



**International covenant
on civil and
political rights**

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HUMAN RIGHTS COMMITTEE
Eighty-first session
5 – 30 July 2004

VIEWS

Communication No. 1060/2002

Submitted by: Franz and Maria Deisl (represented by counsel,
Mr. Alexander Morawa)

Alleged victim: The authors

State party: Austria

Date of communication: 17 September 2001 (initial submission)

Document references: Special Rapporteur's rule 91 decision, transmitted to
the State party on 12 March 2002 (not issued in
document form)

Date of adoption of Views: 27 July 2004

On 27 July 2004, the Human Rights Committee adopted the annexed draft as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1060/2002. The text of the Views is appended to the present document.

[ANNEX]

*Made public by decision of the Human Rights Committee.

ANNEX

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

Eighty-first session

concerning

Communication No. 1060/2002**

Submitted by: Franz and Maria Deisl (represented by counsel,
Mr. Alexander Morawa)

Alleged victim: The authors

State party: Austria

Date of communication: 17 September 2001 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant
on Civil and Political Rights,

Meeting on 27 July 2004,

Having concluded its consideration of communication No. 1060/2002, submitted to the
Human Rights Committee on behalf of Franz and Maria Deisl under the Optional Protocol to the
International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of
the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication are Franz Deisl and his wife, Maria Deisl, Austrian
citizens, born on 10 July 1920 and 21 January 1932. They claim to be victims of a violation by
Austria¹ of articles 14, paragraph 1, and 26 of the Covenant. They are represented by counsel.

** The following members of the Committee participated in the examination of the present
communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal
Bhagwati, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr.
Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin
Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman
Wieruszewski and Mr. Maxwell Yalden.

The facts as submitted by the authors

2.1 By virtue of contracts dated 20 February and 19 October 1966, the authors bought a plot of land located in the Municipality of Elsbethen near the City of Salzburg from one Mr. F. H. On 15 February 1967, the authors were formally registered as owners of the plot.

2.2 On 20 November 1966, and without the authors' knowledge, F. H. applied for an exception from the zoning regulations in order to change the designation of the plot from "rural" to "residential". The Elsbethen Municipal Council approved his request, on 13 April 1967, and forwarded the decision to grant the exception to the Salzburg Provincial Government for formal approval. On 31 May 1967, the Salzburg Provincial Government refused to grant an exception from the zoning regulations, again without the authors' knowledge.

2.3 Also in the spring of 1967, the authors bought an old granary, after the mayor of Elsbethen had orally informed them that he would not object to their plan to rebuild the granary on their property. However, on 12 August 1969, the Municipality of Elsbethen issued a decision ordering the authors to stop converting the granary into a weekend house. By letter of 12 September 1969, the Municipality advised the authors to apply for an exception from the zoning regulations prohibiting construction on their plot of land, pursuant to Section 19, paragraph 3, of the Salzburg Provincial Zoning Law.

2.4 The Elsbethen Municipal Council granted the authors' application for an exception on 30 September 1969, and, on 3 October 1969, confirmed its decision in writing. On 8 October 1969, the Municipality submitted the decision for approval to the Salzburg Provincial Government, which, on 17 October 1969, denied the exception as *res iudicata*, stating that the application for an exception by the former owners of the plot had already been denied. The authors were not informed of that decision until February 1982.

¹ The Covenant and the Optional Protocol to the Covenant entered into force for the State party respectively on 10 December 1978 and 10 March 1988.

Upon ratification of the Covenant, the State party entered a reservation, which reads, in pertinent parts: "[...] 2. Article 9 and article 14 of the Covenant will be applied provided that legal regulations governing the proceedings and measures of deprivation of liberty as provided for in the Administrative Procedure Acts and in the Financial Penal Act remain permissible within the framework of the judicial review by the Federal Administrative Court or the Federal Constitutional Court as provided by the Austrian Federal Constitution. 3. [...]. 4. Article 14 of the Covenant will be applied provided that the principles governing the publicity of trials as set forth in article 90 of the Federal Constitutional Law as amended in 1929 are in no way prejudiced [...]."

Upon ratification of the Optional Protocol, the State party entered the following reservation concerning article 5, paragraph 2 (a), of the Optional Protocol: "On the understanding that, further to the provisions of article 5, paragraph 2, of the Protocol, the Committee provided for in article 28 of the Covenant shall not consider any communication from an individual unless it has been ascertained that the same matter has not been examined by the European Commission on Human Rights established by the European Convention for the Protection of Human Rights and Fundamental Freedoms."

2.5 In the spring of 1974, the authors acquired and reconstructed another granary on their property for use as a shed. On 17 July 1974, the mayor ordered them to demolish the building used as a shed. The authors' appeal of 30 July 1974 against that decision was not examined until May 1987.

2.6 Meanwhile, the mayor of Elsbethen had ordered the authors to discontinue "construction of a further weekend house" on 21 August 1973, and on 23 April 1974, to demolish "a dwelling" on their plot of land by 31 July 1974. On 7 May 1974, the authors appealed this decision to the Elsbethen Municipal Council, which set the decision aside on 9 June 1974, stating that it merely identified a "dwelling", without clarifying which of the two buildings on the authors' plot was to be demolished. The decision could therefore not be complied with for lack of precision.

2.7 On 1 February 1982, the Elsbethen Municipal Council dismissed the authors' application for an exception from the zoning regulations, endorsing the Provincial Government's argument that the application had to be rejected as *res iudicata*. The authors appealed that decision to the Provincial Government, arguing that the former owners had applied for the exception, without the authors' authorization or knowledge, after having sold the plot of land to the authors. On 10 August 1982, the Salzburg Provincial Government quashed the decision of the Municipal Council because of its failure to deal with the merits of the application. The Provincial Government also considered that the Council's decision of 1 February 1982 was the first formal decision on the authors' application, dated 18 September 1969, for an exception from the zoning regulations.

2.8 Thereafter, the Municipality of Elsbethen initiated formal proceedings to determine whether an exception from the zoning regulations should be granted. On 7 May 1985, it issued another decision denying the exception, noting that the authors' weekend house would affect the existing rural structure of the area, after the authors had been given opportunity to comment on two one-page expert opinions on the matter. The authors appealed that decision on 9 July 1985.

2.9 Meanwhile, construction of a family home had started about 70 meters from the author's plot of land, on the basis of an exception from the zoning regulations and a building permit granted by the Municipality of Elsbethen in 1977.

2.10 On 20 December 1985, the authors applied for a retroactive exception from the zoning regulations under a new "amnesty law", enabling owners of unlawfully constructed dwellings in the Province of Salzburg to apply for special retroactive permits. By letter of 4 April 1986 to the Governor of Salzburg, the mayor of Elsbethen indicated his willingness to grant an exception from the zoning regulations as well as a building permit for the first granary, while the second granary on the authors' property should be removed. At the same time, he recalled that the Municipality had granted two exceptions permitting the construction of family homes in the immediate vicinity of the authors' plot, which had been approved by the Provincial Government.

2.11 By letter of 12 June 1986, an assistant of the Governor informed the authors of a proposed settlement, whereby the authors would withdraw their appeal against the denial of an exception from the zoning regulations, while the Municipality would set aside its decision denying such an exception, issue a favourable decision, and submit this decision to the Provincial

Government for approval. The authors, accordingly, withdrew their appeal on 4 July 1986; the Municipality, in turn, set aside its decision of 7 May 1985 and submitted a decision dated 21 May 1986, by which the Municipal Council had granted an exception under the “Amnesty Law”, to the Provincial Government.

2.12 On 13 January 1987, the Provincial Government informed the authors that their application for an exception from the zoning regulations had to be rejected as *res iudicata*. The Municipality of Elsbethen endorsed this finding on 4 February 1987. The authors appealed that decision on 18 February 1987.

2.13 On 6 February 1987, the mayor of Elsbethen ordered the authors to demolish the granary and the shed by 31 December 1987. The authors appealed that decision on 17 February 1987. On 6 May 1987, the Municipality set aside the mayor’s demolition order, as the authors’ appeal against the demolition order of 17 July 1974 in respect of the shed was still pending. With two decisions relating to the same matter, the second demolition order had to be set aside, until a decision on the appeal against the first demolition order was taken. On 11 May 1987, the Municipal Council dismissed the authors’ appeal against the 1974 demolition order and directed the authors to remove the shed by 31 December 1987. This deadline was extended several times.

2.14 On 13 November 1989, the Salzburg Provincial Government set aside the Municipality’s decision of 4 February 1987 denying an exception from the zoning regulations, because the Municipality had not addressed the merits of the authors’ application. The Provincial Government ordered the Municipality to initiate proceedings to determine whether an exception should be granted and to give the authors access to the file of the proceedings, from 1966 onwards.

2.15 On 25 March 1991, the Municipality of Elsbethen again rejected the authors’ request for an exception, after giving them an opportunity to comment on the opinion of an expert on zoning issues. On 3 June 1991, the Provincial Government, on appeal by the authors, set aside the Municipality’s decision, finding that the expert opinion merely contained general statements. It directed the Municipality to seek another expert opinion to determine whether the authors’ buildings contravened local zoning regulations, which was completed on 15 January 1993.

2.16 On 22 February 1993, the Municipality again denied an exception from the zoning regulations. On 4 October 1993, the Provincial Government dismissed the authors’ appeal against that decision, based on the new Provincial Zoning Law (1992), which no longer provided for exceptions from the zoning regulations.

2.17 By decision of 29 November 1994, the Constitutional Court refused to examine the authors’ complaint, dated 16 November 1993, against the Provincial Government’s decision of 4 October 1993 and referred the matter to the Administrative Court. On 12 October 1995, the Administrative Court set the decision aside, holding that applications for exceptions from zoning regulations had to be assessed not on the basis of the 1992 Zoning Law, but of the regulations in force at the material time.

2.18 Meanwhile, on 12 February 1994, the Municipality of Elsbethen had ordered the authors to demolish their weekend house by 30 September 1994. The Provincial Government dismissed the authors' appeal against this decision on 4 December 1995, and on 5 January 1996, affirmed its earlier decision to deny an exception from the zoning regulations. The authors' complaints of 15 January 1996 against these decisions, in which they alleged violations of their rights to a decision by a competent tribunal, equality before the law, and inviolability of their property, were rejected by the Constitutional Court on 29 September 1998. The matter was referred to the Administrative Court, which rejected the complaints on 3 November 1999.

2.19 On 25 September 2001, after the Regional Administrative Authority for the District of *Salzburg-Umgebung* had rejected their request for an extension of the deadline for settling the modalities of the demolition of their buildings, the authors submitted an application to the European Court of Human Rights, alleging a breach of their right to property (article 1 of the first Additional Protocol to the European Convention). At the same time, they applied for interim measures to prevent the imminent demolition of their buildings. On 26 September 2001, the European Court registered the authors' application but rejected their request for interim measures, and on 29 January 2002, it declared the application inadmissible, as it had been lodged more than six months after the date of the final domestic decision, i.e. the decision of the Administrative Court of 3 November 1999.²

The complaint

3.1 The authors allege violations of their rights under articles 14, paragraph 1, and 26 of the Covenant, as the proceedings were neither "fair" nor "public" nor concluded expeditiously, but were conducted by authorities which consistently and deliberately acted to the detriment of their procedural position and discriminated against them. By reference to the jurisprudence of the European Court of Human Rights, they claim that article 14, paragraph 1, is applicable to the proceedings concerning their request for an exception from the zoning regulations, as well as their appeals against the demolition orders, since these proceedings determined their rights and obligations in a suit at law.

3.2 The authors claim that their right to equality before the courts under article 14, paragraph 1, had been violated through the misapplication of laws, failure to decide on their petitions and appeals, and the mishandling of their file at all stages of the proceedings. Thus, they were never informed of the former owner's application for an exception from the zoning regulations, or its rejection, despite the fact that the authorities knew about the pending transfer of ownership. The Provincial Government's disapproval of the authors' own request for an exception, dated 18 September 1969, was not communicated to them until February 1982. Similarly, their appeal against the mayor's demolition order of 17 July 1974 was not dealt with for 13 years and then suddenly decided against the authors in May 1987. For some 20 years, the authorities failed to examine the substance of the authors' application, repeatedly rejecting it as *res iudicata*. When a decision on the merits was finally taken in 1991, the Municipality again failed to address the

² See European Court of Human Rights, Decision on the admissibility of Application no. 74262/01 (*Franz and Maria Deisl against Austria*), 29 January 2002.

relevant issues and merely relied on generalities. The Provincial Government, in its decision of 4 October 1993, even found a new law applicable to the authors' case.

3.3 The authors submit that none of the authorities or administrative courts conducted a public hearing, as required by article 14, paragraph 1. Their right to a fair trial before an independent and impartial tribunal was violated, because the authorities demonstrated by their conduct that they would decide against the authors, irrespective of the facts put before them.³

3.4 The authors claim a violation of their right to an expeditious procedure, an integral element of the right to a fair hearing guaranteed by article 14, paragraph 1,⁴ as the proceedings relating to their application for an exception took more than 30 years, despite the simplicity of the matter, which required only little factual research and legal analysis. Given that this duration was *prima facie* unreasonable, the burden was on the State party to prove that its organs were not responsible for the delays. While the authors exercised due diligence throughout the proceedings and submitted all required information within short deadlines, the authorities kept them uninformed about the status of the proceedings for some 15 years (1967 until 1982), failed to take a single decision that survived even the most rudimentary scrutiny on appeal for 24 years (1969 until 1993) and twice failed to take any decision at all for approximately 13 years. Even the Administrative and Constitutional Courts remained inactive for considerable periods of time before setting aside a decision of the Provincial Government in October 1995 (after 11 months) or dismissing the authors' constitutional complaints in November 1994 (after one year) and in September 1998 (after two years and nine months). The authors consider that the fact that they consistently appealed against obviously flawed decisions cannot be held against them.

3.5 The authors claim that the rejection of their application from the zoning regulations, combined with the authorities' failure to take a decision on the merits for decades, or to deal with their appeals, the procedural flaws of their decisions, and the *ex post facto* application of the 1992 Provincial Zoning Law, amounted to arbitrariness and discriminated against them, in violation of article 26 of the Covenant, in comparison to their neighbour, Mr. X., who obtained an exception from the zoning regulations and a building permit in 1977, for the construction of a family home located some 70 meters from the authors' own plot of land.

3.6 The authors submit documentary evidence (pictures, sketches) to show that, by contrast to the two neighbouring family homes, which are made of wood and brick with oversize modern roofs and are visible from miles away, since they stand on a meadow in an elevated position without any treeline hiding them, their granary and shed are well shielded by a treeline and cannot be seen unless one steps on their plot of land. From a hiking trail passing by the authors' property, hikers can only see a small part of the granary, an antique building dating from 1757, which has been restored and is an all-wooden construction typical of the Province of Salzburg. Therefore, neither the granary nor the shed defeat the purpose of the zoning regulations not to have residential structures erected in rural areas to preserve the natural beauty of the landscape.

³ The authors refer to Communication No. 387/1989, *Karttunen v. Finland*, Views adopted on 23 October 1992, at para. 7.2.

⁴ Reference is made to Communication No. 207/1986, *Yves Morael v. France*, Views adopted on 28 July 1989, at para. 9.3.

Although the neighbouring buildings were equally located on plots zoned “rural”, the Municipality of Elsbethen, with the explicit approval of the Salzburg Provincial Government, granted their owners an exception from the zoning regulations.

3.7 The authors submit that their application to the European Court of Human Rights did not relate to the same matter, as it exclusively alleged a violation of their right to property, which is not as such protected under the Covenant.

The State party’s observations on admissibility

4.1 On 28 May 2002, the State party challenged the admissibility of the communication, by reference to article 5, paragraph 2 (a), of the Optional Protocol and, insofar as the events complained of had occurred before the entry into force of the Optional Protocol for Austria on 10 March 1988, also *ratione temporis*.

4.2 The State party submits that the same matter is being examined by the European Court of Human Rights. The fact that, in their application to the European Court, the authors only claim a violation of their right to property, as guaranteed in article 1 of the First Additional Protocol to the European Convention on Human Rights, does not preclude the Court from *ex officio* also examining violations of articles 6 (right to a fair trial) and 14 (prohibition of discrimination) of the European Convention. Since the European Court could therefore examine the facts in a manner consistent with the fair trial and equal treatment principles enshrined in articles 14 and 26 of the Covenant, the authors’ application to the European Court relates to the same substantive rights as the communication registered before the Committee.

4.3 By reference to the Committee’s jurisprudence⁵, the State party argues that the communication is inadmissible *ratione temporis*, insofar as it relates to decisions and delays that occurred prior to the entry into force of the Optional Protocol for the State party on 10 March 1988. This particularly concerns the alleged difference in treatment between the authors and Mr. X., whose request for an exemption from the zoning regulations was granted in 1977, and the State party’s alleged failure to decide within a reasonable time frame on the authors’ request of 18 September 1969 for an exception from the zoning regulations (denied on 1 February 1982) as well as on their appeal dated 30 July 1974 against the mayor’s demolition order of 17 July 1974 (dismissed on 11 May 1987).

Author’s additional submissions and comments on the State party’s observations on admissibility

5.1 On 12 June 2002, the authors requested the Committee to issue a request for interim measures, under Rule 86 of its rules of procedure, asking the State party to suspend proceedings to enforce the demolition order. They informed the Committee that, on 23 May 2002, the

⁵ The State party refers to Communication No. 490/1992, *A.S. and L.S. v. Australia*, Decision on admissibility of 30 March 1993; Communication No. 646/1995, *Leonard John Lindon v. Australia*, Decision on admissibility of 20 October 1998; Communication No. 754/1997, *A. v. New Zealand*, Views of 15 July 1999.

Regional Administrative Authority for the District of *Salzburg Umgebung* had rejected their petition to suspend the enforcement proceedings until the Committee's final decision, at the same time ordering them to transfer a down payment of € 4.447,67 by 1 August 2002 for implementing the demolition order, and that an appeal against that decision had no suspensive effect.

5.2 The authors argue that the enforcement of the demolition order would cause them irreparable damage, since the destruction of the irreplaceable antique granaries, which they had restored, maintained and furnished over the past 30 years, cannot be compensated by money and would give rise to further breaches of their rights under articles 7 and 17 of the Covenant. By letter of 9 September 2002, the Committee informed the authors that no interim measures would be granted in their case.

5.3 On 18 September 2002, the authors noted that the matter was no longer being examined by the European Court, after the Court had declared their application inadmissible for non-compliance with the six-month rule on 29 January 2002. Given the purely formal nature of the six-month rule, the Court was precluded from examining the substance of the application.⁶ The Austrian reservation to article 5, paragraph 2 (a), of the Optional Protocol was consequently inapplicable, as the same matter had never been *examined* by the European Court, within the meaning of that provision.

5.4 The authors reject the State party's contention that their communication is inadmissible *ratione temporis*. At least the decisions which finally determined their legal position and constituted a violation of their Covenant rights, in particular the decisions of the Constitutional and Administrative Courts, were taken after the entry into force of the Optional Protocol for Austria.⁷ Moreover, the Committee had repeatedly asserted its competence to consider alleged violations of the Covenant which, despite having their origin prior to the entry into force of the Optional Protocol, either continue or have effects which themselves constitute violations after that date. This was particularly true for cases where a certain status of the authors affecting their rights is confirmed by administrative and judicial decisions after the date of entry into force.⁸ Moreover, the Committee was competent to determine whether violations of the Covenant occur after the date of entry into force as a consequence of acts or omissions related to the continued application of laws or decisions affecting the rights of the authors.⁹

⁶ The authors refer to Communication No. 158/1983, *O. F. v. Norway*, Decision on admissibility of 26 October 1984, at para. 5.2; Communication No. 441/1990, *Robert Casanovas v. France*, Views of 19 July 1994, at para. 5.1.

⁷ Reference is made to Communication No. 72/1980, *K. L. v. Denmark*, Decision on admissibility of 31 July 1980; Communication No. 75/1980, *Duilio Fanali v. Italy*, Views of 31 March 1983.

⁸ The authors refer to Communication No. 24/1977, *Sandra Lovelace v. Canada*, Views of 30 July 1981.

⁹ Reference is made to Communication No. 196/1985, *Ibrahima Gueye et al. v. France*, Views of 3 April 1989, at para. 5.3.

The State party's additional submissions on admissibility and observations on merits

6.1 On 18 September 2002, the State party further commented on the admissibility and, subsidiarily, on the merits. It reiterates that the communication is inadmissible *ratione temporis*, insofar as it relates to events that occurred before 10 March 1988. Insofar as the authors complain about a violation of article 14 of the Covenant, the communication must be rejected *ratione materiae*, since the authors never had a "right" to establish a building on their plot of land, which could have been determined in a suit at law, given that such construction was clearly not allowed under the zoning regulations. Consequently, the proceedings for removing the illegally erected buildings must equally fall outside the scope of article 14. Otherwise, the circumvention through illegal building activities of the proceedings for granting an exemption would lead to an improvement of their legal position.

6.2 Regarding the duration of the proceedings, the State party submits that the authors did not exhaust domestic remedies, as they could have alleged a procedural delay by filing a request for transfer of competence (*Devolutionsantrag*), enabling individuals to bring a case before the competent higher authority if no decision is taken within six months, or by lodging a complaint about the administration's failure to take a decision within due time (*Säumnisbeschwerde*) with the Administrative Court, to speed up the proceedings. According to the European Court of Human Rights, such complaints constituted "effective remedies" in cases where an undue delay of the proceedings is alleged.¹⁰ Moreover, the authors' failure to expedite proceedings by challenging the inactivity of the authorities seemed to indicate that a postponement of the final removal order was in their interest.

6.3 The State party also challenges the authors' status of "victims" on the basis that they had established two buildings on their plot of land, despite their being fully aware that any construction on green land required an exemption from the zoning regulations. It was not until they had been ordered to stop the construction of the first granary that they applied for an exemption. Since more expeditious proceedings would only have led to earlier sanctions for their illegal conduct, the authors had not been placed at any disadvantage as a result of the duration of the proceedings.

6.4 Insofar as the authors claim that none of the authorities were properly constituted tribunals within the meaning of article 14, paragraph 1, of the Covenant, and that no public hearing was conducted in their case, the State party invokes its reservation to article 14 of the Covenant, which had the objective of maintaining "the Austrian organisation of administrative authorities under the judicial control of the Administrative Court and the Constitutional Court." These claims also lacked sufficient substantiation in the light of the European Court's jurisprudence that: (a) The right to a fair trial does not oblige States parties to have a decision on civil rights issued by tribunals at all stages of the proceedings¹¹; (b) the Administrative Court is a

¹⁰ Reference is made to Application No. 29800/96, *Basic v. Austria*, and Application No. 30160/96, *Pallanich v. Austria*.

¹¹ The State party refers to the European Court's judgment of 23 June 1981, *Le Compte, Van Leuven and De Meyere v. Belgium*, Series A 43, at para. 51.

tribunal within the meaning of article 6 of the European Convention¹²; and (c) the absence of an oral hearing does not violate the right to a fair trial, if complainants do not avail themselves of the possibility to request a hearing (Section 39 of the Austrian Administrative Court Act), thereby waiving their right to an oral hearing¹³.

6.5 Concerning the authors' allegations that their right to a fair hearing and to equality before the courts had been violated, the State party refers to the Committee's jurisprudence that it is generally for the courts of States parties to evaluate facts in a particular case and to interpret domestic legislation, unless such evaluation or interpretation was manifestly arbitrary or amounted to a denial of justice. Since the alleged deficiencies in the proceedings, in any event, fell short of manifest arbitrariness or denial of justice, this part of the communication was inadmissible for lack of substantiation. The same was true of the authors' claim that the competent authorities were not impartial, for which no reasons had been given.

6.6 Subsidiarily and on the merits, the State party submits that the length of proceedings was justified by the complexity of the matter, the proper conduct of the authorities as well as the authors' own conduct. Thus, proceedings with an impact on regional planning were frequently highly complex because of the numerous interests at stake, e.g. the need to protect the environment, to ensure that the population density is in line with an area's economic and ecological capacity, to create the basic prerequisites for sustainable development of the economy, infrastructure and housing, and to secure a viable agriculture and forestry. While the authorities complied with their duty to conduct several rounds of proceedings in order to determine the authors' requests and appeals, the authors themselves failed to meet their procedural responsibility to combat delays with all procedural means¹⁴, such as the above request for transfer of competence or complaint about the administration's inactivity.

6.7 As to the allegedly excessive delays in the proceedings before the Administrative Court and the Constitutional Court, the State party argues that the authors would have been free to seize both courts simultaneously rather than successively in order to avoid a loss of time. Moreover, between 1994 and 1996, the Constitutional Court had to give priority to consideration of some 5.000 cases in the field of alien law, which had mainly resulted from the crisis in the Balkans. In 1996 and 1997, the Court was faced with mass proceedings comprising more than 11.000 complaints about the minimum corporate tax. The temporary backlog resulting from the sudden increase in the Court's workload could not be attributed to the State party, considering

¹² European Court of Human Rights, Judgment of 21 September 1993, *Zumtobel v. Austria*, Series A 268-A, at paras. 31 *et seq.*

¹³ European Court of Human Rights, Judgment of 25 April 1997, *Pauger v. Austria*, Application No. 16717/90, at paras. 59 *et seq.*

¹⁴ The State party refers to European Court of Human Rights, Judgment of 7 July 1989, *Unión Alimentaria Sanders v. Spain*, Application No. 11681/85, at para. 35.

that prompt remedial action had been taken, with pending cases being prioritized on the basis of importance.¹⁵

6.8 The State party submits that the authors' situation could not be compared to that of their neighbours, who had applied for a permit prior to establishing buildings on their plot of land. Moreover, these buildings were permanent homes rather than weekend homes, constructed in the vicinity of existing farms. Owing to the spatial connection with the existing farm buildings, these constructions were less exposed than the authors' weekend home, which lacked any connection with existing settlements.

6.9 The authors' claim under article 26 of the Covenant would be unfounded, even if the situations were comparable, in the absence of a right to "equality in injustice". According to the Constitutional Court's jurisprudence, the legality of an authority's decision cannot be challenged on the basis of that authority's failure to sanction similar misconduct in comparable cases. Otherwise, any law would invariably be inapplicable, and the principle of the rule of law jeopardized, whenever a decision that is favourable to the applicant but contrary to the law were to be issued by an authority. This could not have been the intention of the equality principle in article 26 of the Covenant.

6.10 Lastly, the State party submits that the "amnesty regulations for illegal buildings" referred to by the authors were merely a statement of intent by the Salzburg Regional Government designed to remedy defects in the zoning regulations and providing for a review of individual cases in order to establish (a) whether a building was constructed in good faith; (b) whether a building was constructed at a time when no zoning regulations existed; or (c) whether a building was constructed with the intention of circumventing existing legal provisions. Given the lack of good faith of the authors, who had knowingly erected their buildings in contravention of the existing zoning regulations, the refusal retroactively to grant them a permit could not be considered an arbitrary act in violation of article 26. Furthermore, the 30-year long existence of these buildings could not lead to the "prescription" of an unlawful condition.

Authors' comments on the State party's observations on admissibility and merits

7.1 By submission of 24 July 2003, the authors object to the State party's contention that they had erected the buildings unlawfully, thereby circumventing the proceedings for granting a permit. Rather, they had merely moved an antique granary from a neighbouring plot to their own land, after having sought the consent of the mayor of Elsbethen, which had given rise to their expectation that they could lawfully erect the building. From a formalistic point of view, this was entirely lawful at that time, given that an exception from the zoning regulations had initially been granted to the former owner of their property, albeit unknown to them.

7.2 The authors reaffirm that the communication is admissible *ratione temporis* and, moreover, *ratione materiae*, because article 14, paragraph 1, of the Covenant lacks the qualifying

¹⁵ Reference is made to the European Court's judgment of 25 June 1987, *Baggetta v. Italy*, Application No. 10256/83, at para. 23, as well as to the Report of the European Commission of Human Rights of 12 December 1983, Application No. 9132/80, at para. 125.

word “civil”, therefore covering a wider scope than article 6, paragraph 1, of the European Convention. Since their case concerns the question of whether an existing building could be maintained or would have to be torn down, it directly affects “rights” within the meaning of article 14, paragraph 1. The State party’s argument that a permit to build on the authors’ land, by means of an exception from the zoning regulations, was “clearly not allowed”, was inconsistent with the fact that the Elsbethen Municipal Council had granted exactly such an exception to the former owners of the plot, presumably because it considered that this exception was lawful. Taking into account that it took the administrative authorities and courts more than 35 years to reach a final conclusion, it could hardly be claimed that there was any degree of clarity in this respect.

7.3 Regarding domestic remedies, the authors submit that they were not required actively to pursue, or even accelerate, a set of proceedings that could result in a legal consequence detrimental to their interests and property rights¹⁶, such as the demolition of their buildings.

7.4 The authors reaffirm that they are victims of a violation of article 14, paragraph 1, which seeks to protect the right to have one’s case determined in a reasonable period of time; prolonged proceedings placed those affected in the situation and formal status of victims, in particular if they lasted for no less than 35 years.

7.5 The authors argue that the length of the proceedings was not attributable to their own conduct. In the absence of any obligation to actively pursue the case, they were merely required to, and indeed did, comply with the procedural norms, respond to official queries and file appeals with due diligence. By contrast, the State party had failed to ensure that the proceedings initiated by its authorities were completed in compliance with article 14, paragraph 1.

7.6 The authors recall that, out of their allegations concerning the numerous delays in the proceedings, the State party had merely challenged those related to proceedings before the Constitutional and Administrative Courts. They reject the State party’s attempt to justify these delays by the alleged complexity of the case, which was neither supported by the case file, containing documents and decisions produced in the course of 35 years which barely filled one folder, nor by the little effort required for the assessment of the facts and the law, the scarce evidence taken or the marginal involvement of experts. Similarly, the State party had failed to substantiate that the increased workload of the Constitutional Court allegedly caused by mass proceedings in asylum and minimum corporate tax cases impaired the Court in such a way as to justify the substantial delays complained of.

7.7 In support of their claim under article 26, the authors submit that the State party falsely stated (a) that the houses constructed by the authors’ neighbours are permanent homes; (b) that these homes had been built for the farmers’ children; and (c) that the neighbouring buildings are

¹⁶ By way of analogy, the authors refer to the jurisprudence of the European Court of Human Rights in *Eckle v. Germany*, Judgment of 23 June 1982, Series A, No. 51, at para. 82; *Corigliano v. Italy*, Judgment of 10 December 1982, Series A, No. 57, at para. 42; *Dobbertin v. France*, Judgment of 28 January 1993, Series A, No. 256-D, at para. 44; *Francesco Lombardo v. Italy*, Judgment of 26 November 1992, Series A, No. 249-B, at para. 23.

not as exposed as the authors' granary, despite the detailed documentary evidence proving that the opposite is true. While the granary, a traditional structure which had been located in the immediate vicinity since the 18th century, was virtually invisible unless one entered the authors' property, the other buildings were large and imposing homes which could be seen from far away.

7.8 In response to the State party's argument that no "equality in injustice" exists, the authors argue that article 26 governs any official conduct regulated by law, be it positive or negative for the individual.

Additional observations by the State party and authors' comments

8.1 On 22 October 2003, the State party reiterated its arguments made in May 2002. In particular, it emphasizes that the authors had never obtained a permit under the Regional Planning Act, as the decision issued by the Municipal Council on 13 April 1967 had not been approved by the supervisory authority in its decision of 31 May 1967. An oral consent by the mayor could not replace the required permit under the Provincial Zoning Law.

8.2 The State party submits that it was irrelevant for the requirement of exhaustion of domestic remedies whether proceedings are directed against an author. Thus, the European Court of Human Rights considered that even an accused in criminal proceedings must make use of legal remedies to expedite proceedings in order to exhaust domestic remedies in cases where a violation of the right to have one's case determined without undue delay is alleged.¹⁷ In any event, this right had not been violated in the present case, taking into account the authors' counterproductive conduct, i.e. their request to suspend the proceedings during a four-month absence in 1987.¹⁸

8.3 The State party reiterates that it follows from the far reaching similarity between articles 6, paragraph 1, of the European Convention and article 14, paragraph 1, of the Covenant¹⁹ that the latter is inapplicable to the authors' case. Moreover, the authors were never entitled to construct a building on their plot of land. In the absence of such a right, the present proceedings did not relate to the "determination of rights" within the meaning of article 14 of the Covenant.

8.4 The State party maintains that the workload of the Constitutional Court rose tremendously between 1994 and 1996, with more than 5.000 cases relating to foreigners alone and 11.122 complaints against notices requiring prepayment of corporate taxes.

9.1 On 8 December 2003, the authors reply that their request to postpone the Provincial Government's decision on their appeal against the Municipality's denial of 4 February 1987 to grant the requested exception from the zoning regulations for *res iudicata* only showed their determination to fully participate in the proceedings. Although they had returned from their

¹⁷ The State party refers to Application No. 29800/96, *Basic v. Austria*; Application No. 30160/96, *Pallanich v. Austria*; Application No. 37323/97, *Talirz v. Austria*; Application No. 57652/00, *Lore Wurm v. Austria*.

vacation in November 1987, it took the Provincial Government until 13 November 1989 to take a decision on their appeal.

9.2 Regarding the length of proceedings, the authors consider it appropriate to follow the traditional approach of the European Court of Human Rights²⁰ of not requiring individuals to actively cooperate with the prosecuting authorities. Even if the Committee were to prefer the Court's recent jurisprudence, requiring applicants to avail themselves of legal remedies to complain about the excessive length of proceedings also in criminal cases, this requirement had so far only been applied by the European Court to cases with a single set of proceedings within which a remedy to accelerate the same existed but was not used by the applicants.²¹ The present communication had to be distinguished from these cases in that it involved numerous administrative and judicial review proceedings.

9.3 Moreover, the authors submit that the effectiveness of such remedies depends on whether they had a significant impact on the length of proceedings as a whole and whether they were available throughout the proceedings. However, from 8 October 1969 to 1 February 1982, remedies to accelerate proceedings were unavailable to the authors, simply because they did not know that proceedings concerning the approval of the exception granted by the Municipality were pending before the Provincial Government. Subsequently, negotiations on a friendly settlement had resulted in an agreement in 1986, which was unilaterally terminated by the Provincial Government's withdrawal of its approval.

9.4 The authors submit that no remedy to accelerate proceedings exists before the Constitutional and Administrative Courts. The part of the communication relating to the delays before these courts, totaling five years and nine months, was therefore admissible in any event.²²

9.5 The authors reiterate that the increase in the Constitutional Court's workload was not substantial, since all 11.000 complaints relating to the minimum corporate tax had been removed from the Court's docket with one single judgment of 22 pages. While the sorting, registering and storing of the thousands of petitions had surely constituted a burden for the Court's registry, it had in no way affected the adjudicative processes.

9.6 Lastly, the authors submit that the European Court's case law was unequivocal in declaring article 6, paragraph 1, of the European Convention applicable to proceedings concerning building permits and demolition orders.²³

²⁰ The authors refer to the European Court's judgment of 23 June 1982, *Eckle v. Germany*, Application No. 8130/78, Series A, No. 51, at para. 82.

²¹ Reference is made to, *inter alia*, Application No. 23459/94, *Holzinger v. Austria (No.1)*; Application No. 30160/96, *Pallanich v. Austria*; Application No. 37323/97, *Talirz v. Austria*.

²² The authors refer to the European Court's decision of 6 June 2002 on Application No. 42032/98, *Widmann v. Austria*.

²³ Reference is made, respectively, to Application No. 74159/01, *Egger v. Austria*, decision of 9 October 2003, and to the Court's judgment of 22 November 1995, *Bryan v. The United Kingdom*, Series A, No. 335-A, at para. 31.

Issues and proceedings before the Committee

Consideration of admissibility

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

10.2 Irrespective of whether the State party has invoked its reservation to article 5, paragraph 2 (a), of the Optional Protocol or not, the Committee recalls that when the European Court has based a declaration of inadmissibility solely on procedural grounds, rather than on reasons that include a certain consideration of the merits of the case, then the same matter has not been “examined” within the meaning of the Austrian reservation to article 5, paragraph 2 (a), of the Optional Protocol.²⁴ The Committee notes that the European Court declared the authors’ application inadmissible for failure to comply with the six-month rule (article 35, paragraph 4, of the European Convention), and that no such procedural requirement exists under the Optional Protocol. In the absence of an “examination” of the same matter by the European Court, the Committee concludes that it is not precluded from considering the authors’ communication by virtue of the Austrian reservation to article 5, paragraph 2 (a), of the Optional Protocol.

10.3 The Committee takes note of the State party’s objection that the communication is inadmissible *ratione temporis*, insofar as it relates to events which occurred prior to the entry into force of the Optional Protocol for Austria on 10 March 1988. It recalls that it cannot consider alleged violations of the Covenant which occurred before the entry into force of the Optional Protocol for the State party, unless these violations continue after that date or continue to have effects which in themselves constitute a violation of the Covenant.²⁵ It notes that the 13-year delay in informing the authors about the Provincial Government’s decision of 17 October 1969, which disapproved the Municipality’s decision to grant their application for an exemption from the zoning regulations, as well as in deciding on the authors’ appeal of 30 July 1974 against the mayor’s demolition order of 17 July 1974, both predate the entry into force of the Optional Protocol for the State party. The Committee does not consider that these alleged violations continued to have effects after 10 March 1988, which would in themselves have constituted violations of the authors’ Covenant rights. The communication is therefore inadmissible *ratione temporis* under article 1 of the Optional Protocol, insofar as it relates to the above mentioned delays.

10.4 As to the State party’s argument that the allegedly discriminatory treatment of the authors also predated the entry into force of the Optional Protocol for Austria, the Committee notes that, while it is true that an exemption from the zoning regulations and a building permit had been granted to Mr. X. as early as 1977, the authors’ request for similar permits was ultimately

²⁴ See Communication No. 716/1996, *Pauger v. Austria*, Views adopted on 25 March 1999, at para. 6.4.

²⁵ See Communication No. 520/1992, *Könye and Könye v. Hungary*, Decision on admissibility adopted on 7 April 1994, at para. 6.4; Communication No. 24/1977, *Sandra Lovelace v. Canada*, Views adopted on 30 July 1981, at para. 7.3.

rejected by the Provincial Government on 5 January 1996, and their appeal against that decision dismissed by the Administrative Court on 3 November 1999.

10.5 However, the Committee considers that the authors have failed to substantiate, for purposes of admissibility, that their allegedly discriminatory treatment was based on one of the grounds enumerated in article 26. Similarly, they have not substantiated, for purposes of admissibility, that the reasons advanced by the Provincial Government and the Administrative Court for rejecting their request for an exemption from the zoning regulations were arbitrary. The Committee concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

10.6 Regarding the authors' claim that the absence of any oral hearing throughout the proceedings violated their right to a fair and public hearing under article 14, paragraph 1, of the Covenant, the Committee has noted the State party's argument that the authors could have requested an oral hearing before the Administrative Court and that, by failing to do so, they had waived their right to such a hearing. It also notes that the authors have not refuted this argument in substance and that they were represented by counsel throughout the proceedings before the Administrative Court. The Committee therefore considers that the authors have failed to substantiate, for purposes of admissibility, that their right to a fair and public hearing has been violated. Consequently, this part of the communication is inadmissible under article 2 of the Optional Protocol.

10.7 Insofar as the authors allege a violation of their rights under articles 14, paragraph 1, and 26 of the Covenant, because the competent authorities did not qualify as independent and impartial tribunals within the meaning of article 14, paragraph 1, deliberately acted to their detriment, and *ex post facto* applied the 1992 Provincial Zoning Law to facts that occurred prior to 1992, the Committee observes that article 14, paragraph 1, does not require States parties to ensure that decisions are issued by tribunals at all appellate stages. In this regard, it notes that the Provincial Government's refusal of 4 October 1993, to grant an exception from the zoning regulations was subsequently quashed by the Administrative Court. The Committee concludes that this part of the communication is equally inadmissible under article 2 of the Optional Protocol, for lack of substantiation.

10.8 As for the remaining claims, i.e. alleged delays in the examination of their appeal against the Municipality's decision of 4 February 1987, delays in the proceedings before the Constitutional and Administrative Courts, and in relation to the length of the proceedings as a whole, the Committee must address the State party's objection to the author's status as "victim", the applicability of article 14, paragraph 1, to the facts of the case, and the issue of exhaustion of domestic remedies.

10.9 The Committee is satisfied that the authors have sufficiently substantiated, for purposes of admissibility, that article 14, paragraph 1, of the Covenant applies to proceedings concerning building permits and demolition orders, and that they qualify as victims of a violation of their right, under article 14, to have their case determined without undue delay.

10.10 On the issue of exhaustion of domestic remedies, the Committee notes that the authors have raised the issue of delays in the proceedings in their complaint of 15 January 1996 to the Constitutional Court, which referred the matter to the Administrative Court. The State party has not shown that the authors could have availed themselves of any further remedies to appeal the final decision of the Administrative Court. Moreover, it has not refuted the authors' argument that no remedies exist which would have enabled them to accelerate the proceedings before the Constitutional and Administrative Courts. The Committee is therefore satisfied that the authors have exhausted domestic remedies, in accordance with article 5, paragraph 2 (b), of the Optional Protocol.

10.11 The Committee concludes that the communication is admissible insofar as the length of the examination of the authors' appeal against the Municipality's decision of 4 February 1987 and the proceedings before the Constitutional and Administrative Courts are concerned, and that the delays of the proceedings as a whole raise issues under article 14, paragraph 1, of the Covenant. It proceeds to the examination of these claims on the merits.

Consideration of the merits

11.1 The Committee recalls, at the outset, that the concept of a "suit at law" in article 14, paragraph 1, of the Covenant is based on the nature of the right and obligations in question rather than on the status of the parties.²⁶ It notes that the proceedings concerning the authors' request for an exemption from the zoning regulations, as well as the orders to demolish their buildings, relate to the determination of their rights and obligations in a suit at law, in particular their right to freedom from unlawful interference with their privacy and home, their rights and interests relating to their property, and their obligation to comply with the demolition orders. It follows that article 14, paragraph 1, is applicable to these proceedings.

11.2 The Committee further recalls that the right to a fair hearing under article 14, paragraph 1, entails a number of requirements, including the condition that the procedure before the national tribunals must be conducted expeditiously.²⁷ The issue before the Committee is therefore whether the delays complained of violated this requirement, to the extent that they occurred or continued after the entry into force of the Optional Protocol for the State party.

11.3 As to the alleged delay in examining the authors' appeal of 18 February 1987, the Committee notes that the authors themselves requested a postponement of the decision until November 1987. Although it thereafter took the Provincial Government another two years to set aside the impugned decision, of which 20 months coincide with the period of time following the entry into force of the Optional Protocol for the State party, the Committee considers that the authors have not demonstrated that this delay was so unreasonable, as to amount to a violation of article 14, paragraph 1, taking into account that: (a) the delay had no detrimental effect on their

²⁶ See Communication No. 207/1986, *Yves Morael v. France*, Views adopted on 28 July 1989, at para. 9.3.

²⁷ See Communication No. 441/1990, *Robert Casanovas v. France*, at para. 7.3; Communication No. 238/1987, *Floresmilo Bolaños v. Ecuador*, at para. 8.4; Communication No. 207/1986, *Yves Morael v. France*, at para. 9.3.

legal position; (b) the authors chose not to avail themselves of available remedies to accelerate the proceedings; and (c) the outcome of the appellate proceedings was beneficial to them.

11.4 Regarding the alleged delays in the proceedings before the Constitutional Court (16 November 1993 to 29 November 1994 and 15 January 1996 to 29 September 1998), the Committee observes that, while the first set of these proceedings were conducted expeditiously, the second may have exceeded the ordinary length of proceedings resulting in a complaint's dismissal and referral to another court. However, in the Committee's view, the second delay is not so long as to constitute, in proceedings before a constitutional court in a property-related matter, a violation of the concept of fairness enshrined in article 14, paragraph 1, of the Covenant.

11.5 As to the alleged delays in the proceedings before the Administrative Court (29 November 1994 to 12 October 1995 and 29 September 1998 to 3 November 1999), the Committee has noted the State party's uncontested argument that the authors could have filed their complaints simultaneously with the Constitutional and Administrative Courts, to avoid a loss of time. In the light of the complexity of the matter complained of, as well as the Court's detailed legal reasoning in its decisions of 12 October 1995 and 3 November 1999, the Committee does not consider that the delays complained of amount to a violation of article 14, paragraph 1, of the Covenant.

11.6 The Committee notes that the length of the proceedings as a whole, counted from the date of entry into force of the Optional Protocol for Austria (10 March 1988) to the date of the Administrative Court's final decision (3 November 1999), totaled eleven years and eight months. In assessing the reasonableness of this delay, the Committee bases itself on the following considerations: (a) the length of each individual stage of the proceedings²⁸; (b) the fact that the suspensive effect of the proceedings vis-à-vis the demolition orders was beneficial, rather than detrimental, to the authors legal position; (c) the fact that the authors did not avail themselves of possibilities to accelerate administrative proceedings or to file complaints simultaneously; (d) the considerable complexity of the matter; and (e) the fact that, during this time, the Provincial Government twice, and the Administrative Court once, set aside negative decisions on appeal by the authors. The Committee considers that these factors outweigh any detrimental effects which the legal uncertainty during the protracted proceedings may have caused to the authors. It concludes, having regard to all the circumstances of the case, that their right to have their case determined without undue delay has not been violated.

12. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it do not disclose a violation of article 14, paragraph 1, of the Covenant.

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

²⁸ See above paras. 11.4-11.6.