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HUMAN RIGHTS COMMITTEE
Eighty-fourth session
11 – 29 July 2005

DECISION

Communication No. 1292/2004

Submitted by:	Mr. Marijan Radosevic (represented by counsel, Mr. Frank Selbmann)
Alleged victim:	The author
State Party:	Germany
Date of communication:	27 May 2004 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 4 June 2004 (not issued in document form).
Date of decision:	22 July 2005

* Made public by decision of the Human Rights Committee.

Subject matter: Unequal remuneration of work performed by prisoners

Procedural issues: Substantiation of claims by author - Exhaustion of domestic remedies

Substantive issues: Right to equality before the law and to equal protection of the law - Permissible exceptions to prohibition of forced or compulsory labour - Reformation and social rehabilitation of prisoners

Articles of the Covenant: 8 (3) (c) (i), 10 (3) and 26

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

[ANNEX]

ANNEX

DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER
THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT
ON CIVIL AND POLITICAL RIGHTS

Eighty-fourth session

Concerning

Communication No. 1292/2004[*]

Submitted by:	Mr. Marijan Radosevic (represented by counsel, Mr. Frank Selbmann)
Alleged victim:	The author
State Party:	Germany
Date of communication:	27 May 2004 (initial submission)

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

Meeting on 22 July 2005,

Adopts the following:

[*] The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

DECISION ON ADMISSIBILITY

1. The author of the communication is Mr. Marijan Radosevic, a Croatian national currently residing in Switzerland. He claims to be a victim of a violation by Germany[1] of his rights under article 26, read alone, as well as in conjunction with article 8, paragraph 3 (c) (i), of the Covenant. He is represented by counsel (Mr. Frank Selbmann).

Factual background

2.1 The author served a prison term in Heimsheim prison in Germany from 10 March 1998 to 28 February 2003, when he was deported. The remainder of his prison term was suspended, provided that he would not return to Germany.

2.2 During imprisonment, the author performed work, as required under Section 41 of the German Enforcement of Sentences Act. He was remunerated from April 1998 until August 1999 and again in April 2000, as well as from June until August 2001. The wages were calculated pursuant to Section 200 of the Enforcement of Sentences Act, on the basis of five percent of the base amount[2] from April until August 1999 and in April 2000, and on the basis of nine percent of the base amount from June until August 2001. They ranged from about 180 to about 400 Deutsche Mark (DM) per month.

2.3 On 28 April 2000, the author suffered an employment-related accident, which made him permanently unfit for work.

2.4 By judgment of 1 July 1998, the Federal Constitutional Court ruled that the constitutional principle of re-socialization of prisoners requires adequate remuneration for their work; the Court set aside the calculation methods for the wages of prisoners laid down in Section 200 of the Enforcement of Sentences Act (five percent of the base amount, despite the legislator's original

[1] The Covenant and the Optional Protocol to the Covenant entered into force for Germany on 23 March 1976 and 25 November 1993 respectively. Upon ratification of the Optional Protocol, the State Party entered the following reservation: "The Federal Republic of Germany formulates a reservation concerning article 5 paragraph 2 (a) to the effect that the competence of the Committee shall not apply to communications
a) which have already been considered under another procedure of international investigation or settlement, or
b) by means of which a violation of rights is reprimanded having its origin in events occurring prior to the entry into force of the Optional Protocol for the Federal Republic of Germany
c) by means of which a violation of article 26 of the [said Covenant] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant."

[2] Section 18 of Book IV of the German Social Security Code defines the base amount as follows: "Without prejudice to the specific provisions applicable to the different insurance systems, base amount within the meaning of the provisions on social security means the average amount of benefits payable under the statutory pensions insurance during the preceding calendar year, rounded up to the next highest amount which can be divided by 420."

intention progressively to raise the level of remuneration to 40 percent of the base amount). It considered the average wages paid to prisoners under that legislation, which amounted to 1.70 DM per hour or 10 DM per day, or 200 DM per month, in 1997, to be incompatible with the German Basic Law, in the absence of any other work-related benefits apart from the employer's contribution to the prisoner's unemployment insurance. The Court argued that "in the light of the amount paid for mandatory work performed by a prisoner, he cannot be convinced that honest work is an appropriate means for earning a living" after his release. However, it allowed the legislator a transitional period, to run until 31 December 2000, to introduce an adequate raise in the remuneration of work as well as revised provisions for social insurance coverage of such work.

2.5 On 12 February 2004, the author submitted a request to the warden of Heimsheim prison, requesting remuneration of no less than 40 percent of the base amount for the work performed prior to his employment-related accident on 28 April 2000. On 19 February 2004, the warden of Heimsheim prison considered that, the author was estopped from challenging the calculation of his wages, since he had not taken any legal action against the relevant decisions within the one-year deadline that resulted from Section 112, paragraph 4, of the Enforcement of Sentences Act.

2.6 On 4 March 2004, the author reiterated his request for payment of adequate wages, arguing that Section 112, paragraph 4, of the Enforcement of Sentences Act did not apply to his case and that, in any event, the decisive date for the computation of the deadline was the date of his release on 28 February 2003, that is, less than a year before he lodged his first request for re-assessment of the wages (12 February 2004). By reference to the judgment of the Federal Constitutional Court and to article 26 of the Covenant, he claimed that these wages were grossly and unjustifiably disproportionate to the average wages paid to employees outside the prison system. On 9 March 2004, the warden of Heimsheim prison reiterated the position stated in his previous letter.

The complaint

3.1 The author claims that the denial of an adequate remuneration for the work performed during his incarceration amounts to a violation of article 26 of the Covenant. He argues that his work was in many respects similar to that performed by the regular workforce. While conceding that prisoners are not entitled to absolutely equal remuneration, he submits that any differentiation must be justified by reasonable and objective criteria and must be proportionate in the individual circumstances. His remuneration was inadequate in the light of his vulnerable status as a prisoner and the overall objective of re-integration into society. By reference to Rule 76 (1)[3] of the UN Standard Minimum Rules for the Treatment of Prisoners and Article 14 (1)[4] of ILO Convention No. 29 (Forced or Compulsory Labour Convention, 1930), the author concludes that his wages were disproportionately low, in violation of article 26 of the Covenant.

[3] "There shall be a system of equitable remuneration of the work of prisoners."

[4] "With the exception of the forced or compulsory labour provided for in Article 10 of this Convention, forced or compulsory labour of all kinds shall be remunerated in cash at rates not less than those prevailing for similar kinds of work either in the district in which the labour is employed or in the district from which the labour is recruited, whichever may be the higher."

3.2 The author claims that the transitional period of two years and six months for the legislative adjustment of Section 200 of the Enforcement of Sentences Act, during which he was continued to be remunerated on a discriminatory basis, was also disproportionate and contrary to article 26. Even assuming that this period was justified under German constitutional law, such justification could not change the underlying violation of article 26, which required corrective measures to be taken without undue delay, once discrimination was established. The delay was not justified by any compelling reasons; the mere financial burden on a State did not suffice as a justification.

3.3 The author submits that the same matter is not being examined under another procedure of international investigation or settlement. On exhaustion of domestic remedies, he argues that it would have been futile to appeal the decision of the Heimsheim prison warden, given that the Federal Constitutional Court had itself authorized the continued application of Section 200 of the Enforcement of Sentences Act until 31 December 2000 and that, in a subsequent judgment,[5] it had considered that the new legislation satisfies, even though barely so, the requirement of a significant raise of the remuneration of prison work stipulated in its earlier judgment.

State party's observations on admissibility

4.1 On 3 August 2004, the State party challenged the admissibility of the communication, invoking the German reservation concerning article 26 of the Covenant, as well as an abuse of the right of application within the meaning of article 3 of the Optional Protocol.

4.2 The State party submits that the Committee's competence to examine the alleged violation of article 26 is precluded by the German reservation, since the author did not claim a violation of a substantive Covenant right: The right to property is not protected under the Covenant; the prison work performed by him falls outside the prohibition of forced or compulsory labour in article 8, paragraph 3, of the Covenant, which specifically excludes any work or service normally required of a person who is under detention in consequence of a lawful order of a court.[6] The *travaux préparatoires* of article 8 reveal that a proposal to include a right of prisoners to equitable remuneration for their work was rejected by the Commission on Human Rights.[7]

4.3 The State party argues that there is no indication that the reservation itself is inadmissible. While the Committee expressed its regret "that Germany maintains its reservations, […] which partially limit the competence of the Committee with respect to article 26 of the Covenant" and recommended considering their withdrawal,[8] it did not conclude that they are inadmissible.

4.4 For the State party, the author's late submission of his complaint about the allegedly discriminatory remuneration of the prison work that he performed between April and August 1999 and in April 2000 to the Heimsheim prison warden and, subsequently, to the Committee

[5] German Constitutional Court, judgment of 24 March 2002, 2 BvR 2175/01.
[6] See article 8, paragraph 3 (c) (i), of the Covenant.
[7] UN Doc. E/CN.4/365.
[8] Human Rights Committee, 80th session, Concluding observations on the fifth periodic report of Germany, 4 May 2004, at para. 10.

constitutes an abuse of the right of application. Although no specific time-limit exists for the submission of a communication under the Optional Protocol, the Committee has held that the late submission of a complaint can amount to such abuse, in the absence of any justification.[9] The author's explanation, provided in his letter of 4 March 2004 to the prison warden, that he was unaware of the legal situation, being a foreign national, and that legal advice was unavailable to him, did not justify the delay, since it was hardly conceivable that the Federal Constitutional Court's judgments of 1 July 1998 and of 24 March 2002 were not discussed among prisoners, whose interests were directly affected by these decisions, and since the author would have been free to seek legal advice during his incarceration.

Author's comments

5.1 On 22 September 2004, the author commented on the State party's admissibility submission, arguing that his claim bears a sufficient link to article 8, paragraph 3 (c) (i), of the Covenant and that, in any event, the State party's reservation concerning article 26 is incompatible with the object and purpose of the Covenant. He denies an abuse of the right of petition on his part.

5.2 For the author, the subject matter of his case is regulated in article 8, paragraph 3 (c) (i), which allows States parties to oblige convicted prisoners to perform work "normally required" of such individuals. In his initial submission, he invoked article 26 in isolation from article 8, paragraph 3 (c) (i), because it provided more precise guidelines on what may be required of a prisoner than the latter provision, which remains silent on the specific conditions of prison work. However, in the light of the State party's admissibility observations, he now alleges breaches of both article 26 as a free-standing right, and read in conjunction with article 8, paragraph 3 (c) (i), of the Covenant. Read together with article 8, paragraph 3 (c) (i), which protects not only against "arbitrary decisions by prison authorities", but also against laws which prescribe arbitrary conditions of prison work, article 26 was applicable irrespective of the German reservation, requiring adequate remuneration for work performed by prisoners.

5.3 The author challenges the German reservation as being incompatible with the character of article 26 as an autonomous right to equality free from any limitations inherent in accessory non-discrimination clauses, such as article 14 of the European Convention on Human Rights. The effect of the reservation was to transform article 26 into an accessory right without independent existence, thereby duplicating the limited intra-Covenant non-discrimination clause of article 2 of the Covenant. This restrictive scope was neither intended by the drafters of article 26, nor supported by any of the traditional means of treaty interpretation. It was moreover inconsistent with the Committee's constant jurisprudence on article 26[10] and defied recent trends to extend the level of protection afforded under international equal protection clauses. Thus, article 1 of

[9] The State party refers to Communication No. 787/1997, *Gobin v. Mauritius*, Decision on admissibility adopted on 16 July 2001, at para. 6.3.

[10] The author refers to Communication No. 172/1984, *Broeks v. The Netherlands*, Views adopted on 9 April 1987, at para. 12.1, Communication No. 182/1984, *Zwaan-de Vries v. The Netherlands*, Views adopted on 9 April 1987, at para. 12.1, and General Comment 18 [37], 9 November 1989, at para. 12.

Protocol No. 12 to the European Convention on Human Rights, once entered into force, would replace article 14 of the Convention with an independent right identical to article 26 of the Covenant; similar autonomous non-discrimination clauses can be found in article 24 of the American Convention on Human Rights and article 3 of the African Charter on Human and Peoples' Rights. The author contends that what the Committee regretted in its concluding observations on Germany's fifth periodic report "amounts to a reservation that unduly infringes upon the very essence of the right established in article 26 of the Covenant and should be found inapplicable."

5.4 As regards the late submission of his communication, the author reiterates that, as a Croatian national without legal training, he could not be expected to follow the jurisprudence of the German Constitutional Court, which was extremely complex on the subject matter and therefore unlikely to become the topic of debate in a prison setting. On accessibility of legal advice, he submits that prison-internal legal services are rare in German prisons and that his deportation directly after his release on parole prevented him from contacting a lawyer. Once he had been able to secure legal representation, he and his counsel acted promptly and with due diligence. He denies that the Committee's decision in *Gobin v. Mauritius* is a precedent to be followed, given that five Committee members dissented and considered that the Committee was precluded from introducing a preclusive time limit in the Optional Protocol,[11] and that another member considered that a delay of five years should not be taken as a reason for shifting the burden of proof that such delay was (not) abusive from the State party to the author.[12]

Additional observations by the State party

6.1 In its additional observations dated 6 December 2004, the State party criticized that the author seeks to circumvent the German reservation concerning article 26 by invoking article 8, paragraph 3 (c) (i), although this provision does not guarantee a right to equitable remuneration for work performed by prisoners. The conditions of such work could not be regulated in detail in a general convention relating to civil and political rights, even though this might seem necessary in the case of permissible compulsory labour. Since the right to equitable remuneration for work performed by prisoners could only be derived from article 26, the subject matter of the author's complaint fell outside the Committee's competence.

6.2 The State party recalls that Protocol No. 12 to the European Convention on Human Rights has not yet entered into force. Germany has only signed but not ratified the Protocol; its reservation concerning article 26 of the Covenant was consistent with its existing obligations under article 14 of the European Convention, an accessory non-discrimination clause.

6.3 The State party reiterates its arguments in respect of the author's alleged abuse of his right of petition. By reference to *Gobin v. Mauritius*, it argues that the Committee's decision itself was authoritative, and not the dissenting opinions invoked by the author.

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[11] Communication No. 787/1997, *Gobin v. Mauritius*, Decision on admissibility adopted on 16 July 2001, individual opinion by Committee members Christine Chanet, Louis Henkin, Martin Scheinin, Ivan Shearer and Max Yalden (dissenting).

[12] *Ibid.*, individual opinion by Committee member Eckart Klein (dissenting).

Issues and proceedings before the Committee

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee notes the author's argument that his remuneration calculated on the basis of five percent of the base amount between April 1998 and August 1999 and in April 2000, and on the basis of nine percent of the base amount between June and August 2001, was grossly and unjustifiably disproportionate to wages paid for similar work performed by the regular workforce, thereby violating his right to equality under article 26 of the Covenant. It also notes that the State has invoked its reservation to article 5, paragraph 2 (a), of the Optional Protocol, to the extent that it precludes the Committee from examining communications "by means of which a violation of article 26 […] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant." The Committee considers that the author has not sufficiently substantiated, for purposes of admissibility, his claim that he was a victim of discrimination based on his status as a prisoner because he received only a small part of what he would have been paid on the labour market. In particular, he has not provided any information on the type of work that he performed during his incarceration and whether it was of a kind that is available in the labour market, nor about the remuneration paid for comparable work in the labour market. Mere reference to a certain percentage of the base amount, i.e. the average amount of benefits payable under the German statutory pensions insurance scheme, does not suffice to substantiate the alleged discriminatory discrepancy between the remuneration for his work and work performed by the regular workforce. It follows that this part of the communication is inadmissible under article 2 of the Optional Protocol. The Committee therefore need not address the issue of the State party's reservation concerning article 26.

7.3 The Committee further notes the author's claims that article 26, read in conjunction with article 8, paragraph 3 (c) (i), contains a right to adequate remuneration for work performed by prisoners, and that he was discriminated against in the enjoyment of that right because of the continued application of Section 200 of the Enforcement of Sentences Act for a transitional period of two years and six months after the Constitutional Court had declared that provision incompatible with the constitutional principle of re-socialization of prisoners. It considers that article 8, paragraph 3 (c) (i), read in conjunction with article 10, paragraph 3, of the Covenant requires that work performed by prisoners primarily aims at their social rehabilitation, as indicated by the word "normally" in article 8, paragraph 3 (c) (i), but does not specify whether such measures would include adequate remuneration for work performed by prisoners. While reiterating that, rather than being only retributory, penitentiary systems should seek the reformation and social rehabilitation of prisoners,[13] the Committee notes that States may themselves choose the modalities for ensuring that treatment of prisoners, including any work or service normally required of them, is essentially directed at these aims. It notes that the German Constitutional Court justified the transitional period, during which prisoners were continued to

[13] General Comment 21 [44], 10 April 1992, at para. 10.

be remunerated on the basis of five percent of the base amount, with the fact that the necessary amendment of Section 200 of the Enforcement of Sentences Act required a re-assessment by the legislator of the underlying re-socialization concept. It further recalls that it is generally for the national courts, and not for the Committee, to review the interpretation or application of domestic legislation in a particular case, unless it is apparent that the courts' decisions are manifestly arbitrary or amount to a denial of justice.[14] The Committee considers that the author has not substantiated any such defects in relation to the Constitutional Court's decision to allow the legislator a transitional period until 31 December 2000 to amend Section 200. Accordingly, this part of the communication is inadmissible under article 2 of the Optional Protocol.

8. The Human Rights Committee therefore decides:

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

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

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

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[14] Communication No. 1188/2003, *Riedl-Riedenstein et al v. Germany*, decision on admissibility adopted on 2 November 2004, at para. 7.3; Communication No. 1138/2002, *Arenz et al. v. Germany*, decision on admissibility adopted on 24 March 2004, at para. 8.6.