgado 93° de Instrucción Criminal Ambulante de Bogotá), and on 14 March 1991 to Court No. 65 in Bogotá. On 30 May 1991, the Commander of the Second Brigade of Barranquilla, in his capacity as judge on the military tribunal of first instance, requested the examining magistrate of Court No. 65 to discontinue the proceedings in respect of Lieutenant-Colonel Duque Izquierdo and Lieutenant Fernández Ocampo, as Military Court No. 15 (Juzgado 15° de Instrucción Penal Militar) had begun its own investigation in the case; furthermore, since the alleged offences had been committed in the course of duty by the officers concerned, i.e. in their military capacity, they fell exclusively within military jurisdiction.

2.8 The examining magistrate of Court No. 65 refused and asked the Disciplinary Tribunal to rule on the matter; on 23 July 1991, the Disciplinary Tribunal decided that the competence to try Lieutenant-Colonel Duque Izquierdo and Lieutenant Fernández Ocampo was indeed with the military courts, i.e. the Second Brigade of Barranquilla. There was one dissenting vote, as one magistrate considered that the conduct of the two officers was not directly related to their military status. It is stated that military criminal proceedings against the two accused were discontinued on 30 April 1992, with respect to the allegation made by the Villafañe brothers, and on 5 May 1992 with respect to the disappearance and subsequent murders of the three indigenous leaders. These decisions were confirmed by the High Military Court (Tribunal Superior Militar) on 8 March 1993 and in July 1993.

2.9 Meanwhile, the part of the criminal proceedings in which charges were brought against Eduardo Enrique Mattos and Luis Alberto Uribe had been referred to Court No. 93; on 23 October 1991, the Court acquitted both accused and ordered all criminal proceedings against them to be discontinued. Counsel then appealed to the High Court in Valledupar, which confirmed the decision of 23 October 1991; it found that the evidence against Luis Alberto Uribe was insufficient to prove any involvement in the murders, and also took into consideration the fact that Eduardo Enrique Mattos had died in the meantime.

2.10 The Human Rights Division of the Attorney-General's Office (Procuraduría Delegada para la Defensa de los Derechos Humanos) initiated independent disciplinary proceedings in the case. In a decision dated 27 April 1992, it found Lieutenant-Colonel Duque Izquierdo and Lieutenant Fernández Ocampo guilty of torturing José Vicente and Amado Villafañe, and of having participated in the triple murder of Luis Napoleon Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres. It ordered their summary dismissal from the army. The Director of the Office of Indigenous Affairs was, however, acquitted. Counsel submits that the findings of the Human Rights Division of the Attorney-General's Office have been consistently ignored by the Colombian authorities, as evidenced by Major-General Hernando Camilo Zuñiga Chaparro on 3 November 1994, in his reply to a request for information made by the Colombia section of the Andean Commission of Jurists. In this reply, he stated that the two officers had retired from the army, in December 1991 and September 1992, at their own request.

The complaint

3.1 It is submitted that the above situation reveals that the members of the Arhuaco community, Luis

Napoleon Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres, as well as the two Villafañe brothers, have been victims of violations by Colombia of articles 2, paragraph 3; 6, paragraph 1; 7; 9; 14 and 27 of the Covenant.

3.2 Counsel claims that the disappearance, on 28 November 1990, and subsequent execution of the three indigenous leaders, by members of the armed forces, constitutes a violation of article 6 of the Covenant.

3.3 Counsel claims that the abduction and subsequent murder of the three indigenous leaders, without so much as a warrant for their arrest, is a violation of article 9 of the Covenant.

3.4 The Villafañe brothers claim that the ill-treatment they were subjected to at the hands of the armed forces while detained at the No. 2 Battalion "La Popa", which included blindfolding and dunking in a canal, etc., constitutes a violation of article 7.

3.5 Furthermore, the interrogation of the Villafañe brothers, members of the indigenous community, by members of the armed forces in total disregard of the rules of due process, by denying them the assistance of a lawyer, and the execution of the three indigenous persons in blatant violation of the Colombian legal system, which expressly prohibits the imposition of the death penalty, is a violation of article 14 of the Covenant.

3.6 Finally, the Villafañe brothers claim that the arbitrary detention and torture inflicted on two members of the Arhuaco indigenous community and the disappearance and execution of three other members of this community, two of whom were spiritual leaders of the community, constitute a violation of the cultural and spiritual rights of the Arhuaco community within the meaning of article 27 of the Covenant.

The State party's information and observations

4.1 By submission of 22 March 1995, the State party submits that its authorities have been doing, and are doing, everything possible to bring to justice those responsible for the disappearance and murder of Luis Napoleon Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres. The State party contends that domestic remedies have not been exhausted in the case.

4.2 The State party summarizes the state of the disciplinary proceedings in the case as follows:

– Disciplinary proceedings were first instituted by the Human Rights Division of the Attorney-General's Office for the torture to which the Villafañe brothers were subjected and subsequently for the abduction and triple murder of Luis Napoleon Torres Crespo, Angel María Torres

Arroyo and Antonio Hugues Chaparro Torres. The result of this investigation was a recommendation that the two officers should be dismissed and that Alberto Uribe Oñate, Director of the Office of Indigenous Affairs in Valledupar, should be acquitted. The decision was appealed, but, on 27 October 1992, the ruling of the lower court was upheld.

– Criminal proceedings were initiated by Court No. 65 in Bogotá and by Military Court No. 15; the conflict of jurisdiction was settled in favour of the military's jurisdiction. The State party notes that a special agent was named from the Attorney-General's Office to appear in the proceedings. On 5 May 1993, the military court held that there was insufficient evidence to indict Lieutenant-Colonel Luis Fernando Duque Izquierdo and Lieutenant Pedro Fernández Ocampo (by then Captain) and that proceedings should be discontinued. This decision was upheld by the High Military Court.

– Meanwhile, on 23 October 1991, Criminal Court No. 93 had ordered the case against Alberto Uribe Oñate and Eduardo Enrique Mattos to be shelved; it also decided that the case should be sent back to the Valledupar Judicial Police for further investigations. In accordance with article 324 of the Code of Penal Procedure, preliminary investigations must continue until such time as there is sufficient evidence either to indict or to clear those allegedly responsible for a crime.

4.3 In his reply, counsel submits that the State party's allegation that domestic remedies exist is a fallacy, since, under the Colombian Military Code, there are no provisions enabling the victims of human rights violations or their families to institute criminal indemnity proceedings before a military court.

4.4 In a further submission of 8 December 1995, the State party observes that, when ruling on the appeal against the sentence of 26 August 1993 handed down by the Administrative Tribunal in Valledupar in respect of the participation of members of the military in the disappearance and subsequent murder of the three indigenous leaders, the Third Section of the Administrative Chamber of the State Council upheld the decision of the lower court that there was no evidence that they had taken part in the murder of the three leaders.

The Committee's admissibility decision

5.1 At its fifty-sixth session, the Committee examined the admissibility of the communication and took note of the State party's request that the communication should be declared inadmissible. With regard to the exhaustion of available domestic

remedies, the Committee noted that the victims' disappearance was reported immediately to the police in Curumani by the bus driver, that the complaint filed with the Human Rights Division of the Attorney-General's Office clearly indicated which army officers were held responsible for the violations and should be punished and that further proceedings were instituted in Criminal Court No. 93. Notwithstanding this material evidence, a military investigation was conducted during which the two officers were cleared and not brought to trial. The Committee considered that there were doubts about the effectiveness of remedies available to the authors in the light of the decision of Military Court No. 15. In these circumstances, it must be concluded that the authors diligently, but unsuccessfully, filed applications for remedies aimed at the criminal prosecution of the two military officers held to be responsible for the disappearance of the three Arhuaco leaders and the torture of the Villafañe brothers. More than five years after the occurrence of the events dealt with in the present communication, those held responsible for the death of the three Arhuaco leaders have not been indicted let alone tried. The Committee concluded that the authors had fulfilled the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

5.2 It had to be decided whether the disciplinary and administrative proceedings could be regarded as effective domestic remedies within the meaning of article 5, paragraph 2 (b). The Committee recalled that domestic remedies must not only be available, but also effective, and that the term "domestic remedies" must be understood as referring primarily to judicial remedies. The Committee considered that the effectiveness of a remedy also depended on the nature of the alleged violation. In other words, if the alleged offence is particularly serious, as in the case of violations of basic human rights, in particular the right to life, purely administrative and disciplinary remedies cannot be considered adequate and effective. This conclusion applied in particular in situations where, as in the present case, the victims or their families might not be party to or even intervene in the proceedings before military jurisdictions, thereby precluding any possibility of obtaining redress before these jurisdictions.

5.3 With regard to the complaint under article 27, the Committee considered that the authors had failed to substantiate how the actions attributed to the military and to the authorities of the State party violated the right of the Arhuaco community to enjoy its own culture or to practise its own religion. Accordingly, that part of the complaint was declared inadmissible.

5.4 In the light of paragraphs 5.1 and 5.2 above, the Committee considered that the authors had met the requirements of article 5, paragraph 2 (b), of the

Optional Protocol. Their complaints under articles 6, paragraph 1; 7; 9 and 14 of the Covenant were sufficiently substantiated, and could be considered on their merits. On 14 March 1996, the case was declared admissible.

The State party's information and observations on the merits and counsel's comments

6.1 In its submission under article 4, paragraph 2, of the Optional Protocol, dated 14 November 1996, the State party observes that difficulties of an internal nature arose in obtaining the information needed to reply to the Committee in the case at hand. It considers that the case should be declared inadmissible because of failure to exhaust available domestic remedies and indicates that it would be willing to reopen the case if new evidence warranting such a course came to light.

6.2 As far as the criminal proceedings are concerned, the State party submits that the first proceedings instituted against Mr. Eduardo Enrique Mattos and Mr. Alberto Uribe after the murders of the indigenous leaders were unsuccessful and it was not possible to identify those responsible. On 18 January 1995, the investigation was assigned to the Seventeenth Public Prosecutor's Office attached to the Valledupar District Court and under article 326 of the Code of Criminal Procedure, it suspended the proceedings, as no new evidence had come to light since 30 June 1992. On 23 March 1995, the Seventeenth Public Prosecutor reopened the proceedings for the purpose of considering the possibility of securing the cooperation of an alleged witness to the events. On 9 May 1995, the witness was interrogated by a psychologist on the staff of the Technical Investigation Unit in Bucaramanga. On 1 November 1995, the psychologist issued a report on the witness's credibility. In view of the contradictions between the witness's statements to the prosecutor and the psychologist, the Public Prosecutor decided that the witness lacked credibility. On 2 September 1996, he ordered the case temporarily suspended, also pursuant to article 326 of the Code of Criminal Procedure.

6.3 In connection with the disciplinary proceedings and the dismissals of Lieutenant-Colonel Luis Fernando Duque Izquierdo and Lieutenant Fernández Ocampo, they went into retirement at their own request, on the basis of decisions of December 1991 and September 1992, as upheld by a decision of 7 November 1996.

7.1 In his comments on the criminal proceedings, counsel states that the proceedings have taken place in two spheres: ordinary jurisdiction and military jurisdiction. The ordinary criminal proceedings have been conducted in a tortuous manner: on 30 June 1992, the investigation was halted by

decision of the Valledupar High Court; on 23 March 1995, the investigation was reopened, by decision of the Attorney-General of the Nation; on 2 September 1995, the investigation was temporarily suspended at the request of the Seventeenth Public Prosecutor in Valledupar. In six years of investigation, both sets of proceedings led to the closure of the case.

7.2 Counsel states that the criminal proceedings are in contrast with the clear and forceful action taken by the Human Rights Division of the Attorney-General's Office. In Decision No. 006 of 27 April 1992, the Human Rights Division considered the following facts to have been substantiated:

– That the indigenous leaders of the Arhuaco community, Luis Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres, were detained on 28 November 1990 by Colombian army units near Curumani, Department of César.

– That also on 28 November, at about 10 p.m., the brothers José Vicente and Amado Villafañe Chaparro, members of the indigenous community, and Manuel de la Rosa Pertuz were detained in Valledupar, Department of César, by military units headed by Lieutenant Pedro Antonio Fernández Ocampo in an operation ordered by Military Court No. 15, and later taken to the No. 2 Artillery Battalion "La Popa" barracks, where they were tortured (sheets 12 and 13). That, in the view of the Human Rights Division, "there is no doubt that Lieutenant-Colonel Duque Izquierdo played an active role in the events under investigation" (sheet 13).

– That José Vicente Villafañe Chaparro was transported, against his will and after being tortured, in a helicopter to a place in the mountains by military personnel (sheets 14 and 17), where he was tortured by units of No. 2 Artillery Battalion "La Popa", as part of an investigation conducted by military personnel attached to Military Court No. 15 to determine the whereabouts of Mr. José Eduardo Mattos, who had been abducted by an insurgent group.

– That, while in detention in the military barracks and in the presence of military personnel, the Villafañe Chaparro brothers were interrogated and tortured by Eduardo Enrique Mattos, a civilian and brother of the abducted person. Eduardo Enrique Mattos threatened the Villafañe brothers that he would kill indigenous people if they did not reveal his brother's whereabouts and said, "to prove it, they were already holding three of them" (sheet 31).

– That the military operations which led to the detention of indigenous leaders Luis Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres, on the one hand,

and the Villafañe Chaparros brothers and Manuel de la Rosa Pertuz, according to the evidence gathered by the Human Rights Division, were coordinated from Valledupar and almost certainly from No. 2 Artillery Battalion “La Popa” (sheet 19).

7.3 In the above-mentioned decision of 1992, the Human Rights Division considered, in the following terms, that the two officers' participation in the events had been established:

“Luis Fernando Duque Izquierdo and Pedro Antonio Fernández Ocampo took part in both the physical and psychological torture inflicted on José Vicente and Amado Villafañe Chaparro, members of the Arhuaco indigenous community, and on a civilian, Manuel de la Rosa Pertuz Pertuz, and also the abduction and subsequent killing of Angel María Torres, Luis Napoleón Torres and Antonio Hugues Chaparro” (sheet 30).

On the basis of the evidence gathered by the Human Rights Division, counsel rejects the Colombian Government's argument justifying the delays and standstill in the investigations.

7.4 Counsel submits that the disciplinary procedure which led to the ordering of the two sanctions was not judicial, but administrative in nature - a “disciplinary investigation”, which is aimed at “preserving the orderly conduct of the public service and protecting the principle of legality infringed by State agents who commit minor administrative offences”. By virtue of his disciplinary powers, the Attorney-General of the Nation may, once the disciplinary procedure has been completed, order administrative sanctions if necessary. Private individuals cannot be parties to a disciplinary investigation nor can they institute criminal indemnity proceedings. Neither can persons injured as a result of an administrative offence use the disciplinary procedure to obtain appropriate compensation for the injury suffered. The purpose of disciplinary proceedings is not to provide compensation for the injury caused by the behaviour of the State agent or to restore the infringed right. In this connection, counsel refers to the previous decisions by the Committee¹.

7.5 Counsel reiterates that domestic remedies were exhausted when the relevant criminal complaint was lodged with the competent ordinary court and also when criminal indemnity proceedings were instituted. The proceedings were closed. There has been unjustified delay in the proceedings.

¹ Communication No. 563/1993 (*Nydia Bautista de Arellana v. Colombia*), Views adopted on 27 October 1995, para. 8.2

Examination of the merits

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

8.2 In its submission of 14 November 1996, the State party indicates that Lieutenant Fernández Ocampo and Lieutenant-Colonel Izquierdo retired from the army at their own request, on the basis of decisions 7177 of 7 September 1992 and 9628 of 26 December 1991, respectively. Moreover, the recommendation by the Human Rights Division of the Attorney-General's Office that these two persons should be dismissed was not implemented, since they retired from the army at their own request. The State party also reiterates its desire to guarantee fully the exercise of human rights and fundamental freedoms. These observations would appear to indicate that, in the State party's opinion, the above-mentioned decision constitutes an effective remedy for the families of the deceased indigenous leaders and for the Villafañe brothers. The Committee does not share this view: purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of article 2, paragraph 3, of the Covenant, in the event of particularly serious violations of human rights, especially when violation of the right to life is alleged, as it indicated in its decision on admissibility.

8.3 In respect of the alleged violation of article 6, paragraph 1, the Committee observes that decision No. 006/1992 of the Human Rights Division of 27 April 1992 clearly established the responsibility of State agents for the disappearance and subsequent death of the three indigenous leaders. The Committee accordingly concludes that, in these circumstances, the State party is directly responsible for the disappearance and subsequent murder of Luis Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres, in violation of article 6 of the Covenant.

8.4 As to the claim under article 7 in respect of the three indigenous leaders, the Committee has noted the results of the autopsies, and also the death certificates, which revealed that the indigenous leaders had been tortured prior to being shot in the head. Given the circumstances of the abduction of Mr. Luis Napoleón Torres Crespo, Mr. Angel María Torres Arroyo and Mr. Antonio Hugues Chaparro Torres, together with the results of the autopsies and the lack of information from the State party on that point, the Committee concludes that Mr. Luis Napoleón Torres Crespo, Mr. Angel María Torres Arroyo and Mr. Antonio Hugues Chaparro Torres were tortured after their disappearance, in violation of article 7.

8.5 As to the Villafañe brothers' claim under article 7, the Committee has noted the conclusions contained in the decision of 27 April 1992, to the effect that the brothers were subjected to ill-treatment by soldiers from the No. 2 Artillery Battalion "La Popa", including being blindfolded and dunked in a canal. The Committee concludes that José Vicente and Amado Villafañe were tortured, in violation of article 7 of the Covenant.

8.6 Counsel has alleged a violation of article 9 in respect of the three murdered indigenous leaders. The above-mentioned decision of the Human Rights Division concluded that the indigenous leaders' abduction and subsequent detention were illegal (see paras. 7.2 and 7.3 above), as no warrant for their arrest had been issued and no formal charges had been brought against them. The Committee concludes that the authors' detention was both unlawful and arbitrary, violating article 9 of the Covenant.

8.7 Counsel has claimed a violation of article 14 of the Covenant in connection with the interrogation of the Villafañe brothers by members of the armed forces and by a civilian with military authorization without the presence of a lawyer and with total disregard for the rules of due process. As no charges were brought against the Villafañe brothers, the Committee considers it appropriate to speak of arbitrary detention rather than unfair trial or unfair proceedings within the meaning of article 14. The Committee accordingly concludes that José Vicente and Amado Villafañe were arbitrarily detained, in violation of article 9 of the Covenant.

8.8 Lastly, the Committee has repeatedly held that the Covenant does not provide that private individuals have a right to demand that the State criminally prosecute another person². The Committee nevertheless considers that the State party has a duty to investigate thoroughly alleged violations of human rights, particularly enforced

² See the decisions adopted on cases No. 213/1986 (*H.C.M.A. v. the Netherlands*), adopted 30 March 1989, para. 11.6; No. 275/1988 (*S.E. v. Argentina*), adopted 26 March 1990, para. 5.5; Nos. 343-345/1988 (*R.A., V.N. et al. v. Argentina*), adopted 26 March 1990, para. 5.5.

disappearances and violations of the right to life, and to criminally prosecute, try and punish those deemed responsible for such violations. This duty applies *a fortiori* in cases in which the perpetrators such violations have been identified.

9. The Human Rights Committee, acting in conformity with 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 the State party of articles 7 and 9 of the Covenant in the case of the Villafañe brothers and of articles 6, 7 and 9 of the Covenant in the cases of Luis Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres.

10. Under article 2, paragraph 3, of the Covenant, the State party has an obligation to ensure that Mr. José Vicente and Mr. Amado Villafañe and the families of the murdered indigenous leaders shall have an effective remedy, which includes compensation for loss and injury. The Committee takes note of the content of decision No. 029/1992, adopted by the Human Rights Division on 29 September 1992, upholding decision No. 006/1192 of 27 April, but urges the State party to expedite the criminal proceedings for the prompt prosecution and trial of the persons responsible for the abduction, torture and death of Mr. Luis Napoleón Torres Crespo, Mr. Angel María Torres Arroyo and Mr. Antonio Hugues Chaparro Torres and of the persons responsible for the abduction and torture of the Villafañe brothers. The State party also has an obligation to ensure that similar events do not occur in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide effective remedies in cases where 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.

Communications Nos. 623, 624, 626 and 627/1995

Submitted by: Victor Domukovsky, Zaza Tsiklauri, Petre Gelbakhiani and Iraki Dokvadze

Alleged victims: The authors

State party: Georgia

Declared admissible: 5 July 1996 (fifty-seventh session)

Date of adoption of Views: 6 April 1998 (sixty-second session)

Subject matter: Alleged kidnapping after failed request for extradition on terrorism charges, ill-treatment in detention and unfair trial

Procedural issues: Interim measures of protection - Absence of co-operation from State party

Substantive issues: Unlawful arrest - Torture and ill-treatment - Unfair trial - Arbitrary imposition of death sentence - Inadequacy of appeal procedure

Articles of the Covenant: 7, 9, 10, 12, 14, 15, 19, 21 and 25

Article of the Optional Protocol and Rules of procedure: rule 86

Finding: Violations [articles 7, 9, paragraphs 1 and 2, 10, paragraph 1, 14, paragraphs 3 (d) and 5]

1. The authors of the communications are Victor P. Domukovsky, Zaza Tsiklauri, Petre Gelbakhiani and Irakli Dokvadze, three Georgian and one Russian national currently imprisoned in Georgia, the last two under sentence of death. They claim to be victims of violations of articles 7, 9, 10, 12, 14, 15, 19, 21 and 25 of the International Covenant on Civil and Political Rights by Georgia.

1.2 On 5 July 1996, the Committee decided to join consideration of the communications.

The facts as submitted by the authors

2.1 The author of the first communication (No. 623/1995), Mr. Domukovsky, is a Russian national. On 5 October 1993, Mr. Domukovsky and 18 others were brought to trial before the Supreme Court of Georgia on charges of participating in terrorist acts with the aim of weakening the Government's power and of killing the Head of State, Mr. Shevardnadze. On 6 March 1995 Mr. Domukovsky was found guilty and sentenced to 14 years' imprisonment.

2.2 He states that, on 3 February 1993, the Government of Azerbaijan, where he had sought refuge, refused Georgia's request to extradite him and a co-defendant, Mr. P. Gelbakhiani. Thereupon, in April 1993, he was kidnapped from Azerbaijan and illegally arrested. In this context, he states that the President of Georgia has publicly praised the

special services which performed the kidnapping as having carried out a splendid operation. The author states that he was beaten upon arrest and kept in detention from 6 April 1993 to 27 May 1993, after which he was transferred to solitary confinement at the KGB, until August 1993. He further claims that his arrest was illegal, because he was a deputy member of the Supreme Soviet of Georgia and as such protected by immunity.

2.3 On 13 August and 11 December 1994 he was severely beaten in his cell, as a result of which he sustained a concussion. He further claims, without giving any details, that he was forced to testify against himself.

2.4 The author states that, on 13 October 1993, his request to be given a copy of the indictment in his native Russian language was refused by the Court, contrary to the applicable legal rules. He further states that he was not given copies of all the material related to the charges against him. Furthermore, he alleges that the judge on several occasions prevented him from meeting with his legal representatives. In this context, he states that he had to apply to the judge for permission to see his lawyer. He claims that the failure to give him unhindered access to counsel violates article 14, paragraph 3 (b).

2.5 He complains that he was not allowed to say anything in Court, that he was removed from the courtroom without reason. From the enclosures, it appears that the author turned his back to the court out of protest against the irregular nature of the proceedings, and that he was judged in his absence and without defence counsel. In this context, he states that three lawyers were removed by the judge from the trial, and that his fourth lawyer was not admitted by the judge to the trial. In these circumstances, the author states, he could not call any witnesses nor cross-examine witnesses against him.

2.6 He claims that the Courts in Georgia are not independent, but act in accordance with the orders of President Shevardnadze.

2.7 He claims that in violation of article 19 of the Covenant, he is being victimised for having different political views and for trying to express his views, and for defending the Georgian Constitution which was violated on 22 December 1991 by a change of political power. He denies being guilty of any violent acts.

2.8 As regards the exhaustion of domestic remedies, Mr. Domukovsky states that he appealed to the Chairman of the Supreme Court, to the judge who was in charge of his trial, to the Chairman of the State Commission on Human Rights, to the Minister of Internal Affairs and to the Chairman of the KGB, all to no avail. The judge allegedly told him that, since his trial was not a normal one, the law could not be followed. It is stated that no appeal from the judgment of the Supreme Court is possible.

3.1 The author of the second communication (No. 624/1995), Mr. Tsiklauri is a Georgian national born in 1961 and a physicist by profession. He was arrested on 7 August 1992, while visiting his brother who was a deputy of the Supreme Council and Prefect of the Kazbegi Region before the military coup of 1991-1992. He claims that he was arrested without a warrant. A year later he was shown a warrant, charging him with preparing a coup in July 1992, possession of fire arms and explosives, high treason and obstructing investigation. He denies these charges, which he claims fall under the State amnesty of 4 August 1992. He explains that the charges originate in the struggle of the supporters of President Gamsakhurdia against the regime which took power in December 1991 -January 1992, and did not become lawful before the 1992 October elections.

3.2 Mr. Tsiklauri claims that he was put under continuous psychological and physical pressure in order to find out his contacts with the former President, Zviad Gamsakhurdia. As a result of the treatment, he sustained severe injuries, a head concussion, loss of speech and motion, broken legs, broken ribs, open bleeding wounds, and burns caused by boiling water. He claims that as a result of the tortures, he signed an admission of guilt. He substantiates his allegations by enclosing several statements of witnesses testifying to the results of the tortures.

3.3 He claims that the trial against him and his co-accused was totally unfair and violated almost all articles of the Georgian Criminal Code. More precisely, he states that he was not given a copy of the indictment, nor of the other documents relating to the charges against him. He further states that he was refused a lawyer of his choice to represent him at the hearing, that he was not allowed to call witnesses for his defence, that he was banned from attending the trial, and that as a result he could not cross examine witnesses against him and not present a defence. On 6 March 1995 he was convicted and sentenced to 5 years' imprisonment.

4.1 The author of communication No. 626/1995 Mr. Gelbakhiani is a professor of medicine. A Georgian national, he was born in Tbilisi in 1962.

4.2 Mr. Gelbakhiani states that on 6 January 1992, the President of Georgia, elected by 87% of

the population, was overthrown by a military coup, in violation of article 25 of the Covenant. Since then, the opposition has been severely repressed. Mr. Gelbakhiani claims that he was persecuted for his political views, in particular during meetings and rallies, in violation of article 19 of the Covenant, and that a meeting of doctors, of which he was the chairman, was dispersed on 7 May 1992, in violation of article 21. In these conditions, he chose to leave the country. In this context, he also invokes article 12 (2) of the Covenant.

4.3 He states that he had permission from the President of Azerbaijan and from the Minister of Internal Affairs to live in Baku, capital of Azerbaijan. On 6 April 1993, 30 well-armed men kidnapped him and Mr. Domukhovsky, and took them to Tbilisi, where they were physically and morally tortured, in order to extort evidence from them. He states that he spent 2 months in the detention ward, where prisoners can only be kept for 3 days.

4.4 While the case was before the Supreme Court, Mr. Shevardnadze, allegedly expressed himself in newspapers and on TV, ignoring the presumption of innocence, calling the defendants "killers" and "demanding death sentence", in violation of article 14 (2) of the Covenant.

4.5 The author also claims that there have been gross violations of the judicial code, in that only certain people were allowed to attend the trial. These people figured on a special list signed by the judge. This is said to constitute a violation of article 14 (1) of the Covenant.

4.6 Mr. Gelbakhiani claims that he was denied a fair trial. Several of his co-defendants did not have lawyers and were not authorised to study the case in their native language, thus hindering their defence. The author states that he did not have the possibility of studying the trial documents beforehand. Moreover, the judge assigned a lawyer for his defence, whom he had already refused.

4.7 The trial before the Supreme Court was stopped several times without objective reasons and lasted from 5 October 1993 until 6 March 1995.

4.8 At one stage he was banned from the courtroom and was subsequently tried in his absence. The main witnesses were not questioned in court and he was only confronted with very few witnesses. He claims that during the whole interrogation, moral and physical pressure were brought to bear on him in order to make him plead guilty and "confess".

4.9 On 6 March 1995, he was sentenced to death. He claims that his death sentence is in violation of article 15 of the Covenant, since the Constitution in force at the time of the incident of which he was convicted prohibited the imposition of capital punishment.

5.1 The author of communication No. 627/1995, Mr. Dokvadze, is a Georgian citizen born in Tbilisi in 1961.

5.2 Mr. Dokvadze states that he was arrested on 3 September 1992 and that he was severely tortured, in violation of article 7 of the Covenant. During the investigation a confession was extorted from him, under the threat that his two small daughters would be killed. The author states that he withdrew this confession at the trial.

5.3 Like some of his co-defendants, Mr. Dokvadze was removed from the courtroom and was subsequently absent from the proceedings. He claims that, like his co-defendants, he was denied a fair trial by an impartial and competent tribunal.

5.4 On 6 March 1995, he was sentenced to death.

The complaint

6. The authors contend that both their arrest and their detention were arbitrary and contrary to various provisions of article 9 of the Covenant. They complain of having been subjected to torture and ill-treatment, in violation of articles 7 and 10 of the Covenant. They further claim that the State party violated articles 19, 21 and 25 in their respect, because they were prevented from political activity and persecuted for their political ideas. As for the criminal proceedings against them, they contend that the trial was not impartial and that the presumption of innocence and the guarantees of a fair proceeding were violated. As to the two sentences of death, they allegedly entail a violation of the principle *nulla poena sine lege* in contravention of article 15 of the Covenant, and consequently also of article 6 of the Covenant.

State party's information and authors' comments

7.1 The communications of Messrs Domukovsky and Tsiklauri were transmitted to the State party under rule 91 of the rules of procedure on 2 March 1995, requesting the State party to submit observations on the admissibility of the communications. At the same time the Committee requested the State party under rule 86 to stay the execution of any death sentence until the Committee had had an opportunity to examine the cases. The communications of Messrs Gelbakhiani and Dokvadze were transmitted under rules 86 and 91 of the rules of procedure on 10 March 1995.

7.2 Although the State party had been requested to submit its observations on admissibility, it only submitted, on 10 March 1996, information to the effect that on 6 March 1996 seventeen defendants in the criminal case No. 7493010 had received various sentences, including two who had been sentenced to

death, Petre Gelbakhiani and Irakli Dokvadze. A list of convicted persons and sentences was included. With regard to death sentences in general, the State party indicated that these may be appealed to the Supreme Court, and that the execution of death sentences is deferred until the matter of pardon is examined by the Pardon Commission.

7.3 By letter of 23 March 1995, Mr. Tsiklauri informed the Committee that he was sentenced to 5 years of imprisonment in a colony of intensive regime and that his property had been confiscated. He alleged that he was tortured, that he is innocent, that the presumption of innocence was violated repeatedly during the trial, that he was not present at the trial, except on the last day to listen to the verdict, that he was denied the right to have a lawyer of his own choice, that he was unable to testify on his own behalf, that he was denied the right to interrogate witnesses. Mr. Tsiklauri's submission together with accompanying documents in substantiation of his allegations were forwarded to the State party on 11 May 1995, but no observations from the State party were received in spite of a reminder sent on 30 October 1995.

7.4 By letters of 17 March 1995 Mr. Gelbakhiani and Mr. Dokvadze reiterated their innocence and sought the Committee's intercession. The submissions were transmitted to the State party on 16 May 1995. No reply was received from the State party.

Committee's decision on admissibility

8.1 At its 57th session, the Committee examined the admissibility of the communication. It ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter was not being examined under another procedure of international investigation or settlement.

8.2 The Committee noted with concern the absence of cooperation from the State party, in spite of the reminders that were addressed to it. On the basis of the information before it, the Committee found that it was not precluded from considering the communication under article 5, paragraph 2 (b) of the Optional Protocol.

8.3. On the basis of the submissions before it, the Committee observed that the authors had sufficiently substantiated, for purposes of admissibility, their allegations of violations of the Covenant by the State party, in particular, of articles 7, 9, 10, 14, 15, 19, 21 and 25, which should be examined on the merits.

9. On 5 July 1996, the Human Rights Committee therefore decided that the communication was admissible. It requested the State party, under rule 86 of the rules of procedure, not to carry out the death

sentence against Messrs. Dokvadze and Gelbakhiani while their communication was under consideration by the Committee.

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

10.1 By submission of 21 February 1997, the State party provides observations concerning the merits of the communication.

The case of Mr. Viktor P. Domukovsky

10.2 With regard to Mr. Domukovsky, the State party explains that he was sentenced to fourteen years' imprisonment, for banditry, preparation of terrorist acts and diversionary acts for the purpose of weakening the Republic of Georgia.

10.3 The State party submits that Mr. Domukovsky and Mr. Gelbakhiani were legally detained in Azerbaijan by virtue of an agreement between the relevant Georgian and Azerbaijan ministries, which provides for the tracing and detention of suspects who go into hiding in either State. They were detained, on 6 April 1993, on the basis of an arrest warrant, issued by the Government prosecutor on 30 September 1992.

10.4 The State party denies that Mr. Domukovsky enjoyed parliamentary immunity at the time of his arrest. It explains that a newly elected Parliament was in office at the time he was detained, and as a member of the former Supreme Soviet he no longer enjoyed immunity.

10.5 The State party submits that Mr. Domukovsky's claims of physical violence and mental duress during the preliminary investigation were not substantiated in judicial examination. The Court came to its conclusion because neither the accused nor his counsel - in whose presence he was interrogated - made any mention of such violence. Moreover, the case files assembled by the investigation team also contained records in which Mr. Domukovsky denied responsibility for a number of incidents. The Court concluded that this would not have occurred if the investigation had been conducted unfairly.

10.6 Concerning the incident of 13 August 1995, the State party submits that, upon a statement from Mr. Domukovsky to the court on 15 August, the medical service at the remand block was instructed to examine him. He was examined on 17 August according to the record of the examination. As paraphrased by the State party, his body bore no more marks of injury and his health was found to be satisfactory. It was not substantiated that he had been beaten. No copy of the record has been provided.

10.7 With regard to the failure of the Court to provide Mr. Domukovsky with an indictment in Russian, the State party explains that the court established that Mr. Domukovsky had a perfect command of Georgian. In this context, it is submitted that he gave evidence in Georgian during the preliminary investigations and did not ask for an interpreter. According to the State party, Mr. Domukovsky read over the depositions in Georgian and signed them as accurate, drew up his own statements in Georgian and stated in the records that Georgian was his native language. In the light of the above, the Court considered his demand for an indictment in Russian to be a delaying tactic.

10.8 The State party submits that after the preliminary investigation, Mr. Domukovsky and his counsel went over all the material assembled. In none of their applications they asked to be granted access to additional material nor claimed that they had not been provided with all the material. Before the beginning of the trial, Mr. Domukovsky requested an opportunity to go over the files once more. This request was granted by the court. It is submitted that Mr. Domukovsky studied the files from 13 October 1993 to 6 January 1994.

10.9 The State party submits that Mr. Domukovsky and his co-accused had an unrestricted right to defence throughout the preliminary investigation and the judicial enquiry. They were afforded the opportunity to select their own counsel. For this purpose, the court summoned members of the defendants' families and gave them an opportunity to meet with the defendants repeatedly in order to decide on the lawyers which they wanted to call in.

10.10 The State party submits that one of the objectives of the defendants was to delay the consideration of the case and to disrupt the procedures of the court. It explains that, after Domukovsky's counsel had withdrawn from the case, he and his family were allowed the time prescribed by law to find a new lawyer. Since they had not appointed anyone once the time expired, the Court appointed a lawyer, who was given a month and a half to acquaint himself with the case. During this period proceedings were suspended. When the trial resumed, Domukovsky rejected this lawyer, according to the State party without valid grounds, and threatened him. The counsel then withdrew, after which the court decided that he had abused his right to defence and the case was concluded without counsel for Domukovsky in attendance.

10.11 The State party explains that Mr. Domukovsky and other of the accused regularly disrupted the proceedings during the judicial hearings, showing disrespect to the court, ignoring the instructions from the chairman and preventing the court to go about its normal work. It submits that

they turned their backs to the court, resisted the military guards, fled from the courtroom to the cells and whistled. On one occasion, Mr. Domukovsky jumped over the bar into the courtroom and grabbed a guard's automatic weapon. The State party concludes that this was sufficient reason for the Court to continue the examination of the case in the absence of the defendants, as permitted under article 262 of the Georgian Code of Criminal Procedure. The State party points out that the court allowed the defendants back in after a period of time, but they continued disrupting the procedures, following which they were again removed.

10.12 The State party rejects the suggestion by Mr. Domukovsky that the courts in Georgia are not independent and states that they are subordinate to the law alone. It further rejects his claim that he was convicted for his political opinions and emphasizes that he was convicted for having committed criminal offences.

10.13 The State party explains that serious criminal cases, in which the death penalty can be imposed, are under Georgian legislation judged by the Supreme Court. The sentences pronounced by the Supreme Court are not subject to appeal by cassation, but the law provides for a judicial review. Upon review, the conviction and sentence of Mr. Domukovsky and his codefendants was found to be lawful and legitimate.

11.1 In his comments on the State party's submission, counsel for Mr. Domukovsky states that he requested the Ministry of Internal Affairs in Azerbaijan whether they had any trace of an authorisation for the arrest and detention of Mr. Domukovsky and Mr. Gelbakhiani. He joins the reply from the Ministry, dated 7 July 1995, in which the chief of the department of criminal prosecution states that he does not know about the case. Counsel argues that if it were true that Mr. Domukovsky and Mr. Gelbakhiani were arrested on the basis of a bilateral agreement between Azerbaijan and Georgia, it would be logical that the Azerbaijan ministry would have records of such an undertaking. In the absence of such record, counsel argues that Mr. Domukovsky and Mr. Gelbakhiani were arrested in violation of article 9 of the Covenant.

11.2 Counsel maintains that Mr. Domukovsky's arrest was in violation of his parliamentary immunity. He denies that the elections of 11 October 1992 were free and democratic. He further states that, even if the elections were accepted as lawful, the arrest warrant against Mr. Domukovsky was issued before the elections took place, on 30 September 1992, and that in those circumstances it was unlawful to issue the warrant without the agreement of the Supreme Soviet to lift

his immunity. Counsel argues that Mr. Domukovsky's arrest was thus in violation of article 25 of the Covenant.

11.3 With regard to the beatings and psychological pressure to which Mr. Domukovsky and other accused were subjected, counsel argues that it was not possible to make any written statements, because this would not have been allowed, because these statements would have to be addressed to officials involved in the beatings, and because the accused were worried about their families and tried to protect them by keeping silent. Counsel maintains that Mr. Domukovsky was kept in preventive detention from 7 April to 28 May 1993, whereas such detention is only lawful for three days. He was kept in complete isolation and could not see his lawyer. Only after he began a hunger strike on 25 May, was he transferred to a detention block, on 28 May 1993, in a KGB prison. He was put under constant psychological and physical pressure and they threatened to detain his family. He finally consented to plead guilty in the Kvareli case, if they would prove to him that his family was alive and well. Counsel further submits that it is an old trick to make the accused deny certain charges to make the records of interrogation more believable.

11.4 With regard to the incident of 13 August 1995, counsel submits that many of those present in court on 15 August had seen that Mr. Domukovsky had been beaten. According to counsel, a journalist made a video, but a day later he said that he didn't have it. Counsel further states that the judge was initially unwilling to order a medical examination and that it was thanks to Mr. Domukovsky's wife, who at that time acted as his legal counsel, that a medical examination was finally held on 15 August 1995. According to counsel, the examination showed haematomas on the elbow and right shoulder and apparently he should have been prescribed bed rest for ten days because of a concussion. According to counsel, however, the latter was not mentioned in the medical report.

11.5 Counsel points out that the State party did not address the second incident of 11 December 1994. Counsel refers to an incident (date of which unclear) when the judge spoke to the doctors before and after they examined Mr. Domukovsky, and when they took a cardiogram, apparently with the left electrode not well attached. According to counsel they found rests of the symptoms of the disease of Babinski. Counsel reiterates that the accused had no way of protesting but that they tried nevertheless.

11.6 Counsel states that he is in possession of certificates which attest that Mr. Domukovsky finished his studies at the university of Tbilisi in Russian, and that he conducted research at the Science Academy of Georgia, also in Russian. He

points out that in the records of the interrogation of 12 April 1993, it is stated that it was explained to him that he had the right to testify in his mother tongue and to have the services of an interpreter. He was then made to sign a statement in which he said that he spoke the Georgian language well, and that he needed an interpreter. According to counsel, the interrogators were so happy that he had filled out that he spoke the language well, that they overlooked that he had failed to put down the word 'not' with regard to the need for an interpreter. In this context, counsel also points out that Mr. Domukovsky always tried to sign in both Georgian and Russian, by way of protest. Counsel states that his lawyer at the preliminary investigations was Georgian of origin and thus had no problem reading the file.

11.7 With regard to access to the files, counsel explains that in the beginning it was not clear to Mr. Domukovsky that he would be judged with 18 others, and moreover, the trial in the Kvareli case was not yet over. Counsel explains that Mr. Domukovsky was also charged in the Kvareli case, and that in that case all accused had disavowed their statements made during the preliminary hearings. According to counsel, the accused' statements made in public session of the court, were not made available to Mr. Domukovsky nor to his lawyer. Counsel confirms that Mr. Domukovsky had knowledge of the files as from 13 October, but states that he went on hunger strike between 18 and 25 November in order to get access to the main case.

11.8 Concerning the access to his legal representatives, counsel states that this right was severely limited, while he was held first in preventive detention and then in the KGB prison, and that during that period his counsel could not visit him without the procurator being present.

11.9 Counsel denies that Mr. Domukovsky has disrupted the trial proceedings, but states that he participated in passive protest by turning his back to the judge. Counsel submits that there was no other way to show his disagreement with the trial, since no statement had been accepted by the judge. Counsel explains that when Mr. Domukovsky jumped over the barrier, he had been provoked by the vulgar words of the judge. Besides, he was not removed at that time. Counsel states that the judge did not let the accused return to the court room out of his free will, but that he was forced to do so by a hunger strike of 64 days, from 13 January to 17 March 1994. Counsel states that Mr. Domukovsky still suffers from health consequences of the hunger strike.

11.10 On 13 September 1994, Mr. Domukovsky was once more excluded from the trial, when he questioned the removal of his lawyer. In this context, counsel explains that the judge was influenced by the

political situation in the country, and that he delayed the trial in the beginning for political reasons. According to counsel, it could never be in the interests of the accused to delay the trial.

11.11 It is stated that, for reasons independent of him, Mr. Domukovsky found himself without lawyer on 6 June 1994. He was given ten days to find himself a new lawyer, but after eight days already the judge assigned a lawyer to him. When he asked whether Mr. Domukovsky approved, he said that he could not say since he didn't know him. Counsel denies the affirmation of the State party that Domukovsky agreed to the appointment of this lawyer. It is stated that the lawyer visited Mr. Domukovsky only twice, and that on both occasions he was drunk. On 15 August, Mr. Domukovsky then informed the judge that he could not approve of him as his lawyer if he would not visit him more often to get acquainted with the case. The lawyer not having visited him, Mr. Domukovsky then withdrew his approval. Counsel states that Mr. Domukovsky's wife was unlawfully removed as his legal representative by the judge on 12 September 1994, because she demanded a medical examination. On 13 September 1994, Mr. Domukovsky was excluded from attending the hearing. On 19 September, Mr. Domukovsky appointed a new counsel, who had followed the trial from the beginning as representative of one of the other accused. However, the judge refused to accept his appointment and on 24 September 1994 decided that Domukovsky would stay without a defense lawyer.

11.12 Counsel maintains that president Shevardnadze has influenced the courts in a newspaper interview on 29 November, in which he said that the accused had committed acts of terrorism. Moreover, it is stated that the judge had ordered to make lists of everyone who attended the trial. The political character of the trial is also borne out, according to counsel, by the judgement in the case, where it is said that the representatives of the old power and enemies of the present power organised armed troops to commit crimes against the State. Counsel maintains that there was not enough evidence to convict Domukovsky for banditry.

11.13 Concerning the judicial review, counsel seems to suggest that Mr. Domukovsky still has not received a reply on his request for review by the Supreme Court.

The case of Mr. Tsiklauri

12.1 The State party explains that Mr. Tsiklauri was convicted of illegally carrying fire arms and storing explosives. He was sentenced to five years' imprisonment.

12.2 The State party submits that a warrant for Mr. Tsiklauri's arrest was issued on 1 August 1993, and he was arrested on 7 August 1993. According to the State party, he was not covered by the declaration of amnesty of the State Council, since that only applied to those involved in the assault on and occupation of the Georgian Radio and Television building in Tbilisi on 24 June 1992.

12.3 The State party submits that the court did not accept Mr. Tsiklauri's claim that he had been subjected to physical and mental duress during the preliminary investigation, since neither Mr. Tsiklauri nor his lawyer had mentioned this during the investigations. The interrogations were conducted in the presence of a lawyer and Mr. Tsiklauri wrote his confessions in his own hand and signed the records of the interrogations as adequate. Furthermore, the State party submits that during his detention Mr. Tsiklauri was visited by representatives of international organizations, to whom he did not affirm that he had been put under any kind of pressure. Moreover, the Prosecutor instituted criminal proceedings in connection with Mr. Tsiklauri's injuries and a full inquiry was held, but the case had to be dropped for lack of evidence. According to the State party, it was established that he had leaped from a vehicle that had transported him.

12.4 The State party submits that Mr. Tsiklauri was given a copy of the indictment in accordance with the law. Once the preliminary investigation was over, Mr. Tsiklauri and the other accused, together with their lawyers went over the files. The State party notes that the applications submitted did not mention the need to consult additional material. Before the trial, Mr. Tsiklauri requested to consult the case files, and the court agreed and made files and records such as were available at the time accessible from 13 October 1993 to 6 January 1994. Trial proceedings were suspended for this period.

12.5 The State party maintains that Mr. Tsiklauri enjoyed an unrestricted right to defence throughout the preliminary investigation and the judicial enquiry. He was afforded the opportunity to select his own counsel. Mr. Tsiklauri chose to be defended by T. Nizharadze, from 21 September 1992 onwards. On 6 January 1994, he requested that his wife, N. Natsvlshvili, be admitted as additional defence counsel and be allowed to consult the case files. The court, considering this a deliberate attempt to delay the trial, denied the application and the trial continued with Nizharadze as defence counsel.

12.6 With regard to Mr. Tsiklauri's claim that the trial was held in his absence, the State party refers to its explanations in the case of Mr. Domukovsky (see para. 10.11)

13.1 In his comments on the State party's submission, Mr. Tsiklauri states that on 7 August

1992, he was taken from his mother's flat to the KGB for 'conversation'. His family was not informed of his whereabouts. On 17 August 1992, the head of the KGB, Mr. Batiashvili, appeared on national television and announced his resignation, because of the maltreatment of Mr. Tsiklauri.

13.2 Mr. Tsiklauri maintains that he saw his arrest warrant only a year after his arrest when the preliminary investigation was coming to an end and he was handed the materials of his case. He claims that the information in the warrant, which was dated 1 August 1992, such as date of birth, address and marital status, did not coincide with the real state of affairs. He further states that the warrant was for actively participating in preparation of the military coup of 24 June 1992, and for keeping weapons and explosive materials. He states that, according to the material in the case file, the official charges against him date from 20 August 1992, and do not correspond to those mentioned in the warrant.

13.3 He maintains that the crimes he was charged with, of which he denies any knowledge, were covered by the amnesty of 3 August 1992, which read, according to him: " ...10. Proceeding from the supreme interests of unity and concord, persons who have taken part in the actions against the authorities of the Georgian republic since January 6 of the current year shall be freed from criminal charges as long as they have not committed serious crimes against peaceful population... 12. The participants of the adventurist coup attempt on 24 July 1992 shall be exempted from criminal charges committed by them against the country and people." Mr. Tsiklauri thus confirms that the charges against him were covered by the amnesty.

13.4 Mr. Tsiklauri denies that his injuries were caused by falling out of a car. He states that the investigation into the cause of the injuries was done by the same people who were investigating the criminal charges against him. He denies that he ever tried to escape by jumping off a car, and states that it is a lie that he burned a third of his body by dropping hot tea he was drinking. He further states that this could easily have been established if there would have been a court hearing into his case.

13.5 Mr. Tsiklauri further states that, with exception of the confessions as a result of torture, all testimonies given during the presence of his lawyer deny guilt of the charges. He states that the court never bothered to check whether the testimonies in the preliminary investigation were indeed given by him. He further explains that, because he was not allowed to be present during the court hearings, he was unable to give testimony, interrogate witnesses and present the proofs of his innocence.

13.6 He further challenges the State party's remark that he has never told representatives of international

organizations that he was subjected to torture. He states that he made statements in court, and also to Human Rights Watch/Helsinki and British Helsinki Human Rights Group. He further refers to a report on torture in Georgia and Batiashvili's statement on national television of 17 August 1992, plus a newspaper article of 27 August 1992 and an interview with the British Human Rights Helsinki Group. Mr. Tsiklauri also refers to his statement to the medical expert on 18 August 1992, which is apparently reflected in the case file, that he was severely beaten by unknown people on 7 August 1992. He further refers to a letter from the KGB to the Prosecutor's Office, in which the KGB states that the statement made by Batiashvili on August 17 was based on a meeting that same day with Tsiklauri in the preliminary detention cell when Tsiklauri claimed that he had been beaten and then tortured by unknown people with boiling water. He also refers to testimonies given during the court hearings by Gedevan Gelbakhiani, Gela Mechedilishvili and Gia Khakhviashvili, all attesting to the fact that he was tortured.

13.7 Mr. Tsiklauri states that after the appearance of the KGB boss on television, a Special Commission was formed to investigate. He states that his state of health was serious, that he had multiple bone fractures, and that he had partially lost speech. He adds that he was not transferred to the prison hospital until he had signed false testimonies. Afterwards, during one of the regular interrogations in presence of his lawyer, he denied the statements that he had given under torture.

13.8 Mr. Tsiklauri maintains that he did not have access to all the materials in the case.

13.9 Mr. Tsiklauri states that he was left without a defence at the beginning of his detention, and that only in October 1992, he managed to hire a lawyer. On 22 March 1994, he requested the court to allow his wife, Nino Natvlishvili, to become his legal representative at the hearing. This was rejected by the court, because she would need additional time to get acquainted with the materials of the case which would delay the trial. When Mr. Tsiklauri said that no additional time was needed, the Court still refused to accede to his demand. On 4 April 1994, the lawyer Nizharadze, who was told by the court to continue the defence of Mr. Tsiklauri, put a motion asking to be released from his duty to defend Tsiklauri, since the agreement between him and the defendant had been annulled. The Court refused, according to the author in violation of the law, and the lawyer told the court that he could not defend him against his will. Then the judge wrote to the Bar Society, informing them that he had refused the order of the court to take up the defence of Tsiklauri. He was subsequently expelled from the Bar, with the consequence that he can no longer practice as a

lawyer. On 8 July 1994, the court appointed a new lawyer, Mr. G. Kapanadze, who was given until 29 July to study the files. Although not refusing the assignment, the lawyer publicly spoke about the lack of trust of Mr. Tsiklauri in him, and that by consequence, he was in fact left without defense. He made it clear that he was not refusing out of fear to be dismissed. On 9 February 1995, the lawyer stated in court that the accused did not want him as his lawyer, that he had no contact with him, and that he had a right to choose his counsel himself and to refuse an advocate even at this stage of the proceedings. He stated that the decision of the court to refuse him the lawyer of his own choice violated his rights.

13.10 In this connection, Mr. Tsiklauri states that it was the Court itself that was delaying the trial, whereas the defendants were demanding a timely trial. According to him, the judge did not consider any of the defendants' lawful demands, created stressful situations and violated the law openly. The judge is alleged to have said that the law was written for normal court hearings, not for abnormal ones. It is alleged that the courts in Georgia are not independent but subordinate to the government. In this context, reference is made to statements by the president of the Supreme Court in Georgia.

13.11 Mr. Tsiklauri states that he never violated any court order during the trial and that there was no reason to send him away. He states that the judge did not want him present because he did not want to satisfy his lawful demands. He states that the incident when they all turned their backs to the judge happened when the judge had decided to send one of the defendants out of the court room, since he had requested special assistance because he was suffering from impaired hearing caused by torture. All the defendants were then removed by the judge. After three months they were again allowed to follow the hearing in court, but the judge continued to deny lawful requests from the defendants. Mr. Tsiklauri states that he was then removed from court for a 'cynical smile'. He was not allowed back in, and therefore had no opportunity to defend himself.

The case of Mr. Gelbakhiani

14.1 The State party submits that Mr. Gelbakhiani was convicted of banditry, preparation of terrorist acts, preparation of diversionary acts for the purpose of weakening the Republic of Georgia, and of the wilful murder of several individuals and of attempted murder in aggravating circumstances. He was sentenced to death. On 25 July 1997, his sentence was commuted to 20 years' imprisonment.

14.2 The State party rejects Mr. Gelbakhiani's claim that he was convicted for his political opinions

and emphasizes that he was convicted for having committed criminal offences.

14.3 The State party reiterates that Mr. Gelbakhiani and Mr. Domukovsky were arrested in Azerbaijan by virtue of an agreement between Georgia and Azerbaijan. A warrant for the arrest of Mr. Gelbakhiani was issued by the Government Prosecutor on 30 September 1992. He was arrested on 6 April 1993.

14.4 That Mr. Gelbakhiani was subjected to mental and physical duress during the preliminary investigation was not substantiated according to the State party.

14.5 As the review procedure, it was established that no breaches of procedure had occurred during the preliminary investigation or judicial inquiry.

14.6 The State party explains that the trial took place in public and that entry to the court room and attendance was restricted only when there was not enough room for all who wished to be present.

14.7 The State party maintains that Mr. Gelbakhiani was given a copy of the charges against him, in full compliance with the law. Once the preliminary investigation was over, he and the other accused, together with their lawyers went over the files. The State party notes that the applications submitted did not mention the need to consult additional material. Before the trial, Gelbakhiani requested to consult the case files, and the court agreed and made files and records such as were available at the time accessible from 13 October 1993 to 6 January 1994. Trial proceedings were suspended for this period.

14.8 The State party maintains that Mr. Gelbakhiani enjoyed an unrestricted right to defence throughout the preliminary investigation and the judicial enquiry. He was afforded the opportunity to select his own counsel. For this purpose, the court gave him an opportunity to meet with members of his family in order to decide on the lawyers which he wanted to call in. Mr. Gelbakhiani chose to be defended by I. Konstantinidi, from 24 September 1993 onwards. This lawyer had also defended him during the preliminary investigations. On 16 February 1994, Konstantinidi applied to the court to be released from the case, but the court refused, considering that the application was an attempt to delay proceedings.

14.9 In this context, the State party points out that the trial lasted a year and five months, but that only during six months, the court was considering the case. The rest of the time, consideration was delayed because of the unwarranted applications from the defendants.

14.10 With regard to Gelbakhiani's claim that the trial was held in his absence, the State party refers to

its explanations in the case of Mr. Domukovsky (see para. 10.11)

14.11 Concerning the legitimacy of the death sentence, the State party explains that the Declaration of the Supreme Soviet of the Republic of Georgia of 21 February 1992 recognized the supremacy of the Constitution of Democratic Georgia of 21 February 1921 and laid down the procedure for its application with due regard for present-day conditions. In accordance with the first paragraph of the Order adopted by the State Council on 24 February 1992, the legislation existing at that time was to apply in the Republic of Georgia until current legislation had been brought into line with the principles of the Georgian constitution. Moreover, on 11 June 1992, the State Council passed an order, explaining that the existing legislation, including the system of punishments laid down in the criminal Code - which provides for the death penalty - was in effect in the territory of the Republic of Georgia. The State party argues therefore that Gelbakhiani's claim that the death sentence passed on him violated the constitution in force at the time is unfounded.

15.1 In his comments, Mr. Gelbakhiani explains that he left Georgia because of his political opinions, and that he received permission to live in Azerbaijan. On 6 April 1993, thirty armed persons surrounded his house and kidnapped him and Mr. Domukovsky. He states that no arrest warrant was produced and that he was moved to Georgia illegally.

15.2 He maintains that he was beaten upon his arrest and that he still has scars on his face. During interrogation, he was put under psychological pressure, and the interrogators threatened the members of his family. He states that he was kept in the detention ward for two months, whereas according to the law the maximum time in such detention is three days.

15.3 He states that the principles of due process were violated during his trial, and that ordinary citizens were not allowed to attend the trial. He further states that the presumption of innocence was violated, since the president of the Republic called the accused killers and demanded the death penalty.

15.4 He further reiterates that he was denied access to the documents in the so-called Kvareli case, which initially was to be tried together with his case, but had been separated from it.

15.5 On 28 January 1994, Mr. Gelbakhiani decided to abolish the agreement with his lawyer, because of the disturbed working relations with the court. The agreement was abolished on 28 January 1994. However, the Court did not accede to the request, and on 16 February 1994, appointed the same lawyer

again. When the lawyer protested, the Bar Association confirmed the court's decision, on 21 February 1994. Mr. Gelbakhiani argues that, since he was defended by a lawyer whom he had dismissed before, he had been denied free choice of counsel and was in fact left without a lawyer.

15.6 According to Mr. Gelbakhiani, on 25 February 1992 the 1921 Constitution was restored, according to which the death penalty was abolished. This remained the legal situation until 17 June 1992. Since the incident of which he was convicted took place on 14 June 1992, the death penalty cannot legally be applied to his case.

The case of Mr. Irakli Dokvadze

16.1 The State party explains that Mr. Dokvadze was convicted of banditry, preparation of terrorist acts, preparation of diversionary acts for the purpose of weakening the Republic of Georgia, and of the wilful murder of several individuals and of attempted murder in aggravating circumstances. He was sentenced to death. On 25 July 1997, his sentence was commuted to 20 years' imprisonment.

16.2 The State party submits that Mr. Dokvadze's claim that he had given evidence under physical and mental duress was not substantiated during the judicial examination of the case. The State party explains that throughout the preliminary investigation, Mr. Dokvadze made no mention of torture or psychological pressure being inflicted on him although he repeatedly had meetings alone with his lawyer and thus had the opportunity to appeal to the authorities or to the international human rights organizations whose representatives he also met. The State party submits that on 8 September 1992, he was interviewed on television and acknowledged his crimes. Further, during the preliminary investigation he was interrogated in the presence of a lawyer and he wrote out his confessions himself, read the reports of the interrogations, added comments and signed the testimony given as accurate. On this basis, the court found that the claim that violence had been used against him, was not borne out by the facts.

16.3 With regard to the claim that the trial was held in his absence, the State party refers to its explanations in the case of Mr. Domukovsky (see para. 10.11).

17. No comments have been received from Mr. Dokvadze, despite a reminder sent on 20 November 1997.

Issues and proceedings before the Committee

18.1 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.

18.2 With regard to the claim made by Mr. Domukovsky and Mr. Gelbakhiani that they were illegally arrested when residing in Azerbaijan, the Committee notes that the State party has submitted that they were arrested following an agreement with the Azerbaijan authorities on cooperation in criminal matters. The State party has provided no specific information about the agreement, nor has it explained how the agreement was applied to the instant case. Counsel for Mr. Domukovsky, however, has produced a letter from the Azerbaijan Ministry of Internal Affairs to the effect that it was not aware of any request for their arrest. In the absence of a more specific explanation from the State party of the legal basis of their arrest in Azerbaijan, the Committee considers that due weight should be given to the authors' detailed allegations and finds that their arrest was unlawful and in violation of article 9, paragraph 1, of the Covenant.

18.3 In the circumstances, the Committee need not address the question whether Mr. Domukovsky's arrest was also illegal because of his claimed parliamentary immunity or that it violated article 25 of the Covenant.

18.4 Mr. Tsiklauri has claimed that he was arrested illegally in August 1992 without a warrant and that he was not shown a warrant for his arrest until after he had been in detention for a year. The State party has denied this allegation, stating that he was arrested in August 1993, but it does not address the claim in detail or provide any records. In the absence of information provided by the State party as to when the arrest warrant was presented to Mr. Tsiklauri and when he was first formally charged, and in the absence of an answer to the author's claim that he had been in custody for one year before the warrant was issued, the Committee considers that due weight must be given to the author's allegation. Consequently, the Committee finds that article 9, paragraph 2, has been violated in Mr. Tsiklauri's case.

18.5 With respect to Mr. Tsiklauri's claim that the charges against him were covered by the amnesty decree of 3 August 1992, the Committee considers that the information before it does not enable it to make any conclusions in this respect and finds that the author's claim has not been substantiated.

18.6 Each of the authors have claimed that they have been subjected to torture and ill-treatment, including severe beatings and physical and moral pressure, which in the case of Domukovsky, caused concussion, in the case of Tsiklauri, caused concussion, broken bones, wounding and burning, in the case of Gelbakhiani caused scarring, and in the

case of Dokvadze, involved both torture and threats to his family. The State party has denied that torture has taken place, and stated that the judicial examination found that the claims were unsubstantiated. It has however, not indicated how the court has investigated the allegations, nor has it provided copies of the medical reports in this respect. In particular, with regard to the claim made by Mr. Tsiklauri, the State party has failed to address the allegation, simply referring to an investigation which allegedly showed that he had jumped from a moving vehicle and that he had spilled hot tea over himself. No copy of the investigation report has been handed to the Committee, and Mr. Tsiklauri has contested the outcome of the investigation, which according to him was conducted by police officers without a court hearing ever having been held. In the circumstances, the Committee considers that the facts before it show that the authors were subjected to torture and to cruel and inhuman treatment, in violation of articles 7 and 10, paragraph 1, of the Covenant.

18.7 The Committee has taken note of Mr. Domukovsky's claim that he did not receive a copy of the indictment in Russian and that he was denied the services of an interpreter, whereas he is Russian of nationality, not Georgian. The State party has submitted that the court found that the author's knowledge of the Georgian language was excellent. Moreover, the author is said to have given his statements in Georgian. The author's counsel has submitted that he did his studies and research in Russian, but has not shown that he did not have sufficient knowledge of Georgian. In the circumstances, the Committee finds that the information before it does not show that Mr. Domukovsky's right under article 14, paragraph 3 (f), to have the free assistance of an interpreter if he cannot speak or understand the language used in court, has been violated.

18.8 With regard to the question whether the authors had access to all the materials in the trial against them, the Committee notes that the information before it is inconclusive. The Committee finds that the authors' claim has not been substantiated.

18.9 The Committee notes that it is uncontested that the authors were forced to be absent during long periods of the trial, and that Mr. Domukovsky was unrepresented for part of the trial, whereas both Mr. Tsiklauri and Mr. Gelbakhiani were represented by lawyers whose services they had refused, and were not allowed to conduct their own defence or to be represented by lawyers of their choice. The Committee affirms that at a trial in which the death penalty can be imposed, which was the situation for each author, the right to a defence is inalienable and should be adhered to at every instance and without

exception. This entails the right to be tried in one's presence, to be defended by counsel of one's own choosing, and not to be forced to accept ex-officio counsel¹. In the instant case, the State party has not shown that it took all reasonable measures to ensure the authors' continued presence at the trial, despite their alleged disruptive behaviour. Nor did the State party ensure that each of the authors was at all times defended by a lawyer of his own choosing. Accordingly, the Committee concludes that the facts in the instant case disclose a violation of article 14, paragraph 3 (d), in respect of each author.

18.10 Mr. Gelbakhiani has claimed that the death penalty imposed on him and Mr. Dokvadze was unlawful, because the constitution in force at the time when the crimes were committed did not allow the death penalty. The State party has argued that by decree of the State Council this part of the constitution was not applicable and that the death penalty remained in force. The Committee expresses its concern that basic rights, laid down in the Constitution, would have been abrogated by decree of the State Council. However, in view of the lack of precise information before it and in view of the commutation of the death sentence against the authors, the Committee need not consider whether the imposition of the death penalty in the instant case was indeed unlawful for the reasons forwarded by the authors. The Committee recalls, however, that the imposition of a death sentence upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of article 6 of the Covenant.

18.11 The Committee notes from the information before it that the authors could not appeal their conviction and sentence, but that the law provides only for a judicial review, which apparently takes place without a hearing and is on matters of law only. The Committee is of the opinion that this kind of review falls short of the requirements of article 14, paragraph 5, of the Covenant, for a full evaluation of the evidence and the conduct of the trial and, consequently, that there was a violation of this provision in respect of each author.

18.12 The Committee finds that the authors' claims that they were denied a public trial, that the presumption of innocence was violated in their case, that the courts were not impartial and that they were prosecuted in violation of their right to freedom of opinion and expression and that their freedom of

¹ See Committee's Views in *inter alia* communications Nos. 52/1979, *Sadias de Lopez v. Uruguay*, adopted on 29 July 1981, 74/1980, *Estrella v. Uruguay*, adopted on 29 March 1983. See also 232/1987, *Pinto v. Trinidad & Tobago*, Views adopted on 20 July 1990.

association was violated, have not been substantiated.

19. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 7, 10, paragraph 1, and 14, paragraphs 3 (d) and 5, of the International Covenant on Civil and Political Rights, in respect of each author, and also a violation of article 9, paragraph 1, in respect of Mr. Domukovsky and Mr. Gelbekhiani, and of article 9, paragraph 2, in respect of Mr. Tsiklauri.

20. The Committee is of the view that the authors are entitled, under article 2, paragraph 3 (a), of the Covenant, to an effective remedy, including their

release. The State party is under an obligation to ensure that similar violations do not occur in the future.

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

Communication No. 628/1995

Submitted by: Tae Hoon Park [represented by counsel]

Alleged victim: The author

State party: Republic of Korea

Declared admissible: 5 July 1996 (fifty-seventh session)

Date of adoption of Views: 20 October 1998 * (sixty-fourth session)

Subject matter: Compatibility of State party's national security law with provisions of the Covenant

Procedural issues: Admissibility *ratione temporis* - Continued effect of violation - Exhaustion of domestic remedies

Substantive issues: Permissibility of restriction on freedom of expression and freedom of thought - Discrimination

Articles of the Covenant: 2 (3) (a), 18 (1), 19 (1) and (2), and 26

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

Finding: Violation [article 19]

1. The author of the communication is Mr. Tae-Hoon Park, a Korean citizen, born on 3 November 1963. He claims to be a victim of a violation by the Republic of Korea of articles 18, paragraph 1, 19, paragraphs 1 and 2, and 26 of the Covenant. He is represented by Mr. Yong-Whan Cho of Duksu Law Offices in Seoul. The Covenant and the Optional Protocol thereto entered into force for the Republic of Korea on 10 July 1990.

The facts as submitted by the author

2.1 On 22 December 1989, the Seoul Criminal District Court found the author guilty of breaching paragraphs 1 and 3 of article 7 of the 1980 National Security Law. The National Security Law was amended on 31 May 1991. The law applied to the author, however, was the 1980 law, article 7 of which reads (translation provided by the author):

"(1) Any person who has benefited the anti-State organization by way of praising, encouraging, or siding with or through other means the activities of an anti-State organization, its member or a person who had been under instruction from such organisation, shall be punished by imprisonment for not more than 7 years. ...

"(3) Any person who has formed or joined the organisation which aims at committing the actions as stipulated in paragraph 1 of this article shall be punished by imprisonment for more than one year. ...

"(5) Any person who has, for the purpose of committing the actions as stipulated in paragraphs 1 through 4 of this article, produced, imported, duplicated, possessed, transported, disseminated, sold or acquired documents, drawings or any other similar means of expression shall be punished by the same penalty as set forth in each paragraph." and sentenced him to one year's suspended imprisonment and one year's suspension of exercising his profession. The author appealed to the Seoul High Court, but in the meantime was conscripted into the Korean Army under the

* Pursuant to rule 85 of the Committee's rules of procedure, Mr. Maxwell Yalden did not participate in the examination of the case.

Military Service Act, following which the Seoul High Court transferred the case to the High Military Court of Army. The High Military Court, on 11 May 1993, dismissed the author's appeal. The author then appealed to the Supreme Court, which, on 24 December 1993, confirmed the author's conviction. With this, it is argued, all available domestic remedies have been exhausted. In this context, it is stated that the Constitutional Court, on 2 April 1990, declared that paragraphs 1 and 5 of article 7 of the National Security Law were constitutional. The author argues that, although the Court did not mention paragraph 3 of article 7, it follows from its decision that paragraph 3 is likewise constitutional, since this paragraph is intrinsically woven with paragraphs 1 and 5 of the article.

2.2 The author's conviction was based on his membership and participation in the activities of the Young Koreans United (YKU), during his study at the University of Illinois in Chicago, USA, in the period 1983 to 1989. The YKU is an American organization, composed of young Koreans, and has as its aim to discuss issues of peace and unification between North and South Korea. The organization was highly critical of the then military government of the Republic of Korea and of the US support for that government. The author emphasizes that all YKU's activities were peaceful and in accordance with the US laws.

2.3 The Court found that the YKU was an organization which had as its purpose the commission of the crimes of siding with and furthering the activities of the North Korean Government and thus an "enemy-benefiting organization". The author's membership in this organization constituted therefore a crime under article 7, paragraph 3, of the National Security Law. Moreover, the author's participation in demonstrations in the USA calling for the end of US' intervention constituted siding with North Korea, in violation of article 7, paragraph 1, of the National Security Law. The author points out that on the basis of the judgment against him, any member of the YKU can be brought to trial for belonging to an "enemy-benefiting organization".

2.4 From the translations of the court judgments in the author's case, submitted by counsel, it appears that the conviction and sentence were based on the fact that the author had, by participating in certain peaceful demonstrations and other gatherings in the United States, expressed his support or sympathy to certain political slogans and positions.

2.5 It is stated that the author's conviction was based on his forced confession. The author was arrested at the end of August 1989 without a warrant and was interrogated during 20 days by the Agency for National Security Planning and then kept in detention for another 30 days before the indictment. The author states that, although he does not wish to

raise the issue of fair trial in his communication, it should be noted that the Korean courts showed bad faith in considering his case.

2.6 Counsel submits that, although the activities for which the author was convicted took place before the entry into force of the Covenant for the Republic of Korea, the High Military Court and the Supreme Court considered the case after the entry into force. It is therefore argued that the Covenant did apply and that the Courts should have taken the relevant articles of the Covenant into account. In this connection, the author states that, in his appeal to the Supreme Court, he referred to the Human Rights Committee's Comments after consideration of the initial report submitted by the Republic of Korea under article 40 of the Covenant (CCPR/C/79/Add.6), in which the Committee voiced concern about the continued operation of the National Security Law; he argued that the Supreme Court should apply and interpret the National Security Law in accordance with the recommendations made by the Committee. However, the Supreme Court, in its judgment of 24 December 1993, stated:

"Even though the Human Rights Committee established by the International Covenant on Civil and Political Rights has pointed out problems in the National Security Law as mentioned, it should be said that NSL does not lose its validity simply due to that. ... Therefore, it can not be said that punishment against the defendant for violating of NSL violates international human rights regulation or is contradictory application of law without equity." (translation by author)

The complaint

3.1 The author states that he has been convicted for holding opinions critical of the situation in and the policy of South Korea, which are deemed by the South Korean authorities to have been for the purpose of siding with North Korea only on the basis of the fact that North Korea is also critical of South Korean policies. The author argues that these presumptions are absurd and that they prevent any freedom of expression critical of government policy.

3.2 The author claims that his conviction and sentence constitute a violation of articles 18, paragraph 1, 19, paragraphs 1 and 2, and 26, of the Covenant. He argues that although he was convicted for joining an organization, the real reason for his conviction was that the opinions expressed by himself and other YKU members were critical of the official policy of the South Korean Government. He further contends that, although freedom of association is guaranteed under the Constitution, the National Security Law restricts the freedom of association of those whose opinions differ from the official government policy. This is said to amount to

discrimination in violation of article 26 of the Covenant. Because of the reservation made by the Republic of Korea, the author does not invoke article 22 of the Covenant.

3.3 The author requests the Committee to declare that his freedom of thought, his freedom of opinion and expression and his right to equal treatment before the law in exercising freedom of association have been violated by the Republic of Korea. He further requests the Committee to instruct the Republic of Korea to repeal paragraphs 1, 3 and 5, of article 7 of the National Security Law, and to suspend the application of the said articles while their repeal is before the National Assembly. He further asks to be granted a retrial and to be pronounced innocent, and to be granted compensation for the violations suffered.

State party's observations and counsel's comments

4.1 By submission of 8 August 1995, the State party recalls that the facts of crime in the author's case were, *inter alia*, that he sympathized with the view that the United States is controlling South Korea through the military dictatorship in Korea, along with other anti-state views.

4.2 The State party argues that the communication is inadmissible for failure to exhaust domestic remedies. In this context, the State party notes that the author has claimed that he was arrested without a warrant and arbitrarily detained, matters for which he could have sought remedy through an emergency relief procedure or through an appeal to the Constitutional Court. Further, the State party argues that the author could demand a retrial if he has clear evidence proving him innocent or if those involved in his prosecution committed crimes while handling the case.

4.3 The State party further argues that the communication is inadmissible since it deals with events that took place before the entry into force of the Covenant and the Optional Protocol.

4.4 Finally, the State party notes that on 11 January 1992 an application was made by a third party to the Constitutional Court concerning the constitutionality of article 7, paragraphs 1 and 3, of the National Security Law. The Constitutional Court is at present reviewing the matter.

5.1 In his comments on the State party's submission, counsel for the author notes that the State party has misunderstood the author's claims. He emphasizes that the possible violations of the author's rights during the investigation and the trial are not at issue in the present case. In this context, counsel notes that the matter of a retrial has no relevance to the author's claims. He does not challenge the evidence against him, rather he contends that he should not

have been convicted and punished for these established facts, since his activities were well within the boundaries of peaceful exercise of his freedom of thought, opinion and expression.

5.2 As regards the State party's argument that the communication is inadmissible *ratione temporis*, counsel notes that, although the case against the author was initiated before the entry into force of the Covenant and the Optional Protocol, the High Military Court and the Supreme Court confirmed the sentences against him after the date of entry into force. The Covenant is therefore said to apply and the communication to be admissible.

5.3 As regards the State party's statement that the constitutionality of article 7, paragraphs 1 and 3, of the National Security Law, is at present being reviewed by the Constitutional Court, counsel notes that the Court on 2 April 1990 already decided that the articles of the National Security Law were constitutional. Later applications concerning the same question were equally dismissed by the Court. He therefore argues that a further review by the Constitutional Court is devoid of chance, since the Court is naturally expected to confirm its prior jurisprudence.

The Committee's admissibility decision

6.1 At its 57th session, the committee considered the admissibility of the communication.

6.2 The Committee noted the State party's argument that the communication was inadmissible since the events complained of occurred before the entry into force of the Covenant and its Optional Protocol. The Committee noted, however, that, although the author was convicted in first instance on 22 December 1989, that was *before* the entry into force of the Covenant and the Optional Protocol thereto for Korea, both his appeals were heard *after* the date of entry into force. In the circumstances, the Committee considered that the alleged violations had continued after the entry into force of the Covenant and the Optional Protocol thereto and that the Committee was thus not precluded *ratione temporis* from examining the communication.

6.3 The Committee also noted the State party's arguments that the author had not exhausted all domestic remedies available to him. The Committee noted that some of the remedies suggested by the State party related to aspects of the author's trial which did not form part of his communication to the Committee. The Committee further noted that the State party had argued that the issue of the constitutionality of article 7 of the National Security Law was still pending before the Constitutional Court. The Committee also noted that the author had argued that the application to the Constitutional

Court was futile, since the Court had already decided, for the first time on 2 April 1990, and several times since, that the article was compatible with the Korean Constitution. On the basis of the information before it, the Committee did not consider that any effective remedies were still available to the author within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

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

6.5 The Committee considered that the facts as submitted by the author might raise issues under articles 18, 19 and 26 of the Covenant that need to be examined on the merits.

7. Accordingly, on 5 July 1996 the Human Rights Committee declared the communication admissible.

State party's merits observations and counsel's comments

8.1 In its observations, the State party notes that the author has been convicted for a transgression of national laws, after a proper investigation bringing to light the undisputed facts of the case. The State party submits that in spite of the precarious security situation it has done its utmost to guarantee fully all basic human rights, including the freedom to express one's thoughts and opinions. The State party notes, however, that the overriding necessity of preserving the fabric of its democratic system requires protective measures.

8.2 The Korean Constitution contains a provision (article 37, paragraph 2) stipulating that "the freedoms and rights of citizens may be restricted by law only when necessary for national security, the maintenance of law and order and for public welfare." Pursuant to the Constitution, the National Security Law contains some provisions which may partially restrict individuals' freedoms or rights. According to the State party, a national consensus exists that the NSL is indispensable to defend the country against the North Korean communists. In this connection, the State party refers to incidents of a violent nature. According to the State party, it is beyond doubt that the author's activities as a member of YKU, an enemy benefitting organization that endorses the policies of the North Korean communists, constituted a threat to the preservation of the democratic system in the Republic of Korea.

8.3 In respect to the author's argument that the Court should have applied the provisions of the Covenant to his case, the State party submits that the "author was convicted not because the Court

intentionally precluded the application of the Covenant but because it was a matter of necessity to give the NSL's provisions priority over certain rights of individuals as embodied in the Covenant in view of Korea's security situation."

9.1 In his comments on the State party's submission, counsel argues that the fact that the State party is in a precarious security situation has no relation with the author's peaceful exercise of his right to freedom of thought, opinion, expression and assembly. Counsel argues that the State party has failed to establish any relation between the North Korean communists and the YKU or the author, and has not provided any sound explanation about which policies of the North Korean communists the YKU or the author endorsed. According to counsel, the State party has likewise failed to show what kind of threat the YKU or the author's activities posed to the security of the country.

9.2 It is submitted that the author joined the YKU as a student with aspiration for democracy and peaceful unification of his country. In his activities, he never had any intention to give benefit to North Korea or put the security of his country in danger. According to counsel, the kind of opinion expressed by the author can be rebutted by discussion and debate, but, as far as such expression is discharged in a peaceful manner, it should never be suppressed by criminal prosecution. In this context, counsel submits that it is not for the State to assume the role of divine judge about what is the truth or the false and the good or the evil.

9.3 Counsel maintains that the author was punished for his political opinion, thought and peaceful expression thereof. He also claims that his right to equal protection before the law under article 26 of the Covenant was denied. In this connection, he explains that this is so because, while every citizen is guaranteed to enjoy the right to freedom of association under article 21 of the Constitution, the author was punished and thereby subjected to discrimination for joining the YKU which had allegedly different political opinions than those of the Government of the Republic of Korea.

9.4 The author refers to the report on the mission to the Republic of Korea by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression E/CN.4/1996/39/Add.1. The author requests the Committee to recommend to the Government to publish its Views on the communication and its translation into Korean in the Official Gazette.

Examination of merits

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

provided in article 5, paragraph 1, of the Optional Protocol.

10.2 The Committee takes note of the fact that the author has not invoked article 22 of the Covenant, related to freedom of association. As a reason for not invoking the provision, counsel has referred to a reservation or declaration by the Republic of Korea according to which article 22 shall be so applied as to be in conformity with Korean laws including the Constitution. As the author's complaints and arguments can be addressed under other provisions of the Covenant, the Committee need not on its own initiative take a position to the possible effect of the reservation or declaration. Consequently, the issue before the Committee is whether the author's conviction under the National Security Law violated his rights under articles 18, 19 and 26 of the Covenant.

10.3 The Committee observes that article 19 guarantees freedom of opinion and expression and allows restrictions only as provided by law and necessary (a) for respect of the rights and reputation of others; and (b) for the protection of national security or public order (*ordre public*), or of public health or morals. The right to freedom of expression is of paramount importance in any democratic society, and any restrictions to the exercise of this right must meet a strict test of justification. While the State party has stated that the restrictions were justified in order to protect national security and that they were provided for by law, under article 7 of the National Security Law, 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 by reference to the general situation in the country and the threat posed by "North Korean communists". 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. The Committee has carefully studied the judicial decisions by which the author was convicted and finds that neither those decisions nor the submissions by the State party show that the author's conviction was necessary for the protection of one of the legitimate purposes set forth by article 19 (3). The author's conviction for acts of expression must therefore be regarded as a violation of the author's right under article 19 of the Covenant.

10.4 In this context, the Committee takes issue with the State party's statement that the "author was convicted not because the Court intentionally precluded the application of the Covenant but because it was a matter of necessity to give the NSL's provisions priority over certain rights of individuals as embodied in the Covenant in view of Korea's security situation." The Committee observes that the State party by becoming a party to the Covenant, has undertaken pursuant to article 2, to respect and to ensure all rights recognized therein. It has also undertaken to adopt such legislative or other measures as may be necessary to give effect to these rights. The Committee finds it incompatible with the Covenant that the State party has given priority to the application of its national law over its obligations under the Covenant. In this context, the Committee notes that the State party has not made the declaration under article 4 (3) of the Covenant that a public emergency existed and that it derogated certain Covenant rights on this basis.

10.5 In the light of the above findings, the Committee need not address the question of whether the author's conviction was in violation of articles 18 and 26 of the Covenant.

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

12. Under article 2, paragraph 3(a), of the Covenant, the State party is under the obligation to provide Mr. Tae-Hoon Park with an effective remedy, including appropriate compensation for having been convicted for exercising his right to freedom of expression. The State party is under an obligation to ensure that similar violations do not occur in the future.

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

Communication No. 633/1995

Submitted by: Robert W. Gauthier [represented by counsel]

Alleged victim: The author

State party: Canada

Declared admissible: 10 July 1997 (sixtieth session)

Date of adoption of Views: 7 April 1999 (sixty-fifth session)

Subject matter: Denial of equal access to parliamentary press facilities

Procedural issues: Exhaustion of domestic remedies
- Non-substantiation of claim - Partial reversal of admissibility decision

Substantive issues: Right to freedom of expression - Freedom of association - Discrimination

Articles of the Covenant: 2 (3), 19, 22 and 26

Article of the Optional Protocol and Rules of Procedure: 2, and rules 85 and 93 (4)

Finding: Violation [article 19]

1. The author of the communication is Robert G. Gauthier, a Canadian citizen. He claims to be a victim of a violation by Canada of article 19 of the Covenant.

The facts as presented by the author

2.1 The author is publisher of the National Capital News, a newspaper founded in 1982. The author applied for membership in the Parliamentary Press Gallery, a private association that administers the accreditation for access to the precincts of Parliament. He was provided with a temporary pass that gave only limited privileges. Repeated requests for equal access on the same terms as other reporters and publishers were denied.

2.2 The author points out that a temporary pass does not provide the same access as a permanent membership, since it denies *inter alia* listing on the membership roster of the Press Gallery, as well as access to a mailbox for the receipt of press communiques.

2.3 As regards the exhaustion of domestic remedies, the author explains that he has filed numerous requests, not only with the Press Gallery, but also with the Speaker of the House, all to no avail. According to the author, no reasons have been given for denying him full access. The author applied to the Federal Court for a review of the decision of the Press Gallery, but the Court decided that it did not have jurisdiction over decisions of the Press Gallery since it is not a department of the Government of Canada. A complaint filed with the Bureau of Competition Policy, arguing that the

exclusion of the National Capital News from equal access constituted unfair competition was dismissed.

2.4 The author then initiated an action in the Provincial Court against the Speaker of the House of Commons, requesting a declaration by the court that the denial of access to the precincts of Parliament on the same terms as members of the Canadian Parliamentary Press Gallery infringed the author's right to freedom of the press as provided in the Canadian Charter of Rights and Freedoms. The Court ruled, on 30 November 1994, that the decision of the Speaker not to permit the author to have access to the facilities in the House of Commons that are used by members of the Press Gallery was made in the exercise of a parliamentary privilege and therefore not subject to the charter or to review by the Court.

2.5 The author points out that he has been trying to obtain equal access to press facilities in Parliament since 1982, and he argues therefore that the application of domestic remedies is unreasonably prolonged, within the meaning of article 5, paragraph 2 (b), of the Optional Protocol. He also expresses doubts about the effectiveness of the appeal.

The complaint

3. The author claims that the denial of equal access to press facilities in Parliament constitutes a violation of his rights under article 19 of the Covenant.

State party's observations and author's comments

4.1 By submission of 28 November 1995, the State party argues that the communication is inadmissible.

4.2 The State party recalls that the author runs an Ottawa based publication, the National Capital News, which is issued with varying degrees of regularity.

4.3 The Canadian Parliamentary Press Gallery is a private, independent, voluntary association formed for the purpose of bringing together media professionals whose principal occupation is the reporting, interpreting and editing of news about Parliament and the federal Government.

4.4 The Speaker of the House of Commons is the guardian of the rights and privileges of the House and its members, and as such, by virtue of parliamentary privilege, has exclusive control over those parts of the Parliamentary precincts occupied by the House of Commons. One of his responsibilities in this regard is controlling access to these areas.

4.5 The State party explains that all Canadian citizens enjoy access to Parliament, which is obtained by means of a pass, of which there are different types. The press pass provides access to the media facilities of Parliament and is issued automatically to accredited members of the Press Gallery.

4.6 The State party explains that there is no formal, official or legal relationship between the Speaker and the Press Gallery. The Press Gallery has been accommodated by the Speaker by maintaining the media facilities of Parliament, such as working space, telephones, access to the Library and Restaurant and the provision of designated seating in the public galleries. The Speaker has no involvement with the day-to-day operations of these facilities, which are independently run by the Press Gallery.

4.7 The State party points out that most of the Press Gallery's facilities are located off Parliament Hill and thus outside the Parliament's precincts. The State party also notes that live television coverage of all proceedings in the House of Commons is available throughout Canada and many journalists thus seldom actually use the media facilities of Parliament.

4.8 The Press Gallery has several categories of membership, the most relevant being the active and temporary membership. Active membership allows access to all media facilities of Parliament for as long as the member meets the criteria, that is for as long as he or she works for a regularly published newspaper and requires access to the media facilities as part of his or her primary occupation of reporting Parliamentary or federal Government news. To those who do not meet these criteria the Press Gallery grants temporary membership which is granted for a defined period and provides access to substantially all of the media facilities of Parliament, except for access to the Parliamentary Restaurant.

4.9 According to the State party, the author has applied several times for membership in the Press Gallery since founding the National Capital News in 1982. His requests for active membership have not been granted, because the Gallery has been unable to ascertain whether he satisfies the criteria. Temporary membership was given to him instead, which was renewed on several occasions. In this context, the State party points out that the author has been uncooperative in providing the Press Gallery

information about the regularity of his newspaper. Without such information necessary to see whether the author fulfils the criteria for active membership, the Gallery cannot admit him as a full member.

4.10 The author has requested that the Speaker of the House of Commons intervene on his behalf. The position of the Speaker's office being one of strict non-interference with Press Gallery matters, the Speaker declined to intervene. The State party emphasizes that at all times the author has enjoyed access to the precincts of Parliament, and access to the media facilities of Parliament during the periods of time when he had a temporary membership card of the Press Gallery.

4.11 The State party submits that the author has instituted several proceedings against the refusal of the Press Gallery to grant him active membership. In 1989, he filed a complaint with the Bureau of Competition Policy, which concluded that the Competition Act had not been contravened. In October 1991, the author's application for judicial review of this decision was denied by the Federal Court since the decision was not reviewable. In 1990, the Federal Court dismissed an application by the author for judicial review of the Press Gallery's decision not to grant him active membership, since the Court lacked jurisdiction.

4.12 An action against the Press Gallery in the Ontario Court (General Division) is still pending. In this action, the author seeks damages of \$ 5 million.

4.13 On 30 November 1994, the Ontario Court (General Division) struck out the action brought by the author against the Speaker of the House of Commons, in which he sought a declaration that "the denial of access to the precincts of Parliament on the same terms as members of the Canadian Parliamentary Press Gallery" infringed his right to freedom of the press as guaranteed in the Canadian Charter of Rights and Freedoms. The Court based itself on jurisprudence that the exercise of inherent privileges of a Canadian legislative body is not subject to Charter review. The author has filed a Notice of Appeal against this decision with the Ontario Court of Appeal, but has not as yet filed the required documentation in proper form.

4.14 The State party argues that the communication is inadmissible for non-exhaustion of domestic remedies. The State party notes that the focus of the author's communication, against the Speaker of the House of Commons, is misdirected since the Speaker's policy has been to administer access to the media facilities of Parliament based on the Press Gallery's determinations regarding membership. Determination of membership is entirely within the jurisdiction of the Press Gallery and lies outside the competence of the Speaker. According to the State party, the suggestion that the Speaker should

override the Press Gallery's internal affairs would undermine freedom of the press. Since the source of the author's complaint is the Press Gallery's refusal to grant him active membership, the State party is of the opinion that the author has failed to exhaust the remedies available to him in this regard.

4.15 The State party submits that the author's failure to cooperate with the Press Gallery constitutes a clear failure to exhaust remedies available to him domestically. The State party further notes that legal proceedings against the Press Gallery are still ongoing in the Ontario Court (General Division) and that the author's appeal against the order of the Ontario Court (General Division) striking out his action against the Speaker of the House of Commons remains unresolved, pending his satisfaction of procedural requirements.

4.16 Moreover, the State party argues that the communication is inadmissible for failure to substantiate the allegation that the failure to grant the author full membership of the Press Gallery amounts to a denial of his rights under article 19 of the Covenant. In this context, the State party recalls that the author has never been denied access to the Parliamentary precincts, and that he has had access to the media facilities of Parliament whenever he was in possession of a temporary press pass. The author has not shown any instance in which he has been frustrated in his ability to gain access to or disseminate information about Parliament.

5.1 By submission of 17 January 1996, the author informs the Committee that he has been prohibited access to the media facilities in Parliament (since he has no press pass). The author explains that while the visitors gallery is open to him, it is of little value to a professional journalist as one is not allowed to take notes when seated in the visitors gallery.

5.2 The author further states that the Press Gallery has obtained a Court order, dated 8 January 1996, that prohibits him from entering its premises. The author acknowledges that these premises are located off Parliament Hill, but states that the Government press releases and other material provided in the Press Gallery's premises are funded by the taxpayers of Canada and form part of the facilities and services provided by the Government for the media.

6.1 In comments on the State party's submission dated 5 February 1996, the author contends that the State party's reply consists of false or incomplete information and numerous misleading statements.

6.2 He submits that although no powers or authority have been legally transferred from Parliament or the Government of Canada to the Canadian parliamentary Press Gallery, the Gallery assumes powers to permit or deny access to the

facilities and services provided by the Parliament and Government of Canada to the media. The author states that his numerous requests for access were presented to the Press Gallery without success, and that he made repeated applications to the Administrative Officials within the Parliament for access to the media facilities, also without success. His attempts to have the matter remedied by the Courts have also been unsuccessful.

6.3 The author submits that he has been trying to have a solution to his denial of access to the media facilities since 1982, when he founded his newspaper, and argues that the application of domestic remedies should be considered as unreasonably prolonged. In this context, the author points to "the history of deliberate and contrived delays, failure to reply to or even acknowledge reasonable requests for information and assistance, and the evidence that these delays will continue".

6.4 In addition, the author states that the possibility of achieving an effective remedy in Canada within the foreseeable future does not exist. In this context, he notes that the measures to prevent him from exercising his profession have only increased in the recent past, as is shown by the notice denying him access to the Press Gallery premises, the conviction against him for trespassing on the premises of the Press Gallery, the conviction against him for trespassing on Parliament Hill, and the Court order prohibiting him access to the premises of the Press Gallery, that is to the "publicly subsidized facilities and services provided by the Government of Canada for the media".

6.5 The author also states that "the Canadian Parliamentary Press Gallery, while maintaining that it is bending over backwards to allow access to the facilities and services provided for the media by the Government of Canada continues to enforce the Court-ordered injunction prohibiting access for the Publisher of the National Capital News to any of these public facilities and services - now in addition to being denied access to information the author is also under the threat of contempt of Court should he attempt to even seek equal access as his competitors enjoy to information specifically and purposely provided for the media, domestic and foreign, by the Government and Parliament of Canada."

6.6 The author complains about the ridicule and trivializing to which he has been subjected. He refers to a Federal Court Justice who compared the author with "Don Quixote, tilting at windmills", a Provincial Court Justice who commented to him: "You seem to take offence at every slight", as well as the State party's reply to the Committee, which according to him trivializes the matter brought before it. In his opinion, this shows that he will never be able to obtain an effective remedy in Canada.

6.7 The author contests the State party's statement that live television coverage of all the activities in the House of Commons is available.

6.8 The author takes issue with the State party's suggestion that his conflict is with a private organization. He states that his complaint is that he has been denied access to the facilities and services provided for the media by the Parliament and Government of Canada, by Canadian officials and Courts. He adds that "the pretext that such access requires membership in conjunction with a group of self-anointed journalists calling themselves the Canadian Parliamentary Press Gallery is not material to this issue for the purposes of article 19 (2) of the Covenant". He points out that the Press Gallery has been incorporated in 1987 in order to limit the personal liability of its members, and that in practice it controls access to the media facilities provided by Canada. However, in the author's opinion he is under no obligation to meet prior conditions established by the Press Gallery that limit his freedom of expression. The author also submits that the media facilities in Parliament are staffed by government employees and that the office equipment is owned by the government.

6.9 The author states that he publishes The National Capital News "with a regularity more than appropriate to satisfy the definition of what constitutes newspapers". From the 26 October 1992 issue of the National Capital News, provided by the author, it appears that the newspaper was "founded in 1982 to become a daily newspaper". He claims that no proper application procedure for membership of the Gallery exists and that access is granted or withheld at whim. According to the author, the Press Gallery at no time seriously considered his application and did not review the information he provided. In this context, he claims that a list of the dates of publication of his newspapers was withheld from the members of the Press Gallery. He contests the State party's assertion that he failed to cooperate with the Press Gallery. He further claims that the Speaker of the House of Commons can intervene in situations involving journalists and has done so in the past.

6.10 Further, the author states that he was given daily passes in 1982-83, which were later converted to weekly and then monthly passes. Only in 1990 was he granted a six month temporary membership. He states that he returned the temporary membership since it did not grant him equal access. The author states that temporary membership denied him the right to vote, to ask questions at press conferences, to have a mail slot for receiving all the information available to active members and a listing on the membership list. According to the author, as a result "there was no assurance that all the information would be provided to the author and any information

that was sent individually by people to whom the membership list was circulated would not include the author".

6.11 The author states that on 4 January 1996, the Ontario Court dismissed his action against the Press Gallery. The author states that he will be appealing the judgment, but that the proceedings are unreasonably prolonged and thus no obstacle to the admissibility of his communication. Moreover, he states that his communication is directed against the State party, and that his action against the Press Gallery can thus not be a remedy to be exhausted for purposes of the Optional Protocol. The author adds that he has discontinued his appeal against the 30 November 1994 judgment of the Ontario Court concerning his claim against the Speaker of the House of Commons, since it is accurate that the Courts have no jurisdiction over Parliament.

6.12 As regards the State party's assertion that he has not made a *prima facie* case, the author states that the State party has prohibited him access to the premises of the Press Gallery in the Parliament Buildings, and that it has not intervened to allow access for the author to the Press Gallery premises outside the precincts of Parliament. According to the author it is evident that the State party "has no desire or intention to respect its responsibilities and obligations to abide by article 19 (2)".

Further State party submission and author's comments thereon

7.1 On 25 October 1996, the State party provided some clarifications and acknowledged that the author was denied access to the Parliamentary precincts from 25 July 1995 until 4 August 1995, following an incident on 25 July after which he was charged with trespass for attempting to enter the Press Gallery in Parliament. He was convicted for trespassing on 26 April 1996 and on 9 July 1996 his appeal was dismissed.

7.2 The State party explains that although the author has access to the Parliamentary buildings, he does not have access to the premises of the Press Gallery located in the buildings of Parliament. However, there is no Court order prohibiting him this access; the Court order only relates to the premises of the Press Gallery located off Parliament Hill.

7.3 The State party provides a copy of the judgment of the Ontario Court (General Division) of 4 January 1996, in which it was decided that there was no genuine issue for trial in the author's action against the Press Gallery. The judge found, on the basis of uncontradicted affidavit evidence, that the privileges (access to the media facilities in Parliament) the author was seeking were administered by the Speaker of the House of

Commons, not by the Press Gallery. As regards the issue of denial of membership, the Judge found that the Press Gallery had not failed to accord the author natural justice. The Judge noted that the author had been given temporary membership on a number of occasions and that his failure to obtain active membership was attributable to his refusal to answer questions posed to him by the Board of Directors of the Press Gallery for the purposes of determining whether or not he fulfilled the requirements for active membership.

7.4 The State party reiterates that the author's failure to gain access to the Parliamentary Press Gallery is directly attributable to his failure to cooperate with the Press Gallery in the pursuit of his application for active membership. According to the State party, he has thus failed to exhaust the simplest and most direct domestic remedy available to him. The State party adds that the Speaker of the House of Commons has "good reason to expect individuals to follow the normal channels for obtaining access to the Parliamentary Press Gallery premises located on the Parliamentary precincts. In order to make access to Parliamentary precincts meaningful, the Speaker needs to ensure that access to any location on the precincts is controlled. For this purpose, in the particular case of the Parliamentary Press Gallery premises located in the Parliamentary precincts, the Speaker has chosen, as a matter of practice, to condition such access on membership of the Canadian Press Gallery." The State party submits that the Speaker's practice is reasonable and appropriate and consistent with the freedom of expression and of the press.

8.1 In his comments on the State party's further submission, the author complains about the delays the State party is causing and submits that his complaint is well-founded and has merit, particularly in the light of the State party's demonstrated practice and intention to prolong a domestic resolution.

8.2 The author reiterates that the Government of Canada prevents him to seek and receive information and observe proceedings on behalf of his readers, and prohibits his access to facilities and services provided for the media. He emphasizes that favoured journalists benefit from special privileges, among others free phones, services of a Government staff of nine, access to Press Conferences, office space, access to press releases and to information about the itineraries of public officials, parking, access to the Library of Parliament.

8.3 The author submits that the Court has ruled that he cannot obtain the privileges he wants from the Press Gallery, since they fall under the control of the Speaker of the House of Commons. At the same time, the Speaker refuses to intervene in what he sees as internal matters of the Press Gallery. The author states

that he tried to comply with the Press Gallery's requirements. He states that in one year he published an average of three issues a month., but that there is no appeal available against their decisions. He contests that the temporary pass does not restrict the freedom of expression, as it denied full access to all facilities and services provided for the press.

8.4 The author acknowledges that the Press Gallery may have some merit in screening applicants who request access to the facilities and services provided for the media, but argues that there should be a recourse available of any decision that is unfair or in violation of fundamental human rights. He states that Canada clearly is unwilling to provide such a recourse, as shown by the refusals of the Speaker of the House to address the matter as well as by its reply to the Committee, and argues that all available and effective domestic remedies have thus been exhausted.

The Committee's admissibility decision

9.1 At its 60th session, the Committee considered the admissibility of the communication.

9.2 The Committee noted that the State party had argued that the communication was inadmissible for failure to exhaust domestic remedies. The Committee carefully examined the remedies listed by the State party and came to the conclusion that no effective remedies were available to the author. In this context, the Committee noted that it appeared from the Court decisions in the case that the access the author was seeking, fell within the competence of the Speaker of the House of Commons, and that decisions of the Speaker in this matter were not reviewable by the Courts. The State party's argument that the author could find a solution by cooperating in the determination of his qualifications for membership in the Canadian Parliamentary Press Gallery did not address the issue raised by the author's communication, whether or not the limitation of access to the press facilities in Parliament to members of the Press Gallery violated his right under article 19 of the Covenant.

9.3 The State party had further argued that the author had failed to present a *prima facie* case and that the communication was thus inadmissible for non-substantiation of a violation. The Committee noted that it appeared from the information before it that the author had been denied access to the press facilities of Parliament, because he was not a member of the Canadian Parliamentary Press Gallery. The Committee further noted that without such access, the author was not allowed to take notes during debates in Parliament. The Committee found that this might raise an issue under article 19, paragraph 2, of the Covenant, which should be considered on its merits.

9.4 The Committee further considered that the question whether the State party can require membership in a private organization as a condition for the enjoyment of the freedom to seek and receive information, should be examined on its merits, as it might raise issues not only under article 19, but also under articles 22 and 26 of the Covenant.

10. Accordingly, on 10 July 1997, the Human Rights Committee declared the communication admissible.

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

11.1 By submission of 14 July 1998, the State party provides a response on the merits of the communication. It reiterates its earlier observations and explains that the Speaker of the House of Commons, by virtue of Parliamentary privilege, has control of the accommodation and services in those parts of the Parliamentary precincts that are occupied by or on behalf of the House of Commons. One of the Speaker's duties in this regard is controlling access to these areas. The State party emphasizes that the absolute authority of Parliament over its own proceedings is a crucial and fundamental principle of Canada's general constitutional framework.

11.2 With regard to the relationship between the Speaker and the Press Gallery, the State party explains that this relationship is not formal, official or legal. While the Speaker has ultimate authority over the physical access to the media facilities in Parliament, he is not involved in the general operations of these facilities which are administered and run entirely by the Press Gallery.

11.3 Press passes granting access to the media facilities of Parliament are issued to Gallery members only. The State party reiterates that the determination of membership in the Press Gallery is an internal matter and that the Speaker has always taken a position of strict non-interference. It submits that as a member of the public, the author has access to the Parliament buildings open to the public and that he can attend the public hearings of the House of Commons.

11.4 In this connection, the State party reiterates that the proceedings of the House of Commons are broadcasted on television and that any journalist can report effectively on the proceedings in the House of Commons without using the media facilities of Parliament. The State party adds that the transcripts of the House debates can be found on Internet the following day. Speeches and press releases of the Prime Minister are deposited in a lobby open to the public, and are also posted on Internet. Government reports and press releases are likewise posted on Internet.

11.5 The State party argues that the author has not been deprived of his freedom to receive and impart information. Although as a member of the public, he may not take notes while sitting in the Public Gallery of the House of Commons, he may observe the proceedings in the House and report on them. The State party explains that "Note-taking has traditionally been prohibited in the public galleries of the House of Commons as a matter of order and decorum and for security reasons (e.g. the throwing of objects at the members of Parliament from the gallery above)". Moreover, the information he seeks is available through live broadcasting and Internet.

11.6 Alternatively, the State party argues that any restriction on the author's ability to receive and impart information that may result from the prohibition on note-taking in the public gallery in the House of Commons is minimal and is justified to achieve a balance between the right to freedom of expression and the need to ensure both the effective and dignified operation of Parliament and the safety and security of its members. According to the State party, states should be accorded a broad flexibility in determining issues of effective governance and security since they are in the best position to assess the risks and needs.

11.7 The State party also denies that a violation of article 26 has occurred in the author's case. The State party acknowledges that a difference in treatment exists between journalists who are members of the Press Gallery and those who do not satisfy the criteria for membership, but submits that this has not lead to any significant disadvantage for the author. The State party also refers to the Committee's jurisprudence that not every differentiation can be deemed to be discriminatory and submits that the distinction made is compatible with the provisions of the Covenant and based on objective criteria. In this context, the State party emphasizes that access to press facilities in Parliament must necessarily be limited since the facilities can only accommodate a limited number of people. It is reasonable to limit such access to journalists who report regularly on the proceedings in Parliament. The Speaker is aware of the criteria for membership in the Press Gallery and relies on these criteria as an appropriate standard for determining who should or should not have access to the media facilities of Parliament. It is submitted that these criteria, which the Speaker has by implication adopted and endorsed, are specific, fair and reasonable, and cannot be deemed arbitrary or unreasonable.

11.8 With regard to article 22 of the Covenant, the State party observes that the author is not being forced by the Government to join any association. He is free not to associate with the Press Gallery, nor is his ability to practice the profession of journalism

conditioned in any way upon his membership of the Press Gallery.

12.1 In his comments, dated 25 September 1998, the author refers to his earlier submissions. He emphasizes that he is without remedy because of the refusal of the Speaker to intervene on his behalf and to grant him access to the press facilities or even hear him. The author emphasizes that no powers have been transferred from the Speaker to the Press Gallery, nor has the Speaker the authority to delegate his responsibilities to an individual group without accountability to the Members of Parliament. According to the author, the Parliamentary privileges are of no force or effect when they infringe fundamental rights such as those contained in the Covenant. The author argues that the State party is allowing a private organization to restrict access to news and information.

12.2 The author also gives examples of how Speakers have intervened in the past and given access to the media facilities in Parliament to individual journalists who had been denied membership by the Press Gallery. He rejects the State party's argument that the Speaker would be interfering with the freedom of the press if he were to intervene, on the contrary, he argues that the Speaker has a duty to intervene in order to protect the freedom of expression.

12.3 The author reiterates that as a journalist he requires equal access to the media facilities of Parliament. The author refers to the 1992 Annual Meeting of the Press Gallery, during which members stated that they had a fundamental right to be at the Parliament facilities in order to have access to information.. He states that, although it can be seen as reasonable for the Speaker to have the accreditation of journalists handled by the staff assigned to the Press Gallery, things got out of control and the Press Gallery began using favouritism on the one hand and coercion and blackmail on the other, and as a result the author was denied access and has no recourse. He emphasizes that he meets all the requirements for accreditation. In any event, he argues that the Gallery's by-laws can never affect his fundamental rights under article 19, paragraph 2, to have access to information. He adds that the Gallery's by-laws are arbitrary, inconsistent, tyrannical and in violation not only of the Covenant but also of the State party's own constitution. The author submits that if a group of journalists wishes to form their own association, they should feel free to do so. This private, voluntary organization should in no way be given authority or supervision over any publicly-financed activities and services as it has today, especially since no possibility of appeal from its decisions is provided. He rejects membership in this association as a prerequisite to enjoying his fundamental right to

freedom of expression and submits that he should not be forced to belong to the Press Gallery in order to receive information that is made available by the House of Commons.

12.4 With regard to the State party's argument that live coverage of all proceedings in the House of Commons is available, the author submits that the Cable Public Affairs Channel which broadcasts the House of Commons proceedings, is a news service in competition with the author. He states that it is of very little use as a journalist, since one has to watch whatever they decide to broadcast. The author moreover contests that live coverage of all proceedings in the House of Commons is available, since very often debates are broadcasted as replays, and most Committee meetings are not televised. The author also argues that there is much more to reporting on the activities of Parliament than observe the sessions that take place in the House of Commons. In addition, being recognized in the eyes of the Government community as part of the accepted media is essential to the process of networking within that community. The author therefore maintains that the restrictions by not having access to the media facilities in Parliament seriously impede if not render impossible his ability to seek and obtain information about the activities of the Parliament and Government of Canada.

12.5 The author rejects the State party's argument that his being allowed to do his work along with the other 300 accredited journalists would encroach on the effective and dignified operation of Parliament and the safety and security of its members. With regard to article 26 of the Covenant, the author denies that the difference in treatment between him and journalists members of the Press Gallery is reasonable and reiterates that he has been arbitrarily denied equal access to media facilities. Although he accepts that the State party may limit access to press facilities in Parliament, he submits that such limits must not be unduly restraining, must be administered fairly, must not infringe on any person's right to freedom of expression and the right to seek and receive information, and must be subject to review. According to the author, the absence of an avenue of appeal of a decision by the Press Gallery constitutes a violation of equal protection of the law. The author does not accept that limited space means that he cannot be allowed to use the press facilities, since other new journalists have been admitted and since there would be other possibilities of solving this, such as limiting the number of accredited journalists who work for the same news organization. The author refers to the State-owned CBC, which according to him has 105 members in the Press Gallery.

12.6 Finally, the author submits that the exclusion from access to essential services and facilities provided by the House of Commons for the press of

those journalists who are not a member of the Canadian Press Gallery constitutes a violation of the right to freedom of association, since no one should be forced to join an association in order to enjoy a fundamental right such as freedom to obtain information.

Examination of the merits

13.1 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.

13.2 With regard to the author's claims under articles 22 and 26 of the Covenant, the Committee has reviewed, under article 93 (4) of its Rules of Procedure, its decision of admissibility taken at its 60th session and considers that the author had not substantiated, for purposes of admissibility, his claim under the said articles. Nor has he further substantiated it, for the same purposes, with his further submissions. In these circumstances, the Committee concludes that the author's communication is inadmissible under article 2 of the Optional Protocol, as far as it relates to articles 22 and 26 of the Covenant. In this regard, the admissibility decision is therefore set aside.

13.3 The issue before the Committee is thus whether the restriction of the author's access to the press facilities in Parliament amounts to a violation of his right under article 19 of the Covenant, to seek, receive and impart information.

13.4 In this connection, the Committee also refers to the right to take part in the conduct of public affairs, as laid down in article 25 of the Covenant, and in particular to General Comment No. 25 (57) which reads in part: "In order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion."¹ Read together with article 19, this implies that citizens, in particular through the media, should have wide access to information and the opportunity to disseminate information and opinions about the activities of elected bodies and their members. The Committee recognizes, however, that such access should not interfere with or obstruct the carrying out of the functions of elected bodies, and that a State party is thus entitled to limit access. However, any

¹ General comment No. 25, paragraph 25, adopted by the Committee on 12 July 1996.

restrictions imposed by the State party must be compatible with the provisions of the Covenant.

13.5 In the present case, the State party has restricted the right to enjoy the publicly funded media facilities of Parliament, including the right to take notes when observing meetings of Parliament, to those media representatives who are members of a private organisation, the Canadian Press Gallery. The author has been denied active (i.e. full) membership of the Press Gallery. On occasion he has held temporary membership which has given him access to some but not all facilities of the organisation. When he does not hold at least temporary membership he does not have access to the media facilities nor can he take notes of Parliamentary proceedings. The Committee notes that the State party has claimed that the author does not suffer any significant disadvantage because of technological advances which make information about Parliamentary proceedings readily available to the public. The State party argues that he can report on proceedings by relying on broadcasting services, or by observing the proceedings. In view of the importance of access to information about the democratic process, however, the Committee does not accept the State party's argument and is of the opinion that the author's exclusion constitutes a restriction of his right guaranteed under paragraph 2 of article 19 to have access to information. The question is whether or not this restriction is justified under paragraph 3 of article 19. The restriction is, arguably, imposed by law, in that the exclusion of persons from the precinct of Parliament or any part thereof, under the authority of the Speaker, follows from the law of parliamentary privilege.

13.6 The State party argues that the restrictions are justified to achieve a balance between the right to freedom of expression and the need to ensure both the effective and dignified operation of Parliament and the safety and security of its members, and that the State party is in the best position to assess the risks and needs involved. As indicated above, the Committee agrees that the protection of Parliamentary procedure can be seen as a legitimate goal of public order and an accreditation system can thus be a justified means of achieving this goal. However, since the accreditation system operates as a restriction of article 19 rights, its operation and application must be shown as necessary and proportionate to the goal in question and not arbitrary. The Committee does not accept that this is a matter exclusively for the State to determine. The relevant criteria for the accreditation scheme should be specific, fair and reasonable, and their application should be transparent. In the instant case, the State party has allowed a private organization to control access to the Parliamentary press facilities, without intervention. The scheme does not ensure that there

will be no arbitrary exclusion from access to the Parliamentary media facilities. In the circumstances, the Committee is of the opinion that the accreditation system has not been shown to be a necessary and proportionate restriction of rights within the meaning of article 19, paragraph 3, of the Covenant, in order to ensure the effective operation of Parliament and the safety of its members. The denial of access to the author to the press facilities of Parliament for not being a member of the Canadian Press Gallery Association constitutes therefore a violation of article 19 (2) of the Covenant.

13.7 In this connection, the Committee notes that there is no possibility of recourse, either to the Courts or to Parliament, to determine the legality of the exclusion or its necessity for the purposes spelled out in article 19 of the Covenant. The Committee recalls that under article 2, paragraph 3 of the Covenant, States parties have undertaken to ensure that any person whose rights are violated shall have an effective remedy, and that any person claiming such a remedy shall have his right thereto determined by competent authorities. Accordingly, whenever a right recognized by the Covenant is affected by the action of a State agent there must be a procedure established by the State allowing the person whose right has been affected to claim before a competent body that there has been a violation of his rights.

14. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights, is of the view that the facts before it disclose a violation of article 19, paragraph 2, of the Covenant.

15. Under article 2, paragraph 3 (a), of the Covenant, the State party is under the obligation to provide Mr. Gauthier with an effective remedy including an independent review of his application to have access to the press facilities in Parliament. The State party is under an obligation to take measures to prevent similar violations in the future.

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

APPENDIX I

Individual opinion submitted by Mr. Prafullachandra Natwarlal Bhagwati, Lord Colville, Ms. Elizabeth Evatt, Ms. Cecilia Medina Quiroga and Mr Hipólito Solari Yrigoyen pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the Views of the Committee on communication No. 633/1995,

Robert W. Gauthier v. Canada

In regard to paragraph 13.2 of the Committee's Views, our opinion is that the claims of the author under articles 22 and 26 of the Covenant have been sufficiently substantiated and that there is no basis to revise the decision on admissibility.

Article 26 of the Covenant stipulates that all persons are equal before the law. Equality implies that the application of laws and regulations as well as administrative decisions by Government officials should not be arbitrary but should be based on clear coherent grounds, ensuring equality of treatment. To deny the author, who is a journalist and seeks to report on parliamentary proceedings, access to the Parliamentary press facilities without specifically identifying the reasons, was arbitrary. Furthermore, there was no procedure for review. In the circumstances, we are of the opinion that the principle of equality before the law protected by article 26 of the Covenant was violated in the author's case.

In regard to article 22, the author's claim is that requiring membership in the Press Gallery Association as a condition of access to the Parliamentary press facilities violated his rights under article 22. The right to freedom of association implies that in general no one may be forced by the State to join an association. When membership of an association is a requirement to engage in a particular profession or calling, or when sanctions exist on the failure to be a member of an association, the State party should be called on to show that compulsory membership is necessary in a democratic society in pursuit of an interest authorised by the Covenant. In this matter, the Committee's deliberations in paragraph 13.6 of the Views make it clear that the State party has failed to show that the requirement to be a member of a particular organisation is a necessary restriction under paragraph 2 of article 22 in order to limit access to the press gallery in Parliament for the purposes mentioned. The restrictions imposed on the author are therefore in violation of article 22 of the Covenant.

APPENDIX II

Individual opinion submitted by Mr. David Kretzmer pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the Views of the Committee on communication No. 633/1995,

Robert W. Gauthier v. Canada

I join the opinion of my colleagues who are of the view that there was a violation of article 22 in the present case. However, I do not share their view that a violation of article 26 has also been substantiated. In my mind, it is not

sufficient, in order to substantiate a violation of article 26, merely to state that no reasons were given for a decision. Furthermore, it seems to me that the author's claim under article 26 is in essence a restatement of his claim under article 19. It amounts to the argument that while others were allowed access to the Press Gallery, the author was denied access. Accepting that this constitutes a violation of article 26 would seem to imply that in almost every case in which one individual's rights under other articles of the Covenant are violated, there will also be a violation of article 26. I therefore join the Committee in the view that the author's claim of a violation of article 26 has not been substantiated. The Committee's decision on admissibility should be revised and the claim under article 26 be held inadmissible.

APPENDIX III

Individual opinion submitted by Mr. Rajsoomer Lallah pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the Views of the Committee on communication No. 633/1995, Robert W. Gauthier v. Canada

The Committee is of the view that the claims of the author in relation to articles 22 and 26 of the Covenant have not been sufficiently substantiated for purposes of admissibility and has revised its previous favourable decision on admissibility.

It seems to me that articles 22 and 26 are, in the particular circumstances of this communication, particularly relevant in deciding whether there has been a violation of the author's right under article 19 (2) of the

Covenant to seek, receive and impart information, in relation to Parliamentary proceedings which are matters of interest to the general public. It is to be noted that access to parliamentary press facilities in this regard is given exclusively to members of an association which has so to say a monopoly over access to those facilities.

Freedom of association under article 22 inherently includes freedom not to associate. To impose membership of an association on the author as a condition precedent to access to Parliamentary press facilities in effect means that the author is compelled to seek membership of the association, which may or may not accept the author as a member, unless he decides to forego the full enjoyment of his rights under article 19 (2) of the Covenant.

The rights of the author, in respect of equality of treatment guaranteed under article 26, have been violated in the sense that the State party has, in effect, delegated its control over the provision of equal press facilities within public premises to a private association which may, for reasons of its own and not open to judicial control, admit or not admit a journalist like the author as a member. The delegation of this control by the State party exclusively to a private association generates inequality of treatment as between members of the association and other journalists who are not members.

I conclude, therefore, that the author has been a victim of a violation of his rights under article 19 (2) by the State party's recourse to measures, designed to provide access to journalists reporting on Parliamentary proceedings, which are themselves violative of articles 22 and 26 of the Covenant and which cannot be justified by the restrictions permissible under article 19 (3) of the Covenant.

Communication No. 671/1995

Submitted by: Jouni E. Länsman, Jouni A. Länsman, Eino Länsman and Marko Torikka
[represented by counsel]

Alleged victims: The authors

State party: Finland

Declared admissible: 14 March 1996 (fifty-sixth session)

Date of adoption of Views: 30 October 1996 (fifty-eighth session)

Subject matter: Adverse effects of logging activities on reindeer herding activities of members of the Sami community

Procedural issues: Interim measures of protection - State party request for withdrawal of interim measures - Withdrawal of interim measures of protection

Substantive issues: Right of members of a minority to enjoy their own culture

Articles of the Covenant: 27

Articles of the Optional Protocol and Rules of procedure: 2, 3, and 5, paragraph 2 (a) and (b), and rule 86

Finding: No violation

1. The authors of the communication (dated 28 August 1995) are Jouni E. Länsman, Jouni A. Länsman, Eino A. Länsman and Marko Torikka, all members of the Muotkatunturi Herdsmen's Committee. The authors claim to be 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; they challenge the plans of the Finnish Central Forestry Board to approve logging and the construction of roads in an area covering about 3,000 hectares of the area of the

Muotkatunturi Herdsmen's Committee. The members of the Muotkatunturi Herdsmen's Committee occupy areas in the North of Finland, covering a total of 255,000 hectares, of which one fifth is suitable for winter herding. The 3,000 hectares are situated within these winter herding lands.

2.2 The authors point out that the question of ownership of the lands traditionally used by the Samis remains unsettled.

2.3 The activities of the Central Forestry Board were initiated in late October 1994, but stopped on 10 November 1994 by an injunction of the Supreme Court of Finland (*Korkein oikeus*). According to the authors, a representative of the Central Forestry Board has recently stated that the activities will resume before the winter; they express concern that the logging will resume in October or November 1995, since the injunction issued by the Supreme Court lapsed on 22 June 1995.

2.4 The disputed area is situated close to the Angeli village near the Norwegian border, and to the Muotkatunturi Herdsmen's Committee's slaughterhouse and location for annual roundup of reindeer. The authors affirm that some 40 per cent of the total number of the reindeer owned by the Muotkatunturi Herdsmen's Committee feed on the disputed lands during winter. The authors observe that the area in question consists of old untouched forests, which means that both the ground and the trees are covered with lichen. This is of particular importance due to its suitability as food for young calves and its utility as "emergency food" for elder reindeer during extreme weather conditions. The authors add that female reindeer give birth to their calves in the disputed area during springtime, because the surroundings are quiet and undisturbed.

2.5 The authors note that the economic viability of reindeer herding continues to decline, and that Finnish Sami reindeer herders have difficulties competing with their Swedish counterparts, since the Swedish Government subsidises the production of reindeer meat. Moreover, traditional Finnish Sami reindeer herders in the North of Finland have difficulties competing with the reindeer meat producers in the South of the Sami Homeland, who use fencing and feeding with hay, methods very distinct from the nature-based traditional Sami methods.

2.6 The authors observe that logging is not the only activity with adverse consequences for Sami reindeer herding. They concede that the dispute concerns a specific geographic area and the logging and construction of roads in the area. However, they believe that other activities, such as quarrying, that have already taken place, and such logging as has taken place or will take place, as well as any future

mining (for which licences have already been granted by the Ministry of Trade and Industry), on the total area traditionally used by the Samis, should be taken into consideration when considering the facts of their new case. In this context, the authors refer to the Central Forestry Board's submission to the Inari Court of First Instance (*Inarin kihlakunnanoikeus*) of 28 July 1993, where the Board expressed its intention of logging, by the year 2005, a total of 55,000 cubic metres of wood from 1,100 hectares of forests in the Western parts of the winter herding lands of the Muotkatunturi Herdsmen's Committee. The authors observe that logging has already been carried out in other parts of the winter herding lands, in particular in the Paadarskaidi area in the Southeast.

2.7 The authors reiterate that the situation is very difficult for Samis in the North of Finland, and that any new measure causing adverse effects on reindeer herding in the Angeli area would amount to a denial of the local Samis' right to enjoy their own culture. In this context, the authors invoke paragraph 9.8 of the Views in case No. 511/1992, which they interpret as a warning to the State party regarding new measures that would affect the living conditions of local Samis.

2.8 As to the requirement of exhaustion of domestic remedies, the authors filed a complaint, invoking article 27 of the Covenant, with the Inari Court of First Instance (*Inarin kihlakunnanoikeus*). The authors asked the Court to prohibit any logging or construction of roads on a limited geographic area. The Court declared the case admissible but decided against the authors on the merits on 20 August 1993. According to the Court, the disputed activities would have caused *some* adverse effects for a limited period of time, but only to a minor degree.

2.9 The authors then appealed to the Rovaniemi Court of Appeal (*Rovaniemen hovioikeus*) which, after oral hearings, delivered judgment on 16 June 1994. The Appeal Court found that the adverse consequences of the disputed activities were much more severe than the Court of First Instance had held. Still, two judges of the three-member panel came to the conclusion that the adverse effects for reindeer herding did not amount to a "denial of right to enjoy their culture" within the meaning of article 27 of the Covenant. The Court of Appeal considered that it had not been proven "that logging in the land specified in the petition and road construction ... would prevent them from enjoying in community with other members of their group the Sami culture by practicing reindeer herding". The third judge dissented, arguing that logging and construction of roads should be prohibited and stopped. The authors sought leave to appeal before the Supreme Court (*Korkein oikeus*), pointing out that they were

satisfied with the establishment of the facts by the Court of Appeal, and asking the Supreme Court to review only the issue of whether the adverse consequences of the activities amounted to a "denial" of the authors' rights under article 27 of the Covenant. On 23 September 1994, the Supreme Court granted leave to appeal, without ordering interim measures of protection. On 10 November 1994, however, it ordered the Central Forestry Board to suspend the activities that had been initiated in late October 1994. On 22 June 1995, the Supreme Court confirmed the Court of Appeal's judgment in its entirety and withdrew the interim injunction. The authors contend that no further domestic remedies are available to them.

The complaint

3.1 The authors claim that the facts as described violate their rights under article 27, and invoke the Committee's Views on the cases of *Ivan Kitok v. Sweden* (communication No. 197/1985), *Ominayak v. Canada* (communication No. 167/1984) and *Ilmari Länsman et al. v. Finland* (communication No. 511/1992), as well as ILO Convention No. 169 on the rights of indigenous and tribal people in independent countries, the Committee's General Comment No. 23 [50] on article 27, and the United Nations Draft Declaration on Indigenous Peoples.

3.2 Finally, the authors, who contend that logging and road construction might resume in October or November 1995 and is therefore imminent, request interim measures of protection under rule 86 of the rules of procedure, so as to prevent irreparable damage.

Further submissions by the parties

4.1 On 15 November 1995, the communication was transmitted to the State party under rule 91 of the Committee's rules of procedure. Pursuant to rule 86 of the rules of procedure, the State party was requested to refrain from adopting measures which would cause irreparable harm to the environment which the authors claim is vital to their culture and livelihood. The State party was requested, if it contended that the request for interim protection was not appropriate in the circumstances of the case, to so inform the Committee's Special Rapporteur for New Communications and to give reasons for its contention. The Special Rapporteur would then reconsider the appropriateness of maintaining the request under rule 86.

4.2 By further submission of 8 December 1995, the authors note that the Upper Lapland Branch of the Central Forestry Board started logging in the area specified in the present communication on 27 November 1995. The logging activities are

scheduled to continue until the end of March 1996: the target is to cut some 13,000 cubic metres of wood. Between 27 November and 8 December 1995, some 1,000 cubic metres had been cut over an area covering 20 hectares. Given this situation, the authors request the Committee to reiterate the request under rule 86 and urge the State party to discontinue logging immediately.

4.3 On the other hand, a group of Sami forestry officials from the Inari area who earn their living from forestry and wood economy, by submission of 29 November 1995 addressed to the Committee, contend that forestry as practised today does *not* hamper reindeer husbandry, and that both reindeer husbandry and forestry can be practised simultaneously in the same areas. This assessment was confirmed by the Supreme Court of Finland in a judgment of 22 June 1995. If forestry activities in the Inari area were to be forbidden, Sami groups practising two different professions would be subject to unequal treatment.

4.4 In a submission dated 15 December 1995, the State party contends that interim measures of protection should be issued restrictively, and only in serious cases of human rights violations where the possibility of irreparable damage is real, e.g. when the life or physical integrity of the victim is at stake. In the State party's opinion, the present communication does not reveal circumstances pointing to the possibility of irreparable damage.

4.5 The State party notes that the present logging area covers an area of not more than 254 hectares, out of a total of 36,000 hectares of forest owned by the State and available for reindeer husbandry to the Muotkatunturi Herdsmen's Committee. This area includes the surface of the Lemmenjoki National Park, which obviously is off limits for any logging activity. The logging area consists of small separate surfaces treated by "seed tree felling", for natural regeneration. "Virgin forest areas" are left untouched in between the logged surfaces.

4.6 The State party notes that the Finnish Central Forestry Board had, in a timely manner and before beginning logging activities, negotiated with the Muotkatunturi Reindeer Husbandry Association, to which the authors also belong; this Association had not opposed the logging plans and schedule. The letter referred to in paragraph 4.3 above demonstrates, to the State party, the need for coordination of various and diverging interests prevalent in the way of life of the Sami minority. The State party finally observes that some of the authors have logged their privately owned forests; this is said to demonstrate the "non-harmfulness" of logging in the area in question.

4.7 In the light of the above, the State party regards the request under rule 86 of the rules of procedures as inappropriate in the circumstances of

the case, and requests the Committee to set aside the request under rule 86. Notwithstanding, it undertakes not to elaborate further logging plans in the area in question, and to decrease the current amount of logging by 25 per cent, while awaiting the Committee's final decision.

4.8 The State party concedes that the communication is admissible and pledges to formulate its observations on the merits of the claim as soon as possible.

Committee's admissibility decision

5.1 During its 56th session, the Committee considered the admissibility of the communication. It noted the State party's argument that the request for interim measures of protection in the case should be set aside, and that the communication met all admissibility criteria. It nonetheless examined whether the communication met the admissibility criteria under articles 2, 3, and 5, paragraphs 2 (a) and (b), of the Optional Protocol, concluded that it did, and that the authors' claim under article 27 should be examined on its merits.

5.2 On 14 March 1996, therefore, the Committee declared the communication admissible and set aside the request for interim measures of protection.

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

6.1 In its submission under article 4, paragraph 2, of the Optional Protocol, the State party supplements and corrects the facts as presented by the authors. It recalls that part of the Muotkatunturi Herdsmen's Committee's herding area belongs to the Lemmenkoji Natural Park, an area of pine-dominated forest suitable for reindeer herding during winter time. As to the consultation process between National Forest and Park Service (hereafter NFPS - formerly called the Central Forestry Board) and local Sami reindeer herders, it notes that the representatives of the NFPS had contacted the chairman of the reindeer owners' association, J.S., who in turn invited the representatives of the NFPS to the extraordinary meeting of the Muotkatunturi Herdsmen's Committee on 16 July 1993. Planned logging activities were discussed and amendments agreed upon during the meeting: i.e. reverting to use of winter roads and exclusion of the northern part of the logging area. The records of the Inari District Court (28 July 1993) show that two opinions were presented during the meeting: one in support of and one against the authors. The Muotkatunturi Herdsmen's Committee did not make statements directed against the NFPS.

6.2 The State party further recalls that some Sami are forest owners and practice forest management, whereas others are employed by the NFPS in

functions related to forest management. It emphasizes that the authors' comparison of surface areas to be logged is not illustrative, as it does not relate to forest management practices. Instead, it would be preferable to compare plans of the NFPS with plans for logging of private forests in the Angeli area: thus, the NFPS plans logging activities covering 900 hectares by the year 2005, whereas the regional plan for private forests of the Angeli area (years 1994-2013) includes forest regeneration of 1,150 ha by using the seed tree method.

6.3 The State party recalls that the authors' claims were thoroughly examined by the domestic courts (i.e. the Inari District Court, the Rovaniemi Court of Appeal and the Supreme Court). At every instance, the court had before it extensive documentation, on the basis of which the case was examined *inter alia* in the light of article 27 of the Covenant. All three instances rejected the authors' claims explicitly by reference to article 27. The State party adds that the requirements of article 27 were consistently taken into account by the State party's authorities in their application and implementation of the national legislation and the measures in question.

6.4 In the above context, the State party contends that, given that the authors conceded before the Supreme Court that the Court of Appeal of Rovaniemi had correctly established the facts, they are in fact asking the Committee to assess and evaluate once again the facts in the light of article 27 of the Covenant. The State party submits that the national judge is far better positioned than an international instance to examine the case in all of its aspects. It adds that the Covenant has been incorporated into Finnish law by Act of Parliament, and that its provisions are directly applicable before all Finnish authorities. There is thus no need to argue, as the authors chose to do, that the Finnish courts refrain from interpreting the Covenant's provisions and to wait for the Committee to express itself on "borderline cases and new developments". In the same vein, there is no ground for the authors' argument that the interpretation of article 27 of the Covenant by the Supreme Court and Court of Appeal is "minimalist" or "passive".

6.5 The State party acknowledges that the Sami community forms an ethnic community within the meaning of article 27 of the Covenant, and that the authors, as members of that community, are entitled to protection under the provision. It reviews the Committee's jurisprudence on article 27 of the Covenant, including the Views on cases Nos. 167/1984 (*B. Ominayak and members of the Lubicon Lake Band v. Canada*), 197/1985 (*Kitok v. Sweden*) and 511/1992 (*I. Länsman v. Finland*) and concedes that the concept of "culture" within the meaning of article 27 covers reindeer husbandry, as an essential component of the Sami culture.

6.6 The State party also admits that "culture" within the meaning of article 27 provides for protection of the traditional means of livelihood for national minorities, *in so far as they are essential to the culture and necessary for its survival*. Not every measure or its consequences, which in some way modify the previous conditions, can be construed as a prohibited interference with the right of minorities to enjoy their own culture. This line of reasoning has been followed by the Parliamentary Committee for Constitutional Law, which has stated that Finland's obligations under international conventions mean that reindeer husbandry exercised by the Sami must not be subjected to unnecessary restrictions.

6.7 The State party refers to the Committee's General Comment on article 27 General Comment 23 [50], adopted in April 1994., which acknowledges that the protection of rights under article 27 is directed to ensuring "the survival and continued development of the cultural, religious and social identity of the minorities concerned" (paragraph 9). It further invokes the *ratio decidendi* of the Committee's Views on case No. 511/1992 (*J. Länsman et al. v. Finland*), where it was held that States parties may understandably wish to encourage economic development and allow economic activity, and that measures which have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a violation of article 27. The State party argues that the present communication is in many respects similar to case No. 511/1992, i.e. (1) the responsibility for the contested activities lies once again with the State party, (2) the contested measures merely have a certain limited impact; (3) economic activities and conduct of reindeer husbandry have been reconciled in an appropriate manner; and (4) earlier logging and future logging plans were explicitly taken into consideration in the resolution of the case by the domestic courts.

6.8 In addition, the State party points to the solution of a comparable case by the Supreme Court of Norway, where submersion of a small land area after construction of a hydroelectric dam had been challenged by local Samis. In that case, too, the decisive point for the Supreme Court was the factual extent of the interference with the interests of the local Sami, which was deemed to be too small to raise issues of minority protection under international law. The Supreme Court's reasoning was subsequently endorsed by the European Commission of Human Rights. The State party concludes that the Committee's case law shows that not all measures imputable to the State amount to a denial of the rights under article 27: this principle is said to apply in the present case.

6.9 Still in relation to the authors' argument that different rights and interests cannot be reconciled, and that the right of the Sami to practice reindeer

herding should have precedence over the practice of other rights, such as the right to log forests, the State party asserts that the interests of both forestry and reindeer management can be and have been taken into account and reconciled when measures related to forestry management were or are being planned. This is generally done by the NFPS. The reconciliation is not only possible in the area referred to by the authors and in the entire region in which reindeer husbandry is practised, but it is also a significant issue, as reindeer husbandry is practised in the entire area inhabited by the Sami. It is noted that this type of reconciliation was explicitly approved by the Committee in its Views on case No. 511/1992 (paragraph 9.8), where it was admitted that "economic activities must, in order to comply with article 27, be carried out in a way that enables the authors to continue to benefit from reindeer husbandry". The State party adds that measures related to forestry management can benefit the reindeer husbandry in many cases, and that many herdsman simultaneously practice forestry.

6.10 In the State party's view, the authors merely raise before the Committee the same issues they had been raising before the domestic courts: i.e. what types of measures in the areas concerned trigger the "threshold" beyond which measures must be regarded as a "denial", within the meaning of article 27, of the Samis' right to enjoy their own culture. Before the local courts, the impairments to reindeer husbandry caused by logging and road construction were deemed to be below this threshold. In the State party's opinion, the authors have failed to adduce new grounds which would enable the Committee to assess the "threshold" issue in any other way than the domestic courts.

6.11 In this context, the State party argues that if the concept of "denial" within the meaning of article 27 is interpreted as widely as by the authors, this would in fact give the Sami reindeer herders the right to reject all such activities which are likely to interfere with reindeer husbandry even to a small extent: "[t]his kind of right of veto with respect to small-size reasonable legal activities of the landowners and other land users would be simultaneously given to the herdsman practicing husbandry and would thus have a significant influence on the decision-making system." Simultaneously, legislation governing the exploitation of natural resources as well as the existing plans for land use would become "almost useless". This, the State party emphasizes, cannot be the purpose and object of the Covenant and of article 27. It should further be noted that since the Samis' right to practice reindeer husbandry is not restricted to the State-owned area, the Committee's decision will have serious repercussions on how private individuals may use and exploit land they own in the area of reindeer husbandry.

6.12 In the State party's opinion, the Committee's insistence on the principle of "effective participation of members of minority communities in decisions which affect them"¹, a principle which was reiterated in the Views on case No. 511/1992, was fully applied in the instant case. The area in which interests of forestry management and reindeer husbandry co-exist and possibly conflict forms part of the area of the Muotkatunturi Herdsmen's Committee (the legal entity responsible for matters relating to reindeer husbandry). The State party and the Herdsmen's Committee have had continuous negotiation links, in a framework in which interests of forestry and reindeer husbandry are reconciled. The State party contends that the experiences with this negotiation process have been good, and that it guarantees the Samis' right to conduct reindeer husbandry in accordance with article 27. The NFPS has been in constant contact with the Muotkatunturi Herdsmen's Committee, of which the authors are members.

6.13 The State party explains that reindeer management has been partly transformed into an activity that uses the possibilities offered by forestry management. Herdsmen use roads constructed for the purpose of forestry management: it is recalled that in the privately owned forests in the area of the Muotkatunturi Herdsmen's Committee, logging has been carried out by those practising reindeer husbandry. Furthermore, the State party notes, forestry management practised by Samis does not differ from the way other private forest owners practice forestry management. If the forestry and logging methods used in areas administered by the NFPS are compared with the logging methods used in privately owned forests and by Samis, the lighter methods of forestry management used by the NFPS and manual logging are more mindful of the interests of reindeer husbandry than logging in privately owned forests carried out by machines. The NFPS intends to carry out manual logging, a more natural method than the mechanical logging which was carried out in privately owned forests in the Angeli area in the winter of 1993-1994. Manual logging is moreover closer to the traditional way of life and the culture of the Sami, and its effects on them thus lighter.

6.14 The State party concludes that the authors' concern over the future of reindeer husbandry have been taken into account in an appropriate way in the present case. While the logging and tracks in the ground will temporarily have limited adverse effects on the winter pastures used by the reindeer, it has not been shown, in the State party's opinion, that the consequences would create considerable and long-lasting harm, which would prevent the authors from

continuing reindeer husbandry in the area under discussion on its present scale. The authors are not, accordingly, denied their right to enjoy their own culture within the meaning of article 27 of the Covenant.

7.1 In their comments, the authors begin by noting that logging in the Pyhäjärvi area, a part of the area specified in their complaint, was completed in March 1996. Adverse consequences of the logging for reindeer are said to be mostly of a long-term nature. The authors and other reindeer herdsman have however already observed that the reindeer use neither the logging area nor "virgin forest areas" in between the logging areas as pasture. During the winter of 1996, therefore, a considerable part of the winter herding lands of the Muotkatunturi Herdsmen's Committee was unaccessible for the reindeer. This has caused the reindeer herders much extra work and additional expenses, in comparison to previous years.

7.2 According to the authors, some of the negative consequences of the logging will only materialize after several years or even decades. For example, one particularly difficult winter during which a solid ice layer would prevent reindeer from digging lichen through the snow may cause the starvation of many reindeer, because of the absence of their natural emergency resource, i.e. the lichen growing on old trees. If storms send down the remaining trees, there is a distinct danger of large areas becoming totally treeless, thereby causing a permanent reduction in the surface of winter herding lands for the Muotkatunturi Herdsmen's Committee.

7.3 Counsel observes that because the economic benefit from reindeer herding is low, many reindeer herdsman have had to look for additional sources of income. This development has been accelerated as most herding committees have been forced to cut the number of their herds. The necessity to reduce the herds has been caused by the scarcity of herding lands and the poor condition of existing, over-used herding lands. In such a situation, suitable winter herding areas are a truly critical resource, which determine the scale of reductions in the number of reindeer belonging to each herdsman's committee. The authors themselves developed other economic activities besides reindeer herding in order to survive. They work as butchers for other herdsman's committees, work for private local landowners or conduct small-scale logging within their own private forests. All, however, would prefer to work solely in reindeer herding.

7.4 As to the extent of the logging already carried out, counsel transmits four photographs, including aerial photographs, which are said to provide a clear understanding of the nature and impact of the logging: very few trees remain in logged areas of up

¹ General Comment No. 23 [50], paragraph 7.

to 20 hectares, and all old trees, rich with lichen, have been cut.

7.5 The authors dismiss as misleading the State party's observations on the magnitude and nature of the logging, as the 254 ha mentioned by the State party relate only to logging already completed. The NFPS however plans to continue logging in the area specified in the complaint. If comparisons are made with a larger area, the authors recall the long-lasting and extensive logging, in Paadarskaidi, another part of the winter herding area of the Muotkatunturi Herdsmen's Committee. The consequences of logging activities in Paadarskaidi are said to be alarming, since the reindeer simply have abandoned this area. The authors also challenge the State party's comments on the logging methods and submit that so-called seed-tree felling is also harmful for reindeer herding, as the animals do not use such forests for a number of reasons. In addition, there is the danger that storms fell the seed trees and the area gradually becomes treeless.

7.6 Counsel emphasizes that if two of the authors have sought additional income from forestry, this has not been of their free choice and in no way indicates that logging would be part of the Sami way of life. He criticizes the State party's observations which use this argument against the authors, rather than taking it as a serious indicator of developments which endanger the Sami culture and the Sami way of life. It is submitted that the State party's attempt to explain "manual logging" as being close to the traditional way of life and culture of the Sami is totally unfounded and distorts the facts.

7.7 The authors point specifically to the magnitude of the different logging projects in the area. Of a total of 255,000 ha area of the Muotkatunturi Herdsmen's Committee, some 36,000 ha are forests administered by the NFPS. The most suitable winter herding lands of the Muotkatunturi Herdsmen's Committee are located within these State-administered areas, deep in the forests. Privately owned forests cover some 14,600 ha and are owned by 111 separate owners. Most of the privately owned forests do not exceed 100 ha and are typically located along the main roads. They are accordingly, much less suitable for reindeer herding as for example the strategically important winter herding areas identified by the authors in the present case.

7.8 The authors challenge the State party's affirmation that there was "effective participation" of the Muotkatunturi Herdsmen's Committee and themselves in the negotiation process. Rather, they assert, there was no negotiation process and no real consultation of the local Sami when the State forest authority prepared its logging plans. At most, the Chairman of the Muotkatunturi Herdsmen's

Committee was *informed* of the logging plans. In the authors' opinion, the facts as established by the Finnish courts do not support the State party's contention. The Sami furthermore are generally dissatisfied with the way the State forest authorities exercise their powers as "landowners". On 16 December 1995, the Sami Parliament discussed the experiences of Sami consultation in relation to logging plans by the State party forest authorities. The resolution adopted notes, *inter alia*, that it is "[t]he opinion of the Sami Parliament that the present consultation system between the Central Forestry Board and reindeer management does not function in a satisfactory way...".

7.9 As far as logging in the Angeli area is concerned, the authors note that, even under the terms of the State party's submission, the "negotiations" only proceeded after the authors had instituted court proceedings in order to prevent the logging. The local Sami "had become coincidentally aware" of existing logging plans, upon which the authors instituted court proceedings. The authors contend that what the State party refers to as "negotiations" with local reindeer herdsman amounts to little more than invitations extended to the chairmen of the herdsman's committees to annual forestry board meetings, during which they are informed of short-term logging plans. This process, the authors emphasize, involves no real consultation of the Sami. They express their desire to have a more significant influence on the decision-making processes leading to logging activities within their homelands, and refute the State party's view on the perceived good experiences with the existing consultation process (see paragraph 6.12 above).

7.10 Concerning the State party's argument that the authors in fact seek a re-evaluation, by the Committee, of evidence already thoroughly examined and weighed by the local courts, the authors affirm that the only contribution they seek from the Committee is the interpretation of article 27, not any "reassessment of the evidence", as suggested by the Government. They dismiss as irrelevant the observations of the State party on the role of the national judge (see paragraph 6.4 above).

7.11 As to the State party's comments referred to in paragraph 6.7 above, the authors largely agree with the former's points relating to the Government's responsibility for interference with Sami rights and the weighing of all relevant activities and their impact by the local courts. They strongly disagree with the State party's second point, namely that the measures agreed to and carried out only have a limited impact. In the first *Länsman* case, the Committee could limit its final assessment to activities which had already been concluded. The present case not only concerns such logging as has already been conducted, but all future logging within

the geographical area specified in the complaint. Thus, the winter herding lands in question in the present case are of strategic importance to the local Sami: logging causes long-lasting or permanent damage to reindeer herding, which does not end when the activity itself is concluded. Therefore, the "limited impact" of quarrying on Mt. Riutusvaara, which was at the basis of the first case², cannot be used as a yardstick for the determination of the present case, where the adverse consequences of logging are said to be of an altogether different magnitude.

7.12 The authors equally disagree with the State party's contention that there was an appropriate reconciliation between the interests of reindeer herders and economic activities, noting that the logging plans were drawn up without the authors' participation or of the local Sami in general.

7.13 The authors challenge the State party's assessment of the impact of the logging activities already carried out on the author's ability to continue reindeer herding. They believe that the logging which has taken place and, more so, further envisaged logging, will prevent them from continuing to benefit from reindeer husbandry. The Government's optimistic assessment is contrasted with that of the Rovaniemi Court of Appeal, which admitted that the logging would cause "considerable" and "long-lasting" harm to the local Sami. However, the domestic courts did not prohibit the planned logging activities, because they set the threshold for the application of article 27 in the necessity of "giving up reindeer herding", and not in terms of "continuing to benefit from reindeer husbandry"³.

7.14 In addition to the above, the authors provide information on recent developments concerning Sami rights in Finland. While the development has been positive with respect to constitutional amendments and the formally recognized rule of the Sami Parliament, in has been negative and insecure in other respects, i.e. in relation to the economic well-being of the Sami who live mostly from reindeer herding and associated activities. The authors further refer to a case currently pending before the Supreme Administrative Court of Finland, relating to mining claims staked by Finnish and foreign companies within the Sami homeland. The principal legal basis for the administrative appeals by Sami in this case was article 27 of the Covenant; by decision of 15 May 1996, the Supreme Administrative Court quashed 104 claims which had previously been approved by the Ministry for Trade

² Views on case No. 511/1992 (*I. Länsman et al. v. Finland*), adopted 26 October 1994.

³ See Note 2, paragraph 9.8.

and Industry, and referred the companies' claim applications back to the Ministry for reconsideration. A decision on the merits of the case remains outstanding.

7.15 The authors conclude that, overall, the logging already conducted by the State party's forestry authorities within the area specified in the communication has caused "immediate adverse consequences to the authors, and to the Sami reindeer herders in the Angeli area and the Muotkatunturi Herdsmen's Committee in general". The logging will, and further logging envisaged by the State party's authorities would, result in considerable, long-lasting and even permanent adverse effect to them. To the authors, this conclusion has been well documented and also been confirmed by the judgments of the Rovaniemi Court of Appeal and of the Supreme Court in the case.

8.1 In additional comments dated 27 June 1996, the State party dismisses as groundless the authors' explanations concerning the perceived economic unsuitability of some parts of the logging area. It notes that as far as the possibility of loss of reindeer calves after the harsh winter of 1996 is concerned, possible losses are due to the exceptionally late arrival of spring and the deep cover of snow which has lasted an unusually long time. The situation has been identical for the *whole* reindeer herding area, and since losses are expected *all* over the reindeer herding area, supplementary feeding of reindeer has been increased accordingly. The State party observes that it is not measures related to forestry management, but the extent of reindeer management that has been the reason for the need to reduce the number of reindeer; continuous over-grazing of herding areas is a well-known fact. Finally, the State party considers it to be "self-evident" that selective seed tree felling is a milder procedure than clear felling.

8.2 As regards logging conducted by the authors themselves, the State party notes that private landowners have independent authority in matters concerning the logging of their own forests. It would be difficult to understand that reindeer owners would carry out logging if its consequences for reindeer herding and for Sami culture were as harmful as the authors contend.

8.3 The State party reaffirms, once again, that the processes through which reindeer associations or herders participate in decisions affecting them are effective. The very issue of "effective participation" was discussed in a meeting between the NFPS, the Association of Herdsmen's Committees and different herders' committees on 19 February 1996 in Ivalo. In this meeting, the negotiation system described by the State party in its submission under article 4 (2) of the Optional Protocol was considered

useful. The State party also argues that contrary to the authors' assertion, the Muotkatunturi Herdsmen's Committee did *not* react negatively to the plans for logging initially submitted by the NFPS. The State party regrets that the authors have tended to invoke its comments and observations only partially, thereby distorting the true content of the Finnish Government's remarks.

8.4 As to the impact of logging activities on the authors' ability to carry out reindeer herding, the State party once more refers to the reasoning of the Rovaniemi Court of Appeal, which concluded that it had not "been proven that logging in the land specified in the petition and road construction for any other reasons mentioned by [the authors] would prevent them from enjoying, in community with other members of their group, the Sami culture by practicing reindeer herding". For the State party, this conclusion is fully compatible not only with the wording of article 27 of the Covenant but also paragraphs 9.6 and 9.8 of the Committee's Views in the first *Länsman* case: accordingly, these measures do not create such considerable and long-lasting harm to prevent the authors from continuing reindeer herding even temporarily.

9.1 In additional comments dated 1 July 1996, the authors take issue with some of the State party's observations referred to in paragraph 8.1 above. In particular, they challenge the Government's assertion that selective seed tree felling is a milder procedure than clear felling, and submit that in the extreme climatic conditions of the area in question, so-called "selective felling", which leaves no more than 8-10 trees per hectare, has the same consequences as clear felling. Moreover, the negative effect on reindeer herding is the same due to the growing impact of storms, the remaining trees might fall.

9.2 The authors submit that if the Government invokes the argument that the effects of selective cutting are milder than in the case of clear felling, the only conclusion should be that all further logging in the area in question should be postponed until objective and scientific findings show that the forest in the area already logged - the Pyhäjärvi area - has recovered. The authors further note that the Government's submission is patently mistaken if it states that "logging does not concern the Pyhäjärvi winter feeding area", since the area already logged is called "Pyhäjärvi" even by the NFPS itself and is located in the winter feeding area of the Muotkatunturi Herdsmen's Committee.

9.3 On the issue of "effective participation", the authors contend that meetings such as the one of 19 February 1996 referred to by the State party (see paragraph 8.3 above) do *not* serve as a proper vehicle for effective participation. This was reconfirmed by the Sami Parliament on 14 June

1996, when it once again stated that the NFPS does not cooperate with the herdsmen's committees in a satisfactory manner. The authors deny that they have in any way distorted the contents of the State party's earlier submissions, the conclusions of the Rovaniemi Court of Appeal, or of the Committee's Views in the first *Länsman* case.

Examination of the merits

10.1 The Human Rights Committee has considered the present communication in the light of all the information provided by the parties, as required to do under article 5, paragraph 1, of the Optional Protocol. The issue to be determined is whether logging of forests in an area covering approximately 3,000 hectares of the area of the Muotkatunturi Herdsmen's Committee (of which the authors are members) - i.e. such logging as has already been carried out and future logging - violates the authors' rights under article 27 of the Covenant.

10.2 It is undisputed that the authors are members of a minority within the meaning of article 27 of the Covenant and as such have the right to enjoy their own culture. It is also undisputed that reindeer husbandry is an essential element of their culture; that some of the authors practice other economic activities in order to gain supplementary income does not change this conclusion. 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 community⁴.

10.3 Article 27 requires that a member of a minority shall not be denied the right to enjoy his culture. Measures whose impact amounts to a denial of the right are incompatible with the obligations under article 27. As noted by the Committee previously in its Views on case No. 511/1992, however, measures that have a certain limited impact on the way of life and the livelihood of persons belonging to a minority will not necessarily amount to a denial of the rights under article 27.

10.4 The crucial question to be determined in the present case is whether the logging that has already taken place within the area specified in the communication, as well as such logging as has been approved for the future and which will be spread over a number of years, is of such proportions as to deny the authors the right to enjoy their culture in that area. The Committee recalls the terms of paragraph 7 of its General Comment on article 27, according to which minorities or indigenous groups

⁴ Cf. Views on case No. 197/1985 (*Kitok v. Sweden*), Views adopted 27 July 1988, para. 9.2; case No. 511/1992 (*I. Länsman et al. v. Finland*), adopted 26 October 1994, paragraph 9.1.

have a right to the protection of traditional activities such as hunting, fishing or reindeer husbandry, and that measures must be taken "to ensure the effective participation of members of minority communities in decisions which affect them".

10.5 After careful consideration of the material placed before it by the parties, and duly noting that the parties do not agree on the long-term impact of the logging activities already carried out and planned, the Committee is unable to conclude that the activities carried out as well as approved constitute a denial of the authors' right to enjoy their own culture. It is uncontested that the Muotkatunturi Herdsmen's Committee, to which the authors belong, was consulted in the process of drawing up the logging plans and in the consultation, the Muotkatunturi Herdsmen's Committee did not react negatively to the plans for logging. That this consultation process was unsatisfactory to the authors and was capable of greater interaction does not alter the Committee's assessment. It transpires that the State party's authorities *did* go through the process of weighing the authors' interests and the general economic interests in the area specified in the complaint when deciding on the most appropriate measures of forestry management, i.e. logging methods, choice of logging areas and construction of roads in these areas. The domestic courts considered specifically whether the proposed activities constituted a denial of article 27 rights. The Committee is not in a position to conclude, on the evidence before it, that the impact of logging plans would be such as to amount to a denial of the authors' rights under article 27 or that the finding of the Court of Appeal affirmed by the Supreme Court, misinterpreted and/or misapplied article 27 of the Covenant in the light of the facts before it.

10.6 As far as future logging activities are concerned, the Committee observes that on the basis of the information available to it, the State party's

forestry authorities have approved logging on a scale which, while resulting in additional work and extra expenses for the authors and other reindeer herdsman, does not appear to threaten the survival of reindeer husbandry. That such husbandry is an activity of low economic profitability is not, on the basis of the information available, a result of the encouragement of other economic activities by the State party in the area in question, but of other, external, economic factors.

10.7 The Committee considers that *if* logging plans were to be approved on a scale larger than that already agreed to for future years in the area in question or if it could be shown that the effects of logging already planned were more serious than can be foreseen at present, then it may have to be considered whether it would constitute a violation of the authors' right to enjoy their own culture within the meaning of article 27. The Committee is aware, on the basis of earlier communications, that other large scale exploitations touching upon the natural environment, such as quarrying, are being planned and implemented in the area where the Sami people live. Even though in the present communication the Committee has reached the conclusion that the facts of the case do not reveal a violation of the rights of the authors, the Committee deems it important to point out that the State party must bear in mind when taking steps affecting the rights under article 27, that though different activities in themselves may not constitute a violation of this article, such activities, taken together, may erode the rights of Sami people to enjoy their own culture.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee do not reveal a breach of article 27 of the Covenant.

Communication No. 692/1996

Submitted by: A.R.J. [represented by counsel]

Alleged victim: The author

State party: Australia

Declared admissible: 28 July 1997 (sixtieth session)

Date of adoption of Views: 28 July 1997 (sixtieth session)

Subject matter: Return to country of origin of individual convicted of drug related offences in State Party

Procedural issues: Interim measures of protection - State party request for withdrawal of interim measures - Admissibility *ratione materiae*

Substantive issues: Return to country of origin by State party and possibility of treatment contrary to article 7

Articles of the Covenant: 6 (1), 7, 14 (1), (3) and (7), 15 and 16

Articles of the Optional Protocol and Rules of procedure: articles 1 and 3, and rules 86 and 94 (1) and (2)

Finding: No violation

1. The author of the communication is A. R. J., an Iranian citizen born in 1968, at the time of submission of his communication detained at the Regional Prison in Albany, Western Australia. He claims to be a victim of violations by Australia of articles 2, paragraph 1; 6, paragraph 1; 7; 14, paragraphs 1, 3 and 7; 15, paragraph 1; and 16 of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as submitted by the author

2.1 The author was a crew member of a vessel of the Iranian Shipping Line and was arrested on 15 December 1993 at Esperance, Western Australia, for illegal importation and possession of two kilograms of cannabis resin, in contravention of Section 233B(1) of the Customs Act (Cth). He had tried to sell the cannabis to an undercover customs agent. He was sentenced to five years and six months of imprisonment in April 1994; the Court set a non-parole period of two years and six months, which expired on 7 October 1996.

2.2 On 13 June 1994, the author applied for refugee status and a Protection (Permanent) Entry Permit to the Department of Immigration and Ethnic Affairs. On 19 July 1994, this application was refused at first instance by an officer who represented the Minister for Immigration and Ethnic Affairs. He was of the opinion that Mr. J. did not face any real threat of persecution in Iran relevant to the applicability of the 1951 Convention on the Status of Refugees.

2.3 On 10 August 1994, the author applied for review of the decision to the Refugee Review Tribunal. The review had not been completed when, on 1 September 1994, changes to the Australian Migration Act and Migration Regulations took effect. Under the new rules, the author's application now had to be regarded as an application for a protection visa. On 10 November 1994, the Refugee Review Tribunal confirmed the original decision of 19 July 1994. The Tribunal held that the author's fear of being returned to Iran was based on his drug-related conviction in Australia, and that he had not raised any other argument that he would face serious difficulties if he were to be returned to Iran.

2.4 The Tribunal concluded: "While it has sympathy for the applicant in that should he return to Iran it is likely that he would face treatment of an extremely harsh nature, the applicant cannot be considered to be a refugee. The applicant must have a well founded fear of being persecuted for one of the reasons stated in the Convention, that is, race, religion, nationality, membership of a particular social group or political opinion. The applicant's fear does not arise for any of those reasons ... [but] solely out of his conviction for a criminal act..."

2.5 Early in 1995, Justice Lee ordered that the author's deadline for filing an application for an order of review of the Refugee Review Tribunal's decision be extended to 25 May 1995, and that an amended application which was filed on 24 May 1995 stand as an amended application for review before the Federal Court of Australia.

2.6 On 14 November 1995, Justice French delivered the judgment of the Federal Court of Australia. The judgment concluded that the author had failed to show any error of reasoning of the Refugee Review Tribunal, or any basis upon which he could be said to attract Convention protection. Nonetheless, the risk to which he might be exposed upon return to Iran was a matter of serious concern. The possibility that the author might be subjected to an unfair trial, to imprisonment and to torture were not matters to be put aside lightly in a country with a humanitarian tradition. The question of whether or not the author could be returned to another country or be permitted to remain in Australia for some time on another basis was not, however, before the Court. The issue before the Court was whether or not the

Refugee Review Tribunal had erred in finding that he did not attract Refugee Convention protection. This not being the case, the application had to be dismissed.

2.7 In the light of the Federal Court's finding, the Legal Aid Commission of Western Australia was of the view that a further appeal to the Full bench of the Federal Court of Australia would be futile, and that legal aid should not be made available for the purpose. However, the author filed a request with the Legal Aid Commission of Western Australia to make representations to the Minister for Immigration and Ethnic Affairs to exercise his discretion to allow Mr. J. to remain in Australia on humanitarian grounds.

2.8 On 11 January 1996, the author was informed by Legal Aid Western Australia that the Minister was unprepared to exercise his discretion under Section 417 of the Migration Act to allow Mr. J. to remain in Australia on humanitarian grounds. Counsel then expressed the view that it was unlikely that anything further could be done on the author's behalf.

2.9 The Guidelines for Humanitarian Recommendations provide non-exhaustive guidelines to members of the Refugee Review Tribunal and to the review Officer or to tribunal members on the exercise of their recommendatory functions. They lay down that:

- It is in the interest of Australia as a humane society to ensure that individuals who do not meet the technical definition of a refugee are not returned to their country of origin if there is a reasonable likelihood that they will face a significant, individualized threat to their personal security upon return;

- It is in the public interest that protection offered on humanitarian grounds, which is not based on international obligations but on positive, discretionary considerations, is only offered to individuals with genuine and pressing needs;

- As a discretionary measure, the granting of a stay on humanitarian grounds must be limited to exceptional cases presenting elements of threat to personal security and intense personal hardship;

- It would not be appropriate as part of the refugee status determination procedure to address cases of a compassionate nature, such as family difficulties, economic hardship or of medical problems, not involving serious violations of human rights;

- It is not intended to address broad situations of differentiation between particular groups or elements of society within other countries;

- The Guidelines should only apply to individuals whose circumstances and characteristics provide them with a sound basis for expecting to

face a significant threat to personal security upon their return, as a result of targeted actions by persons in the country of return;

- To ensure that remedies offered under this process are limited to genuine cases, one should not consider on humanitarian grounds any individuals who (a) have a safe third country to which to go; (b) who could subsequently alleviate the perceived risk by relocation to a region of safety within the country of origin; or (c) who is seeking residence in Australia mainly to secure better social, economic or education opportunities.

2.10 It is stated that the author's case was also submitted to the Office of the UN High Commissioner for Refugees for appropriate action. There had been no reaction from this office at the time of submission of the communication to the Committee.

The complaint

3.1 The author claims that Australia would violate article 6 if it were to return him to Iran. It is said to be a fact that individuals who commit drug-related offences are subject to the jurisdiction of Islamic Revolutionary Tribunals, and that there would be a real possibility that the author may be persecuted because he was convicted of an offence which had a connection with an Iranian Government agency - i.e. the Iranian Shipping Line of which the author was an employee - and that such persecution could lead to the ultimate sanction.

3.2 It is submitted that there is a consistent pattern of the use of the death penalty for drug-related offences in Iran. The author notes that the imposition of the death penalty in Islamic Revolutionary Courts after trials which fail to meet international standards of due process violates the right to life protected by article 6 and also contravenes the Second Optional Protocol on the Abolition of the Death Penalty, to which Australia has acceded.

3.3 The author contends that his deportation to Iran would violate article 7 of the Covenant, as well as article 3 of the Convention against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment. To surrender a prisoner knowingly to another State where there are substantial grounds for believing that he would be in danger of being tortured, while not explicitly covered by the wording of article 7 of the Covenant, would clearly run counter to its object and purpose. Reference is made to the judgment of the European Court of Human Rights in *Soering v. United Kingdom*¹ as well as to a judgment of the French *Conseil d'Etat* of

¹ Series A No. 161 (1989).

27 February 1987². On the basis of information readily available in reports submitted to the UN Commission on Human Rights and in reports prepared by other governmental or non-governmental organizations, and in the light of the comments made by the Refugee Review Tribunal and by Justice French, the author's involuntary repatriation to Iran would give rise to issues under article 7.

3.4 It is claimed that if the author were to be deported to Iran, Australia would violate article 14. The nature of the offence of which the author was convicted constitutes a crime against the laws of Islam, and Islamic Revolutionary Tribunals have jurisdiction for the type of offence the author stands convicted of. It is said to be accepted that these revolutionary courts do not observe internationally accepted rules of due process, that there is no right of appeal, and that the accused is generally unrepresented by counsel. This view was shared by Justice French of the Federal Court of Australia.

3.5 The author contends that any prosecution in Iran, in the event of his deportation, would be contrary to article 14, paragraph 7, of the Covenant, since he would face the serious prospect of double jeopardy. Therefore, his forcible deportation to Iran would, in all likelihood, amount to complicity to double jeopardy.

3.6 The author further claims violations of articles 15 and 16 of the Covenant and seeks to substantiate said allegations. Counsel seeks interim measures of protection under rule 86 of the rules of procedure on behalf of his client, who may face repatriation to Iran at any moment.

The State party's information and observations on the admissibility and the merits of the communication

4.1 In a submission dated 17 October 1996, the State party offers comments both on the admissibility and the merits of the case. As to the author's claim under article 2, it argues that the rights under this provision are accessory in nature and linked to the other specific rights enshrined in the Covenant. It recalls the Committee's interpretation of a State party's obligations under article 2, paragraph 1, pursuant to which if a State party takes a decision concerning 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

² FIDAN's case [1987], Recueil Dalloz – Sirey, 305-310.

Covenant³. It notes however that the Committee's jurisprudence has been applied so far to cases concerning extradition, whereas the author's case raises the issue of the "necessary and foreseeable consequence" test in the context of expulsion of an individual who was convicted of serious drug offences and who has no legal basis for remaining in Australia: it cannot be said that a retrial for drug trafficking offences is certain or the purpose of returning Mr. J. to Iran.

4.2 In the State party's opinion, a narrow construction of the "necessary and foreseeable consequences" test allows for an interpretation of the Covenant which balances the principle of State party responsibility embodied in article 2 (as interpreted by the Committee) and the right of a State party to exercise its discretion as to whom it grants a right of entry. To the State party, this interpretative approach retains the integrity of the Covenant and avoids a misuse of the Optional Protocol by individuals who entered Australia for the purpose of committing a crime and who do not have valid refugee claims.

4.3 Regarding the author's claim under article 6, the State party recalls the Committee's jurisprudence as set out in the Views on communication No. 539/1993⁴ and notes that while article 6 of the Covenant does not prohibit the imposition of the death penalty, Australia has, by accession to the Second Optional Protocol to the Covenant, undertaken an obligation not to execute anyone within its jurisdiction and to abolish capital punishment. The State party argues that the author has failed to substantiate his allegation that it would be a necessary and foreseeable consequence of his mandatory removal from Australia that his rights under article 6 of the International Covenant on Civil and Political Rights and article 1, paragraph 1, of the Second Optional Protocol will be violated; this aspect of the case should be declared inadmissible under article 2 of the Protocol, or dismissed as being without merits.

4.4 The State party adduces several arguments which in its opinion demonstrate that there is no real risk to the author's life if he were to be returned to Iran. It first notes that expulsion is distinguishable from extradition in that extradition results from a request from one State to another for the surrender of an individual to face prosecution or the imposition or enforcement of a sentence for criminal conduct. Accordingly, as a consequence of a request for

³ See Views on communications Nos. 469/1991 (*Ch. Ng v. Canada*), adopted on 5 November 1993, paragraph 6.2; and 470/1991 (*J. Kindler v. Canada*), Views adopted 30 July 1993.

⁴ Communication No. 539/1993 (*Keith Cox v. Canada*), Views adopted 31 October 1994, paragraph 16.1.

extradition it is virtually certain that the person will face trial or enforcement of sentence in the receiving state. On the other hand, it cannot be said that such a consequence is certain or the purpose of handing over in relation to the routine deportation or expulsion of a person. For expulsion cases, the State party submits, the threshold question should be whether the receiving state has a clear intention to prosecute the deported person. Without clear intention of an actual intention to prosecute in the first place, allegations such as those raised by the author are purely speculative.

4.5 The State party submits, still in the context of the claim under article 6, that no arrest warrant is outstanding against the author in Iran, and that the Iranian authorities have no particular interest in the author. Thus, the Australian Embassy in Teheran advised that "... [i]f the Iranians have not sought the assistance of Interpol in this case, then that is the most compelling evidence that the alleged victim will not suffer arrest or re-imprisonment on return for the drug offence. This is a view shared by all Western embassies who have dealt with such cases in the recent past".

4.6 The State party notes that it has, through its embassy in Teheran, sought independent legal advice on the specific circumstances of the author from a lawyer practicing in Iran. The advice given was that it is very unlikely that an Iranian citizen who already has served a sentence abroad for a (drug-related) offence will be retried and resented. The only possibility of this occurring would be where the penalty incurred abroad is considered far too lenient by the Iranian authorities; these would *not* consider a six year sentence as too lenient. Furthermore, the State party points out, Iranian law does *not* provide for the imposition of the death penalty for the trafficking of two kilograms of cannabis resin; rather, the penalty for trafficking between 500 grams and 5 kilograms of cannabis resin is a fine of between 10 and 40 million rials, 20-74 lashes and 1-5 years imprisonment. In respect of the author's argument that there is a consistent pattern of the use of the death penalty in drug trafficking cases in Iran, the State party notes that reliance on an alleged consistent pattern of resort to the death penalty is insufficient to demonstrate a real risk in the specific circumstances of the alleged victim: Mr. J. offers no evidence that he would personally be at risk of being subject to the death penalty.

4.7 The State party's own inquiries do not reveal any evidence that deportees who were convicted of drug-related offences are at a heightened risk of a violation of the right to life. Thus, the Australian embassy in Teheran has advised that it is unaware of any cases where an Iranian citizen was subjected to prosecution for the same or similar offences. The embassy was advised by another embassy, which

handles a high volume of asylum cases, that it had processed several similar cases in recent years and that none of the individuals deported to Iran after serving a prison sentence in that embassy's country had faced problems with the Iranian authorities upon their return. The State party adds that other countries which have deported convicted Iranian drug traffickers have stated that none of the individuals who were so deported were subjected to rearrest or to retrial.

4.8 For the purpose of ascertaining whether there is a real possibility that the author may face the death penalty in Iran, the State party sought legal advice through its embassy in Teheran as to whether Mr. J.'s criminal record would increase his risk of being the subject of adverse attention from the local authorities. The legal advice obtained does not support this proposition. It was further advised that although the author had been arrested once previously in 1989 for consumption of alcohol and was refused work clearance at a petro-chemical plant, this does not suggest in any way that he would be rearrested upon return to Iran or subjected to additional adverse attention.

4.9 Finally, the State party argues that the author has failed to substantiate his claim that he might be subjected to extra-judicial execution if returned to Iran. It is submitted that an Iranian citizen in the author's position is at no risk of extra-judicial execution, disappearance or detention without trial during which that person might be subject to torture.

4.10 In respect of the author's claim under article 7 of the Covenant, the State party concedes that if Mr. J. were prosecuted in Iran, he might, under the Islamic penal code, be exposed to 20-74 lashes. It argues, however, that there is no real risk that the author would be retried and resented if returned. Accordingly, this claim is said to be unsubstantiated and without merits.

4.11 The State party argues that the author's allegation that prosecution in an Islamic Revolutionary Court would violate his right under article 14, paragraph 7, of the Covenant is incompatible with the provisions of the Covenant and should be declared inadmissible under article 3 of the Optional Protocol. In this context, it argues that article 14, paragraph 7, does not guarantee *ne bis in idem* with regard to the national jurisdictions of two or more States - on the basis of the *travaux préparatoires* of the Covenant and the jurisprudence of the Committee⁵, the State party argues that article

⁵ Communication No. 204/1986 (*A.P. v. Italy*), declared inadmissible during the 31st session (2 November 1987), paragraph 7.3.

14, paragraph 7, only prohibits double jeopardy with regard to an offence adjudicated in a given State.

4.12 The State party argues that its obligation in relation to future violations of human rights by another State arises only in cases involving a potential violation of the most fundamental human rights and does *not* arise in relation to Mr. J.'s allegations under article 14, paragraphs 1 and 3. It recalls that the Committee's jurisprudence so far has been confined to cases where the alleged victim faced extradition and where the claims related to violations of articles 6 and 7. In this context, it refers to the jurisprudence of the European Court of Human Rights in the case of *Soering v. United Kingdom*, where the Court, while finding a violation of article 3 of the European Convention, stated in respect of article 6 i.e. the equivalent of article 14 of the International Covenant on Civil and Political Rights, that issues under that provision might only exceptionally be raised by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of due process in the requesting state. In the instant case, Mr. J. asserts that he will not be afforded due process but provides no evidence to substantiate that in the circumstances of his case, the Iranian courts would be likely to violate his rights under article 14 and that he would have no possibility to challenge such violations. The State party adds that there is no real risk that the author's right to legal representation under article 14, paragraph 3, would be violated. It bases this contention on advice from the Australian embassy in Teheran, which states:

"In relation to the operation of the Iranian Revolutionary Courts, the Mission's legal advice is that a defendant accused of drug trafficking offences does have the right of legal ... counsel. The defendant can use a court-appointed lawyer or select his/her own. In the latter case, the lawyer selected must be authorized to appear in the Revolutionary Court. The fact that a lawyer's credentials are approved by the Revolutionary Court does not compromise that lawyer's independence. A lawyer who knows and is known to the Court can generally achieve more for a client in the Iranian system. There is also provision for review of a conviction and sentence by a higher tribunal."

4.13 Concerning the claim under article 15, the State party submits that the author's allegation does not fall within the scope of application of the provision and thus should be declared inadmissible *ratione materiae* under article 3 of the Optional Protocol: while Mr. J. asserts that if he were sentenced under Iranian criminal law he would be subject to a penalty heavier than the one which he served in Australia, he raises no issue of retrospectivity and thus the issue of a violation of article 15 does not arise.

4.14 Finally, as to the claim under article 16, the State party recognizes the author as a person before

the law and accepts its obligation to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant. It dismisses the author's claim under article 16 as devoid of substantiation and thus inadmissible under article 2 of the Optional Protocol or, subsidiarily, as without merits.

Examination of admissibility and merits

5.1 On 3 April 1996, the communication was transmitted to the State party, requesting it to provide information and observations in respect of the admissibility of the communication. Under rule 86 of the Committee's rules of procedure, the State party was requested to refrain from any action that might result in the forced deportation of the author to a country where he is likely to face the imposition of a capital sentence. On 5 March 1997, the Attorney-General of Australia addressed a letter to the Chairman of the Committee, requesting the Committee to withdraw the request for interim protection under rule 86, pointing out that the author had been convicted of a serious criminal offence, after having entered Australia with the express purpose of committing a crime. The State party's immigration authorities had given his applications full and careful consideration. As Mr. J. had become eligible for parole on 7 October 1996, he had been placed under immigration detention pursuant to the Migration Act 1958, pending his deportation. The Attorney-General further noted that the author would be kept in immigration detention as long as the Committee had not reached a final decision on his claims, and strongly urged the Committee to decide on Mr. J.'s claims on a priority basis.

5.2 During its 59th session in March 1997, the Committee considered the Attorney-General's request and gave it careful consideration. It decided that on the balance of the material before it, the request for interim protection should be maintained, and that the admissibility and the merits of the author's case should be considered during the 60th session. Counsel was advised to forward his comments on the State party's submission in time for the Committee's 60th session. No comments have been received from counsel.

6.1 The Committee appreciates that the State party has, although challenging the admissibility of the author's claims, also provided information and observations on the merits of the allegations. This enables the Committee to consider both the admissibility and the merits of the present case, pursuant to rule 94, paragraphs 1 and 2, of the Committee's rules of procedure.

6.2 Pursuant to rule 94, paragraph 2, of the rules of procedure, the Committee shall not decide on the merits of a communication without having

considered the applicability of any of the grounds of admissibility referred to in the Optional Protocol.

6.3 The author has claimed violations of articles 15 and 16 of the Covenant. The Committee notes, however, that there is no issue of alleged retroactive application of criminal laws in the instant case (article 15). Nor is there any indication that the author is not recognized by the State party as a person before the law (article 16). The Committee therefore considers these claims inadmissible under article 2 of the Optional Protocol.

6.4 The author has claimed a violation of article 14, paragraph 7, because he considers that a retrial in Iran in the event of his deportation to that country would expose him to the risk of double jeopardy. The Committee recalls that article 14, paragraph 7, of the Covenant does not guarantee *ne bis in idem* with respect to the national jurisdictions of two or more states - this provision only prohibits double jeopardy with regard to an offence adjudicated in a given State⁶. Accordingly, this claim is inadmissible *ratione materiae* under article 3 of the Optional Protocol, as incompatible with the provisions of the Covenant.

6.5 The State party contends that the author's claims relating to articles 6, 7 and 14, paragraphs 1 and 3, are either inadmissible on the ground of non-substantiation, or because the author cannot be deemed to be a "victim" of a violation of these provisions within the meaning of article 1 of the Optional Protocol. Subsidiarily, it rejects these allegations as being without foundation.

6.6 The Committee is of the opinion that the author has sufficiently substantiated, *for purposes of admissibility*, his claims under articles 6, 7 and 14, paragraphs 1 and 3, of the Covenant. As to whether he is a "victim" within the meaning of article 1 of the Optional Protocol of violations of the above provisions *if* the State party were to deport him back to his home country, it is to be recalled that the Refugee Review Tribunal, as well as the decision of the single judge of the Federal Court of Australia, considered it to be a real risk that the author might face treatment of an extremely harsh nature if he were deported to Iran, and that this risk was a matter of serious concern. In these circumstances, the Committee considers that the author has plausibly argued, *for purposes of admissibility*, that he is a "victim" within the meaning of the Optional Protocol and that he faces a personal and real risk of violations of the Covenant if deported to Iran.

⁶ See decision on case No. 204/1986 (*A.P. v. Italy*), declared inadmissible 2 November 1987, paragraphs 7.3 and 8.

6.7 The Committee therefore concludes that the author's communication is admissible in so far as it appears to raise issues under articles 6, 7 and 14, paragraphs 1 and 3, of the Covenant.

6.8 What is at issue in this case is whether by deporting Mr. J. to Iran, Australia exposes him to a real risk (that is, a necessary and foreseeable consequence) of a violation of his rights under the Covenant. States parties to the Covenant must ensure that they carry out all their other legal commitments, whether under domestic law or under agreements with other states, in a manner consistent with the Covenant. Relevant for the consideration of this issue is the State party's obligation, under article 2, paragraph 1, of the Covenant, 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 fundamental of these rights.

6.9 If a State party deports a person within its territory and subject to its jurisdiction in such circumstances that as a result, there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, that State party itself may be in violation of the Covenant.

6.10 With respect to possible violations by Australia of articles 6, 7 and 14 of the Covenant by its decision to deport the author to Iran, three related questions arise:

– Does the requirement under article 6, paragraph 1, to protect the author's right to life and Australia's accession to the Second Optional Protocol to the Covenant prohibit the State party from exposing the author to the real risk (that is, the 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 deportation to Iran?

– Do the requirements of article 7 prohibit the State party from exposing the author to the necessary and foreseeable consequence of treatment contrary to article 7 as a result of his deportation to Iran? and;

– Do the fair trial guarantees of article 14 prohibit Australia from deporting the author to Iran if deportation exposes him to the necessary and foreseeable consequence of violations of due process guarantees laid down in article 14?

6.11 The Committee notes that article 6, paragraph 1, of the Covenant must be read together with article 6, paragraph 2, which does not prohibit the imposition of the death penalty for the most serious crimes. Australia has not charged the author with a capital offence but intends to deport him to Iran, a State which retains capital punishment. If the author is exposed to a real risk of a violation of article 6,

paragraph 2, in Iran, this would entail a violation by Australia of its obligations under article 6, paragraph 1.

6.12 In the instant case, the Committee observes that Mr. J.'s allegation that his deportation to Iran would expose him to the "necessary and foreseeable consequence" of a violation of article 6 has been refuted by the evidence which has been provided by the State party. Firstly and most importantly, the State party has argued that the offence of which he was convicted in Australia does not carry the death penalty under Iranian criminal law; the maximum prison sentence for trafficking the amount of cannabis the author was convicted of in Australia would be five years in Iran, i.e. less than in Australia. Secondly, the State party has informed the Committee that Iran has manifested no intention to arrest and prosecute the author on capital charges, and that no arrest warrant against Mr. J. is outstanding in Iran. Thirdly, the State party has plausibly argued that there are no precedents in which an individual in a situation similar to the author's has faced capital charges and been sentenced to death.

6.13 While States parties must be mindful of their obligations to protect the right to life of individuals subject to their jurisdiction when exercising discretion as to whether or not to deport said individuals, the Committee does not consider that the terms of article 6 necessarily require Australia to refrain from deporting an individual to a State which retains capital punishment. The evidence before the Committee reveals that both the judicial and immigration instances seized of the case heard extensive arguments as to whether the author's deportation to Iran would expose him to a real risk of violation of article 6. In the light of these circumstances, and especially bearing in mind the considerations in paragraph 6.12 above, the Committee considers that Australia would not violate the author's rights under article 6 if the decision to deport him to Iran is implemented.

6.14 In assessing whether, in the instant case, the author is exposed to a real risk of a violation of article 7, considerations similar to those detailed in paragraph 6.12 above apply. The Committee does not take lightly the possibility that *if* retried and resented in Iran, the author might be exposed to a sentence of between 20 and 74 lashes. But the risk of such treatment must be real, i.e. be the necessary and foreseeable consequence of deportation to Iran. According to the information provided by the State

party, there is no evidence of any actual intention on the part of Iran to prosecute the author. On the contrary, the State party has presented detailed information on a number of similar deportation cases in which no prosecution was initiated in Iran. Therefore, the State party's argument that it is extremely unlikely that Iranian citizens who already have served sentences for drug-related sentences abroad would be re-tried and re-sentenced is sufficient to form a basis for the Committee's assessment on the foreseeability of treatment that would violate article 7. Furthermore, treatment of the author contrary to article 7 is unlikely on the basis of precedents of other deportation cases referred to by the State party. These considerations justify the conclusion that the author's deportation to Iran would not expose him to the necessary and foreseeable consequence of treatment contrary to article 7 of the Covenant; accordingly, Australia would not be in violation of article 7 by deporting Mr. J. to Iran.

6.15 Finally, in respect of the alleged violation of article 14, paragraphs 1 and 3, the Committee has taken note of the State party's contention that its obligation in relation to future violations of human rights by *another* State only arises in cases involving violations of the most fundamental rights and *not* in relation of possible violations of due process guarantees. In the Committee's opinion, the author has failed to provide material evidence in substantiation of his claim that if deported, the Iranian judicial authorities would be likely to violate his rights under article 14, paragraphs 1 and 3, and that he would have no opportunity to challenge such violations. In this connection, the Committee notes the information provided by the State party that there *is* provision for legal representation before the tribunals which would be competent to examine the author's case in Iran, and that there *is* provision for review of conviction and sentence handed down by these courts by a higher tribunal. The Committee recalls that there is no evidence that Mr. J. would be prosecuted if returned to Iran. It cannot therefore be said that a violation of his rights under article 14, paragraphs 1 and 3, of the Covenant would be the necessary and foreseeable consequence of his deportation to Iran.

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 do not reveal a violation by Australia of any of the provisions of the Covenant.

Communication No. 676/1996

Submitted by: Abdool Saleem Yasseen and Noel Thomas [represented by Interights, London]

Alleged victims: The authors

State party: Guyana

Declared admissible: 11 July 1997 (sixtieth session)

Date of adoption of Views: 30 March 1998 (sixty-second session)

Subject matter: Alleged ill-treatment of individuals charged with capital offence

Procedural issues: Exhaustion of domestic remedies
- Effectiveness of remedy

Substantive issues: Alleged forced confessions -
Physical abuse during pre-trial detention -
Fairness of judicial proceedings

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

Article of the Optional Protocol and Rules of Procedure: 5, paragraph 2 (b)

Finding: Violations [articles 10, paragraph 1, and 14, paragraphs 3 (b), (c), (d) and (e)]

1. The authors of the communication are Abdool Saleem Yasseen and Noel Thomas, two Guyanese citizens awaiting execution at the Centre Prisons, Georgetown, Guyana. They claim to be victims of violations by Guyana of articles 6, paragraphs 1 and 4; 7; 10, paragraphs 1 and 2; and 14, paragraphs 1 and 3 (a) to (e) and (g), of the International Covenant on Civil and Political Rights. They are represented by Interights, a London-based organization.

The facts as submitted by the authors

2.1 On 30 March 1987, the authors were indicted for the murder of one Kaleem Yasseen, half-brother of one of the authors. They were found guilty as charged in the Essequibe High Court and sentenced to death on 2 June 1988. On 25 October 1990, the Court of Appeal ordered a re-trial. The re-trial was aborted and a third trial was held in September 1992. The authors were once again convicted as charged and sentenced to death on 6 December 1992. Their second appeal against conviction and sentence was dismissed in June 1994. On 5 July 1994, the authors applied to the President to invoke the prerogative of mercy. On 1 February 1996 a warrant of execution was read to them. A stay of execution was granted, pending their appeal to the High Court.

2.2 On 20 March 1987, Saleem Yasseen gave an oral statement to the police at Suddie police station. He claimed to have been out of town during the killing and had returned upon hearing about it. On 21 March 1987, Noel Thomas gave an oral statement to the police, the contents of which are unknown. He

was placed in a police lock-up without food, water or toilet facilities, and was not permitted visitors.

2.3 On 24 March Mr. Yasseen was arrested. Both authors were then brought before a magistrate and placed on remand at the Central Prisons: they were not separated from convicted prisoners. Prison conditions were appalling. The authors were placed in a cell measuring 80 by 30 feet with about 150 other prisoners. There was only one electric light and one functioning toilet. Prisoners were only allowed to use the single bathroom once a day. The drainage was defective, forcing the authors to bath in six inches of dirty water. They had to sleep on the floor, due to lack of mattresses. No recreation facilities were available. They were only allowed one visit a month from relatives.

2.4 At the preliminary inquiry, the police produced a written statement, alleged to be a confession made by Noel Thomas. Mr. Thomas asserts that the confession was illegally obtained; he was physically abused by the police, who used pliers on his genitals. The officer who had received his confession, Superintendent Marks, did not testify during the preliminary hearing. Superintendent Barren produced his pocket book, in which he claimed to have recorded an oral confession by Yasseen. This pocket book, along with Superintendent Marks', and the Suddie station diary for the days between 21 to 26 March 1987 have since disappeared. The station diary is kept in a store room under lock and key. All three documents were produced at the first trial but disappeared shortly thereafter.

2.5 On 26 July 1987, the authors were taken to Suddie Magistrate Court, by public transport. The journey took at least eight hours and they were handcuffed in full view of the public. This was repeated some 10 times during the preliminary enquiry, which lasted from 27 July 1987 to 29 February 1988.

2.6 The first trial took place in May 1988. During the trial the authors were kept in solitary confinement at the Suddie Police station, in a 8 by 14 feet cell, with no toilet, mattress or light and one single air vent. The authors were returned to Central Prison upon conviction and placed in solitary confinement on "death row", where they remained during the period of their appeal. They were kept in cells measuring seven by seven feet and eight feet

high, with no lights or toilet nor washing or recreation facilities.

2.7 In March 1990, the authors appealed. The hearings lasted some three months; the decision was reserved until 25 October 1990. The appeal was allowed on that date and a re-trial ordered, because of improper selection of the jury and the fact that superintendent Marks was permitted to testify at the trial and at the *voir dire*, although he had not appeared at the preliminary inquiry (despite having been available). In November 1990, Yasseen was placed in a cell with two other convicted men. In January 1991 when he was diagnosed as being mentally unsound, he was placed in a cell by himself, until April 1991, when he was transferred to the infirmary. Yasseen never saw a doctor, and his request to see the prison director remained unheeded.

2.8 In May-June of 1991 the re-trial was held. It was aborted after two weeks, on grounds of jury tampering. During the trial, the authors were held at the Suddie police station, under the conditions already described. After the trial, they were returned to Central Prison. Mr. Yasseen was placed in the infirmary until September 1992, because of a broken leg, the result of an injury in prison. In the infirmary he was placed in a semi-dormitory called "itchy park", together with eight people with contagious diseases.

2.9 The third trial began in October 1992. On 6 December 1992, the authors were found guilty as charged and sentenced to death. Mr. Yasseen's lawyer was unable to attend the first four days of the trial and accordingly requested an extension. This was denied to him, effectively leaving the author without legal representation.

2.10 The prosecution's case was based on the authors' alleged confession statements. One witness who had been arrested on 25 March 1987 and had made a statement to the police concerning the case was called to testify, but failed to do so; this witness had appeared at the first trial. The station diary and police notebooks, which were produced at the first trial, were not produced in the third trial. The authors believe these would have shown that Mr. Yasseen had not been under arrest at the time of his alleged oral confession. Two medically trained personnel from Central Prison testified that Mr. Thomas had been physically abused in police custody. After the trial, the authors learned that the jury foreman was the deceased wife's uncle. They were returned to Central Prison and kept on death row under the conditions already described. The crutches Mr. Yasseen used for his broken leg were taken away from him, thus forcing him to crawl.

2.11 On Thursday 1 February 1996 at 3:00 p.m., warrants were read to the authors for their execution at 8:00 a.m. on Monday 5 February 1996. The

normal practice is for warrants to be read on a Thursday for the execution to take place the following Tuesday. The authors' families were informed of the execution through an anonymous telephone call at 10:00 p.m. on Thursday 1 February.

2.12 On Saturday 3 February 1996, an application for a stay of execution was heard, and a conservatory order was requested to allow a hearing to take place. The Conservatory order was denied, but an appeal against this judgment to the full Court of Appeal, was allowed. A seven day stay of execution was granted. On 7 February, the authors were informed that the Court of Appeal's hearing on the merits of their case was scheduled for 8 February.

2.13 Counsel notes that no recourse to the Privy Council is permitted in Guyana; therefore, the authors are said to have exhausted domestic remedies. They assert that the litispence of the Conservatory motion should not be held to mean that domestic remedies have not been exhausted, for two reasons. Firstly, because the authors consider it highly unlikely that the motion will succeed. Secondly, since, given the nature of the situation, the authors will be pursuing all legal procedures until the very last minute, they cannot be expected to wait until their final claim has been heard before petitioning the Human Rights Committee; this would require them to wait until a moment dangerously close to their execution before invoking their rights under the International Covenant on Civil and Political Rights, or force them to refrain from taking all possible courses of action in the domestic courts.

The complaint

3.1 Counsel submits that the authors were denied the right to a fair trial, in violation of article 14 of the Covenant. It is alleged that the authors were convicted on scant evidence, and while recognizing that the Human Rights Committee does not normally evaluate facts and evidence, it is submitted that in the instant case, the evidence was so weak that the execution of a death sentence on the basis of such weak evidence would be tantamount to a gross miscarriage of justice. Counsel notes that the authors were convicted on the basis of their own alleged confessions, which in Mr. Thomas' case was extracted from him by physical force and, in Mr. Yasseen's case, was an oral confession which he denies ever having made. Furthermore, the authors submit that they were denied a trial by an impartial tribunal, because it was later discovered that the foreman of the jury during the last trial, was the uncle of the deceased's wife.

3.2 The authors claim a violation of article 14, paragraph 3 (c), in that they were not tried without undue delay. In this respect, it is submitted that the authors have been in detention for over ten years since they were charged with murder in March 1987.

3.3 Counsel submits that the authors' right to examine witnesses and call evidence was not guaranteed because one witness, Hiram Narine, did not appear, in spite of numerous summons and because the missing police notebooks and diary could have contained exculpatory evidence; this is said to be a violation of article 14, paragraph 3 (e), of the Covenant.

3.4 The authors claim a violation of article 14, paragraph 3 (g), in that they were forced to confess guilt. In Mr. Thomas' case, physical force was used against him to obtain his confession; in Mr. Yasseen's case, it was wrongly argued that he had made an oral confession.

3.5 Counsel submits that Mr. Thomas was not promptly informed of the charges against him, in violation of article 14, paragraph 3 (a), since he was arrested on 20 March 1987, that is four days after his arrest. With respect to Mr. Yasseen, it is submitted that he has been the victim of a violation of article 14, paragraph 3 (b) and (d), as his lawyer was unable to attend the first four days of the last trial, despite an adjournment having been requested, thus leaving the author without legal representation.

3.6 The authors claim a violation of articles 7 and 10, paragraph 1, on the grounds that Mr. Thomas was subjected to physical abuse in custody, resulting in a false confession. They were taken on at least 11 separate journeys, lasting eight hours each, on public transport to attend hearings, during which they were handcuffed and fully in the public's view, thereby causing unnecessary humiliation. The conditions of their detention were poor and at various times, they were denied food, medical care and basic hygiene, visits from family and recreational facilities; Mr. Yasseen was denied access to a doctor though he had been pronounced mentally unfit and was deprived of his crutches, forcing him to crawl. Furthermore, it is alleged that the authors have been subjected to great mental anguish, due to the nine years they have lived in terrible prison conditions, during pre-trial detention and during the periods between the various trials. All this has been compounded by the lack of response to their request for mercy; they only learned of the presidential refusal to exercise the prerogative of mercy when their death warrants were read to them. Their families were not officially informed of the date of execution but received an anonymous telephone call.

3.7 Counsel submits that the authors have been the victims of a violation of article 10, paragraph 2, because on many occasions they were held together with convicted prisoners, with no exceptional circumstances justifying this situation.

3.8 The lack of any official response to the authors' request for mercy, and the failure of the

authorities to follow the normal procedure in the issuance of an execution date (the authors were given one day less in which to pursue legal redress), is said to constitute a violation of article 6, paragraph 4, of the Covenant.

State party's admissibility observations and counsel's comments, and Committee's admissibility decision

4.1 On 9 February 1996, the State party argued that domestic remedies still available to the authors had not been exhausted, as their motions before the High Court could be appealed to the Court of Appeal, the State party's final judicial instance. By note of 11 April 1996, the State party requested an extension of the deadline for submission of observations on the admissibility of the communication.

4.2 On 28 February 1997, counsel informed the Committee that the Court of Appeal of Guyana had dismissed the authors' application on 14 May 1996 and that it had decided to remand the case to a new sitting of the Mercy Committee. To counsel, all available domestic remedies were exhausted with the dismissal of the authors' application by the Court of Appeal.

4.3 During its 60th session, the Committee considered the admissibility of the communication. It regretted the lack of cooperation from the State party and rejected the State party's argument, which had been expressed in a note verbale dated 9 May 1997 addressed to the Committee, that the Committee was examining the present communication with undue delay. As to the requirement of exhaustion of domestic remedies, the Committee considered that following the dismissal of the authors' appeal by the Court of Appeal of Guyana, a further remittal of the case to the Mercy Committee did not constitute an effective remedy which the authors were required to exhaust for purposes of the Optional Protocol.

4.4 The Committee considered that the authors had adequately substantiated, for purposes of admissibility, their claims under articles 7, 9, 10 and 14 of the Covenant, which should be examined on their merits. Accordingly, on 11 July 1997, the Committee declared the communication admissible.

State party's merits observations and counsel's comments

5.1 By note verbale of 19 August 1997, the State party's Minister for Foreign Affairs expressed "disappointment and .. distress" about the Committee's admissibility decision, noting that the Committee had failed to take into consideration the Government's observations of 3 October 1996 on the

authors' claims. Upon inquiry by the Committee, it transpired that the State party's submission of that date had been addressed to the Special Rapporteur for Summary and Arbitrary Executions of the UN Commission on Human Rights. The Government of Guyana was so informed on 27 August 1997. By note of 29 August 1997, the State party requested that its observations of 3 October 1996 be incorporated into the case file, and that the Committee reconvene to consider the admissibility and/or the merits of the case during the 61st session in October 1997. The Committee was apprised of these developments during its 61st session and considered that authors' counsel should be given an opportunity to comment on the State party's observations of 3 October 1996. On 11 December 1997, the State party was informed that the case had been remanded for a final decision to the Committee's 62nd session.

5.2 In its observations of 3 October 1996, the State party provides a detailed factual account of the case which differs in some points from the authors' version. It notes that Noel Thomas and others were arrested on 21 March 1987 and questioned about the murder of Kaleem Yasseen. Thomas denied any involvement in the killing and was released from custody. On 23 March, one Hiram Narine was arrested and questioned; he provided information of relevant conversations between him and Thomas, and Thomas was re-arrested on the very same day. On 24 March 1987, Abdool Yasseen was arrested and informed that he was suspected of involvement in the killing of his brother. Later on the same day, Noel Thomas was confronted with Hiram Narine, and after Narine reconfirmed what he had told the police earlier, Thomas was cautioned and observed that he had been used by Abdool Saleen; he then volunteered to give a written statement. According to the State party, Thomas agreed that Asst. Police Superintendent Marks write down the statement, and declined to have a lawyer or relative present.

5.3 Shortly after the written deposition had been made, Abdool Yasseen was confronted with a copy of the statement - he read it, confirmed the correctness of Thomas' version, and volunteered to make an oral statement. On 26 March 1987, both accused were asked, in the presence of each other, about the location of the shotgun which was used for the murder of Kaleem Yasseen. Noel Thomas allegedly made statements heavily incriminating Abdool Yasseen as the instigator of the crime. On 30 March 1987, both were charged with murder in the Suddie Magistrate's Court.

5.4 The State party notes that after each sitting of the preliminary inquiry, the accused were sent on remand to Georgetown Prisons, as Essequibo County (the location of the court) does not have a prison.

According to the State party, the remand section of Georgetown Prisons is not overcrowded and has both toilet and bathing facilities. It has "sufficient mattresses for sleeping purposes -although it is not denied that prisoners sometimes prefer to sleep on the floor rather than share a mattress with another prisoner." The authors' allegation that there is a six-inch build-up of dirty water caused by a defective drain is dismissed as false. The mode of travel to and from Suddie Magistrate's Court is by ferry boat, which is used by the general public including lawyers, magistrates and judges. Prisoners charged with murder are handcuffed during the four-hour journey, as a security measure.

5.5 The preliminary inquiry was concluded on 29 February 1988; neither of them called any witnesses during the preliminary inquiry. The trial in the High Court began in May 1988 and concluded on 2 June 1988; the accused were found guilty as charged. During the trial, Abdool Yasseen denied having made any oral confession to Asst. Superintendent Marks, and Noel Thomas argued that the written statement had been signed under duress. Thomas further claimed that he was beaten by police officers and that pliers were applied to his genitals. The trial judge conducted a *voir dire* into these allegations and, after hearing evidence from both prosecution and defense witnesses on the voluntariness of the statement, dismissed Thomas' allegations and admitted his statement as evidence.

5.6 On 3 June 1988, the authors appealed their conviction and sentence. On 25 October 1990, the appeal was allowed on the grounds that (a) a police witness who was not called during the preliminary inquiry was allowed to testify on trial without any explanation provided by the prosecution as to why he was not called as a prosecution witness then; (b) the trial judge improperly excused jurors on the insufficient ground that they feared that they might be sequestered at some stage during the trial. A re-trial was ordered. The re-trial started before a different High Court Judge in June 1991; it was aborted after an inquiry by the judge into allegations that a member of the jury had been seen in company of, and heard in conversation with, a relative of Abdool Yasseen. Two weeks had elapsed when the trial was aborted.

5.7 The second re-trial was scheduled to start in June 1992, but was adjourned for 3 months due to the absence and unavailability of counsel for Abdool Yasseen between July and September 1992. It eventually started in October 1992 and on 4 December 1992, the accused were again found guilty as charged and sentenced to death. The appeal was heard between April and June 1994, and dismissed. According to the State party, "prior to this final determination, there were two Christmas vacations and annual judicial vacation periods of 2 months or

more”. The State party thereafter provides a detailed account of the constitutional motion and appeal proceedings filed on the authors’ behalf after a warrant for their execution had been issued on 1 February 1996.

5.8 As to conditions of imprisonment for the authors, the State party explains that persons charged with criminal offences awaiting trial in detention are housed in a dormitory at Georgetown Prisons. At no time were the authors kept with convicted prisoners prior to conviction. The dormitory is equipped with adequate lighting, ventilation and mattresses, four toilets and two bathrooms. As prisoners awaiting trial, the authors were allowed visits by friends or relatives twice a week. The State party admits that there is a block at Georgetown Prisons where prisoners with communicable diseases are kept. Abdool Yasseen was never an inmate on that block.

5.9 The State party notes that all inmates at Georgetown Prisons are provided with medical services by qualified medical personnel. Medical records of Abdool Yasseen reveal that he was examined a total of 21 times in the Prison Infirmary. At no time was he diagnosed as mentally unsound nor did he suffer a broken leg nor did he have to move around on crutches. In relation to Mr. Thomas, records reveal that while in prison, he was treated for urinary tract infection, which he had contracted before his incarceration.

5.10 Prisoners under sentence of death are kept in single cells measuring 8 x 8 feet. Cells are illuminated by lighting units placed outside cells to reflect into them, as prisoners on death row are closely watched. The State party notes that there is “adequate ventilation for each cell”. Cells on death row do not have self-contained toilets, but prisoners are provided with utensils for urinary and defecatory purposes: “these are emptied and cleansed after use as often as practicable”. Recreational facilities are available to all inmates, including the authors, and prisoners are allowed an hour a day for recreational purposes.

5.11 In the authors’ cases, both were housed in the remand division of Georgetown Prisons until June 1988. When their appeals were allowed in 1990, they were returned to the remand division. After conviction in December 1992, both were returned to the single cells for prisoners under sentence of death.

6.1 In her comments, counsel notes that the State party does not deny the allegation that Mr. Yasseen was unrepresented during the first four days of the second re-trial, although a request for an adjournment in order to obtain counsel had been made. Whether or not an adjournment was granted for three months in June, it remains that the trial started in October 1992 in the absence of Yasseen’s

counsel. Yasseen had originally retained B. de Santos, who was paid \$ 300,000. One week before the trial was about to begin, de Santos returned the full sum, stating that he was unable to conduct the defense. Yasseen then retained another senior counsel, S. Hardy, who sought an adjournment from the judge, because he could not attend court at the appointed start date. The adjournment was refused, the trial started and two prosecution witnesses were interrogated and testified in counsel’s absence.

6.2 Counsel notes, by reference to the Committee’s jurisprudence¹, that the start of the trial in the absence of counsel violated the author’s rights under article 14, paragraph 3 (b) and (d). She notes that the questioning of two prosecution witnesses in the absence of counsel irreparably obstructed his defense, making it impossible for counsel to subject the prosecution’s case to full adversarial challenge. It is emphasized that there can be no question that counsel was absent for relatively unimportant days, e.g. days on which the prosecution rested the case and the trial concerned procedural issues. Rather, counsel was absent the first 4 days of the trial, when the prosecution presented its case against the authors.

6.3 Concerning the allegation that the authors’ right to examine witnesses and call evidence under article 14, paragraph 3 (e), was violated, since one potentially exculpatory witness, Hiram Narine, did not appear despite summons, and since important police documents and diaries were missing and not produced at trial as requested, counsel recalls the absence of State party information on this point.

6.4 On the issue of the authors’ claim that they were coerced to confess the murder of Kaleem Yasseen, counsel notes that the State party itself concedes that the prosecution case rested almost entirely upon the two alleged confessions, without offering a credible account of the circumstances surrounding them. Counsel dismisses the State party’s version of the alleged spontaneous confession by Noel Thomas, as written down by Asst. Superintendent Marks, as well as Mr. Yasseen’s alleged spontaneous oral confession, as dubious: while the prosecution maintains that the defendants spontaneously elected to forego legal advice and confess in full, Messrs. Yasseen and Thomas consistently maintained that they made no voluntary confessions. Counsel notes that the trial transcript is replete with convincing testimony from the medical examiner who examined Noel Thomas, describing the injuries he was subjected to while

¹ See Views on communication No.223/1987 (*Frank Robinson v. Jamaica*), adopted 30 March 1989, paragraph 10.3.

being forced to confess. In these circumstances, counsel submits that the two dubious confessions cannot support the authors' conviction and their death sentences.

6.5 Counsel recalls that the State party does not dispute the allegation of a violation of article 14, paragraph 1, because the jury foreman of the second re-trial was related to the wife of the deceased, and merely argues that this issue was not raised in domestic judicial proceedings.

6.6 Counsel contends that the aggregate of delays in the judicial proceedings, between 1988 and 1994, constitute a violation of article 14, paragraph 3 (c), of the Covenant. The State party's only explanation for the delay is the statement that, as to the period for the second re-trial and appeal, there were two Christmas vacations and annual judicial vacation periods of 2 months or more. This, it is submitted, is a wholly inadequate explanation given the mental anguish the authors suffered awaiting the determination of their cases.

6.7 Counsel reiterates the allegations pertaining to the deplorable conditions of detention before and after the trial, and forwards two affidavits sworn in November 1997 by the father of Abdool Yasseen and a Georgetown businessman and friend of Abdool Yasseen². Both affidavits testify to the very poor conditions of detention the authors were subjected to, including gross overcrowding, insufficient bedding and toilet facilities, inadequate lighting, cramped accommodations, inadequate clothing and food, insufficient exercise and insufficient access to fresh air. Counsel further notes that the State party does not contest specific allegations concerning the authors' treatment in detention, in particular:

– That the authors sometimes were obliged to sleep on the floor, which is conceded by the remark that prisoners sometimes prefer to sleep on the floor rather than to share mattresses; this is said to be contrary to Rule 19 of the UN Standard Minimum Rules for the Treatment of Prisoners.

– That toilet facilities on death row are inadequate; this is said to be a violation of Rule 16 of the Standard Minimum Rules.

– That the authors' cells on death row have inadequate lighting is conceded by the State party through the remark that cells are illuminated through lighting units placed outside the cells. Counsel submits that lighting units outside the cells do not comply with rule 11 (b) of the Standard Minimum Rules. Moreover, the allegation that the authors were deprived of access to fresh air and sunlight (Rule

11 (a) and Rule 21 (1) of the Standard Minimum Rules) has not been denied by the State party.

– That the State party concedes that the authors were taken on numerous journeys by public transport and, being handcuffed and in public view throughout the journey, suffered great and unnecessary humiliation.

The above conditions of detention are said to constitute a violation of articles 7 and 10, paragraph 1, of the Covenant.

Reconsideration of admissibility and examination of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol to the Covenant. It has noted the State party's request of 29 August 1997 that the question of the admissibility of the communication be reconsidered, in the light of the State party's observations of 3 October 1996 which came to the Committee's attention *after* the communication was declared admissible.

7.2 The Committee observes, in this respect, that the State party's submission of October 1996 addresses the merits of the authors' complaints, and that it does not challenge the admissibility of the communication on any of the grounds enumerated in the Optional Protocol, save for the authors' claim that the jury foreman for the last trial (1992) was related to the deceased's wife. This claim, it argues, was not raised by the authors during the judicial proceedings against them. The Committee observes that in that respect, in effect, domestic remedies have not been exhausted, and, accordingly, the decision of admissibility of 11 July 1997 is set aside in as much as it relates to this claim. As to the other claims made by the authors, the Committee sees no grounds to review its decision of admissibility.

7.3 On the substance of the authors' claims, three distinct complexes must be addressed:

– The issue of the alleged forced confessions of the authors, physical abuse against Mr. Thomas during pre-trial detention, and poor conditions of incarceration during pre-trial detention;

– Conditions of detention since the authors' first conviction (1988);

– And issues relating to the conduct of the authors' last trial (1992).

7.4 As to the first issue, the Committee notes that the authors and in particular Mr. Thomas, claim that they were abused in pre-trial custody, that they were

² Originals of these affidavits are kept in the case file.

detained in poor conditions together with convicted prisoners, and that they were unnecessarily humiliated by virtue of their being transferred handcuffed by public transport to court hearings, in full view of the public. The State party has provided a detailed account of the situation which differs in some respects from that presented by the authors and has provided some explanations for the treatment received. The State party has admitted, however, that detainees are required to share mattresses. The Committee finds that this situation is in violation of the requirements of article 10, paragraph 1, of the Covenant.

7.5 Mr. Thomas argues that he was subjected to ill-treatment in order to force him to confess the killing of Kaleem Yasseen, in violation of article 14, paragraph 3 (g). The Committee notes that this claim was examined by the judge at the first trial (1988) during a *voir dire* and found to be lacking in substance. The Committee has no material before it that would indicate whether or not any issues relating to the alleged ill-treatment or the confession were raised at the last trial (1992) or on appeal (1994). In the circumstances, the Committee considers that there is no basis to find a violation of article 14, paragraph 3 (g).

7.6 The authors claim that their long detention in degrading conditions violated articles 7 and 10, paragraph 1. They have submitted sworn affidavits in support of their allegation that the conditions of their detention on death row are inhuman and particularly insalubrious. The State party refutes these claims but acknowledges that the authors' cells are illuminated by outside lighting units implying that the cells receive no natural lighting. The Committee considers that the fact that the authors are deprived of natural lighting save for their one hour of daily recreation, constitutes a violation of article 10, paragraph 1, of the Covenant, since it fails to respect the authors' inherent dignity as persons.

7.7 The Committee has noted counsel's claim that Mr. Thomas was not promptly informed of the charges against him, in violation of article 14, paragraph 3 (a). This claim is not borne out by the account provided by the State party and was not reiterated by counsel in her comments on the State party's submission of 3 October 1996. There is thus no ground for a finding of violation of article 14, paragraph 3 (a).

7.8 In respect of Mr. Yasseen, counsel claims a violation of article 14, paragraph 3 (b) and (d), because the author was unrepresented during the first four days of the last trial (1992). The State party has simply noted that an adjournment was granted between July and September 1992, at the request of author's former counsel, but does not otherwise deny

the claim. The Committee recalls that it is axiomatic that legal assistance be available in capital cases³. This is so even if the unavailability of private counsel is to some degree attributable to the author, and even if the provision of legal assistance entails an adjournment of proceedings. This requirement is not made unnecessary by efforts which the trial judge may otherwise make to assist the accused in the handling of his defense, in the absence of counsel. The Committee considers that the absence of legal representation for Mr. Yasseen during the first four days of the trial constitutes a violation of article 14, paragraph 3 (b) and (d).

7.9 Counsel claims that the evidence against the authors was so thin as to turn their conviction and death sentence into a miscarriage of justice. Counsel claims in particular that the author was the victim of a violation of article 14, paragraph 3 (e), because at the last trial (1992), a witness did not appear and certain police notebooks and diaries were missing. With regard to the witness, the Committee notes that it appears from the information before it that this witness gave evidence for the prosecution in the first trial (1988). The information before the Committee does not indicate how the absence of this witness at the last trial (1992) could have prejudiced the authors. In the circumstances, the Committee finds that counsel has not substantiated his claim that the failure to ensure the attendance of the witness in the last trial (1992) deprived the authors of their right under article 14, paragraph 3 (e).

7.10 With regard to the missing diaries and notebooks, the Committee notes that the authors claim that these may have contained exculpatory evidence. The State party has failed to address this allegation. In the absence of any explanation by the State party, the Committee considers that due weight must be given to the authors' allegations, and that the failure to produce at the last trial (1992) police documents which were produced at the first trial (1988) and which may have contained evidence in favour of the authors, constitutes a violation of article 14, paragraph 3, (b) and (e), since it may have impeded the authors in preparation of their defence.

7.11 Counsel finally claims a violation of article 14, paragraph 3 (c), because of the aggregate delays between the author's arrest in 1987, their conviction after two re-trials in December 1992, and the dismissal of their appeal in the summer of 1994. The Committee notes that the delays are not entirely attributable to the State party, since the authors

³ See Views on communication No. 223/1987 (*Frank Robinson v. Jamaica*), adopted 30 March 1989, paragraph 10.3.

themselves requested adjournments. Nevertheless, the Committee considers that the delay of two years between the decision by the Court of Appeal to order a retrial and the outcome of the retrial, is such as to constitute a violation of article 14, paragraph 3 (c).

7.12 The Committee considers that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of article 6 of the Covenant. In this case, the authors were convicted after a trial in which they did not have their right to a defense guaranteed. This means that the final sentence of death in their case was passed without having met the requirements of a fair trial set out in article 14 of the Covenant. It must therefore be concluded that the right protected under article 6 has also been violated.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal violations by the State party of articles 10, paragraph 1, and 14, paragraph 3 (b), (c) and (e), in respect of both authors; and of article 14, paragraph 3 (b) and (d), in respect of Mr. Abdool Yasseen.

9. Under article 2, paragraph 3 (a), of the Covenant, Abdool S. Yasseen and Noel Thomas are entitled to an effective remedy. The Committee considers that in the circumstances of their case, this should entail their release.

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

APPENDIX

Individual opinion submitted by Mr. Nisuke Ando pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the Views of the Committee on communication No. 676/1996,

Abdool Saleem Yasseen and Noel Thomas v. Guyana

I do not oppose the Committee's findings of violations with respect to article 14 of the Covenant. However, I am unable to concur with its finding of a violation with respect to article 10, paragraph 1, for the following reasons:

With respect to the issues under article 10, paragraph 1 (as well as article 7, according to the author), the authors originally made the allegations as indicated in paragraph 3.6 of the Views. However, these allegations were refuted in detail by the State party in its observations dated 3 October 1996 as indicated in paragraphs 5.4 and 5.8 - 5.11. Then, the authors attempted to challenge these refutations by quoting from the two affidavits which describe the conditions of detention as indicated in paragraph 6.7. In my view the descriptions of the affidavits are all of general nature and, despite the authors' attempt, it is indeed doubtful whether and how these general conditions affected each of the two authors specifically. The only point on which the Committee has managed to base its finding of a violation of article 10, paragraph 1, is the fact that "the authors were deprived of natural lighting save for their one hour of daily recreation", this fact being inferred from the State party's acknowledgement that "the authors' cells are illuminated by outside lighting units *implying* that the cells receive no natural lighting". (See paragraph 7.6. Emphasis supplied.)

I recognize that the authors attempted to base their allegation of a violation of article 10, paragraph 1, of the Covenant on the UN Standard Minimum Rules for the Treatment of Prisoners (see paragraph 6.7). In my view the standard may well represent "desirable" rules concerning the treatment of prisoners and, as such, the Committee may ask a State party to the Covenant to do its best to comply with those rules *when it considers a report of that State party*. Nevertheless, I do not consider that the rules constitute binding norms of international law which the Committee *must* apply in deciding on the lawfulness of allegations of each individual author of communications. In addition, considering the conditions of detention in urban areas of many of the States parties to the Covenant, I am unable to concur with the finding of a violation of article 10, paragraph 1, in this particular communication.

ANNEX

RESPONSES RECEIVED FROM STATES PARTIES AND AUTHORS AFTER THE ADOPTION OF VIEWS BY THE HUMAN RIGHTS COMMITTEE

Communication No. 422/1990, 423/1990 and 424/1990

Submitted by: Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou

Alleged victim: The authors

State party: Togo

Declared admissible: 30 June 1994 (fifty-first session)

Date of adoption of Views: 14 July 1996 (fifty-seventh session))

Follow-up information received from the State party:

By submission of 24 September 2001, the State party contended that the withdrawal of the charges did not indicate that the acts charged had not taken place, and accordingly it was not possible to pay any compensation. The State party argued that the authors were seeking to politically destabilize the country, and that accordingly its actions were justified under article 19, paragraph 3, of the Covenant, and no compensation was payable. As to article 25, the State party contended that this article was inapplicable to persons already having had access to, or who were in, the public service. Accordingly, rather than compensation, one could only speak of a regularization of the authors' situations, which had occurred.

Communication No. 480/1991

Submitted by: José Luis García Fuenzalida [represented by a non-governmental organization]

Alleged victim: The author

State party: Ecuador

Declared admissible: 15 March 1995 (fifty-third session)

Date of adoption of Views: 12 July 1996 (fifty-seventh session)

Follow-up information received from the State party

The Government of Ecuador informed the Committee that it had reached a friendly settlement with the author on 16 June 1999 on the basis of the Committee's Views.

Communication No. 526/1993

Submitted by: Michael and Brian Hill [represented by a non-governmental organization]

Alleged victim: The authors

State party: Spain

Declared admissible: 22 March 1995 (fifty-third session)

Date of adoption of Views: 2 April 1997 (fifty-ninth session)

Follow-up information received from the State party

By submission of 9 October 1997, Spain informed that the applicants had the right to initiate an effective remedy, either through an administrative, judicial, constitutional (*amparo*) or even international (under the European Convention) recourse. In this connection, the State party referred to articles 24 (1), 106 (2) and 121 of the Constitution concerning compensation for damages caused by violation of rights of individuals.

Communication No. 549/1993

Submitted by: Francis Hopu and Tepoaitu Bessert [represented by counsel]

Alleged victim: The authors

State party: France

Declared admissible: 30 June 1994 (fifty-first session)

Date of adoption of Views: 29 July 1997 (sixtieth session)

Follow-up information received from the State party

By submission of 29 January 1998, the State party informed about recent legal measures taken to protect cultural sites and provides examples of their successful application. In respect of the site at issue in the authors' case, the State party submitted that an archaeological report of July 1996 determined the site with precision, and that, after a scientific study, it was decided to modify the original building plan to protect the graves next to the sea. A retaining wall had been built to preserve them.

Communication No. 563/1993

Submitted by: Federico Andreu (representing the family of Ms. Nydia Erika Bautista de Arellana)

Alleged victim: Ms. Nydia Erika Bautista de Arellana

State party: Colombia

Declared admissible: 11 October 1994 (fifty-second session)

Date of adoption of Views: 27 October 1995 (fifty-fifth session)

Follow-up information received from the State party

By submission of 21 April 1997, the State party forwarded a copy of resolution No. 11/96, adopted by a Ministerial Committee set up pursuant to enabling legislation No. 288 of 1996 on 11 September 1996, and which recommends that compensation be paid to the family of the victim. Further note dated 2 November 1999, stating that the case is pending before the Higher Military Tribunal. The State party mentions that some unspecified payment had been made to the family on an unspecified date.

Communication No. 628/1995

Submitted by: Tae Hoon Park [represented by counsel]

Alleged victim: The author

State party: Republic of Korea

Declared admissible: 5 July 1996 (fifty-seventh session)

Date of adoption of Views: 20 October 1998 (sixty-fourth session)

Follow-up information received from the State party

By submission of 15 March 1999, the State party informed the Committee that the author's request for compensation was being reviewed by the Supreme Court. It further informed the Committee that it was considering amending the National Security Law or replacing it with new legislation in order to take into account the Committee's Views. The Ministry of Justice had translated the Committee's Views and they had been made public through the mass media. The judiciary had also been informed

Communication No. 633/1995

Submitted by: Robert W. Gauthier [represented by counsel]

Alleged victim: The author

State party: Canada

Declared admissible: 10 July 1997 (sixtieth session)

Date of adoption of Views: 7 April 1999 (sixty-fifth session)

Follow-up information received from the State party:

By submission of 20 October 1999, the State party informed the Committee that it had appointed an independent expert to review the Press Gallery's criteria for accreditation as well as the author's application for accreditation. In order to address the Committee's concern that there be a possibility of recourse by individuals who are denied membership of the Press Gallery, in the future the Speaker of the House will be competent to receive complaints and appoint an independent expert to report to him about the validity of the complaint. By submission of 4 March 2000, the State party provided the Committee with a copy of the expert report on the Press Gallery's criteria for accreditation and their application in the author's case.

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