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OF THE
HUMAN RIGHTS COMMITTEE

Volume II

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NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

The present document contains Annexes IX to XIII of the Report of the Human Rights Committee. Chapters I to V and Annexes I to VIII are contained in Volume I.

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ANNEX IX

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

A. Communication No. 167/1984, Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada (views adopted on 26 March 1990 at the thirty-eighth session)

Submitted by:	Chief Bernard Ominayak and the Lubicon Lake Band (represented by counsel)
Alleged victim:	Lubicon Lake Band
State party concerned:	Canada
Date of communication:	14 February 1984 (date of initial letter)
Date of decision on admissibility:	22 July 1987

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

Meeting on 26 March 1990,

Having concluded its consideration of communication No. 167/1984, submitted to the Committee by Chief B. Ominayak and the Lubicon Lake Band 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 by the State party,

Adopts the following:

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

1. The author of the communication (initial letter dated 14 February 1984 and subsequent correspondence) is Chief Bernard Ominayak (hereinafter referred to as the author) of the Lubicon Lake Band, Canada. He is represented by counsel.

2.1 The author alleges violations by the Government of Canada of the Lubicon Lake Band's right of self-determination and by virtue of that right to determine freely its political status and pursue its economic, social and cultural development, as well as the right to dispose freely of its natural wealth and resources and not to be deprived of its own means of subsistence. These violations allegedly contravene

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* Individual opinions submitted by Mr. Nisuke Ando and Mr. Bertil Wennergren, respectively, are appended.

Canada's obligations under article 1, paragraphs 1 to 3, of the International Covenant on Civil and Political Rights.

2.2 Chief Ominayak is the leader and representative of the Lubicon Lake Band, a Cree Indian band living within the borders of Canada in the Province of Alberta. They are subject to the jurisdiction of the Federal Government of Canada, allegedly in accordance with a fiduciary relationship assumed by the Canadian Government with respect to Indian peoples and their lands located within Canada's national borders. The Lubicon Lake Band is a self-identified, relatively autonomous, socio-cultural and economic group. Its members have continuously inhabited, hunted, trapped and fished in a large area encompassing approximately 10,000 square kilometres in northern Alberta since time immemorial. Since their territory is relatively inaccessible, they have, until recently, had little contact with non-Indian society. Band members speak Cree as their primary language. Many do not speak, read or write English. The Band continues to maintain its traditional culture, religion, political structure and subsistence economy.

2.3 It is claimed that the Canadian Government, through the Indian Act of 1970 and Treaty 8 of 21 June 1899 (concerning aboriginal land rights in northern Alberta), recognized the right of the original inhabitants of that area to continue their traditional way of life. Despite these laws and agreements, the Canadian Government has allowed the provincial government of Alberta to expropriate the territory of the Lubicon Lake Band for the benefit of private corporate interests (e.g., leases for oil and gas exploration). In so doing, Canada is accused of violating the Band's right to determine freely its political status and to pursue its economic, social and cultural development, as guaranteed by article 1, paragraph 1, of the Covenant. Furthermore, energy exploration in the Band's territory allegedly entails a violation of article 1, paragraph 2, which grants all peoples the right to dispose of their natural wealth and resources. In destroying the environment and undermining the Band's economic base, the Band is allegedly being deprived of its means to subsist and of the enjoyment of the right of self-determination guaranteed in article 1.

3.1 The author states that the same matter has not been submitted for examination under another procedure of international investigation or settlement.

3.2 With respect to the exhaustion of domestic remedies, it is stated that the Lubicon Lake Band has been pursuing its claims through domestic political and legal avenues. It is alleged that the domestic political and legal process in Canada is being used by government officials and energy corporation representatives to thwart and delay the Band's actions until, ultimately, the Band becomes incapable of pursuing them, because industrial development at the current rate in the area, accompanied by the destruction of the environmental and economic base of the Band, would make it impossible for the Band to survive as a people for many more years.

3.3 On 27 October 1975, the Band's representatives filed with the Registrar of the Alberta (Provincial) Land Registration District a request for a caveat, which would give notice to all parties dealing with the caveated land of their assertion of aboriginal title, a procedure foreseen in the Provincial Land Title Act. The Supreme Court of Alberta received arguments on behalf of the Provincial Government, contesting the caveat, and on behalf of the Lubicon Lake Band. On 7 September 1976, the provincial Attorney General filed an application for a postponement, pending resolution of a similar case; the application was granted.

On 25 March 1977, however, the Attorney General introduced in the provincial legislature an amendment to the Land Title Act precluding the filing of caveats; the amendment was passed and made retroactive to 13 January 1975, thus predating the filing of the caveat involving the Lubicon Lake Band. Consequently, the Supreme Court hearings were dismissed as moot.

3.4 On 25 April 1980, the members of the Band filed an action in the Federal Court of Canada, requesting a declaratory judgement concerning their rights to their land, its use, and the benefits of its natural resources. The claim was dismissed on jurisdictional grounds against the provincial government and all energy corporations except one (Petro-Canada). The claim with the federal Government and Petro-Canada as defendants was allowed to stand.

3.5 On 16 February 1982, an action was filed in the Court of Queen's Bench of Alberta requesting an interim injunction to halt development in the area until issues raised by the Band's land and natural resource claims were settled. The main purpose of the interim injunction, the author states, was to prevent the Alberta government and the oil companies (the "defendants") from further destroying the traditional hunting and trapping territory of the Lubicon Lake people. This would have permitted the Band members to continue to hunt and trap for their livelihood and subsistence as a part of their aboriginal way of life. The provincial court did not render its decision for almost two years, during which time oil and gas development continued, along with rapid destruction of the Band's economic base. On 17 November 1983, the request for an interim injunction was denied and the Band, although financially destitute, was subsequently held liable for all court costs and attorneys' fees associated with the action.

3.6 The decision of the Court of Queen's Bench was appealed to the Court of Appeal of Alberta; it was dismissed on 11 January 1985. In reaching its decision, the Court of Appeal agreed with the lower court's finding that the Band's claim of aboriginal title to the land presented a serious question of law to be decided at trial. None the less, the Court of Appeal found that the Lubicon Lake Band would suffer no irreparable harm if resource development continued fully and that the balance of convenience, therefore, favoured denial of the injunction.

3.7 The author states that the defendants attempted to convince the Court that the Lubicon Lake Band has no right to any possession of any sort in any part of the subject lands, which, logically, included even their homes. In response, the Court pointed out that any attempt to force the members of the Lubicon Lake Band from their dwellings might indeed prompt interim relief, as would attempts to deny them access to traditional burial grounds or other special places, or to hunting and trapping areas. In its complaint, the Band alleged denial of access to all of these areas, supporting its allegations with photographs of damage and with several uncontested affidavits. Yet, the Court overlooked the Band's evidence and concluded that the Band had failed to demonstrate that such action had been taken or indeed threatened by the defendants.

3.8 The author further states that the legal basis for the Court of Appeal's decision was its own definition of irreparable injury. This test was: injury that is of such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the injunction would be a denial of justice. The author submits that the Lubicon Lake Band clearly met this test by demonstrating, with uncontested evidence, injury to their livelihood, to their subsistence economy, to

their culture and to their way of life as a social and political entity. Yet, the Court found that the Band had not demonstrated irreparable harm.

3.9 On 18 February 1985, the Band presented arguments to a panel of three judges of the Supreme Court of Canada, requesting leave to appeal from the judgement of the Alberta Court of Appeal. On 14 March 1985, the Supreme Court of Canada refused leave to appeal. Generally, the author states, the criteria for granting leave to appeal are: whether the questions presented are of public importance, whether the case contains important issues of law or whether the proceedings are for any reason of such a nature or significance as to warrant a decision by the Supreme Court of Canada. He states that the issues presented by the Lubicon Lake Band involved such questions as the interpretation of the constitutional rights of aboriginal peoples, the existence of which was recently confirmed by the Constitution Act, 1982; the remedies available to aboriginal peoples; the rights of aboriginal peoples to carry out traditional subsistence activities in traditional hunting and trapping grounds; the legal régime applicable to a large area of land in northern Alberta; conflicts between Canada's traditional, land-based societies and its industrial society; public interests and minority interests; the competing rights of public authorities and individuals; considerations of fundamental and equitable justice; equality before the law; and the right to equal protection and benefit of the law. The author submits that at least the first four questions have not yet been adjudicated by the Supreme Court of Canada and that they undeniably fall within the criteria for granting leave to appeal.

4. By decision of 16 October 1984, the Working Group of the Human Rights Committee transmitted the communication under rule 91 of the rules of procedure to the State party, requesting information and observations relevant to the question of the admissibility of the communication. The main points reflected in the information and observations received from the State party are set out in paragraphs 5.1 to 5.7 and 6.1 to 6.4 below.

Exhaustion of domestic remedies

5.1 In its submission dated 31 May 1985, the State party contends that the Lubicon Lake Band has not pursued to completion domestic remedies commenced by it and that responsibility for any delays in the application of such remedies does not lie with the Government of Canada. The State party recalls that the Lubicon Lake Band, suing in its own legal right, and Chief Bernard Ominayak, suing in his personal capacity, and with other Band councillors in a representative capacity, have initiated three different legal procedures and points out that only the litigation concerning the caveat filed by the Band has been finally determined. Two other legal actions, one in the Federal Court of Canada and one in the Alberta Court of Queen's Bench, were said to be still pending.

5.2 With regard to the Federal Court action referred to in the communication, the State party recalls that the Band and its legal advisers, in April 1980, sought to sue the Province of Alberta and private corporations in proceedings in the Federal Court of Canada. It is submitted that in the circumstances of this case, neither the province nor private entities could have been sued as defendants in the Federal Court of Canada. Rather than reconstitute the proceedings in the proper forum, the State party submits, the Band contested interlocutory proceedings brought by the defendants concerning the issue of jurisdiction. These interlocutory proceedings resulted in a determination against the Band in November 1980. An appeal by the

Band from the decision of the Federal Court of Canada was dismissed by the Federal Court of Appeal in May 1981.

5.3 Following the interlocutory proceedings relating to the jurisdiction of the Federal Court, a new action was instituted on 21 February 1982 against the province and certain corporate defendants in the Court of Queen's Bench of Alberta. As indicated in the communication, the Band sought an interim injunction. In November 1983, after extensive proceedings, the Band's interim application was dismissed by the Court of Queen's Bench based on the case of Erickson v. Wiggins Adjustments Ltd. (1980) 6 W.R.R. 188, which set out the criteria that must be present for a court to grant an interim injunction. Pursuant to that case, an applicant for an interim injunction must establish:

(a) That there exists a serious issue to be tried;

(b) That irreparable harm will be suffered prior to trial if no injunction is granted;

(c) That the balance of convenience between the parties favours relief to the applicant.

The State party points out that the Alberta Court denied the Band's application on the grounds that the Band had failed to prove irreparable harm and that it could be adequately compensated in damages if it was ultimately successful at trial.

5.4 Rather than proceed with a trial on the merits, the Band appealed against the dismissal of the interim application. Its appeal was dismissed by the Alberta Court of Appeal of 11 January 1985. The Band's application for leave to appeal the dismissal of the interim injunction to the Supreme Court of Canada was refused on 14 March 1985. Almost two months later, on 13 May 1985, the State party adds, the Supreme Court of Canada denied another request by the Band that the Court bend its own rules to rehear the application. Thus, the State party states, the Court upheld its well-established rule prohibiting the rehearing of applications for leave to appeal.

5.5 The State party submits that, after such extensive delays caused by interim proceedings and the contesting of clearly settled procedural matters of law, the author's claim that the application of domestic remedies is being unreasonably prolonged has no merit. It submits that it has been open to the Band as plaintiff to press on with the substantive steps in either of its legal actions so as to bring the matters to trial.

Additional remedies

5.6 The State party submits that the term "domestic remedies", in accordance with the prevailing doctrine of international law, should be understood as applying broadly to all established municipal procedures of redress. Article 2, paragraph 3 (b), of the Covenant, it states, recognises that in addition to judicial remedies a State party to the Covenant can also provide administrative and other remedies. Following the filing of its defence in the Federal Court action, the federal Government proposed late in 1981 that the claim be settled by providing the Band with reserve land pursuant to the treaty concluded in 1899. The conditions proposed by the province (which holds legal title to the lands) were not

acceptable to the Band and it accordingly rejected the proposed resolution of the dispute.

5.7 The Band's claim to certain lands in northern Alberta, the State party submits, is part of a complex situation that involves competing claims from several other native communities in the area. In June 1980, approximately two months after the Band commenced its action in the Trial Division of the Federal Court, six other native communities filed a separate land claim with the Department of Indian Affairs asserting aboriginal title to lands that overlap with the property sought by the Lubicon Lake Band's claim. Subsequently, in June 1983, the Big Stone Cree Band filed a claim with the Department of Indian Affairs - this time claiming treaty entitlement - to an area that also overlaps with land claimed by the Lubicon Lake Band. The Big Stone Cree Band allegedly represents five of the native communities that filed the June 1980 claim based on aboriginal title. To deal with this very complex situation, in March 1985 the Minister of Indian and Northern Affairs appointed a former judge of the British Columbia Supreme Court as a special envoy of the Minister to meet with representatives from the Band, other native communities and the province, to review the entire situation and to formulate recommendations. The State party submits that consideration of the Lubicon Lake Band's claim in isolation from the competing claims of the other native communities would jeopardize the domestic remedy of negotiated settlement selected by the latter.

Right of self-determination

6.1 The Government of Canada submits that the communication, as it pertains to the right of self-determination, is inadmissible for two reasons. First, the right of self-determination applies to a "people" and it is the position of the Government of Canada that the Lubicon Lake Band is not a people within the meaning of article 1 of the Covenant. It therefore submits that the communication is incompatible with the provisions of the Covenant and, as such, should be found inadmissible under article 3 of the Protocol. Secondly, communications under the Optional Protocol can only be made by individuals and must relate to the breach of a right conferred on individuals. The present communication, the State party argues, relates to a collective right and the author therefore lacks standing to bring a communication pursuant to articles 1 and 2 of the Optional Protocol.

6.2 As to the argument that the Lubicon Lake Band does not constitute a people for the purposes of article 1 of the Covenant and it therefore is not entitled to assert under the Protocol the right of self-determination, the Government of Canada points out that the Lubicon Lake Band comprises only one of 582 Indian bands in Canada and a small portion of a larger group of Cree Indians residing in northern Alberta. It is therefore the position of the Government of Canada that the Lubicon Lake Indians are not a "people" within the meaning of article 1 of the Covenant.

6.3 The Government of Canada submits that while self-determination as contained in article 1 of the Covenant is not an individual right, it provides the necessary contextual background for the exercise of individual human rights. This view, it contends, is supported by the following phrase from the Committee's general comment on article 1 (CCPR/C/21/Add.3, 5 October 1984), which provides that the realization of self-determination is "an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights". This general comment, the State party adds, recognizes that the

rights embodied in article 1 are set apart from, and before, all the other rights in the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights. The rights in article 1, which are contained in part I of the Covenant on Civil and Political Rights are, in the submission of Canada, different in nature and kind from the rights in part III, the former being collective, the latter individual. Thus, the structure of the Covenant, when viewed as a whole, further supports the argument that the right of self-determination is a collective one available to peoples. As such, the State party argues, it cannct be invoked by individuals under the Optional Protocol.

6.4 The Government of Canada contends that the Committee's jurisdiction, as defined by the Optional Protocol, cannot be invoked by an individual when the alleged violation concerns a collective right. It therefore contends that the present communication pertaining to self-determination for the Lubicon Lake Band should be dismissed.

7. In a detailed reply, dated 8 July 1985, to the State party's submission, the author summarized his arguments as follows. The Government of Canada offers three principal allegations in its response. It alleges, first, that the Lubicon Lake Band has not exhausted domestic remedies. However, the Band has, in fact, exhausted these remedies to the extent that they offer any meaningful redress of its claims concerning the destruction of its means of livelihood. Secondly, the Government of Canada alleges that the concept of self-determination is not applicable to the Lubicon Lake Band. The Lubicon Lake Band is an indigenous people who have maintained their traditional economy and way of life and have occupied their traditional territory since time immemorial. At a minimum, the concept of self-determination should be held to be applicable to these people as it concerns the right of a people to their means of subsistence. Finally, the Government of Canada makes allegations concerning the identity and status of the communicant. The "communicant" is identified in the Band's original communication. The "victims" are the members of the Lubicon Lake Band, who are represented by their unanimously elected leader, Chief Bernard Ominayak.

8.1 By interim decision of 10 April 1986, the Committee, recalling that the State party had informed it that the Minister of Indian and Northern Affairs had appointed a special envoy and given him the task to review the situation, requested the State party to furnish the Committee with the special envoy's report and with any information as to recommendations as well as measures which the State party had taken or intended to take in that connection.

8.2 In the same decision the Committee requested the author to inform it of any developments in the legal actions pending in the Canadian courts.

9.1 In his reply, dated 30 June 1986, to the Committee's interim decision, the author claims that there has been no substantive progress in any of the pending court proceedings. He reiterates his argument that:

> "The Band's request for an interim injunction to halt the oil development, which has destroyed the subsistence livelihood of its people, was denied and the Supreme Court of Canada refused to grant leave to appeal the denial ... The development and the destruction, therefore, continue unabated. The Band's attorney is continuing to pursue the claims through the courts despite the fact that the Band is unable to provide financial support for the effort and

that there is no possible hope of resolution for the next several years. Therefore, the Band has no basis for altering its previous conclusion that, for all practical purposes, its domestic judicial remedies have been exhausted."

9.2 The Band also points out that the Federal Government's special envoy, Mr. E. Davie Fulton, was relieved of his responsibilities following the submission of his "discussion paper".

"In the discussion paper ... Mr. Fulton reached much the same conclusion as the Band itself, that the Canadian Government must bear the blame for the situation at Lubicon Lake and that the resolution of the problem is up to the Federal Government. His report also suggested a land settlement based on the Band's current population and recognised the importance of providing the Band with wildlife management authority throughout its hunting and trapping territory. The land settlement proposed by Mr. Fulton, which would result in a reserve significantly larger than the 25 square mile reserve the Band was promised in 1940, is consistent with the position of the Band with regard to this issue ... Mr. Fulton also recommended that Alberta compensate the Band for damage caused by the unrestricted oil and gas development for which it has issued leases within the Band's territory. In addition to relieving Mr. Fulton of his responsibility in the matter, the Federal Government, to date, has refused to make his discussion paper public."

10.1 In its reply to the Committee's interim decision, dated 23 June 1986, the State party forwarded the text of Mr. Fulton's report and noted that it had appointed Mr. Roger Tassé to act as negotiator. Furthermore, it informed the Committee that on 8 January 1986 the Canadian Government had made an ex gratia payment of $1.5 million to the Band to cover legal and other related costs.

10.2 In a further submission of 20 January 1987, the State party argues that following the rejection of the Band's application for an interim injunction:

"The Band should then have taken steps with all due speed to seek its permanent injunction before seeking international recourse. The Band alleges in its submission ... that the delay in the litigation will cause it irreparable harm. Its action for a permanent injunction would, if successful, permanently prevent that harm."

11.1 In submissions dated 23 and 25 February 1987, the author discussed, inter alia, matters of substance, such as the Fulton discussion paper, and argued that "Canada has abandoned key recommendations contained in the Fulton discussion paper", and that "Canada is attempting retroactively to subject the Band to a law which this Committee has held to be in violation of article 27 of the International Covenant on Civil and Political Rights and which Canada amended in accordance with the findings of this Committee".

11.2 With regard to the pending litigation proceedings, the Band contends that a permanent injunction would not constitute an effective remedy because it would come too late, explaining that:

"The recognition of aboriginal rights or even treaty rights by a final determination of the courts will not undo the irreparable damage to the society of the Lubicon Lake Band, will not bring back the animals, will not

restore the environment, will not restore the Band's traditional economy, will not replace the destruction of their traditional way of life and will not repair the damages to the spiritual and cultural ties to the land. The consequence is that all domestic remedies have indeed been exhausted with respect to the protection of the Band's economy as well as its unique, valuable and deeply cherished way of life."

12. In a further submission, dated 12 June 1987, the author states that:

"The Lubicon Lake Band is not requesting a territorial rights decision. Rather, the Band requests only that the Human Rights Committee assist it in attempting to convince the Government of Canada that:

"(a) The Band's existence is seriously threatened by the oil and gas development that has been allowed to proceed unchecked on their traditional hunting grounds and in complete disregard for the human community inhabiting the area;

"(b) Canada is responsible for the current state of affairs and for co-operating in their resolution in accordance with article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights."

13.1 Before considering a communication on the merits, the Committee must ascertain whether it fulfils all conditions relating to its admissibility under the Optional Protocol.

13.2 With regard to the requirement, in article 5, paragraph 2 (b), of the Optional Protocol, that authors must exhaust domestic remedies before submitting a communication to the Human Rights Committee, the author of the present communication had invoked the qualification that this requirement should be waived "where the application of the remedies is unreasonably prolonged". The Committee noted that the author had argued that the only effective remedy in the circumstances of the case was to seek an interim injunction, because "without the preservation of the status quo, a final judgement on the merits, even if favourable to the Band, would be rendered ineffectual", in so far as "any final judgement recognizing aboriginal rights, or alternatively treaty rights, [could] never restore the way of life, livelihood and means of subsistence of the Band". Referring to its established jurisprudence that "exhaustion of domestic remedies can be required only to the extent that these remedies are effective and available", the Committee found that, in the circumstances of the case, there were no effective remedies still available to the Lubicon Lake Band.

13.3 With regard to the State party's contention that the author's communication pertaining to self-determination should be declared inadmissible because "the Committee's jurisdiction, as defined by the Optional Protocol, cannot be invoked by an individual when the alleged violation concerns a collective right", the Committee reaffirmed that the Covenant recognizes and protects in most resolute terms a people's right of self-determination and its right to dispose of its natural resources, as an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. However, the Committee observed that the author, as an individual, could not claim under the Optional Protocol to be a victim of a violation of the right of self-determination enshrined in article 1 of the Covenant, which deals with rights conferred upon peoples, as such.

13.4 The Committee noted, however, that the facts as submitted might raise issues under other articles of the Covenant, including article 27. Thus, in so far as the author and other members of the Lubicon Lake Band were affected by the events which the author has described, these issues should be examined on the merits, in order to determine whether they reveal violations of article 27 or other articles of the Covenant.

14. On 22 July 1987, therefore, the Human Rights Committee decided that the communication was admissible in so far as it might raise issues under article 27 or other articles of the Covenant. The State party was requested, under rule 86 of the rules of procedure, to take interim measures of protection to avoid irreparable damage to Chief Ominayak and other members of the Lubicon Lake Band.

15. In its submission under article 4, paragraph 2, dated 7 October 1987, the State party invokes rule 93, paragraph 4, of the Committee's provisional rules of procedure and requests the Committee to review its decision on admissibility, submitting that effective domestic remedies have not been exhausted by the Band. It observes that the Committee's decision appears to be based on the assumption that an interim injunction would be the only effective remedy to address the alleged breach of the Lubicon Lake Band's rights. This assumption, in its opinion, does not withstand close scrutiny. The State party submits that, based on the evidence of the Alberta Court of Queen's Bench and the Court of Appeal - the two courts which had had to deal with the Band's request for interim relief - as well as the socio-economic conditions of the Band, its way of life, livelihood and means of subsistence have not been irreparably damaged, nor are they under imminent threat. Accordingly, it is submitted that an interim injunction is not the only effective remedy available to the Band, and that a trial on the merits and the negotiation process proposed by the Federal Government constitute both effective and viable alternatives. The State party reaffirms its position that it has a right, pursuant to article 5, paragraph 2 (b), of the Optional Protocol, to insist that domestic redress be exhausted before the Committee considers the matter. It claims that the terms "domestic remedies", in accordance with relevant principles of international law, must be understood as applying to all established local procedures of redress. As long as there has not been a final judicial determination of the Band's rights under Canadian law, there is no basis in fact or under international law for concluding that domestic redress is ineffective, nor for declaring the communication admissible under the Optional Protocol. In support of its claims, the State party provides a detailed review of the proceedings before the Alberta Court of Queen's Bench and explains its long-standing policy to seek the resolution of valid, outstanding land claims by Indian Bands through negotiation.

16.1 Commenting on the State party's submission, the author, in a letter dated 12 January 1988, maintains that his and the Lubicon Lake Band's allegations are well founded. According to Chief Ominayak, the State party bases its request for a review of the decision on admissibility on a mere restatement of the facts and is seeking to have the Committee reverse its decision under the guise of substantiation of its previous submissions, without adducing any new grounds. Recalling the Committee's statement that the communication is admissible in so far as it raises issues under article 27 "or other articles of the Covenant", the author spells out which articles of the Covenant he considers to have been violated. First, he claims that Canada has violated article 2, paragraphs 1 to 3, of the Covenant: paragraph 1, because the State party has treated the Lubicon Lake Band without taking into consideration elements of a social, economic and property nature inherent in the Band's indigenous community structure; paragraph 2, because

it is said to continue to refuse to solve some issues complained of by the Band for which there remain means of redress; and paragraph 3, because it is said to have failed to provide the Band with an effective remedy with regard to its rights under the Covenant.

16.2 The author further alleges that the State party, through actions affecting the Band's livelihood, has created a situation which "led, indirectly if not directly, to the deaths of 21 persons and [is] threatening the lives of virtually every other member of the Lubicon community. Moreover, the ability of the community to [survive] is in serious doubt as the number of miscarriages and stillbirths has skyrocketed and the number of abnormal births ... has gone from near zero to near 100 per cent". This, it is submitted, constitutes a violation of article 6 of the Covenant. Furthermore, it is claimed that the appropriation of the Band's traditional lands, the destruction of its way of life and livelihood and the devastation wrought to the community constitute cruel, inhuman and degrading treatment within the meaning of article 7 of the Covenant for which the State party must be held accountable.

16.3 The author raises further questions about the State party's compliance with articles 14, paragraph 1, and 26, of the Covenant. He recalls that the domestic court proceedings instituted by the Lubicon Lake Band, founded on aboriginal rights and title to land, challenge certain of the State's asserted powers and jurisdiction, which he contends are "inherently susceptible to precisely the types of abuses that articles 14, paragraph 1, and 26 are intended to guard against". In this context, he claims that "the bias of the Canadian courts has presented a major obstacle to the Band's attempt to protect its land, community and livelihood, and that the courts' biases arises from distinctions based on race, political, social and economic status". He further claims that the economic and social biases the Band has been confronted with in the Canadian courts, especially in the provincial court system in Alberta, have been greatly magnified by the "fact that several of the judges rendering the decisions of these courts have had clear economic and personal ties to the parties opposing the Band in the actions".

16.4 In addition to the above, it is submitted that in violation of articles 17 and 23, paragraph 1, of the Covenant, the State party has permitted the members of the Lubicon Lake Band to be subjected to conditions that are leading to the destruction of the families and the homes of its members. The author explains that in an indigenous community, the entire family system is predicated upon the spiritual and cultural ties to the land and the exercise of traditional activities. Once these have been destroyed, as in the case of the Band, the essential family component of the society is irremediably damaged. Similarly, it is alleged that the State party has violated article 18, paragraph 1, of the Covenant since, as a consequence of the destruction of their land, the Band members have been "robbed of the physical realm to which their religion - their spiritual belief system - attaches".

16.5 With respect to the requirement of exhaustion of domestic remedies, the author rejects the State party's assertion that a trial on the merits would offer the Band an effective recourse against the federal Government and redress for the loss of its economy and its way of life. First, this assertion rests upon the assumption that past human rights violations can be rectified through compensatory payments; secondly, it is obvious that the Band's economy and way of life have suffered irreparable harm. Furthermore, it is submitted that a trial on the merits is no longer available against the federal Government of Canada since, in

October 1986, the Supreme Court of Canada held that aboriginal land rights within provincial boundaries involve provincial land rights and must therefore be adjudicated before the provincial courts. It was for that reason that, on 30 March 1987, the Lubicon Lake Band applied to the Alberta Court of Queen's Bench for leave to amend its statement of claim before that court so as to be able to add the federal Government as a defendant. On 22 October 1987, the Court of Queen's Bench denied the application. Therefore, despite the fact that the Canadian Constitution vests exclusive jurisdiction for all matters concerning Indians and Indian lands in Canada with the federal Government, it is submitted that the Band cannot avail itself of any recourse against the federal Government on issues pertaining to these very questions.

17.1 In a submission dated 3 March 1988, the State party submits that genuine and serious efforts continue to be made with a view to finding an acceptable solution to the issues raised by the author and the Band. In particular, it explains that:

> "On 3 February 1988, the Minister of Indian Affairs and Northern Development delivered to the Attorney General of Alberta a formal request for reserve land for the Lubicon Lake Band. In this request, he advised Alberta that a rejection of the request would require Canada to commence a legal action, pursuant to the Constitution Act, 1930, to resolve the dispute as to the quantum of land to which the Lubicon Lake Band is entitled. In any event, the Minister of Indian Affairs and Northern Development asked Alberta to consider, as an interim measure, the immediate transfer to the Band of 25.4 square miles of land ... without prejudice to any legal action.
>
> "By letter dated 10 February 1988, the federal negotiator advised counsel for the Band of the above developments and, as well, sought to negotiate all aspects of the claim not dependent on Alberta's response to the formal request ... The communicant, by letter dated 29 February 1988, rejected this offer, but indicated that he would be prepared to consider an interim transfer of 25.4 square miles without prejudice to negotiations or any court actions. As a consequence of the above developments, negotiators for the federal and provincial Governments met on 1 and 2 March 1988 and concluded an interim agreement for the transfer of 25.4 square miles as reserve land for the Band, including mines and minerals. This agreement is without prejudice to the positions of all parties involved, including the Band ..."

17.2 With respect to the effectiveness of available domestic remedies, the State party takes issue with the author's submission detailed in paragraph 16.5 above, which it claims seriously misrepresents the legal situation as it relates to the Band and the federal and provincial Governments. It reiterates that the Band has instituted two legal actions, both of which remain pending: one in the Federal Court of Canada against the federal Government; the other in the Alberta Court of Queen's Bench against the province and certain private corporations. To the extent that the author's claim for land is based on aboriginal title, as opposed to treaty entitlement, it is established case law that a court action must be brought against the province and not the federal Government.

17.3 The State party adds that in the action brought before the Alberta Court of Queen's Bench:

> "The communicant sought leave to add the federal Government as a party to the legal proceedings in the Alberta Court of Queen's Bench. The Court there

held that, based on existing case law, a provincial court is without jurisdiction to hear a claim for relief against the federal Government; rather, this is a matter properly brought before the Federal Court of Canada. The plaintiff has in fact done this and the action is, as already indicated, currently pending. Therefore, recourse against the Government of Canada is still available to the Band, as it has always been, in the Federal Court of Canada. Moreover, the communicant has appealed the decision of the Court of Queen's Bench to the Alberta Court of Appeal".

17.4 Finally, the State party categorically rejects most of the author's allegations detailed in paragraphs 16.2 and 16.3 above as unfounded and unsubstantiated; it submits that these allegations constitute an abuse of process that should result in the dismissal of the communication pursuant to article 3 of the Optional Protocol.

18.1 In a further submission dated 28 March 1988, the author comments on the State party's overview of recent developments in the case (see para. 17.1) and adds the following remarks: (a) the Lubicon Lake Band was not a party to the negotiation of the settlement offer; (b) the settlement offer rests on a "highly prejudicial" view of the Band's rights under Canadian law and an equally prejudicial determination of Band membership; (c) the federal Government would negotiate non-land issues such as housing with fewer than half of the Band members; (d) Canada has leased all but 25.4 square miles of the Band's traditional lands for development, in conjunction with a pulp mill to be constructed by the Daishowa Canada Company Ltd. near Peace River, Alberta; (e) the Daishowa project frustrates any hopes of the continuation of some traditional activity by Band members; and (f) the Parliamentary Standing Committee on Aboriginal Affairs, the oversight committee of the Canadian Parliament with respect to such matters, does not support the approach to negotiated settlement being taken by the Minister of Indian Affairs and Northern Development.

18.2 The author reaffirms that the essential part of the court actions initiated by the Band relates to aboriginal rights claims and that, with the decision of the Alberta Court of Queen's Bench of 22 October 1987 and in the light of recent Supreme Court decisions referred to by the State party, the Band continues to be denied redress against the federal Government.

18.3 The author further rejects the State party's contention that the claims made in his submission of 12 January 1988 are unsubstantiated and unfounded and constitute an abuse of the right of submission; he reaffirms his readiness to furnish detailed information on the "21 unnatural deaths resulting directly or indirectly from the destruction of the traditional Lubicon economy and way of life". Finally, he points out that the State party continues to disregard the Committee's request for interim measures of protection pursuant to rule 86 of its rules of procedure, as evidenced by Canadian backing of the Daishowa paper mill project. This means that far from adopting interim measures to avoid irreparable harm to the Band, Canada has endorsed a project that would contribute to the further degradation of the Band's traditional lands.

19.1 In another submission dated 17 June 1988, the State party points to further developments in the case and re-emphasises that effective remedies continue to be open to the Lubicon Lake Band. It explains that, since 11 March 1988, the date of the Band's refusal of the Government's interim offer to transfer to it 25.4 square miles of reserve land, discussions:

"have taken place between the federal Government, the Province of Alberta and the communicant. However, virtually no progress was made towards settlement. As a consequence, on 17 May 1988, the federal Government initiated legal proceedings against the Province of Alberta and the Lubicon Lake Band in order to enable Canada to meet its lawful obligations to the Band under Treaty 8. The Statement of Claim, commencing the legal action, asks the Court of Queen's Bench of Alberta for a declaration that the Lubicon Lake Band is entitled to a reserve and a determination of the size of the reserve. ... On 9 June 1988 the Lubicon Lake Band filed a Statement of Defence and Counterclaim. On 10 June 1988, all parties to the dispute appeared before Chief Justice Moore of the Alberta Court of Queen's Bench and agreed that best efforts should be made to expedite this case with a preliminary trial date to be set on 16 January 1989."

19.2 The State party accepts its obligation to provide the Lubicon Lake Band with a reserve pursuant to Treaty 8. It argues that the issue that forms the basis of the domestic dispute, as well as the communication under consideration, concerns the amount of land to be set aside as a reserve and related issues. As such, the State party asserts that the communication does not properly fall within any of the provisions of the Covenant and cannot therefore form the basis of a violation.

20.1 In a submission dated 5 July 1988, the author furnishes further information and comments on the State party's submission of 17 June 1988. He identifies "many problems" inherent in the court action initiated by the federal Government against the provincial government in the Alberta Court of Queen's Bench. Among these are: (a) the purported fact that it ignores the Band's aboriginal land claim; (b) the fact that it seeks a declaratory judgement with respect to Band membership "apparently based on the unique and highly controversial approach to determination of Band membership that has been discussed in previous submissions"; and (c) the fact that much of the substance of the issues addressed are already before the courts in the Band's pending actions. The author notes that since "the action was filed in the lowest court in Canada, and will entail subpoena of an argument over the extremely lengthy and complex Lubicon genealogical study, as well as appeals from any decision rendered, there is no basis for believing that the action will do anything but delay indefinitely [the] resolution of the Lubicon land issues". The author believes that the Government's action is intended to have precisely this effect.

20.2 By letter dated 28 October 1988, the author informs the Committee that on 6 October 1988, the Lubicon Lake Band asserted jurisdiction over its territory. He explains that this action was the result of the federal Government's failure to contribute to a favourable solution of the Band's problems. He adds that the State party has continuously delayed action on the issue, accusing it of "practicing deceit in the media and dismissing advisors who recommend any resolution favourable to the Lubicon people. At the same time the Band has watched the Province of Alberta continue to grant leases for oil and gas development and now for timber development on the Lubicons' traditional lands ...".

20.3 The author further observes that the action of the Lubicon Lake Band has resulted in:

"a positive response from the Alberta provincial government. Alberta Premier Don Getty negotiated an agreement with Chief Ominayak whereby Alberta will offer to sell to the Federal Government 79 square miles of land with

surface and subsurface rights, to be designated as a reserve for the benefit of the Lubicon Lake Band. The province has agreed to sell an additional 16 square miles of land to the federal Government with surface rights only, and to make subsurface development on such land subject to Band approval. Thus the total area agreed to by the province is 95 square miles, the amount to which the Band is entitled, based on its present membership, under Canadian federal Indian law. ... The federal Government has stated that it is willing to consider the transfer of 79 square miles of land for the benefit of the Lubicon people. However, it has refused to accept the remaining 16 square miles, recommending that such land be transferred to the Band to be held in free title. The effect of this would be to subject the land in question to taxation and alienation, while reducing the level of federal obligation to the Lubicon people ..."

21.1 In a further submission dated 2 February 1989, the State party observes that in November 1988, following an agreement between the provincial government of Alberta and the Lubicon Lake Band to set aside 95 square miles of land for a reserve, the federal Government initiated negotiations with the Band on the modalities of the land transfer and related issues. During two months of negotiations, consensus was reached on the majority of issues, including Band membership, size of the reserve, community construction and delivery of programmes and services. No agreement could, however, be found on the issue of cash compensation and on 24 January 1989 the Band withdrew from the negotiations when the federal Government presented its formal offer.

21.2 After reviewing the principal features of its formal offer (transfer to the Band of 95 square miles of reserve land; the acceptance of the Band's membership calculation; the setting aside of $C 34 million for community development projects; the granting of $C 2.5 million per year of federal support programmes; the proposal of a special development plan to assist the Band in establishing a viable economy on its new reserve; and the establishment of a $C 500,000 trust fund to assist Band elders wishing to pursue their traditional way of life), the State party observes that the Government's formal overall offer amounts to approximately $C 45 million in benefits and programmes, in addition to a 95 square mile reserve. The Band has claimed additional compensation of between $C 114 million and $C 275 million for alleged lost revenues. The State party has denied the Band's entitlement to such sums but has advised it that it is prepared to proceed with every aspect of its offer without prejudice to the Band's right to sue the federal Government for additional compensation.

21.3 The State party concludes that its most recent offer meets two tests of fairness, namely: that it is consistent with other recent settlements with native groups, and that it addresses the legitimate social and economic objectives of the Band. It adds that the community negotiation process must be considered as a practical vehicle and opportunity for Indian communities to increase their local autonomy and decision-making responsibilities. The federal policy provides for negotiations on a wide range of issues, such as government institutions, membership, accountability, financial arrangements, education, health services and social development. Based on the above considerations, the State party requests the Committee to declare the communication inadmissible on the grounds of failure to exhaust all available domestic remedies.

22.1 In a further submission dated 22 March 1989, the author takes issue with the State party's submission of 2 February 1989, characterizing it as not only misleading but virtually entirely untrue. He alleges that recent negotiations between the Lubicon Lake Band and the federal Government did not, on the Government's side, "in any way represent a serious attempt at settlement of the Lubicon issues". Rather, he submits, the Government's "formal offer" was an exercise in public relations, which committed the Federal Government to virtually nothing. It is submitted that the offer, if accepted, would have stripped the community's members of any legal means of redressing their situation.

22.2 In substantiation of these allegations, the author argues that the Government's "formal offer" contains no more than a commitment to provide housing and a school. On the other hand, it lacks "any commitment to provide the facilities and equipment necessary for the Lubicon people to manage their own affairs, such as facilities for essential vocational training, support for commercial and economic development, or any basis from which the Band might achieve financial independence". It is further submitted that contrary to the State party's statement that an agreement had been reached on the majority of issues for which the Band seeks a viable solution, including membership, reserve size and community construction, no agreement or consensus had been reached on any of these issues. Furthermore, the author argues that while the State party has claimed that its offer would amount to approximately $C 45 million in benefits and programmes, it has failed to indicate that the majority of these funds remain uncommitted and that without adequate means of legal redress the Lubicon Lake Band would be incapable of seeking to obtain any future commitments from the Government.

23.1 By submission of 30 May 1989, the author recalls that the Band has been pursuing its domestic claims through the Canadian courts for over 14 years, and that the nature of the claims and the judicial process involved is bound to draw out these proceedings for another 10 years. He submits that the State party does not dispute that court actions and negotiations undertaken to ensure the Band's livelihood have produced no results, and that court proceedings addressing the issues of land title and compensation would take years in resolution, if resolution ever occurred. It is pointed out that following the Band's refusal to endorse a settlement offer, which would force the Band to relinquish all rights to legal action involving a controversy with the State party in exchange for promises of future discussions between Canada and the Band, Canada terminated the negotiations. The author adds that: "Rather than continuing to seek a course of compromise and settlement, Canada has sent agents into non-native communities of northern Alberta, in the area immediately surrounding the traditional Lubicon territory." Working through a single individual who is said to retain some ties with the Band but who has not lived in the community for 40 years, these agents are said to try to induce other native individuals to strike their own private deals with the federal Government. Most of the individuals identified by the agents do not appear to be affiliated with any recognized aboriginal society.

23.2 In substantiation of earlier allegations, the author explains that the Band's loss of its economic base and the breakdown of its social institutions, including the transition from a way of life marked by trapping and hunting to a sedentary existence, has led to a marked deterioration in the health of the Band members:

> "... the diet of the people has undergone dramatic changes with the loss of their game, their reliance on less nutritious processed foods, and the spectre of alcoholism, previously unheard of in this community and which is now

overwhelming it. ... As a result of these drastic changes in the community's physical existence, the basic health and resistance to infection of community members has deteriorated dramatically. The lack of running water and sanitary facilities in the community, needed to replace the traditional systems of water and sanitary management, ... is leading to the development of diseases associated with poverty and poor sanitary and health conditions. This situation is evidenced by the astonishing increase in the number of abnormal births and by the outbreak of tuberculosis, affecting approximately one third of the community."

24.1 In a submission dated 20 June 1989, the State party concedes "that the Lubicon Lake Band has suffered a historical inequity and that they are entitled to a reserve and related entitlements". It maintains, however, that it has made offers to the Band which, if accepted, would enable the Band to maintain its culture, control its way of life and achieve economic self-sufficiency, and that its offer would provide an effective remedy to the violations of the Covenant alleged by the Band. However, a remedy of this nature cannot be imposed on the Band. The State party recalls that negotiations between the Lubicon Lake Band and senior government officials took place from November 1988 to January 1989; during the autumn of 1988, Chief Ominayak also met with the Prime Minister of Canada. It is submitted that the State party met virtually every demand of the author, either in full or to such an extent that equal treatment with other indigenous groups in Canada was approximated or exceeded. Thus, 95 square miles of land, mineral rights over 79 square miles, community facilities for each family living on the reserve, control over membership and an economic self-sufficiency package were offered in full to the Band. On the basis of a total of 500 Band members and a government package worth $C 45 million (non-inclusive of mineral and land rights), this offer amounted to $C 90,000 per person or almost $C 500,000 for each family of five. A number of the Band's demands, such as a request for an indoor ice arena or a swimming pool, were refused.

24.2 According to the State party, the major remaining point of contention between the federal Government and the Band is a claim by the Band for $C 167 million in compensation for economic and other losses allegedly suffered. In an endeavour to permit the resolution of the matters agreed on between the parties, the federal Government put forth a proposal that would enable the Band to accept the State party's offer in its entirety, while continuing to pursue their general claim for compensation in the Canadian courts. The State party rejects the contention that "virtually all items of any significance" in its offer "were left to future discussions", and contends that most of the Band's claims for land, mineral rights, community facilities, control over membership and an economic self-sufficiency package have been agreed to by the Government. Finally, the State party rejects the allegation that it negotiated in bad faith.

24.3 On procedural grounds, the State party indicates that, since the Committee's decision on admissibility, no clarifications have been put forward by the Committee to enable the State party to address specific allegations of violations of the Covenant. It therefore maintains that the proceedings have not progressed from the admissibility stage. It further submits that by acting within its jurisdiction and procedure, the Committee should (a) issue a ruling pursuant to rule 93, paragraph 4, indicating the outcome of its reconsideration of admissibility; (b) if finding the communication admissible, stipulate the articles and the evidence on which the finding is based; and (c) provide the federal Government with a six-month period during which to file its observations on the merits.

25. By interlocutory decision of 14 July 1989, the Human Rights Committee invited the State party to submit to the Committee any further explanations or statements relating to the substance of the author's allegations, in addition to its earlier submissions, not later than by 1 September 1989. The State party was again requested, pursuant to rule 86 of the rules of procedure and pending the Committee's final decision, to take measures to avoid damage to the author and the members of the Lubicon Lake Band.

26.1 In its reply to the interlocutory decision, dated 31 August 1989, the State party asserts that it is being denied due process, since the principles of natural justice require that a party be aware of the specific charge and evidence on which the accusations of the author of the communication are based. It claims that since it was never informed of the articles of the Covenant and the evidence in respect of which the communication was declared admissible, the principles of procedural fairness have not been respected, and that the federal Government remains prejudiced in its ability to respond to the Band's claim.

26.2 In respect of the alleged violations of articles 14, paragraph 1, and 26, the State party rejects as "totally unfounded" the claim that it failed to provide the Band with an independent and impartial tribunal for the resolution of its claims: the long tradition of impartiality and integrity of Canadian courts includes numerous cases won by aboriginal litigants. It is submitted that the Band has failed to adduce any evidence that would indicate that the judiciary acted any differently in proceedings concerning the Lubicon Lake Band. Furthermore, the State party claims that the responsibility for major delays in the resolution of the Band's court actions lies largely with the Band itself. Not only did the Band fail to take the necessary steps to move any of the actions it initiated forward and refuse to co-operate with the federal Government in the action it had initiated in an effort to resolve the matter, but, in addition, on 30 September 1988, the Band declared that it refused to recognise the jurisdiction of the Canadian courts, thus undermining any attempt to obtain a resolution through the judicial process.

26.3 The State party provides a detailed outline of the chronology of the judicial proceedings in the Band's case. Three court actions in respect of the Band remain outstanding. The first of these was initiated by the Band in the Federal Court of Canada against the federal Government. This action has not moved forward since 1981 although, according to the State party, it was the Band's responsibility to take the next step in this suit. The second action was initiated by the Band in the Alberta Court of Queen's Bench against the province and some private corporations. After the Band was denied an interim injunction in 1985, it did not take substantive steps in the proceedings and abandoned its appeal against the Court's refusal to add the federal Government as a party. The third action was initiated by the federal Government in May 1988 in an attempt to overcome jurisdictional wrangles, to bring both the provincial and federal Governments and the Band before the same courts, and to finally solve matters. The Band chose not to participate in this action, despite the efforts of the Chief Justice of the Court of Queen's Bench of Alberta to expedite matters - this action remains in abeyance. For the State party, each of the above court actions provides a vehicle by which the Band could resolve its claims.

26.4 In addition to judicial proceedings, the State party maintains, the federal Government has sought to settle matters with the Lubicon Lake Band by way of negotiation. Thus, the offers put forward during these negotiations (outlined in para. 24.1 above) met virtually all of the author's claim in full or to a large

extent. The State party adds that a new round of negotiations has started and that "extensive efforts are being made in this regard". Discussions between the Band and the Alberta provincial government resumed on 23 August 1989, and further discussions with the federal Government were scheduled to start on 7 September 1989. The State party reiterates that its offer to the Band remains valid.

26.5 In respect of the determination of Band membership, the State party rejects as "completely incorrect" the Band's claim that "Canada has attempted to subject Lubicon Lake Band members to a retroactive application of the Canadian Indian Act as it stood prior to its amendment following the decision in Sandra Lovelace v. Canada". On the contrary, the State party submits, the Band submitted, in 1985, a membership code pursuant to the Indian Act (as amended following the Committee's decision in the Lovelace case), which was accepted by Canada and gave the Band total control over its membership. As a result, the federal Government's offer is based on the approximately 500 individuals considered by the Band leadership to be members of the Lubicon Lake community.

26.6 In respect of the alleged violations of articles 17 and 23, paragraph 1, 18 and 27, the State party rejects as inaccurate and misleading the Band's claim that "Canada is participating in a project by which virtually all traditional Lubicon lands have been leased for timber development". It points out that the Daishowa pulp mill, which is under construction north of Peace River, Alberta, is neither within the Band's claimed "traditional" lands nor within the area agreed to by the Band and the provincial government for a reserve. It is stated that the new pulp mill is located approximately 80 kilometres away from the land set aside for the Band. The State party continues:

> "As regards the area available to the pulp mill to supply its operations, the forest management agreement between the province of Alberta and the pulp mill specifically excludes the land proposed for the Lubicon Lake Band. Moreover, in the interests of sound forest management practices, the area cut annually outside of the proposed Lubicon reserve will involve less than 1 per cent of the area specified in the forest management agreement."

26.7 Finally, the State party draws attention to recent developments in the Cadotte Lake/Buffalo Lake community, within which the majority of the Lubicon Lake Band members reside. In December 1988, the federal Government was informed of the existence of a new group within the community, which was seeking to solve the rights of its members under Treaty 8 independent of the Lubicon Lake Band. This group, composed of about 350 individuals, requested from the Government recognition of its status as the Woodland Cree Band. According to the State party, the group consists of Lubicon Lake Band members who formally expressed their intention of joining the new Band, former Lubicon Lake Band members whose names were removed by the Lubicon Lake Band in January 1989 from the list of Band members, and other native individuals living within the community. The federal Government agreed to the creation of the Woodland Cree Band. The State party adds that it recognises the same legal obligations in respect of the Woodland Cree Band as it does in respect of the Lubicon Lake Band members.

26.8 In a further submission dated 28 September 1989, the State party refers to the tripartite negotiations between the federal Government, the provincial government and the Lubicon Lake Band, scheduled to take place at the end of August/early September 1989; it claims that although the Band had undertaken to

provide a comprehensive counterproposal to the federal Government's outstanding offer and to provide a list of the persons it represented in the negotiations, it was informed, on 7 September 1989, that a counterproposal had not been prepared by the Band and that no list of the individuals purported to be represented by the Band would be forthcoming. The Band allegedly stated that it refused to negotiate in the presence of Mr. Ken Colby, a member of Canada's negotiating team, because of his activities as a government media spokesman. Thus, owing to the Band's refusal to continue a meaningful discussion of its claim, negotiations were not resumed.

27.1 In his comments of 2 October 1989 on the State party's reply to the Committee's interim decision, the author contends that the State party's claim of prejudice in conducting the case before the Human Rights Committee is unfounded, as all the factual and legal bases of the Band's claims have been thoroughly argued. As to whether domestic remedies continue to be available to the Band, it is pointed out that no domestic remedy exists which could restore the Lubicon Lake Band's traditional economy or way of life, which "has been destroyed as a direct result of both the negligence of the Canadian Government and its deliberate actions". The author submits that from the legal point of view, the situation of the Band is consistent with the Committee's decision in the case of Muñoz v. Peru, a/ in which it was held that the concept of a fair hearing within the meaning of article 14, paragraph 1, of the Covenant necessarily entails that justice be rendered without undue delay. In that case, the Committee had considered a delay of seven years in the domestic proceedings to be unreasonably prolonged. In the case of the Band, the author states, domestic proceedings were initiated in 1975. Furthermore, although the Band petitioned the federal Government for a reserve for the first time in 1933, the matter remains unsettled. According to the Band, it was forced to bring 14 years of litigation to an end, primarily because of two decisions that effectively deny the Band an opportunity to maintain aboriginal rights claim against the federal Government. Thus, in 1986, the Supreme Court of Canada denied federal court jurisdiction in aboriginal rights cases arising within provincial boundaries in the Joe case. In the light of that decision, the Band requested the Alberta courts, in 1987, to include the federal Government as a necessary party in the Band's aboriginal rights claim; this request was opposed by the federal Government. In May 1988, the federal Government instituted proceedings, which, in the author's opinion, were intended to persuade the Alberta Court of Queen's Bench that the Band merely had treaty-based rights to 40 square miles of land. It is submitted that a favourable decision would, for the Government, virtually clear the title to the Daishowa timber leases, encompassing nearly all of the traditional Lubicon territory, while not rendering "moot issues related to [the] destruction of the Band's economic base". The author submits that the Chief Justice of the Court of Queen's Bench recognised that aboriginal rights had to be determined before any decision on the issue of treaty rights, and that if the State party had wanted the courts to truly settle the Lubicon land issue, rather than using them so as to forestall any efforts to solve the matter, it would have referred the issue directly to the Supreme Court of Canada.

27.2 As to the State party's reference to a negotiated settlement, the author submits that the offer is neither equitable nor does it address the needs of the Lubicon community, since it would leave virtually all items of any significance to future discussions, decisions by Canada, or applications by the Band; and that the Band would be required to abandon all rights to present any future domestic and international claims against the State party, including its communication to the Human Rights Committee. The author further submits that the agreement of October 1988 between the Band and the Province of Alberta does not in the least

solve the Band's aboriginal land claims, and that the State party's characterisation of the agreement has been "deceptive". In this context, the author argues that, contrary to its earlier representations, the State party has not offered to implement the October 1988 agreement and that if it were willing to honour its provisions, several issues including the question of just compensation would have to be settled.

27.3 In substantiation of his earlier submissions concerning alleged violations of articles 14 and 26, the author claims that the State party has not only failed to provide the Band equal protection vis-à-vis non-Indian groups, but that it also attempted to deny it equal protection vis-à-vis other Indian bands. Thus, with respect to the issue of Band membership, the author alleges, the effect of the formula proposed by Canada in 1986 for determining Band membership would deny aboriginal rights to more than half of the Lubicon people, thereby treating the Band members in an unequal and discriminatory way in comparison with the treatment of all other native people. It is submitted that as late as December 1988, the State party sought to apply to the Band criteria that were those of the legislation prior to the Human Rights Committee's views in the case of Lovelace v. Canada, b/ which legislation was found to be contrary to article 27 of the Covenant.

27.4 With respect to the alleged violations of articles 17, 18, 23 and 27, the author reiterates that the State party has sought to distort the presentation of recent events and engaged in a misleading discussion of the Daishowa timber project, so as to divert the Committee's attention from "Canada's knowing and wilful destruction of Lubicon society". He recalls that only seven months after the Committee's request for interim protection under rule 86, virtually all of the traditional Lubicon land was leased for commercial purposes in connection with the Daishowa timber project. The relevant forest management agreement to supply the new pulp mill with trees, allegedly completely covers the traditional Lubicon hunting and trapping grounds, which cover 10,000 square kilometres, with the exception of 65 square kilometres set aside but never formally established as a reserve. It is submitted by the author that Canada has acted in violation of the Committee's request for interim protection when it sold the timber resources of the 10,000 square kilometres, allegedly traditionally used by the Band and never ceded by it, to a Japanese company. Moreover, Canada is alleged to portray wrongly the impact of the Daishowa project as minimal; the author points out that current production plans would call for the cutting of 4 million trees annually, and that plans to double the envisaged annual production of 340,000 metric tons of pulp in three years have recently been announced. This economic activity, if proceeding unabated, would, in the author's opinion, continue to destroy the traditional lifeground of the Lubicon community. He submits that the fact that the 95 square miles set aside under the October 1988 agreement are relatively intact would be irrelevant, since the game on which the Band members have traditionally depended for their livelihood has already been driven out of the entire 10,000 square kilometre area.

27.5 Finally, the author submits that the State party's creation of the "Woodland Cree Band", through which it is allegedly attempting to "fabricate" a competing claim to traditional Lubicon lands, places the State party in further violations of articles 1, 26 and 27 of the Covenant. In this context, the author claims that the Woodland Cree Band is:

> "a group of disparate individuals drawn together by Canada from a dozen different communities scattered across Alberta and British Columbia, who have

no history as an organised aboriginal society and no relation as a group to the traditional territory of the Lubicon Lake Band [and that it] is Canada's most recent effort to undermine the traditional Lubicon society and to subvert Lubicon land rights."

The author adds that the federal Government has supported the Woodland Cree Band both financially and legally, recognizing it "with unprecedented dispatch", thereby bypassing more than 70 other groups, including six different homogenous Cree communities in northern Alberta that had been awaiting recognition as bands for over 50 years. Some of the alleged members of the "Woodland Cree" band are said to come from these very communities. The author refers to section 17 of the Indian Act, which gives the Canadian Indian Affairs Minister the power to constitute bands and to determine that "such portion of the reserve land and funds of the existing Band as the Minister determines" may be earmarked for the benefit of the new band. It is submitted by the author that the powers conferred under section 17 of the Indian Act are "extraordinary and unconstitutional" and that they have been invoked "in order to create [the] 'Woodland Cree Band' and to dispossess the Lubicon Lake Band of its traditional territory and culture". Furthermore, while the State party claims that the Woodland Cree Band represents some 350 individuals, the author alleges that the new Band has steadfastly refused to release the names of its members, so that its claims might be verified. He states that the federal Government has recognized that the Woodland Cree Band members comprise only 110 individuals.

27.6 The author concludes that the State party has been unable to refute his allegations of violations of articles 2, 6, paragraph 1, 7, 14, paragraph 1, 17, 18, paragraph 1, 23, paragraph 1, 26 and 27, as set out in his submissions of 12 January 1988 and 30 May 1989, and requests the Committee to find against the State party in respect of these articles. In respect of an alleged violation of article 1, he points out that while he has, as the representative of the Band, signed all the submissions to the Committee, he merely acts in his capacity as a duly elected representative of the Band and not on his own behalf. In this context, he notes that while article 2 of the Optional Protocol provides for the submission of claims to the Committee by individuals, article 1 of the Covenant guarantees "all peoples ... the right of self-determination". He adds that "if the Committee determines that an individual submitting a claim on behalf of a group, in compliance with the provisions of article 2 of the Optional Protocol, may not state a case on behalf of that group under article 1 of the Covenant, the Committee effectively has determined that the rights enumerated in article 1 of the Covenant are not enforceable". The author further adds that it "clearly could not be the intent of the Committee to reach such a result" and that "therefore, the Band respectfully submits that as a people, represented by their duly elected leader, Chief Bernard Ominayak, the Lubicon Lake Band has been the victim of violations by the federal Government of Canada of the Band's rights as enumerated in article 1 of the Covenant on Civil and Political Rights".

28.1 In a final submission dated 8 November 1989, the State party recalls that in any assessment of the judicial proceedings in the case of the Lubicon Lake Band, the State party's constitutional division of powers between the federal and provincial governments and the respective jurisdiction of the courts has to be borne in mind. Where provincially owned lands are claimed, as in the case of the Lubicons, the Supreme Court of Canada has held that claims must be filed in the provincial courts against provincial governments. The Supreme Court's ruling clearly defines, the State party submits, the proper judicial forum for the Band's

claim to aboriginal land rights. The State party emphasizes that the failure of the Band's representatives to initiate proceedings in the competent courts does not imply that Canadian courts are either unable or unwilling to guarantee a fair hearing in the case.

28.2 Regarding the distinction between aboriginal rights and treaty rights, the State party explains that under Canadian constitutional law, aboriginal rights may be superseded by treaty rights. Whenever this occurs, Indian bands may claim benefits under the superseding treaties. The State party acknowledges that the Lubicon Lake Band has a valid claim to benefits under Treaty 8, which was entered into with the Cree and other Indians in the Province of Alberta in 1899. Rights under Treaty 8 formed the basis of the offers made by the Canadian and Albertan governments to the Band. The land offered by the provincial government under the October 1988 agreement is related to these Treaty provisions. On the other hand, the 10,000 square kilometre area referred to by the Band in its submissions relate to its aboriginal claims, which have not been recognized by the federal Government. The Band's complaint about oil exploration and exploitation and impending timber development, refers to activities on this wider territory of 10,000 square kilometres - not on lands that were identified in proposed settlements between the Band and the federal and provincial government.

28.3 The State party refutes the Band's claim that its trapping and hunting lifestyle has been irretrievably destroyed and points out that in areas covered by timber leases the forest, generally, remains intact and sustains an animal population sufficient to satisfy those members of the Lubicon Lake Band who wish to engage in traditional activities. It adds that disturbances of the forest ecosystems usually result in an increase of the population of larger mammals, as they increase food availability in open areas.

28.4 Lastly, the State party reaffirms the voluntary nature of the establishment of the Woodland Cree Band. It points out that a minority of those wishing to join the Woodland Cree Band were at one point in time full members of the Lubicon Lake Band. Some of them, the State party points out, have since left the Band voluntarily, while about 30 of the members were expelled recently by decision of the Lubicon Lake Band. It is submitted that members of the Woodland Cree Band petitioned the federal Government, much in the same way as members of the Lubicon Lake Band did prior to the Band's recognition in the 1930s. The new Band was recognized because, in the State party's view, some of its members have land entitlements pursuant to Treaty 8 which they wish to assert. The State party adds that it recognized the Woodland Cree Band, at the express request of those who sought recognition, so that their desire to form a community could be realized, and that the Woodland Cree Band has not sought any land portions also claimed by the Lubicons.

Summary of the submissions

29.1 At the outset, the author's claim, although set against a complex background, concerned basically the alleged denial of the right of self-determination and the right of the members of the Lubicon Lake Band to dispose freely of their natural wealth and resources. It was claimed that, although the Government of Canada, through the Indian Act of 1970 and Treaty 8 of 1899, had recognized the right of the Lubicon Lake Band to continue its traditional way of life, its land (approximately 10,000 square kilometres) had been expropriated for commercial interest (oil and gas exploration) and destroyed, thus depriving the Lubicon Lake

Band of its means of subsistence and enjoyment of the right of self-determination. It was claimed that the rapid destruction of the Band's economic base and aboriginal way of life had already caused irreparable injury. It was further claimed that the Government of Canada had deliberately used the domestic political and legal processes to thwart and delay all the Band's efforts to seek redress, so that the industrial development in the area, accompanied by the destruction of the environmental and economic base of the Band, would make it impossible for the Band to survive as a people. The author has stated that the Lubicon Lake Band is not seeking from the Committee a territorial rights decision, but only that the Committee assist it in attempting to convince the Government of Canada: (a) that the Band's existence is seriously threatened; and (b) that Canada is responsible for the current state of affairs.

29.2 From the outset, the State party has denied the allegations that the existence of the Lubicon Lake Band has been threatened and has maintained that continued resource development would not cause irreparable injury to the traditional way of life of the Band. It submitted that the Band's claim to certain lands in northern Alberta was part of a complex situation that involved a number of competing claims from several other native communications in the area, that effective redress in respect of the Band's claims was still available, both through the courts and through negotiations, that the Government had made an ex gratia payment to the Band of $C 1.5 million to cover legal costs and that, at any rate, article 1 of the Covenant, concerning the rights of people, could not be invoked under the Optional Protocol, which provides for the consideration of alleged violations of individual rights, but not collective rights conferred upon peoples.

29.3 This was the state of affairs when the Committee decided in July 1987 that the communication was admissible "in so far as it may raise issues under article 27 or other articles of the Covenant". In view of the seriousness of the author's allegations that the Lubicon Lake Band was at the verge of extinction, the Committee requested the State party, under rule 86 of the rules of procedure "to take interim measures of protection to avoid irreparable damage to [the author of the communication] and other members of the Lubicon Lake Band".

29.4 Insisting that no irreparable damage to the traditional way of life of the Lubicon Lake Band had occurred and that there was no imminent threat of such harm, and further that both a trial on the merits of the Band's claims and the negotiation process constitute effective and viable alternatives to the interim relief which the Band had unsuccessfully sought in the courts, the State party, in October 1987, requested the Committee, under rule 93, paragraph 4, of the rules of procedure, to review its decision on admissibility, in so far as it concerns the requirement of exhaustion of domestic remedies. The State party stressed in this connection that delays in the judicial proceedings initiated by the Band were largely attributable to the Band's own inaction. The State party further explained its long-standing policy to seek the resolutions of valid, outstanding land claims by Indian bands through negotiations.

29.5 Since October 1987, the parties have made a number of submissions, refuting each other's statements as factually misleading or wrong. The author has accused the State party of creating a situation that has directly or indirectly led to the death of many Band members and is threatening the lives of all other members of the Lubicon community, that miscarriages and stillbirths have skyrocketed and abnormal births have risen from zero to near 100 per cent, all in violation of article 6 of the Covenant; that the devastation wrought on the community constitutes cruel,

inhuman and degrading treatment in violation of article 7; that the bias of the Canadian courts has frustrated the Band's efforts to protect its land, community and livelihood, and that several of the judges have had clear economic and personal ties to the parties opposing the Band in the court actions, all in violation of articles 14, paragraph 1, and 26; that the State party has permitted the destruction of the families and homes of the Band members in violation of articles 17 and 23, paragraph 1; that the Band members have been "robbed of the physical realm to which their religion attaches" in violation of article 18, paragraph 1; and that all of the above also constitutes violations of article 2, paragraphs 1 to 3, of the Covenant.

29.6 The State party has categorically rejected the above allegations as unfounded and unsubstantiated and as constituting an abuse of the right of submission. It submits that serious and genuine efforts continued in early 1988 to engage representatives of the Lubicon Lake Band in negotiations in respect of the Band's claims. These efforts, which included an interim offer to set aside 25.4 square miles as reserve land for the Band, without prejudice to negotiations or any court actions, failed. According to the author, all but the 25.4 square miles of the Band's traditional lands had been leased out, in defiance of the Committee's request for interim measures of protection, in conjunction with a pulp mill to be constructed by the Daishowa Canada Company Ltd. near Peace River, Alberta, and that the Daishowa project frustrated any hopes of the continuation of some traditional activity by Band members.

29.7 Accepting its obligation to provide the Lubicon Lake Band with reserve land under Treaty 8, and after further unsuccessful discussions, the Federal Government, in May 1988, initiated legal proceedings against the Province of Alberta and the Lubicon Lake Band, in an effort to provide a common jurisdiction and thus to enable it to meet its lawful obligations to the Band under Treaty 8. In the author's opinion, however, this initiative was designated for the sole purpose of delaying indefinitely the resolution of the Lubicon land issues and, on 6 October 1988 (30 September, according to the State party), the Lubicon Lake Band asserted jurisdiction over its territory and declared that it had ceased to recognise the jurisdiction of the Canadian courts. The author further accused the State party of "practicing deceit in the media and dismissing advisors who recommend any resolution favourable to the Lubicon people".

29.8 Following an agreement between the provincial government of Alberta and the Lubicon Lake Band in November 1988 to set aside 95 square miles of land for a reserve, negotiations started between the federal Government and the Band on the modalities of the land transfer and related issues. According to the State party, consensus had been reached on the majority of issues, including Band membership, size of the reserve, community construction and delivery of programmes and services, but not on cash compensation, when the Band withdrew from the negotiations on 24 January 1989. The formal offer presented at that time by the federal Government amounted to approximately $C 45 million in benefits and programmes, in addition to the 95 square mile reserve.

29.9 The author, on the other hand, states that the above information from the State party is not only misleading but virtually entirely untrue and that there had been no serious attempt by the Government to reach a settlement. He describes the Government's offer as an exercise in public relations, "which committed the Federal Government to virtually nothing", and states that no agreement or consensus had been reached on any issue. The author further accused the State party of sending

agents into communities surrounding the traditional Lubicon territory to induce other natives to make competing claims for traditional Lubicon land.

29.10 The State party rejects the allegation that it negotiated in bad faith or engaged in improper behaviour to the detriment of the interests of the Lubicon Lake Band. It concedes that the Lubicon Lake Band has suffered a historical inequity, but maintains that its formal offer would, if accepted, enable the Band to maintain its culture, control its way of life and achieve economic self-sufficiency and, thus, constitute an effective remedy. On the basis of a total of 500 Band members, the package worth $C 45 million would amount to almost $C 500,000 for each family of five. It states that a number of the Band's demands, including an indoor ice arena or a swimming pool, had been refused. The major remaining point of contention, the State party submits, is a request for $C 167 million in compensation for economic and other losses allegedly suffered. That claim, it submits, could be pursued in the courts, irrespective of the acceptance of the formal offer. It reiterates that its offer to the Band stands.

29.11 Further submissions from both parties have, inter alia, dealt with the impact of the Daishowa pulp mill on the traditional way of life of the Lubicon Lake Band. While the author states that the impact would be devastating, the State party maintains that it would have no serious adverse consequences, pointing out that the pulp mill, located about 80 kilometres away from the land set aside for the reserve, is not within the Band's claimed traditional territory and that the area to be cut annually, outside the proposed reserve, involves less than 1 per cent of the area specified in the forest management agreement.

30. The Human Rights Committee has considered the present communication in the light of the information made available by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol. In so doing, the Committee observes that the persistent disagreement between the parties as to what constitutes the factual setting for the dispute at issue has made the consideration of the claims on the merits most difficult.

Request for a review of the decision on admissibility

31.1 The Committee has seriously considered the State party's request that it review its decision declaring the communication admissible under the Optional Protocol "in so far as it may raise issues under article 27 or other articles of the Covenant". In the light of the information now before it, the Committee notes that the State party has argued convincingly that, by actively pursuing matters before the appropriate courts, delays, which appeared to be unreasonably prolonged, could have been reduced by the Lubicon Lake Band. At issue, however, is the question of whether the road of litigation would have represented an effective method of saving or restoring the traditional or cultural livelihood of the Lubicon Lake Band, which, at the material time, was allegedly at the brink of collapse. The Committee is not persuaded that that would have constituted an effective remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol. In the circumstances, the Committee upholds its earlier decision on admissibility.

31.2 At this stage, the Committee must also state that it does not agree with the State party's contention that it was remiss in not spelling out, at the time of declaring the communication admissible, which of the author's allegations deserved consideration on the merits. Although somewhat confusing at times, the author's

claims have been set out sufficiently clearly as to permit both the State party and the Committee, in turn, to address the issues on the merits.

Articles of the Covenant alleged to have been violated

32.1 The question has arisen of whether any claim under article 1 of the Covenant remains, the Committee's decision on admissibility notwithstanding. While all peoples have the right of self-determination and the right freely to determine their political status, pursue their economic, social and cultural development and dispose of their natural wealth and resources, as stipulated in article 1 of the Covenant, the question whether the Lubicon Lake Band constitutes a "people" is not an issue for the Committee to address under the Optional Protocol to the Covenant. The Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated. These rights are set out in part III of the Covenant, articles 6 to 27, inclusive. There is, however, no objection to a group of individuals, who claim to be similarly affected, collectively to submit a communication about alleged breaches of their rights.

32.2 Although initially couched in terms of alleged breaches of the provisions of article 1 of the Covenant, there is no doubt that many of the claims presented raise issues under article 27. The Committee recognizes that the rights protected by article 27, include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong. Sweeping allegations concerning extremely serious breaches of other articles of the Covenant (6, 7, 14, para. 1, and 26), made after the communication was declared admissible, have not been substantiated to the extent that they would deserve serious consideration. The allegations concerning breaches of articles 17 and 23, paragraph 1, are similarly of a sweeping nature and will not be taken into account except in so far as they may be considered subsumed under the allegations which, generally, raise issues under article 27.

32.3 The most recent allegations that the State party has conspired to create an artificial band, the Woodland Cree Band, said to have competing claims to traditional Lubicon land, are dismissed as an abuse of the right of submission within the meaning of article 3 of the Optional Protocol.

Violations and the remedy offered

33. Historical inequities, to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue. The State party proposes to rectify the situation by a remedy that the Committee deems appropriate within the meaning of article 2 of the Covenant.

Notes

a/ Communication No. 203/1986, final views adopted on 4 November 1988, para. 11.3.

b/ Communication No. 24/1977, final views adopted on 30 July 1981.

APPENDIX I

Individual opinion submitted by Mr. Nisuke Ando pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the Committee's views on communication No. 167/1984, B. Ominayak and the Lubicon Lake Band v. Canada

I do not oppose the adoption of the Human Rights Committee's views, as they may serve as a warning against the exploitation of natural resources which might cause irreparable damage to the environment of the earth that must be preserved for future generations. However, I am not certain if the situation at issue in the present communication should be viewed as constituting a violation of the provisions of article 27 of the Covenant.

Article 27 stipulates: "In those States in which ethnic, religious or linguisitic minorities exists, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language". Obviously, persons belonging to the Lubicon Lake Band are not denied the right to profess and practice their own religion or to use their own language. At issue in the present communication is therefore, whether the recent expropriation by the Government of the Province of Alberta of the Band's land for commercial interest (e.g. leases for oil and gas exploration) constitutes a violation of those persons' right "to enjoy their own culture".

It is not impossible that a certain culture is closely linked to a particular way of life and that industrial exploration of natural resources may affect the Band's traditional way of life, including hunting and fishing. In my opinion, however, the right to enjoy one's own culture should not be understood to imply that the Band's traditional way of life must be preserved intact at all costs. Past history of mankind bears out that technical development has brought about various changes to existing ways of life and thus affected a culture sustained thereon. Indeed, outright refusal by a group in a given society to change its traditional way of life may hamper the economic development of the society as a whole. For this reason I would like to express my reservation to the categorical statement that recent developments have threatened the life of the Lubicon Lake Band and constitute a violation of article 27.

Nisuke ANDO

APPENDIX II

Individual opinion submitted by Mr. Bertil Wennergren pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the Committee's views on communication No. 167/1984, B. Ominayak and the Lubicon Lake Band v. Canada

The communication in its present form essentially concerns the authors' rights to freely dispose of their natural wealth and resources, and to retain their own means of subsistence, such as hunting and fishing. In its decision of 22 July 1987, the Human Rights Committee decided that the communication was admissible in so far as it could have raised issues under article 27 or other articles of the Covenant. With respect to provisions other than article 27 the authors' allegations have remained, however, of such a sweeping nature that the Committee has not been able to take them into account except in so far as they may be subsumed under the claims which, generally, raise issues under article 27. That is the basis of my individual opinion.

Since the Committee adopted its decision on admissibility, discussions seeking a resolution of the matter have taken place between the Federal Government, the Province of Alberta and the authors. As no progress was made towards a settlement, the Federal Government initiated legal proceedings against the Province of Alberta and the Lubicon Lake Band on 17 May 1988, in order to enable Canada to meet its legal obligations vis à-vis the authors under Treaty 8. The Statement of Claim, initiating the legal action, seeks from the Court of the Queen's Bench of Alberta (a) a declaration that the Lubicon Lake Band is entitled to a reserve and (b) a determination of the size of that reserve.

On 9 June 1988, the Lubicon Lake Band filed a Statement of Defence and Counterclaim. In this connection, the State party has submitted that the issue forming the basis of the domestic dispute as well as the basis of the communication before the Human Rights Committee concerns the extent of the territory to be set aside as a reserve, and related issues. It is not altogether clear that all issues which may be raised under article 27 of the Covenant are issues to be considered by the Court of Queen's Bench of Alberta in the case still pending before it. At the same time, it does appear that issues under article 27 of the Covenant are inextricably linked with the extent of the territory to be set aside as a reserve, and questions related to those issues.

The rationale behind the general rule of international law that domestic remedies should be exhausted before a claim is submitted to an instance of international investigation or settlement is primarily to give a respondent State an opportunity to redress, by its own means within the framework of its domestic legal system, the wrongs alleged to have been suffered by the individual. In my opinion, this rationale implies that, in a case such as the present one, an international instance shall not examine a matter pending before a court of the respondent State. To my mind, it is not compatible with international law that an international instance consider issues which, concurrently, are pending before a national court. An instance of international investigation or settlement must, in my opinion, refrain from considering any issue pending before a national court

until such time as the matter has been adjudicated upon by the national courts. As that is not the case here, I find the communication inadmissible at this point in time.

Bertil WENNERGREN

B. Communication No. 181/1984, A. and H. Sanjuán Arévalo v. Colombia (views adopted on 3 November 1989, at the thirty-seventh session)

Submitted by:	Elcida Arévalo Péres on behalf of her disappeared sons, Alfredo Rafael and Samuel Humberto Sanjuán Arévalo
Alleged victims:	Alfredo Rafael and Samuel Humberto Sanjuán Arévalo
State party concerned:	Colombia
Date of communication:	17 September 1984 (initial letter)
Date of decision on admissibility:	7 April 1988

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

Meeting on 3 November 1989,

Having concluded its consideration of communication No. 181/1984 submitted to the Committee by Elcida Arévalo Péres under the Optional Protocol to the International Covenant on Civil and Political Rights, on behalf of her disappeared sons Alfredo Rafael and Samuel Humberto Sanjuán Arévalo.

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

Adopts the following:

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

1. The author of the communication (initial letter dated 17 September 1984 and subsequent correspondence) is Elcida Arévalo Péres, a Colombian national residing in Colombia, writing on behalf of her sons, Alfredo Rafael and Samuel Humberto Sanjuán Arévalo, who disappeared in Colombia on 8 March 1982.

2.1 The author states that Alfredo Rafael (born on 7 October 1947), a student of engineering at the District University of Bogotá, left the family home in Bogotá, on 8 March 1982 at 8 a.m., with the intention to go to the university and that Samuel Humberto (born on 25 March 1959), a student of anthropology at the National University of Colombia, left their home on the same day at 3 p.m. for the purpose of attending to a job offer. They did not return and their whereabouts has been unknown ever since. The author further states that on the same day she was told by neighbours that their home had been watched by armed individuals carrying walkie-talkies, that these men had inquired about the activities of the Sanjuán

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* The text of an individual opinion submitted by Mr. Nisuke Ando is reproduced in the appendix.

family and that they had identified themselves as agents of the "F2" (a section of the Colombian police forces).

2.2 On 10 March 1982 the author reported the disappearance of her sons to the local police and to the Section of Disappeared Persons of the "F2". She also regularly visited the morgues. Between June and September 1982 the case of her sons was reported to the assistant prosecutor of the Police, to the Armed Forces, to the Attorney General's office and to the Administrative Department of Security "DAS". Investigations were carried out by most of these authorities for some weeks, but without results. The author also mentions several letters written to the President of the Republic and states that, at the behest of his Office, a judge of a criminal court was appointed in February 1983 to initiate the appropriate investigation. At the time of writing, she stated that these proceedings were still pending, due to frequent changes of judges.

2.3 The author claims that she could never obtain from the authorities any official information about her sons' whereabouts. However, in a letter dated 17 August 1982 from the alleged victims' father addressed to State Minister Rodrigo Escobar Navia (with copies sent to the President of Colombia, Minister of Justice and Attorney General), submitted to the Human Rights Committee as part of communication No. 181/1984, it is stated that the parents of Alfredo and Samuel Sanjuán Arévalo received indications in August 1982 from the Chief of the Administrative Department of Security, "DAS", that their sons had been arrested by agents of the "F2" and that on 13 August 1982 in the course of an interview with the National Director of the "F2", it was intimated that they would soon reappear ("confíen en Dios que prontico aparecerán y estén tranquilos").

2.4 The author claims that articles 2, 6, 7, 9 and 10 of the International Covenant on Civil and Political Rights have been violated.

2.5 She indicates that the case of her sons is not being examined under another procedure of international investigation or settlement.

3. Having concluded that the author of the communication was justified in acting on behalf of the alleged victims, the Working Group of the Human Rights Committee decided on 17 October 1984 to transmit the communication under rule 91 of the rules of procedure to the State party concerned, requesting information and observations relevant to the question of the admissibility of the communication. The Working Group also requested the State party to forward copies of any official inquiries made in connection with the reported disappearance of Alfredo Rafael and Samuel Humberto Sanjuán Arévalo.

4. The deadline for the State party's submission under rule 91 of the Committee's rules of procedure expired on 20 January 1985. No rule 91 submission was received from the State party.

5.1 With regard to article 5, paragraph 2, of the Optional Protocol, the Committee noted that the author's statement, that the case of her sons was not being examined under another procedure of international investigation or settlement, remained uncontested.

5.2 With regard to article 5, paragraph 2 (b), of the Optional Protocol, the Committee was unable to conclude, on the basis of the information before it, that

there were available remedies in the circumstances of the present case which could or should have been pursued.

6. On 11 July 1986 the Human Rights Committee therefore decided that the communication was admissible. The State party was further requested to forward copies of any official inquiries made in connection with the reported disappearance of Alfredo Rafael and Samuel Humberto Sanjuán Arévalo.

7.1 In its submissions under article 4, paragraph 2, of the Optional Protocol, dated 11 August 1986, 21 January and 8 July 1987, 20 October 1988 and 27 January 1989, the State party forwarded the Committee copies of the relevant police reports on the on-going investigations into the disappearance of the Sanjuán brothers.

7.2 A report from the Office of the Attorney-General of Colombia (Procuraduría General), dated 19 June 1986, indicates that pursuant to an order of the Attorney-General of Colombia, dated 21 May 1986, the Colombian lawyer Martha Julieta Tovar Cardona was entrusted with a general review of the records of the Colombian Police Department aimed at determining whether the cases of 10 disappeared persons and 2 deceased persons had been properly investigated.

7.3 The report reflects that on 19 June 1986 Ms. Tovar Cardona studied the records of the investigations started by the Colombian Police on 8 March 1983 concerning the suspected crime of kidnapping of 12 persons, including the Sanjuán brothers. In her report Ms. Tovar Cardona notes that there were indictments against 18 police officials. She also notes the appointment of a judge in charge of the investigations into the suspected crime of kidnapping and that in the course of the police investigations the records of prior discoveries of corpses, on 7 and 27 June 1982, 11 and 19 July 1982, 28 September 1982, 21 November 1982, and 15 February 1983 had been examined. None of the bodies had been identified.

7.4 The next 16 pages of the 18-page report consist mainly of listings of the names of some 193 persons interrogated (including the names of police officials suspected of involvement in the disappearances), with an indication of the date and place of deposition. There is no indication, however, as to the contents of any of the depositions or as to their relevance to the disappearance of the Sanjuán brothers. Except for declarations made by Elcida María Arévalo Péres and Yolanda Sanjuán Arévalo on 11 March 1983 it cannot be seen which, if any, of the other declarations and depositions listed relate to their cases. There is reference, however, to inquiries which had been made at prisons and police stations to ascertain that the Sanjuán brothers were not being detained there. Other references concern the appointment of court officials to evaluate the evidence and the assignment of persons for on-site inspections. There is no indication of the outcome.

7.5 Ms. Tovar Cardona observes that the Colombian Police has carried out very considerable investigations into the alleged disappearances and killings. The investigations are said to have continued until the end of May 1986. It cannot be seen whether the indictments against the various police officers have led to any further actions against them.

7.6 Ms. Tovar Cardona concludes her report by making the following observations:

> "The original records, numbered 1 to 7 inclusive were examined and, in conformity with the instruction given verbally by the attorney assigned to the

police, particular importance was attached to determining by means of dates of reception and transmittal, the various activities undertaken in the preliminary proceedings both in ordinary jurisdiction and in the military criminal justice system as well as the various formalities carried out by the departments responsible for acting on the files. In addition to this, because of their quantity and since they were not absolutely germane to the fulfilment of the mandate of legal vigilance of the representative of the Office of the Attorney-General assigned to the police, the items of judicial evidence were not considered as a whole. Nevertheless, a scrutiny of the material evidence available with which the preliminary proceedings were conducted, complicated as they were on many occasions by the passage of time, distances, the lack of resources, the lack of co-operation on the part of relatives, friends, neighbours or in general those who had knowledge of the facts in coming forward with their testimony or in participating in confrontation formalities, identification parades and the adducing of items of judicial evidence as a whole. An examination of the proceedings does not reveal any irregularity or delay constituting a breach of discipline which would justify bringing charges, pursuant to the opening of a formal disciplinary investigation, and accordingly since the task set out in the order of 21 May 1986 issued by the office of the attorney assigned to the police has been completed, the files are returned herewith."

8.1 In response to the Committee's request for more precise information about the progress of investigations concerning the disappearance of the Sanjuán brothers, the State party indicated by note of 22 January 1987 that the case of the Sanjuán brothers (file No. 45317) was under review and that a statement of charges against members of the police force could follow. By letter of 27 January 1989 the Colombian Ministry of Foreign Affairs informed the Committee that a criminal investigation is being conducted by Court 34 of the Criminal Bench of Bogotá:

"In these criminal proceedings, the Ninth Criminal Investigation Judge of Bogotá, who initially heard the case, on 2 May 1983, admitted an application for related civil proceedings brought by the relatives of the victims. Such proceedings are established in Colombian criminal legislation for compensation, in the event that the acts reported are confirmed for the damages incurred, both materially and morally. Further, they offer the injured parties or their representatives an opportunity of requesting evidence in order to ascertain the truth about the offence, its perpetrators and accessories, their criminal liability and the nature and extent of the damages incurred as well as many other activities granted to them by the law, such as the filing of remedies. In the case of the Sanjuán Arévalo brothers, the records show that their representatives have not made effective use of that right and have confined themselves to requesting copies of the proceedings, without really moving matters forward.

Because of the alleged involvement of members of the national police force, the military criminal proceedings were expedited by the Inspector-General of Police, the judge of the court of first instance, who, on 12 March 1987 qualified the pre-trial proceedings by dismissing the case against the officers, non-commissioned officers and members of the police alleged to be implicated. The decision was taken on the ground that the requirements of article 539 of the Code of Military Criminal Justice are not satisfied, i.e. full proof of corpus delicti or the existence of a convincing statement offering solid grounds for credibility or serious evidence

identifying the accused as the principals or accomplices of the act under investigation ...

This decision by the judge of the court of first instance was transmitted to the Military Superior Court which confirmed it in toto."

8.2 With regard to the disciplinary investigations, the State party adds that the Attorney-General "has reactivated the proceedings and accordingly appointed a special commission by an order dated 8 November 1988, comprising two co-ordinating lawyers of the Judicial Police and two technical investigators to continue to investigate the events that led to the disappearance of the Sanjuán Arévalo brothers. Having completed their mission, the appointed officials submitted on 27 November 1988 the relevant evaluation report suggesting the opening of a disciplinary investigation against the chief of the DIPEC (the former Intelligence Corps of the National Police), the chief of the Intelligence and Counter-Intelligence Section of the DIPEC, the chief of the Judicial Police of the DIPEC, and the non-commissioned officers and members of the National Police Force who acted on the orders of the aforementioned officers. The Office of the Attorney-General, on the basis of the evaluation report, ordered by decree of 19 December 1988 the proceedings to be referred to the Office of the Attorney-General assigned to the National Police so that a formal disciplinary investigation may be opened against the aforementioned officers and non-commissioned officers."

8.3 The State party further observes that since the investigations are still continuing and the applicable judicial procedures are pending, domestic remedies have not been exhausted.

9. No further submissions have been received from the State party or from the author of the communication.

10. The Human Rights Committee has considered the present communication in the light of all written information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol. In adopting its views, the Committee stresses that it is not making any finding on the guilt or innocence of the Colombian officials who are currently under investigation for possible involvement in the disappearance of the Sanjuán brothers. The Committee limits itself to expressing its views on the question whether any of the Covenant rights of the Sanjuán brothers have been violated by the State party, in particular articles 6 and 9. In this connection the Committee refers to its general comment 6 (16) concerning article 6 of the Covenant, which provides, inter alia, that States parties should take specific and effective measures to prevent the disappearance of individuals and establish facilities and procedures to investigate thoroughly, by an appropriate impartial body, cases of missing and disappeared persons in circumstances which may involve a violation of the right to life. The Committee has duly noted the State party's submissions concerning the investigations carried out hitherto in this case.

11. The Human Rights Committee notes that the parents of the Sanjuán brothers received indications that their sons had been arrested by agents of the "F2". The Committee further notes that in none of the investigations ordered by the Government has it been suggested that the disappearance of the Sanjuán brothers was caused by persons other than Government officials. In all these circumstances, therefore, the Committee, acting under article 5, paragraph 4, of the Optional

Protocol to the International Covenant on Civil and Political Rights, finds that the right to life enshrined in article 6 of the Covenant and the right to liberty and security of the person laid down in article 9 of the Covenant have not been effectively protected by the State of Colombia.

12. The Committee takes this opportunity to indicate that it would welcome information on any relevant measures taken by the State party in respect of the Committee's views and, in particular, invites the State party to inform the Committee of further developments in the investigation of the disappearance of the Sanjuán brothers.

APPENDIX

Individual opinion submitted by Mr. Kisuke Ando, pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the views of the Committee on communication No. 181/1984, Sanjuán Arévalo v. Colombia

I have no objection to the Committee's invitation that the State party continue to inform it of further developments in the investigation into the disappearance of the Sanjuán brothers (para. 12 of the views).

However, in inviting the State party to continue to inform, the Committee notes that "the Sanjuán brothers were arrested in the first place by the agents of the 'F2'". It further notes that "in none of the investigations ordered by the Government has it been suggested that the disappearance of the Sanjuán brothers was caused by private persons". Thus, "[In] all these circumstances ... the Committee finds that the right to life enshrined in article 6 of the Covenant and the right to liberty and security of the person laid down in article 9 of the Covenant have not been effectively protected by the State of Colombia" (ibid).

I have three reservations concerning these findings:

Firstly, the finding that "the Sanjuán brothers were arrested ... by agents of the 'F2' is based on a statement contained in a letter of the victims' father (para. 2.3). According to this letter, the parents of the brothers "received indications in August 1982 from the Chief of the Administrative Department of Security ... that their sons had been arrested by agents of the 'F2'". In my opinion, the Committee should have made it clear that its finding is based on that particular letter. Moreover, the letter's evidentiary value must be treated with caution.

Secondly, the finding that "in none of the investigations ordered by the Government has it been suggested that the disappearance ... was caused by private persons" is not, in my opinion, well founded. It is true that the information contained in paragraphs 2.7 and 8 refers merely to the possible involvement of officers and members of the National Police in the brothers' disappearance. Nevertheless, since the investigations of the case are still continuing and the applicable judicial procedures are pending (para. 8.3), it is not proper for the Committee to make such a finding at this stage, notwithstanding the possibility that it might be established that private persons were involved in the disappearances.

Thirdly, the finding that "[In] all these circumstances ... the right to life ... and the right to liberty and security of the person ... have not been effectively protected by the State of Colombia" is, in my opinion, too sweeping. It is true that many cases of disappearances, including this one, are reported to have occurred in Colombia, and that the investigations of these cases seem to have encountered a number of difficulties. This situation is indeed deplorable. Nevertheless, considering the efforts made by the Colombian Government, which can be ascertained from its replies to the Committee's requests for clarifications, I am unable to persuade myself that the Committee's sweeping finding is justified.

C. Communication No. 193/1985, Pierre Giry v. Dominican Republic (views adopted on 20 July 1990, at the thirty-ninth session)

Submitted by: Pierre Giry

Alleged victim: The author

State party concerned: Dominican Republic

Date of communication: 23 August 1985

Date of decision on admissibility: 11 July 1988

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

Meeting on 20 July 1990,

Having concluded its consideration of communication No. 193/1985, submitted to the Committee by Pierre Giry 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 by the State party,

Adopts the following:

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

1. The author of the communication is Pierre Giry, a French citizen, formerly a resident of Saint-Barthélemy (Antilles), at present detained at a Federal penitentiary in the United States. He is represented by counsel.

The complaint

2. The author claims to be the victim of violations by the Government of the Dominican Republic of article 9, paragraphs 1 and 2, articles 12 and 13 in conjunction with articles 2 and 3 of the International Covenant on Civil and Political Rights. In particular, he contends that his detention of nearly three hours by the Dominican authorities violated article 9, because he was prevented from taking his intended flight to Saint-Barthélemy, thereby depriving him of his right to liberty of movement under article 12, and that he was subjected to an illegal expulsion contrary to article 13 of the Covenant, since he was deported by force without the benefit of any administrative or judicial procedures.

Background

3.1 According to the author, he arrived in the Dominican Republic on 2 February 1985, stayed there for two days and then, on 4 February, went to the

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* The text of an individual opinion submitted by Miss Christine Chanet and Messrs. Francisco Aguilar Urbina, Nisuke Ando and Bertil Wennergren is appended.

airport to buy a ticket in order to leave the country on a flight to Saint-Barthélemy. Two agents in uniform, either belonging to the Dominican police or to the customs service, took him to the police office at the airport, where he was subjected to a thorough search. After two hours and forty minutes he was taken out by a back door leading directly to the runway and made to board an Eastern Airlines plane bound for Puerto Rico. Upon his arrival in Puerto Rico he was arrested and charged with conspiracy and attempt to smuggle drugs into the United States.

3.2 The author was tried before the United States District Court in San Juan, Puerto Rico and convicted of the offences of conspiracy to import cocaine into the United States, and of the use of a communication facility, the telephone, to commit the crime of conspiracy.

3.3 On 30 April 1986 he was sentenced to 28 years of imprisonment and fined $250,000. He is serving his term of imprisonment at the Federal Correctional Institution at Ray Brook, New York.

3.4 With respect to the requirement of exhaustion of domestic remedies in the Dominican Republic, the author states that remedies could not be effectively used since he was expelled within three hours of his arrest.

The State party's observations

4.1 By note of 24 June 1988 the State party informed the Committee "that Mr. Pierre Giry was deported from the Dominican Republic to the United States of America on the basis of the extradition treaty existing between the two nations and by virtue of the internal law on extradition No. 489 of 22 October 1969". The State party further observed that "in response to this procedure Mr. Giry should have exhausted the remedies provided for under Dominican legislation before seizing the Committee with the case".

4.2 In a further submission dated 8 June 1990, the State Party contends that in respect of the alleged violation of article 9 of the Covenant, the provision is inapplicable to the particular circumstances of the case, since the Dominican authorities had no intention to arrest Mr. Giry and to detain him in Dominican territory; their intention was merely to expel him from Dominican territory. The brief period that he spent at the airport prior to the departure of the flight for Puerto Rico could not be deemed to be a "detention" within the meaning of article 9. If it were to be considered as such, then the State party argues that it was neither arbitrary nor illegal, since Mr. Giry was internationally sought on charges of drug trafficking. His name had appeared on a list of the United States Drug Enforcement Agency, with which Dominican authorities co-operate in the spirit of international co-operation in the struggle against drug trafficking.

4.3 With respect to the alleged violation of article 13 of the Covenant, the State party contends that there is no violation and invokes that part of the provision that permits summary expulsions where compelling reasons of national security require. It is stated that Mr. Giry constituted a national security danger for the Dominican Republic, which, as any sovereign State, is entitled to take the necessary steps to protect national security, public order, and public health and morals.

4.4 The State party further argues that its actions must be understood in the context of the international efforts to apprehend persons involved in the illegal traffic of drugs, which must be seen as an international crime subject to universal jurisdiction.

Issues and proceedings before the Committee

5.1 When considering the communication at its thirty-third session, the Committee concluded, on the basis of the information before it, that the conditions for declaring the communication admissible had been met and that it raised issues under the Covenant that should be examined on the merits. The author had not submitted the matter for examination elsewhere and there were no effective remedies available in the Dominican Republic which the author could or should have pursued.

5.2 On 11 July 1988 the Committee declared the communication admissible and invited the State party to make its written submission on the merits of the case, in accordance with article 4, paragraph 2, of the Optional Protocol, not later than by 26 February 1989. The State party was further requested to forward to the Committee the text of Law No. 489 on extradition, a copy of the decision to extradite Mr. Giry as well as the text of the relevant laws and regulations governing the expulsion of aliens. Under cover of a note dated 5 October 1989, the State party forwarded a copy of law No. 489. By telefax dated 10 July 1990, the State party asked for an extension of time to furnish other documentation. The Committee understands this request as pertaining to the State party's stated intention of furnishing the records of the United States District Court in Puerto Rico in the court case against the author. It deems it unnecessary, however, to have access to such court records for the consideration of the issues before it.

5.3 The Committee has considered the present communication in the light of all the information provided by the parties. It observes that although the communication concerns an individual suspected of involvement in serious crimes, and later convicted of having perpetrated the very same offences, his rights under the Covenant must be respected.

5.4 The Committee has noted that the author has invoked a number of provisions of the Covenant, which he alleges to have been violated in his case. The Committee observes, however, that the facts as placed before it, basically raise issues under article 13 of the Covenant. It will limit itself to those issues.

5.5 The State party initially submitted that the author was deported from Dominican territory on the basis of an extradition treaty between the Dominican Republic and the United States of America. The State party has also referred to the action as expulsion. Regardless of whether the action against the author is termed extradition or expulsion, the Committee confirms, as it has done in its general comments on the provision in question, a/ that "expulsion" in the context of article 13 must be understood broadly and observes that extradition comes within the scope of the article, which provides:

> "An alien lawfully in the territory of a State party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

The Committee notes that, while the State party has specifically invoked the exception based on reasons of national security for the decision to force him to board a plane destined for the jurisdiction of the United States of America, it was the author's very intention to leave the Dominican Republic at his own volition for another destination. In spite of several invitations to do so, the State party has not furnished the text of the decision to remove the author from Dominican territory or shown that the decision to do so was reached "in accordance with law" as required under article 13 of the Covenant. Furthermore, it is evident that the author was not afforded an opportunity, in the circumstances of the extradition, to submit the reasons against his expulsion or to have his case reviewed by the competent authority. While finding a violation of the provisions of article 13 in the specific circumstances of Mr. Giry's case, the Committee stresses that States are fully entitled vigorously to protect their territory against the menace of drug dealing by entering into extradition treaties with other States. But practice under such treaties must comply with article 13 of the Covenant, as indeed would have been the case, had the relevant Dominican law been applied in the present case.

6. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as presented disclose violations of article 13 of the International Covenant on Civil and Political Rights and that the State party has an obligation to ensure that similar violations do not occur in the future.

[Done in English, French, Russian and Spanish, the English text being the original version.]

Notes

a/ "[Article 13] is applicable to all procedures aimed at the obligatory departure of an alien, whether described in national law as expulsion or otherwise". (Official Records of the General Assembly, Forty-first Session, Supplement No. 40 (A/41/40), annex VI, para. 9.)

APPENDIX

Individual opinion submitted by Miss Christine Chanet and Messrs. Francisco Aguilar Urbina, Nisuke Ando and Bertil Wennergren pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the views of the Committee on communication No. 193/1985 Giry v. Dominican Republic

[Original: French]

In the view of the four signatories of this separate opinion, the communication should be considered in relation to articles 9 and 12 of the Covenant and not to article 13.

It appears from the information available to the Committee at the time when it took its decision that the arrest of Mr. Giry after he had been in the territory of the Dominican Republic for two days, his detention at the airport and his forcible transfer to the aeroplane of a foreign State to which he was handed over forthwith and against his will should be regarded as an act of violence.

This concept of administrative law is defined as a decision not capable of being related to an act falling within the competence of the administration.

In the present case, the Dominican Republic was not able to produce or refer to any administrative act ordering the expulsion or extradition of Mr. Giry before or after his arrest at the airport.

Had there been an administrative act, even an irregular one, this might have been a case of expulsion falling within the scope of article 13.

In the absence of such an act, identifiable, *inter alia*, by its date, by the authority taking the decision and by its nature, it appears to the signatories that the arrest of Mr. Giry and his enforced boarding of an Eastern Airlines flight when he wished to travel to Saint-Barthélemy constitute unlawful and arbitrary arrest within the meaning of article 9, paragraph 1, of the Covenant.

Furthermore, since the arbitrary arrest involved not only depriving the author of his liberty but also, and more particularly, preventing him from travelling to another country of his choice and since he was obliged, against his will, to take a flight other than the one which he would have taken, the arrest in question also constitutes, in our opinion, a violation of article 12 of the Covenant.

Christine CHANET
Francisco AGUILAR URBINA
Nisuke ANDO
Bertil WENNERGREN

D. Communication No. 195/1985, W. Delgado Páez v. Colombia (views adopted on 12 July 1990, at the thirty-ninth session)

Submitted by: William Eduardo Delgado Páez

Alleged victim: The author

State party concerned: Colombia

Date of communication: 4 October 1985 (initial submission)

Date of decision on admissibility: 4 April 1988

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

Meeting on 12 July 1990,

Having concluded its consideration of communication No. 195/1985, submitted to the Committee by William Eduardo Delgado Páez 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 by the State party,

Adopts the following:

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

1. The author of the communication is William Eduardo Delgado Páez, a Colombian national who resided in Bogotá, Colombia, at the time of submission. In May 1986 he left the country and sought political asylum in France, where he was granted refugee status.

Background

2.1 In March 1983, the author was appointed by the Ministry of Education as a teacher of religion and ethics at a secondary school in Leticia, Colombia. He was elected vice-president of the teachers' union. As an advocate of "liberation theology", his social views differed from those of the then Apostolic Prefect of Leticia.

2.2 In October 1983, the Apostolic Prefect sent a letter to the Education Commission withdrawing the support that the Church had given to Mr. Delgado. On 10 December 1983, the Apostolic Prefect wrote to the Police Inspector accusing Mr. Delgado of having stolen money from a student.

2.3 On 25 August 1984, the Circuit Court dismissed all charges against the author, having established that the accusation of theft was unfounded.

2.4 On 5 February 1984, Mr. Delgado was informed that he would no longer teach religion. Instead, a course in manual labour and handicrafts (manualidades y artesanías), for which he had no training or experience, was assigned to him. In order not to lose employment altogether, he endeavoured to teach these subjects.

2.5 On 29 May 1984, the author requested from the Ministry of Education two weeks' leave for the period from 26 June to 10 July 1984 to attend an advanced course at Bogotá to further his teaching qualifications. He and other teachers were admitted to the course on 5 July 1984, but Mr. Delgado was subsequently denied leave. He considered this to be unjustified discrimination and decided to attend the course, also taking into account that, as a result of a national strike (paro nacional), the teachers were, by decree of the Ministry of Education, on enforced vacation (vacaciones forzosas).

2.6 By administrative decisions of the Ministry of Education, dated 12 July, and 11 and 25 September 1984, he was suspended from his post for 30 days, and a six-months' salary freeze was imposed on him on grounds of having abandoned his post without permission from the Principal. On 27 November 1984, the author requested the annulment of these administrative decisions (recurso de reposición), arguing that he had not abandoned his post, but that the law allowed teachers to take such special courses and that he had been duly admitted to the course with the approval of the Ministry of Education. The action was dismissed. He then submitted an appeal, and on 3 December 1985, by decision of the Ministry of Education, the prior decisions of suspension and salary freeze were annulled.

2.7 Convinced that he was a victim of discrimination by the ecclesiastical and educational authorities of Leticia, the author took the following steps:

(a) On 17 May 1985, he submitted a complaint to the Office of the Regional Attorney on grounds of alleged irregularities committed by the Fondo Educativo Regional (Regional Education Fund) in his case;

(b) On 18 May 1985, he submitted a complaint to the penal court of Leticia, accusing the Apostolic Prefect of slander and abuse (injuria y calumnia);

(c) On 28 May, 4 June and 3 October 1985, he wrote to the Office of the Attorney General of the Republic, expressing concern about the denial of justice at the regional level, attributable to the alleged influence of the Apostolic Prefect;

(d) On 13 May 1986, he again wrote to the Attorney General describing the pressures he had been and was being subjected to in order to force him to resign. He indicated, inter alia, that on 23 November 1983 the Apostolic Prefect had written to the Secretary of Education asking the latter in specific and clear terms:

> "to bring pressure on me to resign from my post, and this in fact happened, for, on 2 December 1983, I was summoned to the office of the Secretary of Education and orally informed that the Monsignor was putting pressure on him and that I therefore had to resign from my post as a teacher, failing which criminal proceedings would be instituted against me. I promptly informed the president of the teachers' union and the teachers' representative on the Promotion Board of such an outrage and they immediately went to the office of the Secretary of Education, who repeated that it had nothing to do with him, but that he had been acting at the Monsignor's insistence. I of course refused to resign, but the threat was carried out and criminal proceedings were instituted against me."

2.8 While at his residence in Bogotá, the author received anonymous phone calls threatening him with death if he returned to Leticia and did not withdraw his complaint against the Apostolic Prefect and the education authorities. He also

received death threats at the teachers' residence at Leticia, which he reported to the military authorities at Leticia, the teachers' union, the Ministry of Education and the President of Colombia.

2.9 On 2 May 1986, a work colleague, Ms. Rubiela Valencia, was shot to death outside the teachers' residence in Leticia by unknown killers. On 7 May 1986, the author was himself attacked in the city of Bogotá, and, fearing for his own life, left the country and obtained political asylum in France in June 1986.

2.10 By letter dated 10 June 1986, he tendered to the Ministry of Education at Leticia his resignation from his post, justifying his decision on account of the pressures and threats he had received. His resignation was rejected "in those terms". He resubmitted his resignation on 27 June 1986, without adducing any reasons, and this time it was accepted, effective 14 July 1986.

The complaint

3.1 The author claims to be a victim of violations by Colombia of articles 14, 18, 19, 25 and 26 in conjunction with article 2 of the International Covenant on Civil and Political Rights.

3.2 He maintains that he was subjected to persecution - ideologically, politically and in his work - by the Colombian authorities, because of his "progressive ideas in theological and social matters", that his honour and reputation were attacked by the authorities who falsely accused him of theft, whereas the reason behind the charge was to intimidate him because of his religious and social opinions. Moreover, his professional qualifications were unjustly put into question, although he had studied and taken a degree at the University of Santo Tomás and had taught several years at a high school in Bogotá.

3.3 Furthermore, he claims to have been denied the freedom to teach, having been suspended from his teaching post in breach of the decree concerning appointments and of the teachers' statute (decrees No. 2277 of 1979 and No. 2372 of 1981). When he applied for a transfer, his request was ignored by the administration.

3.4 More importantly, he charges that manifold threats were used to force him to resign: first, being threatened with prosecution; then, when he refused to resign, preliminary proceedings on the theft charges were initiated without prior notice, thereby violating the right of defence; he was not heard by the examining magistrate during the preliminary investigation and was not assisted by a court-appointed lawyer; furthermore, the authorities sent copies of the unfounded allegations, even before they were investigated, to all offices in the Ministry of Education and to all the schools; as a result, he was subjected to public scorn and essentially convicted before the charges had been investigated. Furthermore, copies of the allegations were included in his personal file. This caused him harm in economic, moral and social terms. Nevertheless, he was acquitted of all charges.

3.5 Additionally, he was suspended from practising his profession for 60 days, for alleged dereliction of duty, and from the National Teachers' Register for six months; every possible kind of offence was invoked so that the outcome of the administrative inquiries would not only be contrary to the truth, but would also cause prejudice by leading to criminal proceedings and in this manner implicate his colleagues in the teachers' union who supported him. The case was again dismissed on all points. He then addressed complaints, without success, to the authorities

concerning alleged offences, perpetrated by others, of falsifying public documents, forging his signature, making a false accusation to the authorities and breaching administrative confidentiality.

3.6 He claims that he "found it absolutely essential to leave the country, as there are no guarantees for the protection of the most basic human rights, such as equality, justice and life, which the Colombian Government has a constitutional and moral obligation to protect". Allegedly, the threats on his life and on the lives of other teachers have not been duly investigated by the State party.

The State party's observations

4.1 The State party argues, although only after the communication had been declared admissible, that domestic remedies have not been exhausted, since various actions are still pending.

4.2 It further denies that Mr. Delgado's rights under the Covenant have been violated. In particular, it indicates that Mr. Delgado was cleared of all charges against him and contends that his complaints against various Colombian authorities were duly investigated:

> "William Eduardo Delgado Páez has not been subjected to restrictions on his freedom of thought, conscience, religion, speech or expression, as is demonstrated by the steps he was able to take under the criminal law and in the administrative sphere throughout this investigation."

4.3 In the disciplinary action initiated by Mr. Delgado against various officials, the court of first instance of Leticia acquitted three persons and sanctioned two others with a suspension of 15 days without remuneration. Appeals are pending.

4.4 The criminal action against the Apostolic Prefect on grounds of slander and abuse was referred to the Apostolic Nuncius pursuant to the Concordat between the Republic of Colombia and the Vatican. The investigation was terminated upon the death of the Apostolic Prefect in 1990.

4.5 With respect to Mr. Delgado's qualifications as a teacher, the State party forwards a copy of a statement from the Ministry of Education setting forth the general requirements for teachers, without, however, specifically addressing the application of these requirements in the author's case.

4.6 As to the legal basis for the appointment of teachers of religion in Colombia, the State party states that:

> "Applicants for the post of teacher of religion in Colombia must present a certificate of suitability in the area of religious and moral education, along the lines laid down in article 12 of Act 20 of 1974, which reads: In pursuance of the right of Catholic families to arrange for their children to receive religious education in keeping with their faith, educational plans at the primary and secondary level shall include religious education and training in official establishments in accordance with the teaching of the church. In order to put this right into practice, it falls to the competent church authority to supply curricula, approve religious education texts and verify how such education is provided. The civil authorities shall take into consideration certificates of suitability for teaching religion issued by the competent church authority."

The State party submits the text of the agreement of 31 July 1986 between the Ministry of Education and the Colombian Episcopal Conference, without, however, showing the relevance of this Concordat to the case of Mr. Delgado, whose resignation had already been accepted on 9 July 1986.

4.7 The State party does not address the author's allegations concerning death threats against himself and other teachers, the alleged assault on his person on 7 May 1986, nor the general situation of persecution against named journalists and intellectuals, amounting to a violation of the right of security of the person.

The issues and proceedings before the Committee

5.1 When considering the communication at its thirty-second session, the Committee concluded, on the basis of the information before it, that the conditions for declaring the communication admissible had been met. In particular, the Committee noted that while the State party had claimed that there was no violation of the Covenant, it had not argued that the communication was inadmissible.

5.2 On 4 April 1988, the Committee declared the communication generally admissible, without specifying articles of the Covenant. The Committee, however, requested the State party to address the issues raised in one of the author's submissions, which focused on the right of security of the person.

5.3 The Committee has considered the present communication in the light of all the information provided by the parties. It has taken note of the State party's contention that domestic remedies have not been exhausted and that actions are still pending. The Committee finds, however, that, in the particular circumstances of the author's case, the application of domestic remedies has been unreasonably prolonged and, for purposes of article 5, paragraph 2 (b) of the Optional Protocol, they need therefore not be further pursued.

5.4 Although the author has not specifically invoked article 9 of the Covenant, the Committee notes that his submission of 14 September 1987, which was transmitted to the State party prior to the adoption of the Committee's decision on admissibility, raised important questions under this article. The Committee recalls that upon declaring the communication admissible, it requested the State party to address these issues. The State party has not done so.

5.5 The first sentence of article 9 does not stand as a separate paragraph. Its location as a part of paragraph one could lead to the view that the right to security arises only in the context of arrest and detention. The travaux préparatoires indicate that the discussions of the first sentence did indeed focus on matters dealt with in the other provisions of article 9. The Universal Declaration of Human Rights, in article 3, refers to the right to life, the right to liberty and the right to security of the person. These elements have been dealt with in separate clauses in the Covenant. Although in the Covenant the only reference to the right of security of person is to be found in article 9, there is no evidence that it was intended to narrow the concept of the right to security only to situations of formal deprivation of liberty. At the same time, States parties have undertaken to guarantee the rights enshrined in the Covenant. It cannot be the case that, as a matter of law, States can ignore known threats to the life of persons under their jurisdiction, just because that he or she is not arrested or otherwise detained. States parties are under an obligation to take reasonable and appropriate measures to protect them. An interpretation of

article 9 which would allow a State party to ignore threats to the personal security of non-detained persons within its jurisdiction would render totally ineffective the guarantees of the Covenant.

5.6 There remains the question of the application of this finding to the facts of the case under consideration. There appears to have been an objective need for Mr. Delgado to be provided by the State with protective measures to guarantee his security, given the threats made against him, including the attack on his person, and the murder of a close colleague. It is arguable that, in seeking to secure this protection, Mr. Delgado failed to address the competent authorities, making his complaints to the military authorities in Leticia, the teachers' union, the Ministry of Education and the President of Colombia, rather than to the general prosecutor or the judiciary. It is unclear to the Committee whether these matters were reported to the police. It does not know either with certainty whether any measures were taken by the Government. However, the Committee cannot but note that the author claims that there was no response to his request to have these threats investigated and to receive protection, and that the State party has not informed the Committee otherwise. Indeed, the State party has failed to comply with the request by the Committee to provide it with information on any of the issues relevant to article 9 of the Covenant. Whereas the Committee is reluctant to make a finding of a violation in the absence of compelling evidence as to the facts, it is for the State party to inform the Committee if alleged facts are incorrect, or if they would not, in any event, indicate a violation of the Covenant. The Committee has, in its past jurisprudence, made clear that circumstances may cause it to assume facts in the author's favour if the State party fails to reply or to address them. The pertinent factors in this case are that Mr. Delgado had been engaged in a protracted confrontation with the authorities over his teaching and his employment. Criminal charges, later determined unfounded, had been brought against him and he had been suspended, with salary frozen, in the circumstances indicated in paragraphs 2.2 to 2.6 above. Further, he was known to have instituted a variety of complaints against the ecclesiastical and scholastical authorities in Leticia (see para. 2.7 above). Coupled with these factors were threats to his life. If the State party neither denies the threats nor co-operates with the Committee to explain whether the relevant authorities were aware of them, and, if so, what was done about them, the Committee must necessarily treat as correct allegations that the threats were known and that nothing was done. Accordingly, while fully understanding the situation in Colombia, the Committee finds that the State party has not taken, or has been unable to take, appropriate measures to ensure Mr. Delgado's right to security of his person under article 9, paragraph 1.

5.7 With respect to article 18, the Committee is of the view that the author's right to profess or to manifest his religion has not been violated. The Committee finds, moreover, that Colombia may, without violating this provision of the Covenant, allow the Church authorities to decide who may teach religion and in what manner it should be taught.

5.8 Article 19 protects, inter alia, the right of freedom of expression and of opinion. This will usually cover the freedom of teachers to teach their subjects in accordance with their own views, without interference. However, in the particular circumstances of the case, the special relationship between Church and State in Colombia, exemplified by the applicable Concordat, the Committee finds that the requirement, by the Church, that religion be taught in a certain way does not violate article 19.

5.9 Although the requirement, by the Church authorities, that Mr. Delgado teach the Catholic religion in its traditional form does not violate article 19, the author claims that he continued to be harassed while teaching the non-religious subjects to which he had been assigned. The Committee must for the reasons elaborated in paragraph 5.6 above, accept the facts as presented by the author. This constant harassment and the threats against his person (in respect of which the State party failed to provide protection) made the author's continuation in public service teaching impossible. Accordingly, the Committee finds a violation of article 25, paragraph (c), of the Covenant.

5.10 Article 26 requires that all persons are entitled, without discrimination, to be equal before the law and to receive equal protection by the law. The Committee finds that neither the terms of Colombian law nor the application of the law by the courts or other authorities discriminated against Mr. Delgado, and finds that there was no violation of article 26.

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 of the communication disclose violations of articles 9, paragraph 1, and 25, paragraph (c), of the Covenant.

7.1 In accordance with the provisions of article 2 of the Covenant, the State party is under an obligation to take effective measures to remedy the violations suffered by the author, including the granting of appropriate compensation, and to ensure that similar violations do not occur in the future.

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

[Done in English, French, Spanish and Russian, the English text being the original version.]

E. Communication No. 208/1986, K. Singh Bhinder v. Canada (views adopted on 9 November 1989, at the thirty-seventh session)

Submitted by: Karnel Singh Bhinder

Alleged victim: The author

State party concerned: Canada

Date of communication: 9 June 1986

Date of decision on admissibility: 25 October 1988

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

Meeting on 9 November 1989,

Having concluded its consideration of communication No. 208/1986, submitted to the Committee by Mr. Karnel Singh Bhinder 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 by the State party,

Adopts the following:

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

1. The author of the communication, dated 9 June 1986, is Karnel Singh Bhinder, a naturalized Canadian citizen who was born in India in 1942 and emigrated to Canada in 1974. He claims to be a victim of a violation by Canada of article 18 of the International Covenant on Civil and Political Rights. A Sikh by religion, he wears a turban in his daily life and refuses to wear safety headgear during his work. This resulted in the termination of his labour contract.

The facts as submitted

2.1 In April 1974, the author was employed by the Canadian National Railway Company (CNR) as a maintenance electrician on the night shift at the Toronto coach yard.

2.2 CNR is a Crown Corporation; its shares are owned by the Crown and it is accountable to the Canadian Parliament for the conduct of its affairs.

2.3 With effect of 1 December 1978, the company decreed that the Toronto coach yard would be a "hard hat area" in which all employees were required to wear safety headgear.

2.4 At the time, the relevant Canadian legislation in this matter read as follows:

(a) Canada Labour Code, Chapter L-1, Section 81, subsection (3):
Every person operating or carrying on a federal work, undertaking or business shall adopt and carry out reasonable procedures and techniques designed or intended to prevent or reduce the risk of employment injury (...).

(b) Section 82:
Every person employed upon or in connection with the operation of any federal work, undertaking or business shall, in the course of his employment,
(a) take all reasonable and necessary precautions to ensure his own safety and the safety of his fellow employees; and
(b) at all appropriate times use such devices and wear such articles of clothing or equipment as are intended for his protection and furnished to him by his employer, or required pursuant to this Part to be used or worn by him.

(c) Section 83, subsection (1):
The fact that an employer or employee has complied with or failed to comply with any of the provisions of this Part or the regulations shall not be construed to affect any right of an employee to compensation under any statute relating to compensation for employment injury, or to affect any liability or obligation of any employer or employee under any such statute.

(d) Chapter 1007 (Canada Protective Clothing and Equipment Regulations), Section 3:
Where
(a) it is not reasonably practicable to eliminate an employment danger or to control the danger within safe limits; and
(b) the wearing or use by an employee of personal protective equipment will prevent an injury or significantly lessen the severity of an injury,
every employer shall ensure that each employee who is exposed to that danger wears or uses that equipment (...).

(e) Chapter 1007, Section 8, subsection (1):
No employee shall commence a work assignment or enter a work area where any kind of personal protective equipment is required by these Regulations to be worn or used unless
(a) he is wearing or using that kind of personal protective equipment in the manner prescribed in these Regulations (...).

(f) Chapter 998 (Canada Electrical Safety Regulations), Section 17:
No employer shall permit an employee to work, and no employee shall work, on an electrical facility
(a) that has not more than 250 volts (...), where there is a possibility of a dangerous electric shock, or
(b) that has more than 250 volts, but not more than 5.200 volts (...), or not more than 3.000 volts
unless that employee uses such insulated protective clothing and equipment as is necessary, in accordance with good electrical safety practice or as required by a safety officer, to protect him from injury during the performance of the work.

(g) Section 18:
No employer shall permit an employee to work, and no employee shall work, on an electrical facility that, in accordance with good electrical safety practice, requires protective headwear to be worn unless he is wearing protective headwear (...).

2.5 During the five years prior to the introduction of the hard hat requirement, 20 head injuries were sustained among the Toronto coach yard's workforce of 487, 52 of whom were employed as electricians.

2.6 The author's work consisted of the nightly inspection of the undercarriage of trains from a pit located between the rails, as well as maintenance work inside and outside the train, i.e. on the engine.

2.7 Since it is a fundamental tenet of Sikh religion that men's headwear should consist exclusively of a turban, the author refused to comply with the new hard hat regulations. He also refused a transfer to any other post. His employment was consequently terminated by the CNR on 6 December 1978.

2.8 On 7 December 1978, the author filed a complaint with the Canadian Human Rights Commission, alleging that the CNR had discriminated against him on the basis of his religion. In its decision of 31 August 1981, a Human Rights Tribunal appointed pursuant to the Canadian Human Rights Act made inter alia the following findings:

(a) "there is no evidence that other employees or the public will be affected if Mr. Bhinder were to continue working without a hard hat" (paragraph 5167);

(b) "(...) (the author) will be in greater danger if he does not conform with the hard hat policy. There is no doubt that Mr. Bhinder's turban is inferior to a hard hat in its capacity to protect against impact and electrical shock (...) There is a real increase in risk if Mr. Bhinder does not wear his hard hat, even though that increase in risk may be very small (paragraph 5177);

(c) "(...) (CNR) pays compensation directly to its injured employees, and as such, if an employee's risk of injury is increased, the likelihood of receiving compensation correspondingly increases, and as a result the employer's liability to pay compensation consequentially increases" (paragraph 5332 (37)).

2.9 In respect of the application of the hard hat rule to Mr. Bhinder, the Tribunal found a violation of the Canadian Human Rights Act on the grounds that the hard hat regulation "has the effect of denying a practising Sikh ... employment with the Respondent because of the Complainant's religion" (paragraph 5332 (3)). This finding was based on the following considerations:

(a) An employment policy may be discriminatory within the terms of the Canadian Human Rights Act, even if the employer has no intention to discriminate (paragraph 5332 (3)).

(b) implicit in the defense of bona fide occupational requirement in the Canadian Human Rights Act is the requirement that employers make such accommodation to the religious beliefs of their employees as will not cause them undue hardship (paragraph 5332 (29-32)).

2.10 The Tribunal acknowledged that the "implications of an exemption made for Mr. Bhinder is that all Sikhs are exempt from hard hat regulations in all industries to which the Human Rights Act applies (...)", and that "the effect may be an increase in the overall accident rate in the affected industries for the purpose of workers' compensation" (paragraph 5332 (36)). It held, however, that such added risk was to be regarded as inherent to the employment and consequently to be borne by the employer (paragraph 5332 (38)).

2.11 The CNR appealed and on 13 April 1983 the Federal Court of Appeal reversed the decision of the Human Rights Tribunal on the grounds that the Canadian Human Rights Charter prohibited only direct and intentional discrimination and that it did not encompass the concept of reasonable accommodation.

2.12 The author's appeal to the Supreme Court of Canada was dismissed on 17 December 1985. Although the Supreme Court held that also unintentional or indirect discrimination was prohibited by the Canadian Human Rights Act, it concluded that the policy of the CNR was reasonable and based on safety considerations, and therefore constituted a bona fide occupational requirement. The Court also denied a duty of the employer to "reasonable accommodation" under the Act.

The complaint

3. The author claims that his right to manifest his religious beliefs under article 18, paragraph 1, of the Covenant has been restricted by virtue of the enforcement of the hard hat regulations, and that this limitation does not meet the requirements of article 18, paragraph 3. In particular, he argues that the limitation was not necessary to protect public safety, since any safety risk ensuing from his refusal to wear safety headgear was confined to himself.

The State party's comments and observations

4.1 The State party submits that the author was not discharged from his employment because of his religion as such but rather because of his refusal to wear a hard hat, and contends that a neutral legal requirement, imposed for legitimate reasons and applied to all members of the relevant work force without aiming at any religious group, cannot violate the right defined in article 18, paragraph 1, of the Covenant. In this respect, it refers to the Human Rights Committee's decision in communication No. 185/1984 (L.T.K. v. Finland), where the Committee observed, that "(...) (the author) was not prosecuted and sentenced because of his beliefs or opinions as such, but because he refused to perform military service".

4.2 The State party also invokes its obligation under article 7, paragraph (b), of the International Covenant on Economic, Social and Cultural Rights, to ensure "safe and healthy working conditions", and claims that the interpretation of article 18 of the Covenant should not interfere with the implementation of the ICESCR through uniformly applied safety requirements.

4.3 The State party argues that it was open to the author to avoid the operation of the hard hat requirement by seeking other employment, and refers to a decision of the European Commission of Human Rights (Ahmad v. UK, [1982] 4 E.H.R.R. 126, paragraphs 11, 13) which, in assessing the scope of the freedom of religion as guaranteed by article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, had observed that - in addition to the limitations

contained in that article - special contractual obligations could influence the exercise of the right to freedom of religion, and that the applicant remained free to resign from his employment if he considered it to be incompatible with his religious duties.

4.4 In the State party's opinion, article 18 of the Covenant has not been violated, since the hard hat regulation represented a reasonable and objective criterion, in no way incompatible with article 26 of the Covenant.

4.5 The State party further considers that article 18 does not impose a duty of "reasonable accommodation", that the concept of freedom of religion only comprises freedom from State interference but no positive obligation for States parties to provide special assistance to grant waivers to members of religious groups which would enable them to practice their religion.

4.6 The State party further submits that if a prima facie infringement of article 18, paragraph 1, of the Covenant were to be found in the circumstances of Mr. Bhinder's case, such limitation was justified under paragraph 3. The State party argues that the scope of this provision comprises also the protection of those persons subject to the limiting regulations.

Proceedings before the Committee

5.1 On the basis of the information before it, the Committee concluded that all conditions for declaring the communication admissible were met, including the requirement of exhaustion of domestic remedies under article 5, paragraph 2, of the Optional Protocol.

5.2 On 25 October 1988, the Human Rights Committee declared the communication admissible.

6.1 The Committee notes that in the case under consideration legislation which, on the face of it, is neutral in that it applies to all persons without distinction, is said to operate in fact in a way which discriminates against persons of the Sikh religion. The author has claimed a violation of article 18 of the Covenant. The Committee has also examined the issue in relation to article 26 of the Covenant.

6.2 Whether one approaches the issue from the perspective of article 18 or article 26, in the view of the Committee the same conclusion must be reached. If the requirement that a hard hat be worn is regarded as raising issues under article 18, then it is a limitation that is justified by reference to the grounds laid down in article 18, paragraph 3. If the requirement that a hard hat be worn is seen as a discrimination de facto against persons of the Sikh religion under article 26, then, applying criteria now well established in the jurisprudence of the Committee, the legislation requiring that workers in federal employment be protected from injury and electric shock by the wearing of hard hats is to be regarded as reasonable and directed towards objective purposes that are compatible with the Covenant.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts which have been placed before it do not disclose a violation of any provision of the International Covenant on Civil and Political Rights.

F. Communication No. 215/1986, G. A. van Meurs v. the Netherlands (views adopted on 13 July 1990, at the thirty-ninth session)

Submitted by: G. A. van Meurs

Alleged victim: The author

State party concerned: The Netherlands

Date of communication: 8 November 1986 (date of initial letter)

Date of decision on admissibility: 11 July 1988

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

Meeting on 13 July 1990,

Having concluded its consideration of communication No. 215/1986, submitted to the Committee by G. A. van Meurs 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 by the State party,

Adopts the following:

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

1. The author of the communication (initial letter dated 8 November 1986, numerous subsequent submissions) is G. A. van Meurs, a citizen of the Netherlands born in 1930 in Jakarta. He claims to be a victim of a violation by the Netherlands of article 14, paragraph 1, of the International Covenant on Civil and Political Rights, as a result of proceedings that led to the dissolution of his labour contract by a decision of the sub-district court of Beetsterzwaag.

The background

2.1 The author had been employed in various positions by firms belonging to the private pharmaceutical corporation CIBA GEIGY since 1969, in both New Zealand and the Netherlands.

2.2 In 1983, differences over the rating of the author's performance by his supervisor and his activities in relation to an election to the firm's labour council arose, which resulted in the initiation of judicial proceedings by the employer with a view to dissolving the author's labour contract, pursuant to article 1639w of the Civil Code of the Netherlands.

2.3 At the time of the proceedings, the relevant passages of article 1639w read as follows:

"(1) Each of the parties shall at all times be empowered for compelling reasons to apply to the sub-district court judge with a written request that the contract of employment be dissolved. Any provision excluding or limiting this power shall be null and void.

...

"(3) The judge shall not grant the request until after the other party has been heard or been properly summoned.

"(4) If the judge grants the request, he shall decide on what date the employment is to terminate.

...

"(7) There shall be no remedy whatsoever against a decision under this article, without prejudice to the power of the Attorney General at the Supreme Court to appeal in cassation against the decision, solely in the interests of the law."

2.4 Under these provisions, the respondent may present a written statement in response to the initial application; subsequently, an oral hearing is conducted before a sub-district judge so as to establish the facts of the case.

2.5 It appears that in practice oral hearings under the then applicable article 1639w were held in camera and that the general statutory rules on evidence and the hearing of witnesses were not applicable. Consequently, the judge was under no obligation to hear witnesses on request of the parties; he could, however, do so on his own initiative. In practice, the hearing of witnesses was, however, a regular feature of proceedings under article 1639w.

2.6 The author submitted a written statement of defence, as well as all other material he considered to be relevant, through his counsel to the judge, contending that the employer's request was based on false accusations of his former supervisor.

2.7 The oral hearing was held on 13 October 1983 in a small hearing-room (measuring approximately 5 x 7 metres) of the sub-district court at Beetsterswaag. The room contained nine chairs, of which eight were occupied by the sub-district judge, the registrar, two representatives of the petitioner (CIBA GEIGY B.V.) and their counsel, the author, his counsel and the author's wife.

2.8 No witnesses were summoned; the official records of the hearing do not disclose whether the hearing was held in camera or in public.

2.9 There is no indication in the memorandum of defence presented by author's counsel, in the official records of the hearing or in the author's communication that he or his counsel formally requested the summoning of witnesses or formally requested the oral hearing to be held in public, or that they objected to the eventually non-public character of the hearing.

2.10 By sub-district court decisions of 8 and 17 November 1983, the author's labour contract with CIBA GEIGY was dissolved; the author, who has remained unemployed since, was however awarded damages in the amount of 240,000 guilders, to be paid in even sums in 1984, 1985, 1986, 1987, 1988 and 1989.

2.11 Prior to and subsequent to the hearing, the author contacted a number of lawyers for legal assistance, so as to initiate legal proceedings against his former supervisor for slander and to take recourse against the sub-district court decision. Several lawyers evaluated the merits of the case and advised against further proceedings, or refused to assist in such action. In addition, the author has sent several petitions to government departments, including the Ministry of Social Affairs and Employment and the Secretary of State, who confirmed that no recourse was available against the sub-district court's decision.

2.12 The author has not stated whether he initiated penal proceedings by filing a formal request with the police or the prosecution authorities.

The complaint

3.1 The author claims that the State party violated his rights under article 14, paragraph 1, of the International Covenant on Civil and Political Rights by failing to provide a fair and public hearing in his case.

3.2 In particular, the author complains that the hearing before the sub-district court at Beetsterswaag was not public, because:

(a) According to the established practice of the courts of the Netherlands, hearings pursuant to article 1639w of the Civil Code of the Netherlands were held in camera. The possibility of requesting that the hearing be held in public was not indicated either to the author or to his counsel by the authorities;

(b) The legal opinion of a labour law expert contacted in the case noted that "article 429g of the Civil Code stated quite flatly that the court hearings should take place behind closed doors. It is incorrect to assert that article 838 of the Code of Civil Procedure would have provided for the possibility to request that the hearing be held in public".

(c) Two similar procedures governing the dissolution of labour contracts - that governed by article 1638o of the Civil Code ("unlawful dismissal") and that governed by article 1639w - were treated differently in respect of their public nature. It is stated that there was no justification for distinguishing between the former procedure, which was public, and the latter, which, in practice, was held in camera.

3.3 The author claims that no outsiders were admitted to the courtroom, and that the fact that his wife attended the meeting cannot be construed as evidence of the public nature of the hearing, given that his wife was directly involved. Furthermore, it is submitted that the size of the courtroom did not allow interested members of the public to attend.

3.4 He further alleges that the hearing was not fair, since:

(a) His former supervisor at CIBA GEIGY, on whose reports the employer's assessment of his performance relied, was not summoned ex officio as a witness;

(b) No member of the CIBA GEIGY labour council was summoned ex officio as a witness or expert;

(c) The conduct of the oral hearing was entirely dominated by the employer's counsel, without intervention by the judge, so that the author was unable to respond to the petitioner's pleadings;

(d) He was not granted the opportunity to have his own witnesses or experts examined during the oral hearing;

(e) He was not afforded an opportunity to inspect the "exhibits and pleading notes" presented by employer's counsel at the oral hearing;

(f) The official records did not note the presentation and the contents of these "exhibits and pleading notes";

(g) The facts presented by the author (i.e., documents on his professional performance) were not evaluated correctly by the judge, although all relevant evidence had been made available to him.

3.5 The author also claims that he was "indirectly barred from the courts" in his attempts to "prosecute" his former supervisor for slander, because:

(a) The legal system of the Netherlands allegedly does not provide adequate facilities for legal aid;

(b) He could not find a lawyer willing to take his case or to do so without charging high fees;

(c) No government department advised him on how to handle his case or on recourse procedures open to him.

3.6 The author further contends that article 1639w of the Civil Code of the Netherlands as amended (in force since 25 April 1984), although now specifically providing for public hearings and for the application of general statutory rules on evidence, still remains incompatible with article 14, paragraph 1, of the Covenant.

3.7 The author requests the Committee to recommend that the State party compensate him for all financial losses resulting from the dissolution of his labour contract, in particular:

(a) To continue full payment of unemployment rates until his age of retirement;

(b) To grant him and his wife full general old age benefits (AOW) on retirement age;

(c) To exempt both of them from the application of the Code of Unemployment of the Netherlands.

State party's comments and observations

4.1 The State party objects to the admissibility of the communication under articles 2, 3 and 5 of the Optional Protocol and rule 90 of the rules of procedure, contending, inter alia, that the author had not sufficiently substantiated his allegations.

4.2 In its observations on the merits of the communication, the State party argues that the author's complaints are ill-founded, since:

(a) The non-public character of the oral hearing held on 13 October 1983 could not be assumed, as the information in the official records on this issue was insufficient;

(b) There was no evidence that anyone interested in the oral hearing was barred from the courtroom;

(c) The author did not formally request a hearing of witnesses or experts on his behalf;

(d) Article 14, paragraph 1, of the Covenant does not contain an absolute right to have witnesses and experts summoned and examined, or an overall court duty to order such a hearing ex officio;

(e) The communication did not show that the author petitioned the courts to take civil or criminal action against his former supervisor;

(f) No evidence was adduced as to whether, how and by whom the author was allegedly prevented from taking such action.

Issues and proceedings before the Committee

5.1 On the basis of the information before it, the Committee concluded that the requirements of article 5, paragraph 2, of the Optional Protocol, including the requirement of exhaustion of domestic remedies, had been met.

5.2 With regard to the application of article 14, paragraph 1, of the Covenant to the facts, the Committee observed that the proceedings at issue related to the rights and obligations of the parties in a suit at law. The Committee noted the State party's contention that the communication should be declared inadmissible on the grounds of insufficient substantiation of claims, but considered that the author had made reasonable efforts to sustain his claim, for purposes of admissibility, that the procedure under article 1639w followed in his case was incompatible with article 14, paragraph 1, of the Covenant.

5.3 On 11 July 1988, the Human Rights Committee declared the communication admissible.

6.1 With respect to the author's claim related to the publicity of the sub-district court hearing, the Committee considers that if labour disputes are argued in oral hearing before a court, they fall within the requirement, in article 14, paragraph 1, that suits at law be held in public. That is a duty upon the State that is not dependent on any request, by the interested party, that the hearing be held in public. Both domestic legislation and judicial practice must provide for the possibility of the public attending, if members of the public so wish. In the instant case, the Committee notes that while the old article 1639w of the Civil Code of the Netherlands was silent on the question of the public or non-public nature of the proceedings, it appears that in practice the public did not attend. It is far from clear in this case whether the hearing was or was not held in camera. The author's communication does not state that he or his counsel formally requested that the proceedings be held in public, or that the sub-district

court made any determination that they be held in camera. On the basis of the information before it, the Committee is unable to find that the proceedings in the author's case were incompatible with the requirement of a "public hearing" within the meaning of article 14, paragraph 1.

6.2 The Committee observes that courts must make information on time and venue of the oral hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, e.g., the potential public interest in the case, the duration of the oral hearing and the time the formal request for publicity has been made. Failure of the court to make large courtrooms available does not constitute a violation of the right to a public hearing, if in fact no interested member of the public is barred from attending an oral hearing.

7.1 With respect to the author's claims that the hearing of his case was not fair, the Committee refers to its constant jurisprudence that it is not a "fourth instance" competent to reevaluate findings of fact or to review the application of domestic legislation. It is generally for the appellate courts of States parties to the Covenant to evaluate the facts and the evidence in a particular case unless it can be ascertained that the proceedings before the domestic courts were clearly arbitrary or amounted to a denial of justice.

7.2 As far as the author claims that no witness was summoned for examination at the oral hearing, the Committee notes that no formal request to this effect was made by the author, although he was represented by counsel throughout the proceedings. The author's claim that article 14, paragraph 1, required the judge to do so ex officio is unfounded.

7.3 The author's claim that he was unable to respond to the petitioner's pleading is refuted by the official records, which reveal that author's counsel had the opportunity to plead extensively.

8. Regarding the author's claim of having been indirectly barred from the courts, the Committee observes that the author has repeatedly received legal advice from different lawyers and a measure of financial support to this end.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as submitted do not disclose a violation of any article of the International Covenant on Civil and Political Rights. The Committee welcomes the fact that the State party has amended article 1639w of the Civil Code to provide specifically for public hearings.

[Done in English, French, Russian and Spanish, the English text being the original version.]

G. Communication No. 219/1986, Dominique Guesdon v. France (views adopted on 25 July 1990, at the thirty-ninth session)

Submitted by: Dominique Guesdon (represented by counsel)

Alleged victim: The author

State party concerned: France

Date of communication: 11 December 1986 (date of initial letter)

Date of decision on admissibility: 25 July 1989

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

Meeting on 25 July 1990,

Having concluded its consideration of communication No. 219/1986, submitted to the Committee by Dominique Guesdon 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 by the State party,

Adopts the following:

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

1. The author of the communication (initial letter of 11 December 1986 and subsequent correspondence) is Dominique Guesdon, a French citizen born in 1959, employed as an electrician and residing in Paimpont, France. He claims to be a victim of violations of articles 14, paragraphs 1, 3 (e) and (f); 19, paragraph 2; 26, and 27 of the Covenant by France. He is represented by counsel.

2.1 The author states that he is a Breton and that his mother tongue is Breton, which is the language in which he can express himself best, although he also speaks French. On 11 April 1984, before the Optional Protocol entered into force for France (17 May 1984), he appeared before the Tribunal Correctionnel of Rennes on charges of having damaged public property by defacing road signs in French. He admits that militant Bretons who advocate the use of the Breton language painted over some road signs in order to manifest their desire that road signs be henceforth bilingual. The author never admitted his participation in the offences he was charged with, and claims that he was convicted in the absence of any proof.

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

2.2 On 11 April 1984, the day of the hearing, he requested that 12 witnesses be heard on his behalf. He indicated that all the witnesses and he himself wished to give testimony in Breton, which was the language used daily by most of them and in which they could most easily express themselves for the purposes of his defence. He therefore requested that their testimony be heard through the assistance of an interpreter. This request was refused by the court. He appealed the decision not to provide for interpretation to the President of the Court of Appeal who, on 24 April 1984, rejected the appeal on the ground that Mr. Guesdon was capable of defending himself without interpretation before the trial court. The merits of the case were examined by the Tribunal Correctionnel on 20 June 1984 (after the Optional Protocol had entered into force for France) at which time the defendant and the witnesses on his behalf again sought in vain to be allowed to express themselves in Breton. The court refused to hear them, as they were not willing to express themselves in French, and the author was given a four months' suspended sentence and ordered to pay a fine of 2,000 French francs. On appeal he reiterated his request for the same witnesses on his behalf to be heard. The Court of Appeal refused the request and, on 25 March 1985, sentenced him to a prison term of four months, suspended, and ordered him to pay a fine of 5,000 French francs. The author then appealed to the Court of Cassation on the ground that his defense rights had been violated. The appeal was dismissed by the Court of Cassation on 2 October 1985.

2.3 The author claims that the French courts violated his rights to a fair hearing, his right to have witnesses heard on his behalf, his right to have the assistance of an interpreter, his right to freedom of expression, his right to equal treatment and the enjoyment of minority rights, such as the use of a minority language.

3. Without transmitting the communication to the State party, the Human Rights Committee requested the author, by decision of 9 April 1987, under rule 91 of the rules of procedure, to clarify whether he and each of the witnesses who intended to testify on his behalf before the trial court and the Court of Appeal, understood and spoke French. By letter dated 2 June 1987, counsel for the author replied in the affirmative, adding, however, that some of those called as witnesses might have preferred to express themselves in Breton.

4. By further decision of 20 October 1988, the Working Group of the Human Rights Committee transmitted the communication to the State party, requesting it, under rule 91 of the rules of procedure, to provide information and observations relevant to the question of the admissibility of the communication.

5.1 In its submission under rule 91, dated 15 January 1989, the State party provides a detailed account of the facts of the case and concedes that, on the basis of that account, domestic remedies must be considered to have been exhausted following the dismissal, on 2 October 1985, of the author's appeal by the Court of Cassation.

5.2 Concerning the author's allegation that he was a victim of a violation of article 14, paragraph 1, of the Covenant, the State party contends that it was the author's own fault that he was not heard and assisted by counsel before the judge of first instance, because he refused to express himself in French. It adds that at the hearing on 5 March 1985 before the Court of Appeal, the author expressed himself without difficulty in French, and his counsel delivered his pleadings in French.

5.3 With respect to the alleged violations of article 14, paragraphs 3 (e) and (f), the State party contends that these provisions cannot be construed as encompassing the right of the accused to express himself in the language of his choice. Thus, the author cannot pretend that his right "to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him" was not observed, to the extent that the refusal of the witnesses called on his behalf to express themselves in French made it impossible for the judge to hear them. Concerning article 14, paragraph 3 (f), the State party recalls that this provision merely provides for the assistance of an interpreter if the accused "cannot understand or speak the language used in court". The State party submits that it was evident that the author and the witnesses on his behalf were perfectly capable of expressing themselves in French, and points out that article 407 of the Code of Penal Procedure, which stipulates that French is the official Court language, is not only compatible with article 14, paragraph 3 (f), but actually goes further in its protection of the rights of the accused, since it requires the judge to provide for the assistance of an interpreter if the accused or a witness do not sufficiently master the French language.

5.4 Concerning the alleged violation of article 19, paragraph 2, of the Covenant, the State party objects to the "abusive" interpretation by the author of the notion of "freedom of expression". It states that the author was never prevented from expressing himself before the courts; rather, it was, initially, his own decision not to present his case. Subsequently, before the Court of Appeal, on 25 March 1985, the author used his right under article 19, paragraph 2, as he was able to do throughout the judicial proceedings.

5.5 Concerning the alleged violation of article 26, the State party argues that if it were possible to speak of discrimination in the case, it is imputable directly and solely to the author's behaviour in court. The State party explains that the prohibition of discrimination laid down in article 26 does not extend to the right of the accused to choose, in the proceedings against him, whatever language he sees fit to use; rather, it implies that all the parties to a case accept and submit to the same constraints, that is, in the instant case, to inherent language constraints, and express themselves in the official court language, pursuant to the relevant provisions of the Code of Penal Procedure.

5.6 Finally, with respect to the alleged violation of article 27, the State party recalls that upon ratification of the Covenant, the French Government entered the following "reservation": "In the light of article 2 of the Constitution of the French Republic, the French Government declares that article 27 is not applicable as far as the Republic is concerned". Thus, the State party argues that "the idea of membership of an 'ethnic, religious or linguistic minority' which the applicant invokes is irrelevant in the case in point, and cannot be held against the French Government which does not recognize the existence of 'minorities' in the Republic, defined, in article 2 of the Constitution as 'indivisible, secular, democratic and social ...'."

6.1 In his comments, dated 8 May 1989, author's counsel notes that the State party does not contest the admissibility of the communication. He claims that the defiguration of road signs of which the author was accused should be seen as a reaction to the State party's systematic refusal to recognize the Breton language. Counsel recalls that in the Declaration of San José of December 1981, UNESCO termed policies similar to those pursued by the State party as "ethnocide", and affirms

that the criminal acts imputed to the author are acts of legitimate defense vis-à-vis a crime under international law.

6.2 Counsel reiterates that the author was denied a fair trial, in violation of article 14, paragraph 1, because he was unable to call witnesses and to present his version of the facts as well as his statement of defense. Similarly, before the Court of Appeal, he claims that he did not have a fair hearing, owing to his inability to have witnesses examined. Concerning article 14, paragraphs 3 (e) and (f), it is submitted that the Tribunal Correctionnel and the Court of Appeal failed to even ask the witnesses whether they accepted to express themselves in French. Furthermore, it is submitted that the courts wrongfully denied an interpreter to the author and his witnesses. In that context, counsel claims that the notion of a fair hearing implies that the parties be enabled to express themselves with ease (avec le maximum d'aisance) and in the language which they normally speak. Some of the witnesses, according to the author, would have experienced difficulties in expressing themselves in French; the court, however, allegedly did not attempt to verify their proficiency in the French language.

6.3 In as much as the general prohibition of discrimination in article 26 is concerned, counsel notes that numerous international conventions prohibit any form of discrimination before the tribunals. He refers to article 5 (a) of the International Convention on the Elimination of All Forms of Racial Discrimination, which recognises a right to equal treatment before the tribunals and all other organs administering justice. In this context, he recalls that article 1 of the Convention against Discrimination in Education, adopted by the UNESCO on 14 December 1960 (in force 22 May 1962; France is a State party), defines "discrimination" as "any distinction, exclusion, limitation of preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the effect of nullifying or impairing equality of treatment ..." He further refers to article 1 (c) of the Resolution adopted by the European Parliament with respect to the European Community Charter on Regional Languages and Cultures, which invites governments to guarantee to minorities the possibility to use their own language, particularly before the judicial instances. He finally refers to article 20, paragraph 2, of the Draft International Convention on the Protection of Ethnic Groups and Minorities (draft submitted by the Minorities Rights Group, a non-governmental organisation, to the Commission on Human Rights in January 1979, Doc. E/CN.4/NGO/231), which stipulates that "linguistic autonomy should particularly be observed with regard to the rights of personal liberty, of fair trial and in all matters of social welfare."

6.4 With respect to the alleged violation of article 19, paragraph 2, the author reiterates that he did not enjoy the right to freely express himself, since he was not allowed to express himself in Breton. He claims that the French Government appears to consider that "freedom of expression" does not encompass the right to express oneself in the language of one's ancestors. He cites the names of several politicians said to have made remarks to this effect and adds that such statements run counter to the Conventions ratified by the French Government and other statements of French officials, who are accused of displaying a "double standard" in this respect. It is submitted that the notion of "freedom of expression" must necessarily be defined in the light of international conventions and resolutions adhered to by the State party, not in the light of the statements made by a few officials. Counsel refers to several instruments adopted by the Council of Europe,

the European Parliament and the United Nations General Assembly which recognise the right of minorities to express themselves in their own language.

6.5 As to France's "reservation" with regard to article 27 of the Covenant, counsel affirms that France made a "declaration" in respect of this provision. He further claims that in spite of the State party's contention that there are no minorities within its territory, draft legislation on the promotion of the languages and cultures of France has obtained the support of many parliamentarians, and that the President of the Republic himself has deplored the destruction of the minorities' cultures and affirmed that all forms of bilinguism should be encouraged.

7.1 When deciding on the question of admissibility of the communication, as it is required to do under rule 87 of its rules of procedure, the Human Rights Committee noted that the requirements of article 5, paragraph 2 (a) and (b), were met.

7.2 As to the author's claim that he had been denied his freedom of expression, the Committee observed that the fact of not having been able to speak the language of his choice before the French courts raised no issues under article 19, paragraph 2. The Committee therefore found that this aspect of the communication was inadmissible under article 3 of the Optional Protocol as incompatible with the provisions of the Covenant. With respect to the alleged violations of articles 14 and 26, the Committee considered that the author had made reasonable efforts sufficiently to substantiate his allegations for purposes of admissibility.

7.3 In respect of the author's claim of a violation of article 27 of the Covenant, the Committee did not find it necessary to address the scope of the French "declaration" concerning article 27 of the Covenant in this case, as the facts of the communications did not raise issues under this provision. a/

7.4 On 25 July 1989, the Human Rights Committee, accordingly, declared the communication admissible in so far as it raised issues under articles 14 and 26 of the Covenant.

8.1 In its submission under article 4, paragraph 2, of the Optional Protocol, dated 17 April 1990, the State party reiterates that the author's allegations in respect of violations of articles 14, paragraphs 1 and 3 (e) and (f), are ill-founded. It argues that the notion of "fair trial" (procès équitable) within the meaning of article 14, paragraph 1, cannot be determined abstractly but must be examined in the light of the particular circumstances of any given case. Concerning the judicial proceedings in the author's case, it affirms that it is inexact to pretend that the Tribunal Correctionnal of Rennes did not seek to ascertain whether the witnesses called by the defence spoke and understood French; on the contrary, the President of the tribunal expressly requested information on whether they mastered French sufficiently. The State party asserts that in reply the author's representatives claimed not to know the answer, or indicated that some of the witnesses preferred expressing themselves in Breton. This led the court to conclude that it was not shown that the accused or the witnesses called did not master the French language, and that the sole reason for requesting an interpreter lay in the desire of the accused and the witnesses to express themselves in Breton so as to promote the use of that language. The State party reiterates that on various occasions during the judicial proceedings, the author clearly established that he was perfectly capable of expressing himself in French. He did so notably during the enquiry that resulted in his conviction by the Court of Appeal on 23 March 1985.

8.2 The State party submits that criminal proceedings are not an appropriate venue for expressing demands linked to the promotion of the use of regional languages. The sole purpose of criminal proceedings is to establish the guilt or the innocence of the accused. In this respect, it is important to facilitate a direct dialogue between the accused and the judge; since the intervention of an interpreter always encompasses the risk of the accused's statements being reproduced inexactly, resort to an interpreter must be reserved for strictly necessary cases, i.e. if the accused does not sufficiently understand or speak the court language.

8.3 The State party affirms that in the light of the above considerations, the President of the Tribunal of Rennes was perfectly justified not to apply article 407 of the French Penal Code, as requested by the author. This provision stipulates that whenever the accused or a witness do not sufficiently master French, the President of the Court must ex officio request the services of an interpreter. In the application of article 407, the President of the Court exercises a considerable margin of discretion, based on a detailed analysis of the individual case and all the relevant documents. This has been confirmed by the Criminal Chamber of the Court of Cassation on several occasions. b/

8.4 The State party recalls that the author and all the witnesses called on his behalf were francophone, a fact which was confirmed by author's counsel in his submission of 2 June 1987 to the Committee (see para. 3 above). Accordingly, the State party submits, there can be no question of a violation of article 14, paragraph 3 (f).

8.5 The State party rejects the author's argument that he did not benefit from a fair trial in that the court refused to hear the witnesses called on his behalf, in violation of article 14, paragraph 3 (e), of the Covenant. Rather, Mr. Guesdon was able to persuade the court to call these witnesses, and it was of their own volition that they did not testify. Using his discretionary power, the President of the Court found that it was neither alleged nor proven that the witnesses were unable to express themselves in French and that their request for an interpreter was merely intended as a means of promoting the cause of the Breton language. It was therefore due to the behaviour of the witnesses themselves that the court did not hear them.

8.6 In respect of the alleged violation of article 26, the State party recalls that the prohibition of discrimination is enshrined in article 2 of the French Constitution. It affirms that the author's argument that an imperfect knowledge of French legal terminology justified his refusal to express himself in French before the courts is irrelevant for purposes of article 26: the author was merely requested to express himself in "basic" French. Furthermore, article 407 of the Penal Code, far from operating as discrimination on the grounds of language within the meaning of article 26, ensures the equality of treatment of the accused and of witnesses before the criminal jurisdictions, because all are required to express themselves in French. Finally, the State party charges that the principle of venire contra factum proprium is applicable to the author's behaviour: he refused to express himself in French before the courts under the pretext that he did not master the language sufficiently, whereas his submissions to the Committee are made in impeccable French.

9.1 In his comments, dated 11 May 1990, counsel takes issue with the State party's presentation of the facts. Thus, he indicates that the Tribunal Correctionnel only asked the author's representatives but not the witnesses whether the latter spoke

French. Counsel notes that the rules of procedure of the Bar of Rennes stipulate that lawyers may not advise or influence witnesses on behalf of their clients (interdiction de solliciter des témoins), and that only the accused may call witnesses or provide his representative with the names of witnesses. According to counsel, it should have been obvious that the court could not obtain dispositive answers from the representatives on the question whether the witnesses spoke French; had it been otherwise, the lawyers would have implicitly acknowledged that they had violated professional ethics. Counsel argues that it was the tribunal's duty to ascertain by other means whether the witnesses were proficient in French.

9.2 Counsel reiterates that the notion of "fair trial" implies that any witness unable to express himself with ease in the official court language must be allowed to address the court in his mother tongue. Furthermore, this right extends to all the stages of the judicial procedure. Counsel recalls that before the Court of Appeal, the accused reiterated his request that the witnesses called on his behalf be heard. The Court of Appeal did not, however, consider this request, and failed to ascertain whether the witnesses would agree, at this stage, to express themselves in French. Counsel concludes that the court denied the author the right to have witnesses heard on his behalf.

10.1 The Human Rights Committee has considered the present communication in the light of the information provided by the parties. It bases its views on the following considerations.

10.2 The Committee has noted the author's claim that the notion of a "fair trial", within the meaning of article 14 of the Covenant, implies that the accused be allowed, in criminal proceedings, to express himself in the language in which he normally expresses himself, and that the denial of an interpreter for himself and his witnesses constitutes a violation of article 14, paragraphs 3 (e) and (f). The Committee observes, as it has done on a previous occasion, c/ that article 14 is concerned with procedural equality; it enshrines, inter alia, the principle of equality of arms in criminal proceedings. The provision for the use of one official court language by States parties to the Covenant does not, in the Committee's opinion, violate article 14. Nor does the requirement of a fair hearing mandate States parties to make available to a citizen whose mother tongue differs from the official court language, the services of an interpreter, if this citizen is capable of expressing himself adequately in the official language. Only if the accused or the defence witnesses have difficulties in understanding, or in expressing themselves in the court language, must the services of an interpreter be made available.

10.3 On the basis of the information before it, the Committee finds that the French courts complied with their obligations under article 14, paragraph 1, in conjunction with paragraphs 3 (e) and (f). The author has not shown that he, or the witnesses called on his behalf, were unable to address the tribunal in simple but adequate French. In this context, the Committee notes that the notion of a fair trial in article 14, paragraph 1, juncto paragraph 3 (f), does not imply that the accused be afforded the possibility to express himself in the language which he normally speaks or speaks with a maximum of ease. If the court is certain, as it follows from the decision of the Tribunal Correctionnel and of the Court of Appeal of Rennes, that the accused is sufficiently proficient in the court's language, it is not required to ascertain whether it would be preferable for the accused to express himself in a language other than the court language.

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

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 submitted do not sustain the author's claim that he is a victim of a violation of article 14, paragraphs 1 and 3 (e) and (f), or of article 26 of the Covenant.

[Done in English, French, Russian and Spanish, the English text being the original version.]

Notes

a/ Following the decision on admissibility in this case, the Committee decided at its thirty-seventh session that France's declaration concerning article 27 had to be interpreted as a reservation (T. K. v. France, No.220/1987, paras. 8.5 and 8.6; H. K. v. France, No.222/1987, paras. 7.5 and 7.6).

b/ See, e.g., the judgment of the Criminal Chamber of the Cour de Cassation of 30 June 1981 (Fayomi).

c/ See communication No. 273/1988 (B. d. B. v. Netherlands, decision on inadmissibility of 30 March 1989, paragraph 6.4).

H. Communication No. 232/1987, Daniel Pinto v. Trinidad and Tobago (views adopted on 20 July 1990, at the thirty-ninth session)

Submitted by: Daniel Pinto (represented by counsel)

Alleged victim: The author

State party concerned: Trinidad and Tobago

Date of communication: undated (received in June 1987)

Date of decision on admissibility: 18 July 1989

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

Meeting on 20 July 1990,

Having concluded its consideration of communication No. 232/1987, submitted to the Committee by Mr. Daniel Pinto under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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

1. The author of the communication (initial undated letter, received in June 1987, and subsequent correspondence) is Daniel Pinto, a citizen of Trinidad and Tobago currently awaiting execution at the State Prison of Port-of-Spain, Trinidad. He claims to be the victim of a violation of his human rights by Trinidad and Tobago. He is represented by counsel.

2.1 The author, who claims to be innocent, was arrested at 1.20 a.m. on 18 February 1982 in Arima, and charged with the murder, on the previous day, of one Mitchell Gonsales. His trial took place in the Port-of-Spain Assizes Court, from 3 to 14 June 1985; he was found guilty and sentenced to death on 14 June 1985. On 18 July 1986, the Court of Appeal dismissed his appeal; it produced a reasoned judgment on 8 December 1986.

2.2 The author states that on the night of 17 February 1982 he was assaulted by five men and severely beaten. In the course of the struggle, one of the attackers attempted to stab him but accidentally hit another attacker, who subsequently died. The prosecution's contention was that on the night of the crime the author had approached five men, including Mr. Gonsales, who were sitting together on a bench outside a bar in Arima and that Mr. Pinto had told them that he had learned that two of them had made deprecatory remarks about him and sought to ascertain

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* An individual opinion by Mr. Bertil Wennergren is appended.

what the two, including the deceased, had said. The deceased sought in turn, to ascertain, what these remarks pertained to. He then remarked to the others that Mr. Pinto seemed to be under the influence of alcohol, upon which the author was said to have lashed out at Mr. Gonsales with a knife, stabbing him twice. Mr. Gonsales escaped but collapsed about 200 feet from the scene.

2.3 The author alleges that he was denied a fair trial, since the four men who had allegedly attacked him acted as the prosecution's witnesses against him. Furthermore, the legal aid attorney assigned to his case allegedly defended him poorly: according to the author, this lawyer never consulted with him prior to the trial and remained passive during most of it, without taking any notes or making any statements or objections. The author also alleges that the trial transcript was tampered with after conviction. Throughout the proceedings, the author maintained his innocence. Upon his conviction, his counsel appealed the sentence, among others, on the following grounds:

(a) that the trial judge failed to direct the jury adequately on the issue of self-defence;

(b) that the trial judge misdirected the jury by instructing the jurors that the issue of manslaughter did not arise for their consideration although there was in fact evidence which, if accepted, could have supported such a verdict as a result of provocation; this misdirection, according to counsel, constituted a "grave miscarriage of justice";

(c) that the trial judge failed to properly instruct the jury on the circumstantial nature of the evidence on which the prosecution relied, and that he did not properly warn the jury that it was dangerous to accept such evidence because it could have been "fabricated" so as to cast suspicion on the accused.

3. By decision of 22 July 1987, the Human Rights Committee transmitted the communication, for information, to the State party and requested it, under rule 86 of the rules of procedure, not to carry out the death sentence against the author before it had had the opportunity to consider further the question of the admissibility of the communication. The author was requested, under rule 91 of the rules of procedure, to provide a number of clarifications about the circumstances of his trial and his appeal.

4.1 In his reply, dated 18 August 1987, to the Committee's request for clarifications, the author indicated that an English law firm had agreed to represent him for purposes of a petition for special leave to appeal to the Judicial Committee of the Privy Council.

4.2 In a further submission, the author complained about irregularities in the administration of justice in Trinidad. He maintained that he sought special leave to appeal to the Judicial Committee of the Privy Council in 1986, but two years later, the Registry of the Privy Council had still not received the necessary documents and transcripts from the Court of Appeal in Trinidad. The author quotes from a letter to him by his representatives in London:

> "We have made enquiries at the Privy Council regarding your appeal and we have not yet had the final order of leave to appeal from the Supreme Court of Trinidad and Tobago. We understand that letters have been written twice to the Supreme Court, requesting the same, as this is holding up progress. We

have written to our agent in Trinidad, ..., and requested him to look into the matter urgently on our behalf. ..."

5. By decision of 22 March 1988, the Working Group of the Human Rights Committee reiterated the Committee's request to the State party, under rule 86 of the rules of procedure, that it not carry out the death sentence against the author while his communication is under examination by the Committee. It further requested the State party, under rule 91 of the rules of procedure, to provide information and observations relevant to the question of the admissibility of the communication. In this context the State party was asked to provide the Committee with the texts of the written judgments in the case and to indicate whether the Judicial Committee of the Privy Council had heard the petition for special leave to appeal and, if so, with what result.

6. The deadline for the State party's submission under rule 91 of the rules of procedure expired on 27 June 1988. In spite of two reminders sent to the State party on 16 September and 22 November 1988, no submission has been received.

7. By letter dated 13 June 1988, the author indicated that his application for leave to appeal to the Judicial Committee of the Privy Council was dismissed on 26 May 1988. By further letter dated 14 December 1988, he stated that all his submissions to the judicial authorities of Trinidad, including the Attorney General's Office, the Ministry of National Security and the Minister of External Affairs, have remained unanswered.

8. After the dismissal of his petition for special leave to appeal by the Judicial Committee of the Privy Council, the author sent a petition to the Mercy Committee, without, however, obtaining a reply.

9.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rules 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant. The Committee addressed the question of admissibility at its thirty-sixth session in July 1989.

9.2 The Committee ascertained, as it is required to do 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.

9.3 The Committee noted with concern the absence of any co-operation from the State party on the matter under consideration. In respect of the requirement of exhaustion of domestic remedies, the State party had not made any submission relevant to the question of the admissibility of the communication. The Committee observed that the author's indication that his petition for special leave to appeal to the Judicial Committee of the Privy Council had been dismissed on 26 May 1988 had also remained uncontested. On the basis of the information before it, the Committee found that there were no further effective domestic remedies which the author could still pursue. It therefore concluded that the requirements of article 5, paragraph 2 (b), had been met.

9.4 On 18 July 1989, the Human Rights Committee therefore declared the communication admissible.

10. The deadline for the State party's explanations and statements on the merits of the communication expired on 17 February 1990. No submission was received despite two reminders addressed to it on 20 February and 29 March 1990. Under cover of a note of 12 March 1990, the State party did, however, forward copies of the court documents in the case, including the notes of evidence, the summing-up of the trial judge, the application for leave to appeal against conviction and sentence and the judgment of the Court of Appeal, which the Committee had requested two years earlier to facilitate consideration of the question of the admissibility of the communication.

11.1 In numerous submissions received after the Committee's decision on admissibility, the author provides further information about his case. Three main issues may be drawn from these submissions. He first reiterates his allegations of unfair trial and the alleged inadequacy of the judge's instructions to the jury.

11.2 Secondly, the author reaffirms that his representation before the trial court and the Court of Appeal was inadequate. Mr. I. K., who represented him before the Port-of-Spain Assizes Court, is said to have displayed no interest in the case and to have remained passive throughout the trial failing to challenge pieces of evidence presented by the prosecution. He is also accused of "conflict of interest" and "hidden agendas". Allegedly, the lawyer failed to raise the point that throughout the six days the author spent in police custody before being brought before an examining magistrate, he was not properly informed of his rights. Furthermore, the author claims that counsel did not raise the point that subsequent to his apprehension early in the morning of 18 February 1982, he was escorted to the hospital of Arima, where he was treated for injuries allegedly sustained at the hand of his attackers. According to the author, he never saw or approved the grounds of appeal and never had an opportunity to discuss the preparation of the appeal with I. K. In this context, he notes that prior to the hearing of the appeal, he had informed the Registrar of the Court of Appeal that an eminent lawyer from the United Kingdom would represent him; the Court of Appeal, however, completely ignored his letters and reappointed I. K. as his representative for the appeal, although all the formalities with the English lawyer had been settled. Finally, the author notes that his former representative is actively involved in Government politics, where he serves, among other duties, on the Crime Commission; during the spring of 1989 he is said to have made several statements calling for the speedy execution of prisoners under the sentence of death.

11.3 Thirdly, the author complains about the conditions of his detention on death row. Thus, he claims that, although he was given glasses after failing an eye test, his eye-sight is continuously deteriorating. He further claims that he has been in need of urgent dental care for several years, but that the prison authorities have informed him repeatedly that no funds were available for this purpose. More generally, the author affirms that it is difficult to obtain any medical treatment on death row, and that whoever speaks out about this situation is liable to administrative measures or harassment from the prison authorities.

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

12.2 In formulating its views, the Human Rights Committee notes with concern the failure of the State party to co-operate with it. Apart from furnishing copies of court documents (see para. 10 above), no submission has been received from the

State party. Article 4, paragraph 2, of the Optional Protocol enjoins a State Party to investigate in good faith all the allegations of violations of the Covenant made against it and its judicial authorities, and to forward to the Committee all the information available to it. The Committee notes with concern that in spite of two reminders, no explanations or statements on the substance of the present communication have been received from the State party. In the circumstances, due weight must be given to the author's allegations.

12.3 The Committee notes that part of the author's claims relate to the alleged inadequacy of the judge's evaluation of the evidence in the case, as well as the alleged prejudicial nature of his summing-up of the case to the jury. It reaffirms that while article 14 of the Covenant guarantees the right to a fair trial, it is for the appellate courts of States parties to the Covenant to evaluate facts and evidence in a particular case. It is not, in principle, for the Committee to review specific instructions to the jury by the judge in a trial by jury, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice. In the Committee's opinion, the judge's instructions to the jury must meet particularly high standards as to their thoroughness and impartiality in cases in which a capital sentence may be pronounced on the accused; this applies, a fortiori, to cases in which the accused pleads legitimate self-defence.

12.4 After careful consideration of the material placed before it, the Committee concludes that the judge's instructions to the jury on 14 June 1985 were neither arbitrary nor amounted to a denial of justice. As the judgement of the Court of Appeals states, the trial judge put the respective versions of the prosecution and the defence fully and fairly to the jury. The Committee therefore finds that in respect of the evaluation of evidence by the trial court there has been no violation of article 14.

12.5 Concerning the issue of the author's representation before the Court of Appeal of Trinidad and Tobago, the Committee reiterates that it is axiomatic that legal representation must be made available in capital cases. a/ This does not only apply to an accused person at the trial in the court of first instance, but also in appellate proceedings. In the instant case, it is uncontested that counsel was assigned to the author for the appeal. What is at issue is whether the author had a right to object to the choice of his court-appointed attorney, who had also, in his opinion, inadequately represented him at the trial of first instance. It is uncontested that the author never saw or approved the grounds of appeal filed on his behalf, and that he was never provided with an opportunity to consult with his counsel on the preparation of the appeal. From the material before the Committee, it can be clearly inferred that the author did not wish his counsel to represent him beyond the first instance; this is corroborated by the fact, which has remained uncontested, that he had made the necessary arrangements to have another lawyer represent him before the Court of Appeal. In the circumstances, and bearing in mind that this is a case involving the death penalty, the State party should have accepted the author's arrangements for another attorney to represent him for purposes of the appeal, even if this would have entailed an adjournment of the proceedings. The Committee is of the opinion that legal assistance to the accused in a capital case must be provided in ways that adequately and effectively ensure justice. This was not done in the author's case. To the extent that the author was denied effective representation during the appeal proceedings, the requirements of article 14, paragraph 3 (d), have not been met.

12.6 The Committee is of the opinion that the imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is available, a violation of article 6 of the Covenant. As the Committee noted in its general comment 6 (16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal". In the present case, since the final sentence of death was passed without having met the requirements for a fair trial set forth in article 14, it must be concluded that the right protected by article 6 of the Covenant has been violated.

12.7 As to the author's allegations that he has been denied adequate medical care during his detention on death row, in particular in respect of ophthalmologic and dental treatment, the Committee notes, firstly, that these allegations were made at a late stage, after the communication was declared admissible, as it stood on 18 July 1989, and, secondly, that these additional allegations have not been sufficiently corroborated, for instance by medical certificates, to justify a finding of a violation of article 10, paragraph 1, of the Covenant. The Committee reaffirms, however, that the obligation to treat individuals deprived of their liberty with respect for the inherent dignity of the human person encompasses the provision of adequate medical care during detention, and that this obligation, obviously, extends to persons under the sentence of death.

13.1 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts, as found by the Committee, disclose a violation of articles 6 and 14, paragraph 3 (d), of the Covenant.

13.2 The Committee observes that, in capital punishment cases, the duty of States parties to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant is even more imperative. The Committee is of the view that Mr. Daniel Pinto, a victim of a violation of articles 6 and 14, paragraph 3 (d), is entitled to remedy entailing his release.

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

[Done in English, French, Russian and Spanish, the English text being the original version.]

Notes

a/ See Communication No. 223/1987 (Robinson v. Jamaica), views adopted on 30 March 1989, para. 10.3.

APPENDIX

Individual opinion submitted by Mr. Bertil Wennergren pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the views of the Committee on communication No. 232/1987, Daniel Pinto v. Trinidad and Tobago

The Vienna Convention on the Law of Treaties states, inter alia, that a treaty provision shall be interpreted in accordance with the ordinary meaning to be given to its terms, placed in their context and in the light of the treaty's object and purpose. The object and purpose of article 6, paragraph 2, of the Covenant is obvious. It is to circumscribe the imposition of death sentences. The travaux préparatoires characterize it as a yardstick to which national law authorizing the imposition of the death sentence must conform. This yardstick consists of a number of prerequisites, some of which reflect guarantees also laid down in other articles of the Covenant. The prerequisites are: (a) "only for the most serious crimes"; (b) "only in accordance with the law in force at the time of the commission of the crime", cf. article 15, paragraph 1; (c) "only pursuant to a final judgment rendered by a competent court", cf. article 14, paragraph 1. The same requirements are to be found in article 4 of the American Convention on Human Rights, which reads: the death penalty "may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime." Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is less complete. It merely states that "no one shall be deprived of his life intentionally save in the execution of a sentence of a court following conviction of a crime for which this penalty is provided by law". Thus the Convention provision focuses more than similar provisions on the purpose to protect an individual from any intentional deprivation of his life by State organs. Article 6, paragraph 2, of the Covenant adds a prerequisite that is not included in either the European or the American Conventions, namely (d) "not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide". The latter Convention includes provisions that prohibit any killing - i.e. also execution pursuant to a death sentence - that can be subsumed under the term genocide. Article 6, paragraph 5, of the Covenant prohibits in addition the imposition of a sentence of death for crimes committed by persons below 18 years of age. Thus the prerequisite (d) evidently in the first place aims at those provisions in the Covenant and the Genocide Convention dealing with the imposition and execution of death sentences. It is, however, worded in such general terms that it might be understood as applying to other provisions of the Covenant as well, and not merely to provisions which would apply to the imposition itself of a death sentence, for instance article 26. The Committee has in this case interpreted it that way and found that a violation of the provisions in article 14 about a fair trial has to be looked upon as a violation also of article 6, paragraph 2, when the trial ended with a death sentence. I cannot find grounds for such an interpretation for the following reason: in the context where this prerequisite has been placed - i.e. in paragraph 2 and not in paragraph 1 - and in the light of the object and purpose of that paragraph, it is difficult to assume that it should be given an independent significance apart from its specific purpose (paragraph 5 and article 26 observance) and that it adds to what already is made clear by article 6, paragraph 5. The travaux préparatoires do not provide any useful guidance; moreover, any State power to investigate a crime that may lead to a death sentence,

indict a person for such a crime and conduct a trial against him is outside the focal point of article 6, paragraph 2, that deals only with the power to sentence an individual to death. The exercise of these related powers will then instead fall under paragraph 1, which provides that no one shall be arbitrarily deprived of his life, a term which according to the travaux préparatoires was preferred to "without due process of law". In my opinion violations of the safeguards for a fair trial in article 14 in a capital punishment case cannot be deemed to also constitute violations of article 6, paragraph 2. However, I agree with the Committee that unfairness in a capital case is of utmost gravity. When someone's life is at stake, all possible precautions and safeguards must come into full play. A breach of article 14 in such a case therefore constitutes a particularly grave violation. But, it cannot, even for that reason, be deemed to constitute a violation of article 6, paragraph 2. It is only - and only then - if the trial does not display the characteristics of a real trial but rather those of a mock trial, lacking the paramount characteristics of due process of law, that a violation of article 6 of the Covenant besides a violation of article 14 of the Covenant may arise, namely a violation of article 6, paragraph 1. The trial in this case undoubtedly was a very unsatisfactory one, but the information available does not, in my view, justify the conclusion that the elements of unfairness were such that the trial may be looked upon as arbitrary. I note in this connection that the Judicial Committee of the Privy Council received a petition from the author for special leave to appeal because of the trial deficiencies, but that the Judicial Committee did not grant leave. My conclusion therefore is that, just as under the American and European Conventions, violations of the fair trial safeguards cannot as such at the same time be deemed to be violations of provisions concerning the imposition of death sentences.

Bertil WENNERGREN

I. Communications Nos. 241 and 242/1987, F. Birindwa ci Birhashwirwa and E. Tshisekedi wa Mulumba v. Zaire (views adopted on 2 November 1989, at the thirty-seventh session)

Submitted by:	F. Birindwa ci Birhashwirwa E. Tshisekedi wa Mulumba
Alleged victims:	The authors
State party concerned:	Zaire
Date of communications:	25 and 31 August 1987 (date of initial letters)
Date of decision on admissibility:	4 April 1988

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

Meeting on 2 November 1989,

Having concluded its consideration of communications Nos. 241 and 242/1987, submitted to the Committee by F. Birindwa ci Birhashwirwa and E. Tshisekedi wa Mulumba for consideration 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 authors of the communications and by the State party,

Adopts the following:

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

1. The authors of the communications (initial submissions dated 25 and 31 August 1987, respectively, and subsequent correspondence) are Faustin Birindwa ci Birhashwirwa and Etienne Tshisekedi wa Mulumba, two Zairian citizens and founding members of the Union pour la Démocratie et le Progrès Social ("U.D.P.S."; Union for Democracy and Social Progress), an opposition group in Zaire. They claim to be the victims of violations by Zaire of articles 9, paragraph 1; 10, paragraph 1; 12, paragraph 1; and 17 of the International Covenant on Civil and Political Rights. Mr. Tshisekedi is represented by counsel. The authors were among the co-authors of communication No. 138/1983 concerning themselves and 11 other Zairian parliamentarians. The Committee adopted its views on communication No. 138/1983 at its twenty-seventh session on 26 March 1986.

2.1 In the above-mentioned views, the Committee had observed that the facts disclosed violations of articles 9, paragraph 1; 10, paragraph 1; 12, paragraph 1, 16, paragraph 1; 19 and 25 of the Covenant and concluded that Zaire was under an obligation to take effective measures to remedy the violations that the authors had suffered, to grant them compensation, to conduct an inquiry into the circumstances of their ill-treatment, to take appropriate action thereon and to ensure that similar violations did not occur in the future.

2.2 The authors state that as a consequence of the Committee's views of 26 March 1986, the Zairian authorities, far from granting them compensation or investigating their ill-treatment, decided to impose another term of banishment on them and some of the other authors of communication No. 138/1983. In the case of Mr. Birindwa and Mr. Tshisekedi, this second period of internal exile is said to have lasted from mid-June 1986 to the end of June 1987. While Mr. Birindwa was confined to his native village in the province of Kivu (close to the border of Rwanda), Mr. Tshisekedi was kept under surveillance in his native village in the province of Kasai-Oriental. The relatives of both authors were also subjected to surveillance by the Zairian authorities. Mr. Tshisekedi was released from banishment on 27 June 1987, and Mr. Birindwa on 1 July 1987, following a presidential amnesty promulgated in the context of the Zairian elections of August 1987.

2.3 With regard to the requirement of exhaustion of domestic remedies, the authors refer to the procedures engaged by the counsel to the authors of communication No. 138/1983 before Zairian courts and to the ineffectiveness of appeals to Zairian courts. In that respect, they allege that explicit order has been given to the registrars of the courts in Kinshasa not to make available to members of the political opposition or to their legal counsel any court orders or decisions in cases affecting them. They further allege that the pursuit of domestic remedies is obstructed in Zaire by the fact that any person in possession of official documents of the Human Rights Committee is deemed to be in possession of "subversive" documents and subject to arrest.

3. By decision of 2 November 1987, the Human Rights Committee transmitted communications Nos. 241/1987 and 242/1987 to the State party, requesting information and observations relevant to the question of the admissibility of their communications. The State party was requested, in particular, to provide the Committee with information concerning all the measures taken by its authorities vis-à-vis the victims referred to in communication No. 138/1983, following the transmittal to the State party of the Committee's views in that case.

4.1 In its submission under rule 91, dated 28 January 1988, jointly relating to communications Nos. 241/1987 and 242/1987, the State party provides information concerning the authors' cases. This information relates exclusively to their situation after their release in mid-1987.

4.2 The State party indicates that in June 1987, President Mobutu declared an amnesty for members of the U.D.P.S., some of whose leaders returned to the Mouvement Populaire de la Révolution (M.P.R.), the National Party of Zaire. Senior officials of the U.D.P.S. were appointed to important posts in the hierarchy of the M.P.R. Others were appointed to responsible positions at the head of certain State enterprises.

4.3 With respect to the fate of the authors of these communications, it is stated that they also benefited from the Presidential amnesty. With respect to Mr. Tshisekedi, the State party explains that he was able to travel extensively throughout Europe and the United States, that he returned to Zaire towards the middle of January 1988, where he sought to organise a public demonstration in Kinshasa on 17 January 1988, without prior authorisation. The State party explains that under its laws, every demonstration must be notified to the authorities and meet certain requirements before it is approved. It adds that Mr. Tshisekedi

none the less decided to proceed and that the police was forced to intervene. The author and other demonstrators were arrested and transferred to Makala prison in Kinshasa. The State party submits that as the author displayed "signs of mental disturbance, the judicial authorities decided that he should undergo a psychiatric examination, both in the interests of his health and to ensure a fair trial." With respect to Mr. Birindwa, the State party merely observes that he has remained abroad, and that no administrative or legal measures have been taken against him.

4.4 The State party's submission of 28 January 1988 does not provide any information on the remedies that would have been open to the authors with respect to the treatment allegedly suffered by them between mid-June 1986 and the time of their release at the end of June 1987.

5.1 In her comments on the State party's submission, dated 25 March 1988, Mr. Tshisekedi's counsel affirms that an authorization had been requested for the demonstration led by the author on 17 January 1988 but that it was denied. Allegedly, every request for authorization of a demonstration is refused in Zaire, since demonstrations are prohibited under the country's constitution. In these circumstances, the author decided to defy the authorities. Counsel further claims that the security forces who intervened allegedly caused the death of several demonstrators, although the manifestation is said to have been peaceful.

5.2 Counsel provides further information about Mr. Tshisekedi's situation. Following his arrest and transfer to Makala prison, he was kept detained until 11 March 1988, when he was released. On 16 March 1988, he was, however, again placed under house arrest and military surveillance at his home in Gombe-Kinshasa. On 18 March 1988, the military allegedly began to harass the visitors to the author's home, and on 19 March, violent incidents occurred outside the home and in the neighbourhood, in the course of which numerous arrests are said to have occurred and several individuals who found themselves on the grounds of the author's home were maltreated. As to the reported "mental disturbance" of the author, counsel states that following concerted international pressure, the State party's authorities abandoned their idea of interning him in a psychiatric institution, all while continuing to disseminate information about his allegedly disturbed mental state.

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 ascertained, as it is required to do under article 5, paragraph 2 (a), of the Optional Protocol, that the matters complained of by the authors had not been submitted to another procedure of international investigation or settlement. As to the question of exhaustion of domestic remedies, the Committee noted the authors' statement that appeals to the State party's courts with respect to events occurring prior to the presidential amnesty of June 1987 are ineffective. It observed that these allegations had remained uncontested and that the State party had not provided any information about remedies that would have been available to the authors. As to the State party's statements on the situation of Mr. Tshisekedi, the Committee considered that they related to issues of substance and that they should, accordingly, be examined on the merits.

7.1 On 4 April 1988, the Human Rights Committee therefore decided that the communications were admissible.

7.2 The Committee also decided, pursuant to rule 88, paragraph 2, of its rules of procedure, to deal jointly with the communications of Messrs. Birindwa and Tshisekedi.

8. In a submission dated 4 May 1988, Mr. Tshisekedi's counsel indicates that on 8 April 1988, Mr. Tshisekedi was placed under arrest and taken to the State Security Court, where he was interrogated until midnight. The arrest is said to have been linked to his call for a boycott of the partial elections held in Kinshasa on 10 April 1988. During the night of 8 April he was handed over to General Bolosi, Commander of the city of Kinshasa. He is said to have subsequently been transferred back and forth between various camps located in Upper Zaire and on the border between Zaire and Sudan, where frequent fighting between guerrilla forces is said to occur. Counsel points out that Mr. Tshisekedi suffers from various ailments, that he is without medical attention at the places of his detention, and that the climatic conditions in these places adversely affect his health. By letter of 18 August 1988, counsel supplements this information with excerpts from statements expressing concern about Mr. Tshisekedi's situation made in the international and in particular the Belgian press.

9. On 1 September 1988, the Secretariat was informed by the representative of the U.D.P.S. in Geneva, Mr. G. Wodia Mutombo, that Mr. Tshisekedi was under detention at the military camp of Kota Koli, and that Mr. Birindwa had been released from detention on 27 July 1988 and was reported to be in his home province of Kivu.

10.1 In a submission dated 21 September 1988, the State party informs the Committee "that the administrative measures of banishment taken against citizen Tshisekedi following the events of 17 January 1988 have been lifted with effect from 16 September 1988 by decision of ... the President of the Republic". It adds that the author has returned to his family and "enjoys complete freedom of movement"; as a result, the State party suggests that the "file concerning what has been called the Tshisekedi case may be regarded as definitely closed". As to the fate of those who were arrested at the same time as Mr. Tshisekedi, the State party indicates that many have already been released, and that the rest would be freed shortly. It points out that the procedures initiated against those guilty of other offences would be conducted "with complete legality".

10.2 In another submission dated 2 November 1988, the State party reaffirms that "the situation of citizens Birindwa ci Birhashwirwa and Tshisekedi wa Mulumba is perfectly clear as regards both their place of residence and their freedom of movement". Furthermore, the State party refers to its oral statement made in the Commission on Human Rights on 1 March 1988, concerning the availability of domestic remedies in Zaire.

10.3 In its oral statement to the Commission on Human Rights, made under the procedure governed by ECOSOC resolution 1503 (XLVIII), the State party had pointed out that the "recourse procedure" of complaints to the Department of Citizens' Rights and Freedoms (Département des Droits et Libertés du Citoyen) constitutes an effective domestic remedy and the ultimate recourse in cases of alleged human rights violations, and that the authors of communications submitted to the Commission on Human Rights or to the Human Rights Committee, in their quasi totality, had not resorted to the remedy in question. The State party added that the procedure before the Department of Citizens' Rights and Freedoms is governed by Departmental Decrees No. 0005/CAB/CE/DLC/MAWU/87 of 2 February 1987 and

No. 0027/CAB/DLC/CE/BI/87 of 29 June 1987, and that all complaints about alleged human rights violations after 1 January 1980 may be examined under it.

11.1 In comments, dated 9 January 1989, on the State party's submissions, counsel reaffirms that Mr. Tshisekedi suffered serious violations of his rights under articles 19, paragraph 2; 21, 22 and 25 of the Covenant between the period of 17 January and 16 September 1988 and that he continues to be subjected to serious restrictions on his freedom, since the State party's authorities do not allow him to speak out freely.

11.2 In his own comments, dated 21 February 1989, Mr. Tshisekedi confirms and supplements much of the information contained in paragraphs 5.1, 5.2 and 8 above, reiterating that the State party violated his fundamental human rights in the period from 17 January to 19 September 1988. With respect to the availability of domestic remedies, he claims that the laws and the Constitution of Zaire, in their daily application, render any efforts to exhaust domestic remedies futile. In this context, he submits that Zairian institutions act with the sole purpose of carrying out the ideas, words and acts of President Mobutu; in particular, the country's security services, which act independently of each other and are directly controlled by the President, allegedly engage frequently in human rights violations. If citizens complain about the practices of the security services, they are either accused of apostasy or considered to be mentally unstable. The author therefore asserts that the Département des Droits et Libertés du Citoyen is no more than an instrument of the State destined to conceal the daily occurrence of human rights violations.

11.3 As to the events subsequent to 17 January 1988, Mr. Tshisekedi states that in the evening of that day he was due to deliver an address at the Place du Pont Kasa-Vubu in Kinshasa. Upon addressing the large crowd which had gathered in the square, he was seized by armed agents of the political police, while others attacked the crowd and violently suppressed the manifestation. The author was then taken into custody and brought to a secret place, where he was locked in a high security cell and deprived of food and drink for four days. It is submitted that during his detention, i.e. from 17 January to 11 March 1988, he was never visited or questioned by any examining magistrate.

11.4 One week after his arrest, he had to undergo a medical check-up at the General Hospital. An electro-encephalogram was also carried out on him at the Centre Neuro-Psycho-Pathologique of K hasa. The author was assured by the doctors who examined him, Prof. Mpania and Prof. Loseke, that all tests had produced satisfactory results. Notwithstanding, he was later informed that two days after his check-up, two agents of the political police broke into the office of Prof. Mpania, accused him of being a member of the U.D.P.S., and searched his office. They proceeded to do the same in Prof. Mpania's house: once they had obtained the author's medical file, they ordered it to be destroyed and to have a fake one prepared, which certified that the author was suffering mental disorders. Prof. Loseke was subjected to similar acts of intimidation and even kept in underground detention for some days, as he had attempted to oppose the police action.

11.5 According to the author, five days after his release on 11 March 1988, armed soldiers entered his estate and brutally dispersed the crowd who had gathered to celebrate. The commanding officer informed the author that, as he had been put under judicial supervision ("surveillance judiciaire"), he was not allowed to

receive any visitors. On 11 April 1988, the "surveillance judiciare" changed to internal banishment ("banissement intérieur"), without explanation. As a result, the author was again transferred two thousand kms. to the north of the country, to a camp close to the Sudanese border. Two months later, he was t ansferred to yet another place, located close to the presidential village of Gbadolite, where he was detained until 19 September 1988. The author explains that during the latter period, he had to endure tremendous physical and psychological pressure and had to live in deplorable sanitary conditions, as the place of his banishment was situated in the Equatorial rain forest. Only after he had gone on a hunger strike for 13 days did President Mobutu order him to be released.

12.1 The Human Rights Committee, having considered the present communications in the light of all the information made available to it, as provided in article 5, paragraph 1, of the Optional Protocol, hereby decides to base its views on the following facts, which are not in dispute or which have not been contested by the State party.

12.2 The authors of the communications are two leading members of the Union pour la Démocratie et le Progrès Social (U.D.P.S.), a political party in opposition to the government of President Mobutu. From mid-June 1986 to the end of June 1987, they were subjected to administrative measures of internal banishment, as a result of the views adopted by the Human Rights Committee on 26 March 1986 in communication No. 138/1983. On 27 June and 1 July 1987, respectively, they were released following a presidential amnesty, and decided to travel abroad. Upon his return to Zaire in mid-January 1988, Mr. Tshisekedi sought to organise a manifestation which met with the disapproval of the State authorities. On 17 January 1988 he was arrested and subjected to inhuman treatment, in that he was deprived of food and drink for several days and was placed in a high-security cell. Between 17 January and 11 March 1988, he was kept detained in a prison in Kinshasa; during this time, he was neither informed of the reasons for his arrest or of charges against him nor brought before a judge, while the State party's authorities ordered his psychiatric examination and consistently referred to him in the press as being mentally disturbed. From 16 March to the beginning of April 1988, Mr. Tshisekedi was kept under house arrest at his home in Kinshasa - Gombe, and from 11 April to 19 September 1988, he was intermittently subjected to renewed administrative measures of banishment, which included his internment in several military camps. During his internment, he had to live in unacceptable sanitary conditions.

12.3 The Committee has taken note of the State party's submission of 2 November 1988, contending that the communications should be declared inadmissible, and also of the information contained in its oral statement of 1 March 1988 before the Commission on Human Rights, in which the State party referred to a recourse procedure before the Zairian Department of Citizens' Rights and Freedoms. The State party has not, however, established how the authors could have effectively availed themselves of this remedy in the circumstances of their cases. The Committee reiterates that it is incumbent upon the State party to provide details of the remedies which it submits are available to the authors, together with evidence that there would be a reasonable prospect for such remedies to be successful. In the light of the above, the Committee concludes that there is no reason to review its admissibility decision of 4 April 1988.

12.4 In formulating its views, the Committee observes that the State party, while providing some information about the authors' situation following the presidential

amnesty of June 1987 and their situation between 17 January and September 1988, has not addressed the substance of their allegations, in particular their claim that they were subjected to measures of administrative banishment as a result of the adoption of the Committee's views in communication No. 138/1983 on 26 March 1986. It is implicit in article 4, paragraph 2, of the Optional Protocol that States parties have a duty to investigate in good faith all the allegations of violations of the Covenant made against them and their authorities, and to furnish to the Committee all the information available to them. In the communications under consideration, the information provided by the State party addresses only some aspects of the allegations made by Mr. Tshisekedi and Mr. Birindwa. The Committee takes the opportunity to reiterate that while partial and incomplete information provided by States parties may assist in the examination of communications, it does not satisfy the requirement of article 4, paragraph 2, of the Optional Protocol. In the circumstances, due weight must be given to the authors' allegations.

12.5 The authors have alleged that they suffered retaliatory measures by the Zairian authorities as a direct consequence of their prior communication to the Human Rights Committee, No. 138/1983 (para. 2.2 above) and that any person in possession of official documents of the Human Rights Committee is deemed to be in possession of "subversive" documents and, therefore, subject to arrest (para. 2.3 above). The Committee notes that these serious allegations have not been commented on by the State party. The Committee stresses in this connection that it would be untenable and incompatible with the Covenant and the Optional Protocol if States parties to these instruments were to take exception to anyone's placing a communication before the Committee under the Optional Protocol. Indeed, such allegations, if established as true, would disclose grave violations of a State party's obligations under the Covenant and the Optional Protocol.

The period from mid-June 1986 to June 1987

12.6 Article 12, paragraph 1, of the Covenant stipulates that "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence." Both Mr. Birindwa and Mr. Tshisekedi were, for a period of over one year, confined to their native villages and thus deprived of their freedom of movement within the State party's territory, in contravention of article 12, paragraph 1. In respect of the other allegations made by the authors for the period of mid-June 1986 to June 1987, the Committee lacks sufficient information to make specific findings.

The period from January to September 1988

12.7 In as much as the authors' situation for the period from 17 January to September 1988 is concerned, the Committee finds it necessary to distinguish between the situation of Mr. Tshisekedi and that of Mr. Birindwa. With respect to Mr. Tshisekedi, it observes that he was kept in detention for close to two months following the break-up of the demonstration of 17 January 1988. The State party has not contested his claim that during this period, he was not brought before a magistrate, contrary to article 9, paragraph 3, of the Covenant. Mr. Tshisekedi further suffered administrative measures of internal banishment for intermittent periods between 11 April and 16 September 1988 as a result of his call for a boycott of the partial elections held in Kinshasa on 10 April 1988. Finally, he was subjected to unlawful attacks on his honour and his reputation, in that the authorities sought to have him declared insane, although medical reports contradicted such diagnosis.

12.8 With respect to Mr. Birindwa, the Committee observes that he has not provided any information about his situation following his return to Zaire. Accordingly, the Committee is not in a position to make any findings in this respect for the period from 17 January to September 1988.

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 of the communications disclose violations of the International Covenant on Civil and Political Rights:

(a) in respect of Faustin Birindwa ci Birhashwirwa:

of article 12, paragraph 1, because he was deprived of his freedom of movement during a period of internal banishment which lasted from mid-June 1986 to 1 July 1987;

(b) in respect of Etienne Tshisekedi wa Mulumba:

of article 7, because he was subjected to inhuman treatment, in that he was deprived of food and drink for four days after his arrest on 17 January 1988 and was subsequently kept interned under unacceptable sanitary conditions;

of article 9, paragraph 2, because he was not informed, upon his arrest, on 17 January 1988, of the reasons for his arrest;

of article 9, paragraph 3, because he was not brought promptly before a judge following his arrest on 17 January 1988;

of article 10, paragraph 1, because he was not treated with humanity during his detention from 17 January to 11 March and from 11 April to 19 September 1988;

of article 12, paragraph 1, because he was deprived of his freedom of movement during periods of internal banishment which lasted from mid-June 1986 to 27 June 1987 and again from 11 April to 19 September 1988;

of article 17, paragraph 1, because he was subjected to unlawful attacks on his honour and reputation.

14. The Committee is therefore of the view that the State party is under an obligation, in accordance with the provisions of article 2 of the Covenant, to take effective measures to remedy the violations suffered by the authors, in particular to ensure that they can effectively challenge these violations before a court of law, to grant appropriate compensation to Mr. Tshisekedi and Mr. Birindwa, and to ensure that similar violations do not occur in the future. The Committee takes this opportunity to indicate that it would welcome information on any relevant measures taken by the State party in respect of the Committee's views.

J. Communication No. 250/1987, Carlton Reid v. Jamaica (views adopted on 20 July 1990, at the thirty-ninth session)

Submitted by: Carlton Reid (represented by counsel)

Alleged victim: The author

State party concerned: Jamaica

Date of communication: 7 August 1987 (initial submission)

Date of decision on admissibility: 30 March 1989

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

Meeting on 20 July 1990,

Having concluded its consideration of communication No. 250/1987, submitted to the Committee by Mr. Carlton Reid 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 by the State party,

Adopts the following:

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

1. The author of the communication (initial submission dated 7 August 1987 and subsequent correspondence) is Carlton Reid, a Jamaican citizen awaiting execution at St. Catherine District Prison, Jamaica. He claims to be the victim of a violation by the Government of Jamaica of articles 6, 7 and 14 of the International Covenant on Civil and Political Rights. He is represented by counsel.

2.1 The author was arrested on 2 December 1983 and charged with the murder, on 10 June 1983, of one Miriam Henry, at the site of the Water Commission at Langley, Mount James. His trial took place in the Home Circuit of Kingston on 25 and 26 March 1985; he was found guilty and sentenced to death. On 6 October 1986, the Jamaican Court of Appeal dismissed his appeal.

2.2 The prosecution accused the author of being one of three armed robbers who raided the payroll of the Water Commission Pumping Station on 10 June 1983. It is reported that the perpetrators first proceeded to the kitchen, where the author purportedly wounded a woman by shooting her in the arm. The shot was not fatal and she, together with others, escaped to another building where they locked themselves in a room on the first floor. Witnesses identified the author as being one of the

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* An individual opinion submitted by Mr. Bertil Wennergren is appended.

robbers in the kitchen, but the murder allegedly took place in the upstairs room to where the group had fled. During the trial the prosecution argued that the author had gone upstairs. Of the persons in the upstairs room, the only witness who was called, Mr. P. Josephs, testified that after the door had been opened, the author entered the room with a gun and that the wounded woman was shot in the head.

2.3 According to the author, Mr. Josephs' evidence was unreliable. First, he had described him as wearing no mask, which was in complete contradiction to the evidence of all the other witnesses who had identified him as wearing a mask. Secondly, Mr. Josephs testified that the author had dragged him down the stairs, although none of those downstairs had seen this and no one had identified the author as either walking up or down the stairs at any time. Another witness who had been in the downstairs room, Ms. Hermione Henry, testified during the preliminary inquiry that two men had run upstairs and that one of them was carrying a shotgun. It was agreed that the author was not the man with the shotgun, and Miss Henry never identified either man as the author. During the trial, Miss Henry retracted her testimony given during the preliminary inquiry and claimed that the man with the shotgun had remained downstairs with her all the time.

2.4 At the conclusion of the trial, the author claims, the judge failed to comply with his duty to direct the jury on the relevant points of law and to sum up for the jurors the evidence relevant to the charge. It is alleged that he failed to mention any of the evidence as to what had happened in the upstairs room, where the murder had taken place, and even forgot to tell the jury that the murder had occurred in that room. In short, according to the author, he did not refer to any of the evidence concerning the murder charge on which the jury had to return a verdict. This, in his opinion, was tantamount to summing up a different case altogether, since the judge only focused on the robbery-related evidence, where the identification evidence was strong, although none of that evidence related to the murder.

2.5 Following his conviction, the author appealed to the Jamaican Court of Appeal. He claims that, on appeal, few lawyers are willing to accept legal aid assignments. The lawyer who had been assigned to argue his appeal informed him that an appeal would be futile. The author requested that a different lawyer be assigned to his case. This notwithstanding and against his wishes, the lawyer who had first been assigned to argue the appeal appeared before the Court of Appeal and informed it that there were no grounds of appeal. This, apparently, relieved the Court of Appeal from having to examine the case ex officio, as it would have been required to do if no lawyer had appeared for the author. Faced with the lawyer's concession, the Court of Appeal dismissed the appeal on 6 October 1986.

3. By decision of 12 November 1987, the Human Rights Committee transmitted the communication, under rule 91 of its rules of procedure, to the State party, requesting information and observations relevant to the question of the admissibility of the communication. The Committee further requested the State party, under rule 86 of its rules of procedure, not to carry out the death sentence against the author before the Committee had had the opportunity to decide on the question of admissibility. In addition, the Committee requested clarifications concerning the case from both the State party and the author.

4. By letter dated 29 December 1987, the author provided a number of clarifications. He indicated that the first time he was able to communicate with the legal-aid attorney assigned to his case was on the opening day of the trial. The lawyer requested a postponement because he had not been able to discuss the case with the accused, but the judge refused to grant it. Apparently, the lawyer was wholly unprepared and reportedly told the author that he did not know which questions to pose to the witnesses. With respect to the appeal, the author stated in a further letter dated 11 March 1988 that, prior to the hearing of his appeal, he had received a letter dated 1 September 1986 from the lawyer assigned to argue the appeal, reading as follows: "I am sorry to disappoint you, but having read the transcript of your case, I cannot find any merit in the appeal. Four witnesses identified you as the killer. That evidence cannot be overturned on appeal. Unfortunately, I will be unable to assist you any further." Although the author did request the services of a different attorney, this lawyer represented him in the Court of Appeal. In fact, he argued that "having carefully read the record and considered the learned trial judge's summation, he could find no arguable ground to support the application."

5. In its submission under rule 91, dated 26 May 1988, the State party argued that the communication was inadmissible on the grounds of the author's failure to exhaust all available domestic remedies, as required by article 5, paragraph 2 (b), of the Optional Protocol. It asserted that the author could still apply, pursuant to section 110 of the Jamaican Constitution, for special leave to appeal to the Judicial Committee of the Privy Council, and that legal aid would be available to him for that purpose. The State party also confirmed that the Court of Appeal dismissed the author's appeal on the grounds outlined in paragraph 4 above.

6.1 Commenting on the State party's submission, author's counsel, by letter dated 10 February 1989, indicates that the Judicial Committee of the Privy Council dismissed the author's petition for special leave to appeal on 29 November 1988. This, it is submitted, means that all available domestic remedies in the case have been exhausted. Counsel explains, in this context, that the only way for the author to file an application for special leave to appeal was to seek the assistance of English solicitors and counsel willing to act pro bono, as legal aid available for defendants to submit their case to the Privy Council is inadequate.

6.2 Counsel further states that the grounds on which the Privy Council will entertain appeals from Commonwealth countries in criminal matters are limited. The Privy Council has established the rule that it will not act as a court of criminal appeal and has restricted appeals in criminal matters to such cases where, in its opinion, some issues of constitutional importance arise or where a "substantial injustice" has occurred. The Privy Council's jurisdiction is, therefore, very narrow. In applying its narrow test, it dismissed the author's petition.

6.3 With respect to the alleged violation of article 14 of the Covenant, counsel specifies that the author was deprived of a fair trial within the meaning of article 14, paragraph 1, because the judge never put to the jury any of the evidence relating to the murder but only evidence relating to the robbery. His subsequent appeal to the Jamaican Court of Appeal, according to counsel, was never determined on the merits because of the concession made by the lawyer. This situation, it is submitted, also constitutes a violation of safeguard No. 4 of Economic and Social Council resolution 1984/50 of 25 May 1984 on "Safeguards guaranteeing protection of the rights of those facing the death penalty", which states: "Capital punishment may be imposed only when the guilt of the person

charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts."

6.4 Counsel submits that the State party further violated article 14, paragraph 3 (d), of the Covenant, because the author was not present during the hearing of his appeal and did not have legal assistance of his own choosing. The lawyer who appeared for the author before the Court of Appeal had no retainer to act, nor did he seek to obtain the author's express consent to appear before the Court of Appeal and state that there were no grounds of appeal. In these circumstances, the author should have been provided with an opportunity to obtain the services of a different attorney. It is submitted that an individual's right to legal representation of his own choosing does not only comprise the trial but also subsequent appellate procedures. Moreover, given that the author's lawyer failed to represent him, the author should have been allowed to be present during the hearing of the appeal and allowed to argue his own case, if the legal aid lawyer was not prepared to do so. Because the author was denied representation of his choosing and was not present at the appeal, he was also deprived of his right to an effective review of his conviction and sentence by the Jamaican Court of Appeal, in violation of article 14, paragraph 5.

6.5 With respect to the alleged violation of articles 6 and 7 of the Covenant, counsel recalls that the author has been confined to death row since his conviction on 26 March 1985. It is claimed that the decision as to whether inmates on death row are to be executed does not depend on legal grounds, but is a function of political considerations, and thus that the author's continued uncertainty as to whether or not a warrant for his execution will be issued, and the concomitant mental anguish, amounts to cruel, inhuman and degrading treatment in violation of article 7. It is submitted that the resumption of executions after a long delay unconnected with legal arguments or procedures would amount to a violation of article 6.

7.1 The Committee ascertained, as it is required to do under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter was not being examined under another procedure of international investigation or settlement. With regard to article 5, paragraph 2 (b), the Committee concluded, on the basis of the information provided by the parties, that available domestic remedies had been exhausted.

7.2 On 30 March 1989, the Human Rights Committee therefore declared the communication admissible.

8.1 In its submission under article 4, paragraph 2, dated 15 June 1989, the State party contends that the fact that the author's petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed does not necessarily imply that all available domestic remedies have been exhausted. It points out that the rights under the Covenant which the author alleges have been violated are guaranteed to every Jamaican citizen under Chapter III of the Jamaican Constitution. Thus, section 20, paragraph 1, provides:

> "Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

Section 20, paragraph 6, provides:

"Every person who is charged with a criminal offence:

(a) Shall be informed as soon as reasonably practicable, in a language which he understands, of the nature of the offence charged;

(b) Shall be given adequate time and facilities for the preparation of his defence;

(c) Shall be permitted to defend himself in person or by a legal representative of his own choice;

(d) Shall be afforded facilities to examine in person or by his legal representative the witness called by the prosecution before any court and obtain the attendance of witnesses, subject to the payment of their reasonable expenses, and carry out the examination of such witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and

(e) Shall be permitted to have assigned to him without payment the assistance of an interpreter if he cannot understand the English language."

8.2 The State party adds that the right to life is protected by section 14 of the Constitution, while protection from inhuman or degrading punishment or other treatment is afforded by section 17. Under section 25, anyone who alleges that any of the rights protected by Chapter III have been, or are likely to be contravened in relation to him, may apply to the Supreme (Constitutional) Court for redress. An appeal lies from the decision of the Supreme Court to the Court of Appeal and from the decision of the Court of Appeal to the Judicial Committee of the Privy Council.

8.3 The State party concludes that the right to constitutional redress is a distinct action from an appeal to the Judicial Committee of the Privy Council in a criminal case. Since the author has failed to take steps to pursue his constitutional remedies, the State party argues that his communication is inadmissible on the ground of non-exhaustion of domestic remedies.

9.1 In her comments, dated 19 December 1989, counsel contends that the State party has failed to comply with the Committee's request of 30 March 1989 to provide explanations or statements on the merits of Mr. Reid's case, pursuant to article 4, paragraph 2, of the Optional Protocol. Instead, it tried to revisit the Committee's admissibility decision by arguing that Mr. Reid had failed to exhaust domestic remedies. According to counsel, the State party could have put forward its arguments in its submission under rule 91; at this stage, it is no longer open to the State party to introduce new arguments on admissibility, or at least to do so before providing the information requested by the Committee in its admissibility decision. In her opinion, a different view would be contrary to rule 93, paragraph 4, of the Committee's rules of procedure.

9.2 Counsel adds that the State party's new arguments on admissibility miss the point since article 5, paragraph 2 (b), of the Optional Protocol does not require individuals to prove that they have exhausted every possible domestic course of action which potentially might constitute a remedy. Only such remedies as are both

available and effective must be pursued. Accordingly, it should be reasonably assumed that the remedy which the Jamaican Government claims remains open to the author would redress the alleged violations. But this would not be the case if established case law ran counter to the conclusion sought by the author, as is the situation in the instant case. She notes that the State party should provide, in support of its argument, clarifications on whether or not there is any case law which would assist her with her case, given that Mr. Reid is now being asked to argue certain points before a court of lesser jurisdiction in Jamaica, which he had already argued before the Judicial Committee of the Privy Council. Counsel contends that the Judicial Committee, if seized of the constitutional case, would most likely confirm its earlier decision in the case. Moreover, a court of lesser jurisdiction in Jamaica would be bound by the Judicial Committee's earlier decision. Finally, counsel argues that the constitutional remedy is not only an ineffective but also an unavailable remedy, since it is virtually impossible to secure legal representation in Jamaica to argue constitutional cases on a pro bono basis.

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

10.2 The Committee has taken due note of the State party's contention that with respect to the alleged violations of articles 6, 7 and 14 of the Covenant, domestic remedies have not been exhausted by Mr. Reid. It takes this opportunity to expand upon its admissibility findings.

10.3 The Committee has taken note of the State party's contention that the communication is inadmissible because of the author's failure to pursue constitutional remedies available to him under the Jamaican Constitution. In this connection, the Committee observes that Section 20, paragraph 1, of the Jamaican Constitution guarantees the right to a fair trial, while Section 25 provides for the implementation of the provisions guaranteeing the rights of the individual. Section 25, paragraph 2, stipulates that the Supreme (Constitutional) Court may "hear and determine" applications with regard to the alleged non-observance of constitutional guarantees, but limits its jurisdiction to such cases where the applicants have not already been afforded "adequate means of redress for the contraventions alleged" (Sect. 25, para. 2, in fine). The Committee notes that the State party was requested to clarify, in a number of interlocutory decisions, whether the Supreme (Constitutional) Court has had the opportunity to determine the question pursuant to Section 25, paragraph 2, of the Jamaican Constitution, whether an appeal to the Court of Appeal and the Judicial Committee of the Privy Council constitute "adequate means of redress" within the meaning of Section 25, paragraph 2, of the Jamaican Constitution. The State party has replied that the Supreme Court has so far not had said opportunity. Taking into account the State party's clarification, together with the absence of legal aid for filing a motion in the Constitutional Court and the unwillingness of Jamaican counsel to act in this regard without remuneration, the Committee finds that recourse to the Constitutional Court under Section 25 of the Jamaican Constitution is not a remedy available to the author within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

10.4 Finally, the author's claim that no legal aid is provided to those who envisage filing a constitutional motion and who cannot afford legal representation has remained uncontested. As Mr. Reid is unable to afford legal representation, it

follows that even if a constitutional motion were considered an effective remedy, it would not be available to the author, in fact if not in law.

10.5 The Committee has also taken note of the State party's contention that the Committee's established jurisprudence on article 5, paragraph 2 (b), of the Protocol, namely that domestic remedies must be both available and effective, is merely the Committee's own interpretation of this provision. a/ It reiterates, in this context, that the local remedies rule does not require the resort to appeals which objectively have no prospect of success, which is an established principle of international law and of the Committee's jurisprudence.

10.6 For the reasons set out above, the Committee finds that a constitutional motion is not a remedy that the author would have to exhaust for purposes of the Optional Protocol. It therefore concludes that there is no reason to revise its decision on admissibility of 30 March 1989.

11.1 With respect to the alleged violation of article 14, three principal issues are before the Committee: (a) whether the alleged inadequacy of the judge's summing-up to the jury in the trial before the Home Circuit Court amounted to a denial of a fair trial; (b) whether the author had adequate time and facilities for the preparation of his defence and (c) whether the author's representation before the Court of Appeal by an attorney not of his choosing constituted a violation of article 14, paragraph 3 (d).

11.2 Concerning the first issue under article 14, the Committee reaffirms that it is generally for the appellate courts of States parties to evaluate the facts and the evidence in a particular case. It is not, in principle, for the Committee to review specific instructions to the jury by the judge in a trial by jury, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice. The Committee does not have sufficient evidence that the trial judge's instructions suffered from such defects.

11.3 The Committee notes that the State party has not denied the author's claim that the court failed to grant counsel sufficient minimum time to prepare his examination of witnesses. This amounts to a violation of article 14, paragraph 3 (b), of the Covenant.

11.4 Concerning the issue of the author's representation before the Court of Appeal, the Committee reaffirms that it is axiomatic that legal assistance must be made available to a convicted prisoner under sentence of death. b/ This applies to the trial in the court of first instance as well as to appellate proceedings. In the author's case, it is uncontested that legal counsel was assigned to him for the appeal. What is at issue is whether the author had a right to contest the choice of his court-appointed attorney, and whether he should have been afforded an opportunity to be present during the hearing of the appeal. The author's application for leave to appeal to the Court of Appeal, dated 6 April 1985, indicates that he wished to be present for the hearing of his appeal. However, the State party did not offer this opportunity, since legal aid counsel had been assigned to him. Subsequently, his counsel considered that there was no merit in the author's appeal and was not prepared to advance arguments in favour of it being granted thus effectively leaving him without legal representation. In the circumstances, and bearing in mind that this is a case involving the death penalty, the Committee considers that the State party should have appointed another lawyer for his defence or allowed him to represent himself at the appeal proceedings. To

the extent that the author was denied effective representation at the appeal proceedings, the requirements of article 14, paragraph 3 (d), have not been met.

11.5 The Committee is of the opinion that the imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is available, a violation of article 6 of the Covenant. As the Committee noted in its general comment 6 (16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal". In the present case, since the final sentence of death was passed without having met the requirements for a fair trial set forth in article 14, it must be concluded that the right protected by article 6 of the Covenant has been violated.

11.6 As to the allegation that the delays in the execution of the sentence passed on the author amount to a violation of article 7 of the Covenant, and that the author's execution after the delays encountered would amount to an arbitrary deprivation of life, the Committee reaffirms its earlier jurisprudence pursuant to which prolonged judicial proceedings do not per se constitute cruel, inhuman or degrading treatment even if they can be a source of mental strain for convicted prisoners. However, the situation may be different in cases involving capital punishment, although an assessment of the circumstances of each case would be necessary. g/ In the present case the Committee does not find that the author has sufficiently substantiated his claim that delay in judicial proceedings constituted for him cruel, inhuman and degrading treatment under article 7.

12.1 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts, as found by the Committee, disclose a violation of articles 6 and 14, paragraph 3 (b) and (d), of the Covenant.

12.2 It is the view of the Committee that, in capital punishment cases, the duty of States parties to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant is even more imperative. The Committee is of the view that Mr. Carlton Reid, a victim of a violation of articles 6 and 14, paragraph 3 (b) and (d), is entitled to a remedy entailing his release.

13. The Committee also takes this opportunity to express concern about the practical operation of the system of legal aid under the Poor Prisoners' Defence Act. On the basis of the information before it, the Committee considers that this system, in its current form, does not appear to operate in ways that would enable legal representatives working on legal aid assignments to discharge themselves of their duties and responsibilities as effectively as the interests of justice would warrant. The Committee considers that in cases involving capital punishment, in particular, legal aid should enable counsel to prepare his client's defence in circumstances that can ensure justice. This does include provision for adequate remuneration for legal aid. While the Committee concedes that the State party's authorities are in principle competent to spell out the details of the Poor Prisoners' Defence Act, and while it welcomes recent improvements in the terms under which legal aid is made available, it urges the State party to review its legal aid system.

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

[Done in English, French, Russian and Spanish, the English text being the original version.]

Notes

a/ State party's submission dated 25 May 1989 in communication No. 249/1987 (T. P. v. Jamaica), not yet reported.

b/ See communication No. 223/1987 (Robinson v. Jamaica), final views adopted on 30 March 1989, para. 10.3.

c/ See communication Nos. 210/1986 and 225/1987 (Earl Pratt and Ivan Morgan v. Jamaica), final views adopted on 6 April 1989, para. 13.6.

APPENDIX

Individual opinion submitted by Mr. Bertil Wennergren pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the views of the Committee on communication No. 250/1987, Carlton Reid v. Jamaica

The Vienna Convention on the Law of Treaties states, inter alia, that a treaty provision shall be interpreted in accordance with the ordinary meaning to be given to its terms, placed in their context and in the light of the treaty's object and purpose. The object and purpose of article 6, paragraph 2, of the Covenant is obvious. It is to circumscribe the imposition of death sentences. The travaux préparatoires characterise it as a yardstick to which national law authorising the imposition of the death sentence must conform. This yardstick consists of a number of prerequisites, some of which reflect guarantees also laid down in other articles of the Covenant. The prerequisites are: (a) "only for the most serious crimes"; (b) "only in accordance with the law in force at the time of the commission of the crime", cf. article 15, paragraph 1; (c) "only pursuant to a final judgment rendered by a competent court", cf. article 14, paragraph 1. The same requirements are to be found in article 4 of the American Convention on Human Rights, which reads: the death penalty "may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime." Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is less complete. It merely states that "no one shall be deprived of his life intentionally save in the execution of a sentence of a court following conviction of a crime for which this penalty is provided by law." Thus the Convention provision focuses more than similar provisions on the purpose to protect an individual from any intentional deprivation of his life by State organs. Article 6, paragraph 2, of the Covenant adds a prerequisite that is not included in either the European or the American Conventions, namely (d) "not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide". The latter Convention includes provisions that prohibit any killing - i.e. also execution pursuant to a death sentence - that can be subsumed under the term genocide. Article 6, paragraph 5, of the Covenant prohibits in addition the imposition of a sentence of death for crimes committed by persons below eighteen years of age. Thus the prerequisite (d) evidently in the first place aims at those provisions in the Covenant and the Genocide Convention dealing with the imposition and execution of death sentences. It is, however, worded in such general terms that it might be understood as applying to other provisions of the Covenant as well, and not merely to provisions which would apply to the imposition itself of a death sentence, for instance article 26. The Committee has in this case interpreted it that way and found that a violation of the provisions in article 14 about a fair trial has to be looked upon as a violation also of article 6, paragraph 2, when the trial ended with a death sentence. I cannot find grounds for such an interpretation for the following reason: in the context where this prerequisite has been placed - i.e in paragraph 2 and not in paragraph 1 - and in the light of the object and purpose of that paragraph, it is difficult to assume that it should be given an independant significance apart from its specific purpose (paragraph 5 and article 26 observance) and that it adds to what already is made clear by article 6, paragraph 5. The travaux préparatoires do not provide any useful guidance; moreover, any State power to investigate a crime that may lead to a death sentence,

indict a person for such a crime and conduct a trial against him is outside the focal point of article 6, paragraph 2, that deals only with the power to sentence an individual to death. The exercise of these related powers will then instead fall under paragraph 1, which provides that no one shall be arbitrarily deprived of his life, a term which according to the travaux préparatoires was preferred to "without due process of law". In my opinion violations of the safeguards for a fair trial in article 14 in a capital punishment case cannot be deemed to also constitute violations of article 6, paragraph 2. However, I agree with the Committee that unfairness in a capital punishment case is of utmost gravity. When someone's life is at stake, all possible precautions and safeguards must come into full play. A breach of article 14 in such a case therefore constitutes a particularly grave violation. But, it cannot, even for that reason, be deemed to constitute a violation of article 6, paragraph 2. It is only - and only then - if the trial does not display the characteristics of a real trial but rather those of a mock trial, lacking the paramount characteristics of due process of law, that a violation of article 6 of the Covenant besides a violation of article 14 of the Covenant may arise, namely a violation of article 6, paragraph 1. The trial in this case undoubtedly was a very unsatisfactory one, but the information available does not, in my view, justify the conclusion that the elements of unfairness were such that the trial may be looked upon as arbitrary. I note in this connection that the Judicial Committee of the Privy Council received a petition from the author for special leave to appeal because of the trial deficiencies, but that the Judicial Committee did not grant leave. My conclusion therefore is that, just as under the American and European Conventions, violations of the fair trial safeguards cannot as such at the same time be deemed to be violations of provisions concerning the imposition of death sentences.

Bertil WENNERGREN

K. Communication No. 291/1988, Mario I. Torres v. Finland (views adopted on 2 April 1990, at the thirty-eighth session)

Submitted by: Mario Inés Torres (represented by counsel)

Alleged victim: The author

State party concerned: Finland

Date of communication: 17 February 1988

Date of decision on admissibility: 30 March 1989

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

Meeting on 2 April 1990,

Having concluded its consideration of communication No. 291/1988, submitted to the Committee by Mr. Mario Inés Torres 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 by the State party,

Adopts the following:

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

1. The author of the communication, dated 17 February 1988, is Mario I. Torres, a Spanish citizen born in 1954, who claims to be the victim of a violation by Finland of article 7, 9, paragraph 4, and 14 of the International Covenant on Civil and Political Rights. He is represented by counsel.

The background

2.1 A former political activist, Mr. Torres resided at Toulouse, France, from 1957 to 1979. From 1974 to 1977, he served a prison sentence for acts of sabotage committed against Spanish property in France. In 1979, he returned to Spain.

2.2 On 19 March 1984, he was arrested by the special services of the Spanish Guardia Civil, on suspicion of being a member of a terrorist group, and was detained for 10 days.

2.3 From 1985 to 1987, the author resided in France.

2.4 On 26 August 1987, the author travelled to Finland and requested asylum. On 8 October 1987, however, he was detained by the security police pursuant to the Aliens Act. Since that date and until his extradition to Spain in March 1988, the detention order was renewed on seven occasions for seven days at a time by decision of the Ministry of the Interior. On 3 December 1987, the Minister of the Interior

rejected the author's request for asylum and his request for a resident's permit. On 9 December 1987, the author appealed to the Supreme Court, requesting his release from detention, and on the same day filed a second request for asylum, which was refused by the Ministry of the Interior on 27 January 1988.

2.5 On 16 December 1987, the Government of Spain requested the author's extradition through the International Criminal Police Commission (Interpol). By decision of the same day, the author's detention was prolonged pursuant to the Finnish law on the Extradition of Criminals. On 23 December 1987, the City Court of Helsinki decided to prolong detention on the same grounds. On 4 January 1988, the Ministry of Justice decreed that, since extradition had not yet been officially requested by Spain, the author could no longer be detained pursuant to the Law on the Extradition of Criminals. On 5 January 1988, an order concerning the prolongation of his detention, pursuant to the Aliens Act, was issued by the police.

2.6 On 8 January 1988, the Embassy of Spain at Helsinki formally requested the extradition of Mr. Torres as a suspect in a robbery committed at Barcelona on 2 December 1984. By a note verbale dated 3 February 1988, the request was extended to cover his alleged membership in an armed group. The City Court of Helsinki thereupon decided, on 11 January 1988, that Mr. Torres could be detained pursuant to the Law on the Extradition of Criminals. On 4 March 1988, the Supreme Administrative Court of Finland considered that there had been justifiable grounds for lawfully detaining the author pursuant to the Aliens Act. On 10 March 1988, the Minister of Justice approved the extradition request and the author was extradited to Spain on 28 March 1988. Until the author's extradition, the City Court of Helsinki reviewed the detention at two-week intervals.

2.7 The detention of Mr. Torres from 8 October to 15 December 1987 and from 5 to 10 January 1988 was based on the Aliens Act and from 16 December 1987 to 4 January 1988 and from 11 January to 28 March 1988 on the law on the Extradition of Criminals; during the entire period, Mr. Torres was detained at the Helsinki District Prison.

2.8 On 14 October 1988, the Juzgado Central de Instrucción convicted the author of armed robbery and sentenced him to seven years' imprisonment. He is currently appealing his conviction and remains on bail.

Complaint

3. The author claims that the extradition order of 10 March 1988 was contrary to article 7 of the Covenant, because the Finnish authorities had been provided with information, on the basis of which it could be feared that the author would be subjected to torture if he were to return to Spain. With regard to his complaint under article 9, paragraph 4, of the Covenant, the author argues that during his detention pursuant to the Aliens Act, he was not provided an opportunity to have recourse to a judicial body, and that the proceedings before the Supreme Administrative Court were unreasonably prolonged.

State party's comments and observations

4.1 The State party submits that article 7 of the Covenant does not cover the issue of extradition, and adds that the decision on the extradition of Mr. Torres was taken in conformity with the international obligations of Finland:

"The request for extradition by Spain concerned armed robbery as well as membership in an armed group. The extradition was considered possible only on the basis of the former but not of the latter. The Finnish extradition order specifically provided that the Spanish authorities do not prosecute Mr. Torres for crimes other than the one for which extradition was granted (armed robbery). The rights guaranteed under the Covenant have thus not been affected by the extradition. Even if an extradition were treated as potential complicity to a violation of article 7, the State party argues that Mr. Torres did not submit the necessary evidence to indicate that he would, after his extradition, be subjected to treatment in violation of article 7."

4.2 The State party further elaborates on the grounds for the author's detention: the first decision, dated 7 October 1987, was based on reasons relating to a presumed risk of crime (Aliens Act, section 23, subsections 1 and 2). The second decision, dated 3 December 1987, was justified by the preparations for his extradition to Spain and a presumed risk of crime and evasion (Aliens Act, section 23, subsections 1 and 2). The third decision, dated 5 January 1988, was predicated, inter alia, on a presumed risk of crime (Aliens Act, section 23, subsections 1 and 2).

4.3 Under section 33 of the Aliens Act, Mr. Torres could have appealed the extension of his detention to the Supreme Administrative Court within 14 days of the decision. He did appeal the decision made by the Ministry of the Interior on 26 November 1987 on the extension of detention, and his appeal was dismissed by the Supreme Administrative Court on 4 March 1988. Under section 32 of the Aliens Act ("Seeking annulment of a decision rendered by the police or a passport control officer"), Mr. Torres had the right to submit the decisions on detention (concerning the first seven days) taken by the police on 7 October 1987, 3 December 1987 and 5 January 1988, respectively, to review by the Ministry of the Interior. He did seek annulment of the two latter decisions of the police. In its decision of 23 February 1988, the Ministry of the Interior considered that there had been reasonable grounds for detention.

4.4 The State party further submits that detention under the Extradition Act must, pursuant to section 19, be referred "without delay" to the City Court which in turn shall, according to section 20, decide "without delay" whether detention should be continued. The detention order of 16 December 1987 was prolonged by decision of 23 December 1987 of the Helsinki City Court. According to section 42 of the Extradition Act, the decision of the City Court can be appealed to the Supreme Court. There is no time-limit for an appeal. The State party notes that the files do not indicate that Mr. Torres ever filed this appeal and submits that this domestic remedy was thus not exhausted and is, in principle, still available to him.

4.5 Finally, the State party indicates that a government bill with a view to amending the Aliens Act will be submitted to Parliament shortly so as to guarantee the right to have detention order reviewed by a court without delay.

Issues to be considered by the Committee

5.1 On the basis of the information before it, the Committee concluded that all conditions for declaring the communication admissible were met, including the requirement of exhaustion of domestic remedies under article 5, paragraph 2, of the Optional Protocol.

5.2 In its decision on admissibility, the Committee reserved consideration of the author's allegations under article 7 for the merits in order to be able to ascertain whether the Finnish Government, when deciding upon Mr. Torres' extradition, was in possession of such information as to indicate that he might upon extradition be subjected to torture or to other cruel, inhuman or degrading treatment.

5.3 The Committee further recalled that according to the uncontested facts, Mr. Torres was unable to challenge his detention under the Aliens Act during the first week of detention on several occasions. The Committee noted that the Aliens Act did not contain a right of complaint for detention up to seven days; therefore, it had to consider whether the provisions of the Aliens Act, which were concretely applied to the author, conformed with the requirements of article 9, paragraph 4, of the Covenant. The Committee observed that the State party had not furnished any information on the domestic remedies which the author could have pursued with respect to this particular complaint; it thus concluded that in respect of this complaint there were no domestic remedies available to Mr. Torres.

5.4 The Committee noted the State party's statement that although the author had, on 9 December 1987, filed an appeal to the Supreme Administrative Court against the decision by the Ministry of the Interior of 26 November 1987, the Court did not decide until nearly three months later. In the light of the circumstances, the Committee found that Mr. Torres' complaint relating to the delay in having his detention adjudicated upon could raise issues under article 9, paragraph 4, of the Covenant.

5.5 On the basis of the written information before it, the Committee considered that there was no evidence in substantiation of the author's claim that he was a victim of any of the rights set forth in article 14 of the Covenant.

5.6 On 30 March 1989, the Human Rights Committee declared the communication admissible in so far as it related to complaints under articles 7 and 9, paragraph 4, of the Covenant.

6. The Committee notes the author's allegation that Finland is in violation of article 7 of the Covenant for extraditing him to a country where there were reasons to believe that he might be subjected to torture. The Committee finds, however, that the author has not sufficiently substantiated his fears that he would be subjected to torture in Spain.

7.1 Three separate questions arise with respect to article 9, paragraph 4, of the Covenant: (a) whether the fact that the author was precluded, under the Aliens Act, from challenging his detention for the periods of 8 to 15 October 1987, 3 to 10 December 1987 and 5 to 10 January 1988 before a court when he was being detained under orders of the police, constitutes a breach of this provision; (b) whether once he was by law entitled to challenge his detention under the Aliens Act, alleged delays in the handing down of the judgement constitute a breach; and (c) whether the application of the Extradition Act to the author entails any violation of this provision.

7.2 With respect to the first question, the Committee has taken note of the State party's contention that the author could have appealed the detention orders of 7 October, 3 December 1987 and 5 January 1988 pursuant to section 32 of the Aliens Act to the Ministry of the Interior. In the Committee's opinion, this possibility,

while providing for some measure of protection and review of the legality of detention, does not satisfy the requirements of article 9, paragraph 4, which envisages that the legality of detention will be determined by a court so as to ensure a higher degree of objectivity and independence in such control. The Committee further notes that while the author was detained under orders of the police, he could not have the lawfulness of his detention reviewed by a court. Review before a court of law was possible only when, after seven days, the detention was confirmed by order of the Minister. As no challenge could have been made until the second week of detention, the author's detention from 8 to 15 October 1987, from 3 to 10 December 1987 and from 5 to 10 January 1988 violated the requirement of article 9, paragraph 4, of the Covenant that a detained person be able "to take proceedings before a court in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful" (emphasis added).

7.3 With respect to the second question, the Committee emphasises that, as a matter of principle, the adjudication of a case by any court of law should take place as expeditiously as possible. This does not mean, however, that precise deadlines for the handing down of judgements may be set which, if not observed, would necessarily justify the conclusion that a decision was not reached "without delay". Rather, the question of whether a decision was reached without delay must be assessed on a case by case basis. The Committee notes that almost three months passed between the filing of the author's appeal, under the Aliens Act, against the decision of the Ministry of the Interior and the decision of the Supreme Administrative Court. This period is in principle too extended, but as the Committee does not know the reasons for the judgment being issued only on 4 March 1988, it makes no finding under article 9, paragraph 4, of the Covenant.

7.4 With respect to the third question, the Committee notes that the Helsinki City Court reviewed the author's detention under the Extradition Act at two-week intervals. The Committee finds that such reviews satisfy the requirements of article 9, paragraph 4, of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts of the communication disclose a violation of article 9, paragraph 4, of the International Covenant on Civil and Political Rights, because the author was unable to challenge his detention from 8 to 15 October 1987, from 3 to 10 December 1987 and from 5 to 10 January 1988 before a court.

9. In accordance with the provisions of article 2 of the Covenant, the State party is under an obligation to remedy the violations suffered by the author and to ensure that similar violations do not occur in the future. The Committee takes this opportunity to indicate that it would welcome information on any relevant measures taken by the State party in respect of the Committee's views. In this context, the Committee welcomes the State party's expressed intention to amend its legislation so as to guarantee the right to have detention based on the Aliens Act reviewed without delay by a court.

L. Communication No. 295/1988, Aapo Järvinen v. Finland (views adopted on 25 July 1990, at the thirty-ninth session)

Submitted by: Aapo Järvinen (represented by counsel)

Alleged victim: The author

State party concerned: Finland

Date of communication: 16 March 1988 (date of initial letter)

Date of decision on admissibility: 23 March 1989

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

Meeting on 25 July 1990,

Having concluded its consideration of communication No. 295/1988 submitted to the Committee by Mr. Aapo Järvinen 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 by the State party,

Adopts the following:

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

1. The author of the communication, dated 16 March 1988, is Aapo Järvinen, a Finnish citizen born in February 1965, who claims to be the victim of a violation of article 26 of the International Covenant on Civil and Political Rights by Finland. He is represented by counsel.

The background

2.1 In Finland, until the end of 1986, applications for exemption from military service were dealt with under the Act on Unarmed and Civilian Service. Under this legislation, conscripts whose religious or ethical convictions did not allow them to perform their compulsory military service as armed service in accordance with the Conscription Act could be exempted from such service in times of peace and be assigned to unarmed or to civilian service. The duration of military service is eight months. The duration of unarmed service was 11 months, to be performed in the Defence Forces in duties not involving the carrying of arms. Civilian service lasted 12 months, to be performed in government civilian service, in the municipalities or in hospitals.

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* Individual opinions submitted (a) by Messrs. Francisco Aguilar Urbina and Fausto Pocar and (b) by Mr. Bertil Wennergren, respectively, are appended.

2.2 Under the law in force until the end of 1986, a written application as well as the genuineness of an applicant's religious or ethical convictions were examined by a particular examination board. At the end of 1986 this procedure was abolished by Act No. 647/85, the Act on the Temporary Amendment to the Act on Unarmed and Civilian Service and applicants are now assigned to civilian service solely on the basis of their own declarations. The duration of civilian service was set at 16 months. The ratio legis for the amendment reads as follows:

> "As the convictions of conscripts applying for civilian service will no longer be examined, the existence of these convictions should be ascertained in a different manner so as not to let the new procedure encourage conscripts to seek an exemption from armed service purely for reasons of personal benefit or convenience. Accordingly, an adequate prolongation of the term of such service has been deemed the most appropriate indicator of a conscript's convictions".

2.3 On 9 June 1986, the author, who had been called upon to report for military service, submitted a written statement to the competent authorities stating that his ethical convictions did not permit him to perform armed or unarmed service in the Finnish Defence Forces. The headquarters of the military district of Tampere transmitted the author's statement to the Investigation Board on 8 December 1986. The Board failed to take a decision before the expiration of its mandate on 31 December 1986, and the documents were returned to the headquarters, from where the matter was referred to the Commander of the military district for consideration under the implementation order of Act No. 647/85.

2.4 In January 1987, the author submitted a new application for exemption from military service; this was accepted in February 1987. On 9 June 1987, the author started alternative civilian service. Under the new provisions referred to above, the term of civilian service is determined in accordance with the provisions in force at the time of the service order. Accordingly, Mr. Järvinen's term of service was 16 months, because he did not receive the order assigning him to alternative civilian service until the amendment became effective. In reply to a complaint of discrimination filed by the author, the Parliamentary Ombudsman of Finland, on 17 February 1988, concluded that there had been no evidence of any intention on the part of the authorities deliberately to prolong the procedure in Mr. Järvinen's case; had his case been considered in the course of 1986, his ethical convictions would have had to have been considered, with the possibility of failing to persuade the authorities of their genuineness.

2.5 Certain categories of individuals are exempt from military or alternative service in Finland. An Act on the Exemption of Jehovah's Witnesses from Military Service has been in force since the beginning of 1987. Under this Act, the service of a conscript who adheres to the religious community of Jehovah's Witnesses may be deferred until his twenty-eighth birthday; after that he may be exempted from military service in times of peace. This means that, in practice, Jehovah's Witnesses do not have to perform any type of military or alternative service.

The author's allegations

3.1 The author considers that he has been the victim of discrimination, since individuals who choose alternative service are required to serve for 16 months, whereas the term of military service is only eight months. While he concedes that the previous term of 12 months for alternative service was not necessarily

discriminatory within the meaning of article 26 of the Covenant, he argues that a prolongation from 12 to 16 months is not justified and constitutes discrimination. A period of 16 months is disproportionately longer than that applicable to military conscripts, being twice as long. In the author's opinion, the Finnish Government has failed to adduce valid arguments to establish the proposition that increasing the period of alternative service to 16 months is a reasonable, non-discriminatory measure, proportionate to the stated objective; moreover, the determination of the new term of alternative service was not based on any empirical research but was selected arbitrarily. To the author, the stated ratio legis of the legislative amendment, Act No. 647/85, is indicative of the Government's intention to introduce some punitive element in the prolongation of alternative service.

3.2 It is pointed out that the earlier term of alternative civilian service, 12 months, was in fact based on an argument of proportionality. The author refers in this context to government bill No. 136 on unarmed and civilian service, which had been presented to Parliament in 1967. Under the initial proposal, civilian service would have lasted six months longer than military service, i.e., a total of 14 months. The parliamentary Defence Matters Committee shortened the term of civilian service to 12 months, considering that the proposed term for alternative service was "unreasonably long", and that it was inappropriate to treat conscripts who had opted for unarmed or civilian service in a considerably more disadvantageous way than others. Accordingly, the Committee proposed to set the duration for unarmed service at 11 months and for civilian service at 12 months.

3.3 The author adds that if one were to compare the situation of conscientious objectors in Finland with that of conscientious objectors in other Western European countries, it would be apparent that a term of civilian service twice as long as that of armed military service is disproportionate to the aim of the measure, as in all those countries except one, civilian service usually lasts as long or only somewhat longer (up to 50 per cent longer) than military service. This is true not only of Western Europe but also of Poland and Hungary, which recently passed legislation governing civilian service.

3.4 In respect of the State party's argument that the simple abolition of the examination procedure for conscientious objectors might encourage conscripts to seek exemption from armed service on grounds of personal benefit and convenience, the author submits that the criteria for any differentiation in the term(s) of service are neither reasonable nor objective, as the prolongation of the term of service is applied to all groups of conscientious objectors except for one specific group, Jehovah's Witnesses, who are exempt from all forms of service. Under the current system, serious religious or ethical objectors are punished by an excessive prolongation of their service, while some seeking personal benefit or convenience opt for the shortest possible term of armed service, eight months. In the author's opinion, such criteria of differentiation cannot be considered reasonable and objective, as the entire burden is placed on those objectors whose genuineness of convictions has never been at issue. Further, for such objectors the matter is not one of choice but is inherent in their philosophy.

The State party's comments and observations

4.1 Referring to the Committee's decision in communication No. 185/1984, a/ the State party argues that inasmuch as States parties do not have any obligation to provide for alternative service, they may, whenever they do provide for such alternative service, determine its conditions as they see fit, provided that these conditions do not per se constitute a violation of the Covenant.

4.2 Invoking the ratio legis of Act No. 647/85, the State party contends that the duration of civilian service, although admittedly longer than that of armed conscripts, does not indicate any intention of, or actual, discrimination vis-à-vis civilian servicemen within the meaning of article 26 of the Covenant. Inasmuch as the specific circumstances of the author's case and the examination of his application of June 1986 are concerned, the State party considers that on the basis of the facts, and in the light of the opinion of the Parliamentary Ombudsman of 17 February 1988, the determination of his term of civilian service took place in accordance with Finnish law and with article 26 of the Covenant.

4.3 In respect of the general exemption of Jehovah's Witnesses from any form of service, the State party points out that the Act on the Exemption of Jehovah's Witnesses from Military Service was passed in accordance with section 67 of the Parliament Act, which lays down the procedural requirements for the enactment of constitutional legislation, and affirms that the Act cannot be regarded as discriminatory within the meaning of article 26 of the Covenant.

Issues and proceedings before the Committee

5.1 On the basis of the information before it, the Committee concluded that all conditions for declaring the communication admissible had been met, and that, in particular, it was agreed between the parties that available domestic remedies had been exhausted, pursuant to article 5, paragraph 2 (b), of the Optional Protocol.

5.2 On 23 March 1989, the Human Rights Committee declared the communication admissible.

6.1 Article 8 of the Covenant makes clear that "service of military character" or "national service required by law of conscientious objectors" is not to be regarded as forced or compulsory labour. The Committee notes that the new arrangements, whereby applicants are now assigned to civilian service solely on the basis of their own declarations, effectively allows a choice as to service and departs from the previous pattern of an alternative civilian service for proven conscientious objectors. Accordingly, any issue of alleged discrimination falls under article 26 rather than under article 2, paragraph 1, in relation to article 8.

6.2 Thus, the main issue before the Committee is whether the specific conditions under which alternative service must be performed by the author constitute a violation of article 26 of the Covenant. That the Covenant itself does not provide a right to conscientious objection does not change this finding. Indeed, the prohibition of discrimination under article 26 is not limited to those rights which are provided for in the Covenant.

6.3 Article 26 of the Covenant, while prohibiting discrimination and guaranteeing equal protection of the law to everyone, does not prohibit all differences of treatment. Any differentiation, as the Committee has had the opportunity to state repeatedly, must however, be based on reasonable and objective criteria. b/

6.4 In determining whether the prolongation of the term for alternative service from twelve to sixteen months by Act No. 647/85, which was applied to Mr. Järvinen, was based on reasonable and objective criteria, the Committee has considered in particular the ratio legis of the Act (see para. 2.2 above) and has found that the new arrangements were designed to facilitate the administration of alternative service. The legislation was based on practical considerations and had no discriminatory purpose.

6.5 The Committee is, however, aware that the impact of the legislative differentiation, works to the detriment of genuine conscientious objectors, whose philosophy will necessarily require them to accept civilian service. At the same time, the new arrangements were not merely for the convenience of the State alone. They removed from conscientious objectors the often difficult task of convincing the examination board of the genuineness of their beliefs; and they allowed a broader range of individuals potentially to opt for the possibility of alternative service.

6.6 In all the circumstances, the extended length of alternative service is neither unreasonable nor punitive.

6.7 Although the author has made certain references to the exemption of Jehovah's Witnesses from alternative or military service in Finland, their situation is not at issue in the present communication.

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 terms of alternative service imposed on Mr. Järvinen by Act No. 647/85 do not disclose a violation of article 26 of the Covenant.

[Done in English, French, Russian and Spanish, the English text being the original version.]

Notes

a/ See communication No. 185/1984 (L. T. K. v. Finland), inadmissibility decision adopted on 9 July 1985; in this decision, the Committee held that the Covenant "does not provide for the right to conscientious objection", para. 5.2; Selected Decisions of the Human Rights Committee, volume 2, p. 62 of the English version.

b/ See communication No. 196/1985 (Gueye et al. v. France), final views adopted on 3 April 1989, para. 9.4; Official Records of the General Assembly, Forty-fourth Session, Supplement No. 40 (A/44/40, annex X, sect. B).

APPENDIX I

Individual opinion submitted by Messrs. Francisco Aguilar Urbina and Fausto Pocar, pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the views of the Committee on communication No. 295/1988, Järvinen v. Finland

We share the view expressed by the majority of the Committee that the present case is to be considered under article 26 of the Covenant, as well as the view that the same article does not prohibit all differences of treatment, provided that a differentiation be based on reasonable and objective criteria. However, we do not share the view that reasonable and objective criteria exist in the present case.

A consideration of the ratio legis of the Finnish Act 647/85 discloses that the difference of duration between military and civilian service is not based on objective criteria, such as a more severe type of service or the need for a special training required in order to accomplish the longer service. The ratio of the law is rather to replace the earlier method of testing the sincerity of an applicant's conscientious objection with a procedure based on administrative convenience, whereby the longer duration of the civilian service results in a sanction against consicentious objectors. Such longer duration constitutes in our view a difference of treatment incompatible with the prohibition of discrimination on grounds of opinion enshrined in article 26 of the Covenant.

Francisco AGUILAR URBINA
Fausto POCAR

APPENDIX II

Individual opinion submitted by Mr. Bertil Wennergren pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the views of the Committee on communication No. 295/1988, Järvinen v. Finland

Article 6 of the International Covenant on Economic, Social and Cultural Rights recognizes the right of everyone to gain his living by work which he freely chooses or accepts. The objective of article 8 of the Covenant on Civil and Political Rights is the protection against being forced to carry out work which one has not freely chosen. However, exception is made for any service of military character and, in conjunction herewith, for any national service required by law of conscientious objectors. As the national service in question is meant to replace military service, the question of equality before the law arises, as explained in paragraphs 6.1 to 6.3 of the Committee's views. I concur in the opinions expressed in these paragraphs. When considering the question of equality before the law, the natural starting-point for me is everyone's right freely to choose his work and the time to devote to it and the fact that the object of national service is a replacement of military service.

The ratio legis of Act No. 647/85 (see para. 2.2 of the views) was that by choosing to prolong service time by as much as 240 days, the effect would be to discourage applicants without sincere and truly genuine convictions. Looked upon exclusively from the point of view of deterrence of objectors without genuine convictions, this method may seem both objective and reasonable. However, from the point of view of those for whom national service had been established in place of military service, the method is inadequate and runs counter to its purpose. As the Committee observes in paragraph 6.5, the impact of the legislative differentiation works to the detriment of genuine conscientious objectors, whose philosophy will necessarily require them to accept civilian service, no matter how long it is in comparison to military service. From this finding I draw the conclusion, contrary to the Committee, that the method not only is inadequate in relation to its very purpose to provide a possibility to those who, for reasons of conscience, are unable to perform military service, to instead perform civilian service. The effect of this practice is that they will be compelled to sacrifice twice as much of their liberty in comparison to those who are able to perform military service on the basis of their belief.

In my view, this is unjust and runs counter to the requirement of equality before the law laid down in article 26 of the Covenant. The differentiation in question is, in my view, based on grounds that are neither objective nor reasonable. Nor does it in my opinion comply with the provisions of article 18, paragraph 2, which state that no one shall be subject to coercion which would impair his freedom to have or adopt a religion or belief of his choice. Obliging conscientious objectors to perform 240 extra days of national service on account of their beliefs is to impair their freedom of religion or to hold beliefs of their choice.

I am therefore of the view that the terms for performance of national service, in place of military service, imposed on Mr. Järvinen by Act No. 647/85 disclose violations of articles 18 and 26 in conjunction with article 8 of the Covenant.

Bertil WENNERGREN

N. Communication No. 305/1988, Hugo van Alphen v. the Netherlands (views adopted on 23 July 1990, at the thirty-ninth session)

Submitted by: Hugo van Alphen

Alleged victim: The author

State party concerned: The Netherlands

Date of communication: 12 April 1988 (date of initial letter)

Date of the decision on admissibility: 29 March 1989

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

Meeting on 23 July 1990,

Having concluded its consideration of communication No. 305/1988, submitted to the Committee by Hugo van Alphen 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 by the State party,

Adopts the following:

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

1. The author of the communication dated 12 April 1988 is Hugo van Alphen, a Netherlands solicitor born in 1924, currently residing in The Hague, the Netherlands. He claims to be the victim of a violation by the Netherlands of articles 9, paragraphs 1 to 5, 14, paragraph 3, and 17 of the International Covenant on Civil and Political Rights.

Facts as submitted

2.1 The author was arrested on 5 December 1983 on the suspicion of having been an accessory or accomplice to the offence of forgery, or having procured the commission of the offence of forgery, and of having been an accessory to the intentional filing of false income tax returns for the years 1980 and 1981. He was taken from his home to the police station. On the same day, the author's home was searched by agents of the Tax Inquiry and Investigation Department, pursuant to article 97 of the Code of Criminal Procedure; documents belonging to the author were seized on this occasion. The author complained of the seizure to the Examining Magistrate.

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* The text of an individual opinion submitted by Mr. Nisuke Ando is appended.

2.2 Immediately upon arrival at the police station, at 20:10 hours, the author was brought before an Assistant Public Prosecutor, who decided that the author be remanded in custody. The author was informed of the reasons for the decision. On 7 December 1983, the Public Prosecutor extended the remand order. The previous day, on 6 December 1983, the Public Prosecutor had applied for a preliminary judicial investigation, and followed up with a further application for such an investigation on 16 December 1983. At the Prosecutor's request, the Examining Magistrate, a judge handling criminal cases at the District Court of Amsterdam, decreed on 8 December that the author be remanded in custody for a maximum of six days, after having heard the author. The order was subsequently extended.

2.3 After again hearing the author, the District Court of Amsterdam, on 15 December 1983, decided that the author be kept in custody for a maximum of 30 days. On 4 January 1984, the author's legal representative requested the court to release his client. After hearing the author, the court twice extended the remand order, first on 12 January and again on 31 January 1984. By further judgment of 31 January 1984, the remand period was terminated on 9 February 1984 at the author's request; on the latter date, the author was released.

2.4 Under Dutch law, the arrest and remand in custody of suspects in a criminal investigation is governed by articles 52 to 62 of the Code of Criminal Procedure. Suspects who are arrested are immediately brought before a public prosecutor. If the offence for which an individual has been arrested is a serious one, the public prosecutor or the assistant public prosecutor may issue a remand order in the interests of the criminal investigation, after having questioned the suspect. This remand order can normally be issued for not more than two days; if deemed necessary, the prosecutor may extend the remand order once for two days. Article 40 of the Code of Criminal Procedure stipulates that the suspect be provided with legal assistance for the period of his custody. If the public prosecutor considers that a prolongation of the detention is warranted by the circumstances, he may refer the suspect to an Examining Magistrate, who decides whether further to keep the suspect in detention, pursuant to article 64 of the Code of Criminal Procedure. Remand orders issued by an Examining Magistrate are valid for up to six days; the Magistrate may extend the order once for a maximum of six days.

2.5 Upon application by the Public Prosecutor, the court may decide that a suspect who was remanded in custody by order of the Examining Magistrate shall be further detained in the interest of the investigation. Before the decision is taken, the suspect is heard by the court. The length of the period for which custody is extended may not exceed 30 days; at the request of the Public Prosecutor, this period may twice be extended. The court may rescind the order on its own initiative, at the request of the suspect, at the recommendation of the Examining Magistrate or upon application by the Public Prosecutor (art. 69 of the Code of Criminal Procedure).

2.6 Examining magistrates in the Netherlands may also take a number of measures that restrict the freedom of suspects in a criminal investigation during the investigation. The legal basis for such measures is article 225, paragraph 1, of the Act establishing the Code of Criminal Procedure, in conjunction with article 132 of the Prison Rules, which empower Examining Magistrates to impose restrictions on a suspect's correspondence or visits. Upon examining an application for a six-day remand order, the Examining Magistrate generally informs the suspect as to whether restrictions are to be imposed, and what they would

entail. Pursuant to article 225, paragraph 3, of the Act establishing the Code of Criminal Procedure, the suspect may appeal against such measures to the District Court.

2.7 When the author was first heard by the Examining Magistrate on 8 December 1983, following the Public Prosecutor's application for a six-day remand order, the Magistrate informed the author that restrictions would be imposed in the interest of the criminal investigation. From that day until 6 January 1984, the author could not contact his family or his office, and only his legal representative was allowed to visit him. The author did not appeal against the restrictions imposed by the Magistrate; on 6 January 1984, the restriction order was lifted with immediate effect.

2.8 In respect of the author's complaint against the search of his home and the seizure of documents, a meeting was convened by the Examining Magistrate on 16 December 1983, which, apart from the author, was attended by his counsel, two investigating officers of the Fiscal Intelligence Department and by the Dean of the Hague Branch of the Netherlands Bar Association. The purpose of the meeting was to discuss the reasons for the seizure of the documents on 5 December. On 3 January 1984 the Examining Magistrate, in the company of the Assistant Public Prosecutor and the Deputy Clerk of the Court, carried out a search of the author's home and office, after an application to this effect had been filed by the Public Prosecutor and a search warrant issued. Also present during this search was the Dean of the Hague Branch of the Netherlands Bar Association.

2.9 The principal reason for the length of the author's detention - over nine weeks - was his refusal to waive his professional obligation to secrecy, although the interested party had released him from his obligations in this respect. From 1984 to 1986, extensive judicial investigations took place into the complex tax fraud scheme the author was suspected to be an accomplice in, or an accessory to. At the request of the Public Prosecutor, these investigations were discontinued in December 1986. The reason for this decision was the perceived impossibility to conclude the investigations and initiate criminal proceedings within a reasonable period of time, in the light of article 6 of the European Convention on Human Rights and article 14, paragraph 3 (c), of the International Covenant on Civil and Political Rights. On 23 January 1987, the author was informed that the Public Prosecutor had dropped the charges and that the case would be solved by fiscal means.

2.10 On 2 April 1987, the author filed two claims for damages with the Amsterdam District Court. Article 89 of the Code of Criminal Procedure provides that any individual suspected of having committed a criminal offence, whose case does not result in any court sentence being imposed, may submit a claim for damages to the court. The principal purpose is to provide for the possibility of compensation in cases involving pre-trial detention which subsequently proves to have been mistaken. The possibility of filing a claim for compensation is not restricted to cases of unlawful pre-trial detention but extends to pre-trial detention deemed to have been lawful. Damages for pre-trial detention may only be granted in cases which were concluded without the imposition of a sentence and in respect of which, in the Court's opinion, award of damages is warranted. The author's first claim was based on article 89 of the Code of Criminal Procedure; the second claim was based on article 591a of the Code of Criminal Procedure, involving compensation for legal fees incurred between 1983 and 1986.

2.11 The Amsterdam District Court scheduled a hearing to hear the author's claim for 23 April 1987, but, owing to the Court's heavy work-load, this hearing did not take place until 26 August 1987. By written judgment of 9 September 1988, the District Court awarded the author compensation for the legal aid costs incurred, as well as such compensation for the material and immaterial damages suffered as was considered reasonable and just.

2.12 On 6 October 1988, the author appealed against this judgement to the Amsterdam Court of Appeal. On 24 February 1989, the Court of Appeal quashed the District Court's judgement. No further remedies exist against the Court of Appeal's decision.

2.13 In its judgement, the Court of Appeal held that in the light of the statements made by the author and other witnesses heard in connection with the tax fraud scheme, the official reports of the Fiscal Intelligence and Investigation Department and the formal grounds for the application for a preliminary judicial investigation, serious grounds had existed for suspecting the author of involvement in a criminal offence. The Court of Appeal considered that the length of the author's detention was partly attributable to his consistent pleading of his professional obligation to observe confidentiality, even after the party directly concerned had relieved him of that obligation and that, that being so, it was not unreasonable to expect the author, as a former suspect, to bear the losses that had resulted from his pre-trial detention and his prosecution. In the light of these considerations, the Court of Appeal considered that there were no reasonable grounds for awarding the author damages.

Author's allegations

3.1 The author alleges that his arrest and his detention were arbitrary and therefore in violation of article 9, paragraphs 1 to 4, of the Covenant. In his opinion, the arrest and subsequent nine-week detention were used deliberately as a means of pressure against him, so as to force him to waive his professional obligation to secrecy and to solicit statements and evidence which could be used in the investigations against his clients. He claims that arrest and detention remained arbitrary and unlawful even if those serving the arrest warrant and implementing the decisions related to his detention complied with the applicable regulations and with the instructions they had received. It is submitted that detention based primarily on the observance of the professional duties of lawyers in itself amounts to a violation of the provisions of the Covenant, as a refusal to comply with the wishes of criminal investigators is not a criminal offence for which the law admits of detention. Furthermore, the author claims, he was deliberately left in the dark about the exact nature of the charges in connection with the search of his office and of his home. Finally, he alleges a violation of his enforceable right, under article 9, paragraph 5, to compensation for unlawful detention. In this context, he submits that the Netherlands authorities are generally reluctant to deal with claims for damages and compensation filed by victims of unlawful acts in cases such as his, and that such cases as reach the courts are handled negligently.

3.2 In respect to his right to a fair trial, the author alleges that the Court of Appeal failed to observe the minimum guarantees of article 14, paragraph 3, of the Covenant. He contends that the length of the proceedings before the Amsterdam District Court, which postponed hearings on his claims for compensation on two occasions and did not produce a written judgement until 9 September 1988, i.e.,

over one year after the hearing on 26 August 1987, were incompatible with his right, under article 14, paragraph 3 (c), to have the trial proceed without undue delay. He further argues that the Court of Appeal did not afford him the opportunity to examine the content of various statements incriminating him made by third parties, and that he was denied the possibility to himself cross-examine prosecution witnesses, who had been heard in the course of the investigation more than five years ago, and to have witnesses examined on his behalf.

3.3 The author complains that coercive measures such as arrest, detention, house and office searches and widely disseminated adverse publicity are frequently used by the authorities in fiscal investigations, so as to force suspects either to confess or to make statements that can be used by the authorities against other individuals subject to taxation. In this respect, the author states that these coercive measures seriously affected his professional reputation and his social position, and submits that they constituted arbitrary and unlawful interference with his privacy and family life, his correspondence, as well as an unlawful attack on his honour and reputation.

State party's comments and observations

4.1 The State party contends that the author did not, either in the course of the petition procedure governed by articles 89 and 591a of the Code of Criminal Procedure or during his detention, invoke the substantive rights protected by the Covenant before a court of law, and that therefore he cannot be deemed to have complied with the requirement of exhaustion of domestic remedies. It refers, in this context, to the decision adopted by the Human Rights Committee in communication No. 273/1988, a/ in which it had been held, inter alia, that "authors must invoke the substantive rights contained in the Covenant", in domestic proceedings. The State party adds that the author was entitled to apply to the competent court for an interlocutory injunction based on a claim of a violation of article 9, paragraph 1, or of any violation of the other provisions of article 9. Although himself a solicitor and represented by counsel of his choice throughout the period of pre-trial detention, the author made no use of that opportunity. The State party points out that it is a generally accepted principle of international law that individuals invoke the substantive rights contained in international instruments in the course of domestic judicial proceedings before petitioning an international instance. Since the author failed to comply with this requirement, the State party concludes his communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

4.2 With respect to the allegation of a violation of article 9, paragraph 5, the State party argues that the communication should be declared inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol. It contends that article 9, paragraph 5, is not applicable to the author's case because, in the light of serious reasons for suspecting the author of having committed criminal offences, his pre-trial detention was not unlawful.

4.3 Concerning the right, under article 14, paragraph 3 (c), to be tried without undue delay, the State party considers that this provision merely concerns the determination of a criminal charge and does not apply to claims for compensation such as those initiated by the author. Accordingly, the State party considers the communication to be incompatible with the provisions of the Covenant in so far as it relates to a violation of article 14, paragraph 3 (c). Furthermore, the author

did not, in his appeal to the Amsterdam Court of Appeal, complain about the undue prolongation of the proceedings in his case before the District Court. Accordingly, he also failed to exhaust domestic remedies in that respect.

4.4 As to the merits of the author's case, the State party contends that, given the strong reasons for suspecting the author of involvement in a serious criminal offence, and given that the Netherlands judicial authorities complied with the provisions of the Code of Criminal Procedure that govern the arrest and remand in custody of suspects in a criminal investigation, it cannot be said that the author was arbitrarily arrested or detained and that article 9, paragraph 1, was violated. As to the length of the author's detention, the State party notes that it was attributable to the fact "that the applicant continued to invoke his obligation to maintain confidentiality despite the fact that the interested party had released him from his obligations in this respect", and that "the importance of the criminal investigation necessitated detaining the applicant for reasons of accessibility". It further points out that the author was informed of the reasons for his arrest and detention, in accordance with the provisions of article 9, paragraph 2. Subsequently, the author had the option of applying to the competent court for an interlocutory injunction on the grounds of an alleged violation of article 9 of the Covenant. During his pre-trial detention, the author was heard on repeated occasions by the Examining Magistrate and the District Court of Amsterdam in connection with the request of the public prosecutor for an extension of the pre-trial detention. Thus, in the State party's opinion, the claim that article 9, paragraphs 3 and 4, were violated cannot be sustained.

4.5 In respect of the alleged violation of article 17, the State party points out that the search of the author's home on 5 December 1983 and on 3 January 1984 was carried out in accordance with the applicable regulations and that, accordingly, there can be no question of an arbitrary or unlawful interference with the author's privacy or home. The State party concludes that the author has not submitted any evidence in support of his claim of a violation of articles 9 and 17 of the Covenant.

Issues and proceedings before the Committee

5.1 When considering the communication at its thirty-fifth session, the Committee concluded, on the basis of the information before it, that the conditions for declaring the communication admissible were met, including the requirement of exhaustion of domestic remedies under article 5, paragraph 2 (b), of the Optional Protocol. On 29 March 1989, the Committee declared the communication admissible.

5.2 In its decision on admissibility, the Committee indicated that its decision might be reviewed in accordance with rule 93, paragraph 4, of its rules of procedure, in the light of any pertinent information submitted by the State party. In its subsequent submission of 26 October 1989 (see paras. 4.1 to 4.3 above), the State party did contest the admissibility of the communication in respect of the author's claims relating to violations of articles 9 and 14 of the Covenant.

5.3 The Committee has considered the present communication in the light of all the information provided by the parties. It has taken note of the State party's contention that with respect to the alleged violations of articles 9 and 14, the author has failed to exhaust domestic remedies because he did not invoke substantive rights guaranteed by the Covenant before the courts.

5.4 With respect to the alleged violation of article 14, paragraph 3 (c), the author has not contradicted the State party's contention that, in his appeal to the Amsterdam Court of Appeal, he did not complain about the length of the proceedings before the District Court. Further, it must be noted that the appeal was filed on 6 October 1988, almost six months after the author had submitted his communication to the Committee for consideration under the Optional Protocol to the Covenant (because of the delay of the District Court in providing its written judgment). The Committee is precluded from considering claims which had not been made, or in respect of which local remedies had not been exhausted, at the time the Committee was seised of the case. Accordingly, the communication is inadmissible in respect of the author's claim that his request for compensation was not adjudicated without undue delay.

5.5 Concerning the alleged violations of articles 9 and 17, the Committee begins by noting that no appeal is possible against the judgement of the Amsterdam Court of Appeal of 24 February 1989. The State party has contended that the author did not invoke the substantive rights in the Covenant during his detention or during the judicial proceedings, and that he is, accordingly, precluded from claiming violation of article 9 before the Committee. The Committee reiterates that authors are not required, for purposes of the Optional Protocol, to invoke specific articles of the Covenant in the course of domestic judicial proceedings, although they must invoke the substantive rights protected by the Covenant. a/ After the decision of the public prosecutor to drop the criminal charges against the author and to settle the case by fiscal means, on the grounds that criminal proceedings would be expected to infringe article 6 of the European Convention on Human Rights and article 14, paragraph 3 (c), of the Covenant, the author could only file a claim for compensation. He did file such a claim alleging that the detention between December 1983 and February 1984 had been an arbitrary one. Thus, it cannot be said that the author failed, in the course of the proceedings, to invoke "substantive rights protected by the Covenant". The Committee concludes, accordingly, that there is no reason to review its decision of 29 March 1989 in respect of alleged violations of articles 9 and 17.

5.6 The principal issue before the Committee is whether the author's detention from 5 December 1983 to 9 February 1984 was arbitrary. It is uncontested that the Netherlands judicial authorities, in determinating repeatedly whether to prolong the author's detention, observed the rules governing pre-trial detention laid down in the Code of Criminal Procedure. It remains to be determined whether other factors may render an otherwise lawful detention arbitrary, and whether the author enjoys an absolute right to invoke his professional obligation to secrecy regardless of the circumstances of a criminal investigation.

5.7 In the instant case, the Committee has examined the reasons adduced by the State party for a prolongation of the author's detention for a period of nine weeks. The Committee observes that the privilege that protects a lawyer-client relationship belongs to the tenets of most legal systems. But this privilege is intended to protect the client. In the case under consideration the client had waived the privilege. The Committee does not know the circumstances of the client's decision to withdraw the duty of confidentiality in the case. However, the author himself was a suspect, and although he was freed from his duty of confidentiality, he was not obliged to assist the State in mounting a case against him.

5.8 The drafting history of article 9, paragraph 1, confirms that "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime. The State party has not shown that these factors were present in the instant case. It has, in fact, stated that the reason for the duration of the author's detention "was that the applicant continued to invoke his obligation to maintain confidentiality despite the fact that the interested party had released him from his obligations in this respect", and that "the importance of the criminal investigation necessitated detaining the applicant for reasons of accessibility". Notwithstanding the waiver of the author's professional duty of confidentiality, he was not obliged to provide such co-operation. The Committee therefore finds that the facts as submitted disclose a violation of article 9, paragraph 1, of the Covenant.

5.9 With respect to an alleged violation of article 17, the Committee finds that the author has failed to submit sufficient evidence to substantiate such a violation by the State party.

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 of the communication disclose a violation of article 9, paragraph 1, of the Covenant.

7. The State party is under an obligation to take effective measures to remedy the violation suffered by the author and to ensure that similar violations do not occur in the future. The Committee takes this opportunity to indicate that it would wish to receive information on any relevant measures taken by the State party in respect of the Committee's views.

[Done in English, French, Russian and Spanish, the English text being the original version.]

Notes

a/ See communication No. 273/1988 (B. d. B. v. Netherlands), decision of 30 March 1989, para. 6.3.

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. 305/1988, van Alphen v. Netherlands

The central issue of the present case is whether the author's detention of nine weeks - from 5 December 1983 to 9 February 1984 - should be regarded as "arbitrary" under the provision of article 9, paragraph 1, of the International Covenant on Civil and Political Rights.

Article 9, paragraph 1, prohibits "unlawful" detention as well as arbitrary detention. With respect to the relations between unlawful detention and arbitrary detention, I agree with the Committee's view that the latter is to be more broadly interpreted than the former to include the elements of inappropriateness, injustice, and lack of predictability. (See 5.8 of the views.) However, it is presumed that the laws of many States parties to the Covenant regulating detention under those laws should not be regarded as arbitrary unless the aforementioned elements are clearly established to exist by undoubted evidence. In this respect, I consider that the laws of the State party regulating detention are not per se arbitrary and that any lawful detention under those laws should not be regarded as arbitrary unless the aforementioned elements are clearly established to exist by undoubted evidence. In this respect, I consider that the laws of the State party regulating detention are not per se arbitrary (2.4, 2.5) and that the author's detention was in compliance with those laws.

As to the question whether this lawful detention of the author should be regarded as arbitrary, the Committee bases its views on the submission of the State party that "the reason for the length of the detention period was that the author continued to invoke his obligation to maintain confidentiality despite the fact that the interested party had released him from this obligation in this respect. The importance of the criminal investigation necessitated the author's detention for reasons of accessibility" (5.8). Presumably, the Committee considers that the facts as submitted, together with the search of the author's home and office and the seizure of documents as well as the subsequent dropping by the Public Prosecutor of the charges against the author, reveal the elements of inappropriateness, injustice and lack of predictability, thus making the detention arbitrary (2.1, 2.9).

On the other hand, the State party also submits that extensive judicial investigations took place for two years - from 1984 to 1986 - into the complex tax fraud scheme the author was suspected to be an accomplice in, or accessory to. It is true that the Public Prosecutor requested the discontinuance of these investigations and dropped the charges against the author (2.9). Nevertheless, it is also true that the case was not terminated permanently but was to be settled by fiscal means (2.9, 5.5). In addition, in its judgments of 24 February 1989, the Netherlands Court of Appeal held that, in the light of statements made by the author and other witnesses heard in connection with the tax fraud scheme, the official reports of the Fiscal Intelligence and Investigation Department and the formal grounds for applications for a preliminary judicial investigation, serious grounds existed for suspecting the author of involvement in a criminal offence. The court further considered that the length of the author's detention was partly

attributable to his consistent pleading of his professional obligation to observe confidentiality, even after the party directly concerned had relieved him of that obligation, thus quashing the lower court's decision to award compensation to the author (2.13, emphasis supplied).

Under the provision of article 5, paragraph 1, of the Optional Protocol to the Covenant, the Committee "shall consider communications received ... in the light of all written information made available to it" by the parties concerned. In other words, the Committee must base its views solely on the written information at hand and consequently it is in no better position than the Netherlands Court of Appeal in ascertaining facts which should have essential weight for the purpose of regarding the detention as arbitrary. Taking into account all the above, I am unable to convince myself to agree to the Committee's views that the facts as submitted reveal the elements of inappropriateness, injustice, and lack of predictability, thus making the author's detention arbitrary.

Nisuke ANDO

ANNEX X

Decisions of the Human Rights Committee declaring communications inadmissable under the Optional Protocol to the International Covenant on Civil and Political Rights

A. Communication No. 220/1987, T. K. v. France (Decision of 8 November 1989, adopted at the thirty-seventh session)

Submitted by: T. K. [name deleted]

Alleged victim: The author

State party concerned: France

Date of communication: 12 January 1987 (date of initial letter)

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

Meeting on 8 November 1989,

Adopts the following:

Decision on admissibility*, **

1. The author of the communication (initial letter dated 12 January 1987 and a further letter dated 30 June 1987) is T. K., a French citizen of Breton ethnic origin, writing on his own behalf and in his capacity as president of the Unvaniezh Ar Galennerien Breshoneg (UAGB, Union des Enseignants de Breton). He was born in 1937 in Brittany and is employed as a professor of philosophy and of the Breton language. He alleges violations by France of articles 2, 16, 19, 26 and 27 of the Covenant.

2.1 The author states that the Tribunal Administratif de Rennes has refused to consider a case which he submitted on behalf of the UAGB in the Breton language on 7 November 1984. In this case, the author sought the recognition of the license for the association that he is heading. In reply to an inquiry written in French and Breton, the Tribunal answered that the case had not been registered because it was not written in French. A subsequent letter of complaint to the French Minister of Justice has allegedly remained unanswered. In support of his case, the author encloses copies of two decisions, one from the Tribunal Administratif de Rennes

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* Pursuant to rule 85 of the Committee's rules of procedure, Ms. Christine Chanet did not participate in the examination of the communication or in the adoption of this decision.

** The texts of two individual opinions submitted by Mrs. Rosalyn Higgins and Mr. Bertil Wennergren are appended.

dated 21 November 1984, the other from the Conseil d'Etat dated 22 November 1985, both stating that a complaint drafted in the Breton language should not be registered. Such decisions, according to the author, constitute discrimination on the ground of language, in contravention of article 2, paragraph 1, of the Covenant. The author further claims that the State party has violated article 2, paragraph 2, with regard to legislative or other measures necessary to give effect to the rights recognised in the Covenant, article 2, paragraph 3, with regard to effective remedies, article 16 with regard to the right to recognition everywhere as a person before the law, article 19, paragraph 2, with regard to freedom of expression, article 26 with regard to equality before the law without discrimination on any ground, and article 27 with regard to the right to use one's own language.

2.2 Concerning the question of the exhaustion of domestic remedies, the author states that the complaint before the Tribunal Administratif de Rennes was not even registered and that the Minister of Justice has not responded to his written complaint. The author further states that he has not submitted the same matter to another procedure of international investigation or settlement.

3. Without transmitting the communication to the State party, the Human Rights Committee requested the author, by decision of 9 April 1987 under rule 91 of the rules of procedure, to clarify (a) whether he claimed, as an individual, to be personally affected by the alleged violations of the Covenant by the State party, or whether he claimed, in his capacity as President of an organisation, that the organization was the victim of the alleged violations; and (b) whether he understood, read and wrote French. By letter dated 30 June 1987, the author replied that he had initially intended to submit the communication on behalf of the organisation, although he maintained that he was also directly affected by the events described in his initial communication. He further stated that he understands, reads and writes French.

4. By further decision of 20 October 1988, the Working Group of the Human Rights Committee transmitted the communication to the State party, requesting it, under rule 91 of the rules of procedure, to provide information and observations relevant to the question of admissibility. The author was requested, under rule 91, (a) to specify in which way he claimed to have been denied the right to recognition as a person before the law, (b) to which extent and in which context he claimed that his freedom of expression had been curtailed and (c) to substantiate his allegation that French citizens of French mother tongue and those of Breton mother tongue are not equal before the law.

5. In his reply, dated 13 January 1989, to the Working Group's questions, the author claims that French citizens of French mother tongue and those of Breton mother tongue are not equal before the law because the former can express themselves in their mother tongue before the tribunals while the latter cannot. While there exists a "Secrétariat à la francophonie", a similar institution has not been created in defence of regional languages other than French. Because the Government refuses to recognise the Breton language, those who use it daily are forced to abandon its use or to forgo their right to freely express themselves. The author adds that the violation of his freedom of expression is manifest in that the Administrative Tribunal refused to register a complaint submitted in Breton on the ground that its content was unintelligible, thereby refusing to recognise the validity of a complaint submitted in a local language and denying the citizens the use of their own language in court. Finally, the author affirms that he is barred,

as a French citizen of Breton mother tongue, from access to courts, as the judicial authorities do not authorise him to submit complaints in his mother tongue.

6.1 In its submission under rule 91, dated 15 January 1989, the State party argues that the communication is inadmissible on the ground of non-exhaustion of domestic remedies and that some of the author's claims are incompatible with the provisions of the Covenant. The State party recalls that the author did not contest, within the delays prescribed by law, the decision of the Administrative Tribunal not to register his complaint. His written complaint to the Minister of Justice that he had suffered a denial of justice cannot, in the State party's opinion, be considered to be a judicial remedy. Nor has he appealed to any other judicial instance. His communication thus fails to meet the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

6.2 As to the alleged violation of article 2 of the Covenant, the State party argues that this article can never be violated directly and in isolation. A violation of article 2 can only be admitted to the extent that other rights recognised by the Covenant have been violated (paragraph 1) or if necessary steps to give effect to Covenant rights have not been taken (paragraph 2). A violation of article 2 can only be the corollary of another violation of a Covenant right. The State party contends that the author did not base his argumentation on any precise facts, and that he cannot demonstrate that he has been a victim of discrimination in his relations with the judicial authorities. It was up to him to use the remedies which were available to him.

6.3 With respect to the alleged violation of article 16, the State party notes that the author has not put forth any specific complaint and dismisses his interpretation of this provision as abusive. Thus, the standing of the author in the administrative procedure has never been at issue; what was refused was the possibility to submit his case in Breton, as

> "in the absence of legislative provision to the contrary, the language of procedure in French courts is the French language" (judgment of the Rennes Administrative Tribunal, 21 November 1984, Quillévéré case).

6.4 Concerning the alleged violation of article 19, paragraph 2, the State party submits that the author has not substantiated how his freedom of expression has been violated. On the contrary, his letter to the Minister of Justice demonstrates that he had ample opportunity to present his position. Furthermore, "freedom of expression" within the meaning of article 19 cannot be construed to encompass the right of French citizens to use Breton before French administrative tribunals.

6.5 As to article 26, the State party rejects the author's contention that the refusal by the Administrative Tribunal of Rennes of a complaint submitted in Breton constitutes discrimination on grounds of language. On the contrary, the authorities based themselves on generally applicable rules, which are intended to facilitate the administration of justice by enabling the tribunals to rule on the original submission (without having to resort to translation).

6.6 Finally, the State party recalls that upon ratification of the Covenant, the French Government entered a reservation with respect to article 27: "In the light of article 2 of the Constitution of the French Republic, the French Government declares that article 27 is not applicable so far as the Republic is concerned."

7.1 In his comments, dated 23 May 1989, the author rejects the State party's contention that the communication is inadmissible because of non-exhaustion of domestic remedies. Thus, he submits that his letter to the Minister of Justice was meant to be an appeal against the decision of the Administrative Tribunal not to register his complaint. Moreover, the State party has failed to indicate to the Committee exactly what kind of remedies would be open to him. To the author, this failure is easily explained, as the State party itself must be well aware that remedies are non-existent, once the court of first instance has refused to register a complaint submitted in Breton. Every subsequent complaint submitted in Breton is bound to suffer the same fate, regardless of which judicial instance is the addressee.

7.2 The author reaffirms that violations of his rights under articles 16, 19, 26 and 27 entail ipso facto a violation of article 2, paragraphs 1 and 2. He adds that several legislative proposals have deliberately been ignored by successive French Governments, although they would have brought France at least partially into compliance with article 2. With respect to article 16, the author qualifies the State party's interpretation as restrictive if not discriminatory. He expresses surprise at its argument that his standing before the court was never at issue despite the fact that his complaint was not even registered, and contends that the refusal of his complaint necessarily meant a denial of standing. Furthermore, he argues that the Covenant does not link the issue of legal personality to the use, in court, of any specific language, and that in the absence of specific legal rules confirming the use of French as the official language in judicial proceedings, the use of Breton must be considered to be permissible.

7.3 With respect to article 19, paragraph 2, the author contends that freedom of expression cannot be limited to freedom to express oneself in French, and that freedom of expression for citizens of Breton mother tongue can only mean the freedom to express themselves in Breton. Furthermore, the refusal of the Administrative Tribunal to register his complaint is said to have been intended to restrict his freedom of expression, although the limitations laid down in paragraph 3 of article 19 are said to be inapplicable.

7.4 The author dismisses the State party's arguments concerning an alleged violation of article 26 and claims that a proper administration of justice would not rule out the use of Breton in court. He recalls that several States, including Switzerland and Belgium, allow the use of several languages before their courts and do not force their citizens to abandon the use of their mother tongue. The refusal to register his complaint, according to the author, constitutes discrimination on the ground of language, since French citizens of Breton mother tongue do not benefit from the same procedural guarantees before the tribunal as French citizens of French mother tongue.

7.5 Finally, the author indicates that France did not enter a "reservation" with respect to article 27 but contented itself with making a mere "declaration". The author points out that draft legislation supported by many parliamentarians acknowledges the various languages spoken in France as testimony to the singular character of a region or a community. To the author, there can be no doubt that the Breton community constitutes a linguistic minority within the meaning of article 27, entitled to enjoy the right to use its own language, including in the courts.

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

8.2 Article 5, paragraph 2 (b), of the Optional Protocol precludes the Committee from considering any communication by an individual who has failed to exhaust all available domestic remedies. This is a general rule, which applies unless the remedies are unreasonably prolonged, or the author of a communication has convincingly demonstrated that domestic remedies are not effective, i.e. do not have any prospect of success.

8.3 On the basis of the information before the Committee, there are no circumstances which would absolve the author from attempting to pursue all domestic remedies. He has not been criminally prosecuted but seeks to initiate proceedings before an administrative court to establish that he has been denied rights protected by the Covenant. The purpose of article 5, paragraph 2 (b), of the Optional Protocol is, inter alia, to direct possible victims of violations of the provisions of the Covenant to seek, in the first place, satisfaction from the competent State party authorities and, at the same time, to enable States parties to examine, on the basis of individual complaints, the implementation, within their territory and by their organs, of the provisions of the Covenant and, if necessary, remedy the violations occurring, before the Committee is seised of the matter.

8.4 It remains to be determined whether recourse to the French courts must be considered an unavailable or ineffective remedy, given that the author must use French to establish his claim that it is a violation of his rights under the Covenant to have to use French, rather than Breton, in legal proceedings. The Committee observes that the matter of the exclusive use of French to institute proceedings in courts is the issue to be examined at first instance by the French judicial organs and that, under the applicable laws, this can be done only by using French. In view of the fact that the author has demonstrated his proficiency in French, the Committee finds that it would not be unreasonable for him to submit his claim in French to the French courts. Further, no irreparable harm would be done to the author's substantive case by using the French language to pursue his remedy.

8.5 The author has also invoked article 27 of the Covenant claiming that he has been a victim of a breach of its provisions. Upon accession to the Covenant, the French Government declared that "in the light of article 2 of the Constitution of the French Republic, ... article 27 [of the Covenant] is not applicable so far as the Republic is concerned". a/ This declaration has not been objected to by other States parties, nor has it been withdrawn.

8.6 The Committee is therefore called upon to decide whether this declaration precludes it from examining a communication alleging a violation of article 27. Article 2, paragraph 1 (d), of the Vienna Convention on the Law of Treaties stipulates as follows:

> "'Reservation' means a unilateral statement, however phrased or named, made by a State, when ... acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."

The Convention does not make a distinction between reservations and declarations. The Covenant itself does not provide any guidance in determining whether a unilateral statement made by a State party upon accession to it should have preclusionary effect regardless of whether it is termed a reservation or declaration. The Committee observes in this respect that it is not the formal designation but the effect the statement purports to have that determines its nature. If the statement displays a clear intent on the part of the State party to exclude or modify the legal effect of a specific provision of a treaty, it must be regarded as a binding reservation, even if the statement is phrased as a declaration. In the present case, the statement entered by the French Government upon accession to the Covenant is clear: it seeks to exclude the application of article 27 to France and emphasizes this exclusion semantically with the words "is not applicable". The statement's intent is unequivocal and thus must be given preclusionary effect in spite of the terminology used. Furthermore, the State party's submission of 15 January 1989 also speaks of a French "reservation" in respect of article 27. Accordingly, the Committee considers that it is not competent to consider complaints directed against France concerning alleged violations of article 27 of the Covenant.

9. The Committee therefore decides:

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

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

Notes

a/ The reasons for the declaration are explained by the State party in its second periodic report to the Human Rights Committee under article 40 of the Covenant (document CCPR/C/46/Add.2) as follows: "Since the basic principles of public law prohibit distinctions between citizens on grounds of origin, race or religion, France is a country in which there are no minorities and, as stated in the declaration made by France, article 27 is not applicable as far as the Republic is concerned." The same explanation also appears in the initial report of France (document CCPR/C/22/Add.2).

APPENDIX I

Individual opinion submitted by Mr. Bertil Wennergren pursuant to rule 92, paragraph 3, of the Committee's rules of procedure concerning the Committee's decision to declare communication No. 220/1987 inadmissible

As stated in paragraph 8.2 of the Committee's decision, article 5, paragraph 2 (b), of the Optional Protocol precludes the Committee from considering any communication by an individual who has failed to exhaust all available domestic remedies. However, in accordance with recognized rules of international law and established jurisprudence of the Committee, domestic remedies need not be exhausted if they objectively have no prospect of success. In my view a remedy cannot be deemed to be effective if under substantive national legislation the claim would inevitably be dismissed by the courts. Pursuant to article 2 of the Constitution of the French Republic, France shall ensure equality of all citizens before the law, without distinction of origin, race and religion. Of relevance in this context is that among the prohibited grounds for distinction, this provision does not include "language", as does article 26 of the Covenant. In an earlier case concerning the right to use the Breton language (C. L. D. v. France, 228/1987), it was brought to the attention of the Committee that the Tribunal Administratif de Rennes, by decision of 21 November 1984, had ruled as follows: "Bearing in mind that in the absence of legal provisions determining otherwise, the procedural language before French tribunals is the French language, the document which was submitted not in the French language and signed by M. Q. was wrongly registered as a complaint by the tribunal's registrar." As the document had neither then nor later been translated, the Tribunal found that it could not be considered. Q's appeal to the Conseil d'Etat was rejected on 22 November 1985, because it had not been written in the French language and therefore was found to be inadmissible. A commentary on this case (Recueil Dalloz Sirey (1986), p. 71) indicates that the Conseil d'Etat thereby established a general procedural rule, according to which complaints to administrative courts must be submitted in French. Taking that precedent into account in the light of the contents of article 2 of the French Constitution, it follows that the remedies referred to by the State party cannot be deemed to be effective. In my opinion, the communication should have been declared admissible in so far as it may raise issues under article 26 of the Covenant.

APPENDIX II

Individual opinion: submitted by Mrs. Rosalyn Higgins pursuant to rule 92, paragraph 3, of the Committee's rules of procedure concerning the Committee's decision to declare communication No. 220/1987 inadmissible

I agree with the decision of the Committee in so far as it refers to a remaining requirement that local remedies be exhausted in respect of the claim under article 26. The Conseil d'Etat has not actually ruled on the substantive issue; rather it has decided that it will not do so unless the issue is brought before it through an application itself in the French language. The authors, being perfectly able to use French, could seek through a French language application a definitive ruling on the use of the Breton language in administrative tribunal proceedings. While this might be unpalatable to the authors, no legal harm would be done to their cause by adopting this course of action.

However, I am not able to agree with the findings of the Committee that it is precluded by the French declaration of 4 November 1980 from examining the author's claim as it relates to article 27 of the Covenant. The fact that the Covenant does not itself make the distinction between reservations and declarations does not mean that no distinction between these concepts exists, so far as the Covenant is concerned. Nor, in my view, is the matter disposed of by invocation of article 2 (1) (a) of the Vienna Convention on the Law of Treaties, which emphasises that intent, rather than nomenclature, is the key.

An examination of the notification of 4 January 1982 shows that the Government of the Republic of France was engaged in two tasks: listing certain reservations and entering certain interpretative declarations. Thus in relation to article 4 (1), 9, 14 and 19 it uses the phrase "enters a reservation". In other paragraphs it declares how terms of the Covenant are in its view to be understood in relation to the French Constitution, French legislation, or obligations under the European Convention on Human Rights. To note, by reference to article 2 (1) (d) of the Vienna Convention, that it does not matter how a reservation is phrased or named, cannot serve to turn these interpretative declarations into reservations. Their content is clearly that of declarations. Further, the French notification shows that deliberately different language was selected to serve different legal purposes. There is no reason to suppose that the contrasting use, in different paragraphs, of the phrase "reservation" and "declaration" was not entirely deliberate, with its legal consequence well understood by the Government of the Republic.

The relevant paragraph provides:

"In the light of article 2 of the Constitution of the French Republic, the French Government declares that article 27 is not applicable so far as the Republic is concerned."

Article 2 of the French Constitution provides in relevant part:

"France is a Republic, indivisible, secular, democratic and social. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs."

As is noted in the decisions of the Committee, the Reports of France to the Committee under article 40 of the Covenant have explained that the prohibition in the Constitution of distinction on grounds of origin, race or religion means that there are no minorities in France; and therefore article 27 does not apply. As I believe the French notification concerning article 27 is a declaration and not a reservation, it is in my view ultimately for the Committee to see if the interpretation of the French Government accords with its own. The Committee has, in relation to several States parties, rejected the notion that the existence of minorities is in some way predicated on an admission of discrimination. Rather, it has insisted that the existence of minorities within the sense of article 27 is a factual matter; and that such minorities may indeed exist in States parties committed, in law and in fact, to the full equality of all persons within its jurisdiction. Any many States parties whose constitutions, like that of the French Republic, prohibit discrimination, readily accept that they have minorities on whom they report under article 27.

I therefore conclude that the declaration of the French Government, while commanding the respectful attention of the Committee, does not accord with its own interpretation of the meaning and scope of article 27; and does not operate as a reservation.

The point of principle seems to me an important one. However, local remedies would require to be exhausted as much in respect of article 27 as of article 26. My views on the French declaration would not lead me to any different conclusion as to admissibility.

B. Communication No. 222/1987, M. K. v. France (Decision of 8 November 1989, adopted at the thirty-seventh session)

Submitted by: M. K. [name deleted]

Alleged victim: The author

State party concerned: France

Date of communication: 20 February 1987 (date of initial letter)

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

Meeting on 8 November 1989,

Adopts the following:

Decision on admissibility*, **

1. The author of the communication (initial letter dated 20 February 1987; further submissions dated 10 March, 29 June 1987, 28 December 1988 and 22 May 1989) is M. K., a French citizen born in 1952, residing in Rennes, France and employed as a teacher. He claims to be a victim of violations of articles 2, 16, 19, 26 and 27 of the International Covenant on Civil and Political Rights by France.

2.1 The author states that he is a Breton and that his mother tongue is Breton. He complains that French courts have consistently refused him the right to express himself in Breton, and that his right to defence in Breton and the right to freedom of expression in Breton are not respected. His daughter allegedly does not enjoy the right to education in Breton, and television broadcasts in Breton amount only to one hour and a half per day, except in the summer when there are no Breton broadcasts at all.

2.2 In more detail, the author states that the Administrative Tribunal of Rennes refused to consider a complaint which he had submitted in Breton on 6 March 1987. This complaint was directed against the steadfast refusal of the French tax authorities to write his address in Breton. Thus, the author sought to force the tax authorities to use his Breton address. On 6 March 1987 the Tribunal decided that the document had to be submitted in French if it was to be considered by the Court.

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* Pursuant to rule 85 of the Committee's rules of procedure, Ms. Christine Chanet did not participate in the examination of this communication or in the adoption of this decision.

** The texts of two individual opinions submitted by Mrs. Rosalyn Higgins and Mr. Bertil Wennergren are appended.

2.3 With respect to the exhaustion of domestic remedies, the author alleges that none are available, since French law does not recognise the right to the use of Breton before French tribunals, nor the right to be educated in the Breton language.

3. By decision of 9 April 1987, the Human Rights Committee, without transmitting the communication to the State party, requested the author, under rule 91 of the rules of procedure, to clarify whether he understood and spoke French and to indicate whether, in addition to himself, he also purported to act on behalf of his daughter.

4.1 In his reply to the Committee's questions, dated 29 June 1987, the author states that, although he understands and speaks French, he nevertheless does not regard himself as sufficiently proficient in French or sufficiently acquainted with French legal terminology to be able to draft his petition to the Administrative Tribunal of Rennes or his communication to the Human Rights Committee without outside assistance.

4.2 The author alleges that his complaint to the Administrative Tribunal of Rennes should have been accepted, because article 27 recognises his right to use his own language before the courts. Furthermore, the author claims, the Tribunal refused his petition on the basis of a ruling that denied his legal personality (article 16 of the Covenant) and which therefore discriminated between French citizens on the ground of their Breton national origin and language in violation of article 26 of the Covenant.

4.3 With regard to the alleged violation of article 14, the author contends that the right to the assistance of interpreters, stipulated in article 14, paragraph 3 (f) of the Covenant, has always been denied to Breton-speaking French citizens. He finally asserts that the French judicial administration simply expects every French citizen to speak French.

5. By decision of 20 October 1988, the Working Group of the Human Rights Committee transmitted the communication under rule 91 of the rules of procedure to the State party, requesting information and observations relevant to the question of the admissibility of the communication, in particular on the effective remedies available to the author in the specific circumstances of the case.

6.1 In its submission under rule 91, dated 15 January 1989, the State party contests the admissibility of the communication on several grounds. With regard to the exhaustion of domestic remedies, it argues that the author failed to exhaust them, as required under article 5, paragraph 2 (b), of the Optional Protocol. According to the State party, the author should have complied with the rules of submission of the Administrative Tribunal; moreover, he retained the right to appeal to the Conseil d'Etat should the Administrative Tribunal dismiss his claim.

6.2 With regard to the alleged violations of article 2, paragraphs 1 and 2, the State party submits that such violations cannot but be the result of an infringement of the author's rights under other articles of the Covenant. The State party adds that the author has not been able to establish such infringements.

6.3 With regard to the author's allegations that he has been denied the right to recognition as a person before the law (article 16), the State party submits that the author has provided no evidence in substantiation of this claim, and that the reference to article 16 constitutes an abusive interpretation of the notion of

"person before the law". On the contrary, the State party continues, such right was fully recognized to the author inasmuch as it was open to him to initiate the procedure indicated to him by the Administrative Tribunal in its letter of 6 March 1987.

6.4 With regard to the author's allegations under article 19, paragraph 2, the State party submits that the claim is inadmissible because he has not substantiated his assertion to have been denied the right to freedom of expression. Furthermore, the State party contends, such right cannot be deemed to encompass the freedom of French citizens to use whatever language or dialect they choose before French administrative tribunals.

6.5 As to the author's claim that he suffered discrimination on grounds of his language, the State party submits that the refusal of the Administrative Tribunal of Rennes to register the author's complaint was in conformity with an established practice sanctioned by the jurisprudence of the Conseil d'Etat and destined to facilitate the administration of justice by relieving courts from the obligation to use translation services and allowing them to issue their decisions on the basis of the text of the original submission. Consequently, the State party concludes, the author cannot be deemed to have been discriminated against on account of the application to him of a general and uniform rule.

6.6 As to the author's allegations under article 27, the State party considers that the declaration made by it upon accession to the Covenant on 4 November 1980 excludes the Committee's competence to examine communications concerning purported violations of that article. The State party therefore concludes that the communication should be declared inadmissible as incompatible with the provisions of the Covenant.

7.1 Commenting on the State party's submission, the author, in a letter dated 22 May 1989, contends that the established jurisprudence of the Conseil d'Etat on the matter shows that the remedies indicated by the State party would have no prospect of success.

7.2 The author further explains that he has been a victim of discrimination on the ground of his mother tongue in the sense that some French citizens are allowed to use their own language in courts while others are not. In addition, the author claims, technical problems, such as the need for the courts to use translation services, should not constitute an obstacle to the full enjoyment of human rights. He refers in this context to the example of Belgium and Switzerland, where different practices prevail.

7.3 As far as article 27 is concerned, the author first noted that, upon accession to the Covenant on 4 November 1980, France made a "declaration" but not a "reservation", that since France made "reservations" with regard to other articles of the Covenant, its "declaration" with regard to article 27 should be treated differently; secondly, that a distinct Breton ethnic and linguistic minority is internationally recognized by sociologists and other scholarly publicists; and thirdly, that numerous French Parliamentarians (centre, communist, socialist) have proposed bills concerning the Breton language. Finally, the author submits that, notwithstanding the French declaration in respect of article 27, no reservation or declaration equivalent to a reservation has ever been made by the State party concerning articles 2, 16, 19 and 26 of the Covenant.

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

8.2 Article 5, paragraph 2 (b), of the Optional Protocol precludes the Committee from considering any communication by an individual who has failed to exhaust all available domestic remedies. This is a general rule, which applies unless the remedies are unreasonably prolonged, or the author of a communication has convincingly demonstrated that domestic remedies are not effective, i.e. do not have any prospect of success.

8.3 On the basis of the information before the Committee, there are no circumstances which would absolve the author from attempting to pursue all domestic remedies. He has not been criminally prosecuted but seeks to initiate proceedings before an administrative court to establish that he has been denied rights protected by the Covenant. The purpose of article 5, paragraph 2 (b), of the Optional Protocol is, inter alia, to direct possible victims of violations of the provisions of the Covenant to seek, in the first place, satisfaction from the competent State party authorities and, at the same time, to enable States parties to examine, on the basis of individual complaints, the implementation, within their territory and by their organs, of the provisions of the Covenant and, if necessary, remedy the violations occurring, before the Committee is seised of the matter.

8.4 It remains to be determined whether recourse to the French courts must be considered an unavailable or ineffective remedy, given that the author must use French to establish his claim that it is a violation of his rights under the Covenant to have to use French, rather than Breton, in legal proceedings. The Committee observes that the matter of the exclusive use of French to institute proceedings in courts is the issue to be examined at first instance by the French judicial organs and that, under the applicable laws, this can be done only by using French. In view of the fact that the author has demonstrated his proficiency in French, the Committee finds that it would not be unreasonable for him to submit his claim in French to the French courts. Further, no irreparable harm would be done to the author's substantive case by using the French language to pursue his remedy. The objection raised by the author, that he is not sufficiently acquainted with French legal terminology to prepare submissions to courts cannot be entertained by the Committee; the same difficulty is faced by citizens in all countries, even when using their mother tongue, and is the principal reason for seeking professional legal assistance.

8.5 The author has also invoked article 27 of the Covenant claiming that he has been a victim of a breach of its provisions. Upon accession to the Covenant, the French Government declared that "in the light of article 2 of the Constitution of the French Republic, ... article 27 is not applicable so far as the Republic is concerned." a/ This declaration has not been objected to by other States parties, nor has it been withdrawn.

8.6 The Committee is therefore called upon to decide whether this declaration precludes it from examining a communication alleging a violation of article 27. Article 2, paragraph 1 (d), of the Vienna Convention on the Law of Treaties stipulates as follows:

"'Reservation' means a unilateral statement, however phrased or named, made by a State, when ... acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."

The Convention does not make a distinction between reservations and declarations. The Covenant itself does not provide any guidance in determining whether a unilateral statement made by a State party upon accession to it should have preclusionary effect regardless of whether it is termed a reservation or declaration. The Committee observes in this respect that it is not the formal designation but the effect the statement purports to have that determines its nature. If the statement displays a clear intent on the part of the State party to exclude or modify the legal effect of a specific provision of a treaty, it must be regarded as a binding reservation, even if the statement is phrased as a declaration. In the present case, the statement entered by the French Government upon accession to the Covenant is clear: it seeks to exclude the application of article 27 to France and emphasizes this exclusion semantically with the words "is not applicable". The statement's intent is unequivocal and thus must be given preclusionary effect in spite of the terminology used. Furthermore, the State party's submission of 15 January 1989 also speaks of a French "reservation" in respect of article 27. Accordingly, the Committee considers that it is not competent to consider complaints directed against France concerning alleged violations of article 27 of the Covenant.

9. The Human Rights Committee therefore decides:

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

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

Notes

a/ The reasons for the declaration are explained by the State party in its second periodic report to the Human Rights Committee under article 40 of the Covenant (document CCPR/C/46/Add.2) as follows: "Since the basic principles of public law prohibit distinctions between citizens on grounds of origin, race or religion, France is a country in which there are no minorities and, as stated in the declaration made by France, article 27 is not applicable as far as the Republic is concerned." The same explanation also appears in the initial report of France (document CCPR/C/22/Add.2).

APPENDIX I

Individual opinion submitted by Mr. Bertil Wennergren pursuant to rule 92, paragraph 3, of the Committee's rules of procedure concerning the Committee's decision to declare communication No. 223/1987 inadmissible

As stated in paragraph 8.2 of the Committee's decision, article 5, paragraph 2 (b), of the Optional Protocol precludes the Committee from considering any communication by an individual who has failed to exhaust all available domestic remedies. However, in accordance with recognised rules of international law and established jurisprudence of the Committee, domestic remedies need not be exhausted if they objectively have no prospect of success. In my view a remedy cannot be deemed to be effective if under substantive national legislation the claim would inevitably be dismissed by the courts. Pursuant to article 2 of the Constitution of the French Republic, France shall ensure equality of all citizens before the law, without distinction of origin, race and religion. Of relevance in this context is that among the prohibited grounds for distinction, this provision does not include "language", as does article 26 of the Covenant. In an earlier case concerning the right to use the Breton language (C. L. D. v. France, 228/1987), it was brought to the attention of the Committee that the Tribunal Administratif de Rennes, by decision of 21 November 1984, had ruled as follows: "Bearing in mind that in the absence of legal provisions determining otherwise, the procedural language before French tribunals is the French language, the document which was submitted not in the French language and signed by M. Q. was wrongly registered as a complaint by the tribunal's registrar." As the document had neither then nor later been translated, the Tribunal found that it could not be considered. Q's appeal to the Conseil d'Etat was rejected on 22 November 1985, because it had not been written in the French language and therefore was found to be inadmissible. A commentary on this case (Recueil Dalloz Sirey (1986), p. 71) indicates that the Conseil d'Etat thereby established a general procedural rule, according to which complaints to administrative courts must be submitted in French. Taking that precedent into account in the light of the contents of article 2 of the French Constitution, it follows that the remedies referred to by the State party cannot be deemed to be effective. In my opinion, the communication should have been declared admissible in so far as it may raise issues under article 26 of the Covenant.

APPENDIX II

Individual opinion: submitted by Mrs. Rosalyn Higgins pursuant to rule 92, paragraph 3, of the Committee's rules of procedure concerning the Committee's decision to declare communication No. 222/1987 inadmissible

I agree with the decision of the Committee in so far as it refers to a remaining requirement that local remedies be exhausted in respect of the claim under article 26. The Conseil d'Etat has not actually ruled on the substantive issue; rather it has decided that it will not do so unless the issue is brought before it through an application itself in the French language. The authors, being perfectly able to use French, could seek through a French language application a definitive ruling on the use of the Breton language in administrative tribunal proceedings. While this might be unpalatable to the authors, no legal harm would be done to their cause by adopting this course of action.

However, I am not able to agree with the findings of the Committee that it is precluded by the French declaration of 4 November 1980 from examining the author's claim as it relates to article 27 of the Covenant. The fact that the Covenant does not itself make the distinction between reservations and declarations does not mean that no distinction between these concepts exists, so far as the Covenant is concerned. Nor, in my view, is the matter disposed of by invocation of article 2 (1) (a) of the Vienna Convention on the Law of Treaties, which emphasises that intent, rather than nomenclature, is the key.

An examination of the notification of 4 January 1982 shows that the Government of the Republic of France was engaged in two tasks: listing certain reservations and entering certain interpretative declarations. Thus in relation to article 4 (1), 9, 14 and 19 it uses the phrase "enters a reservation". In other paragraphs it declares how terms of the Covenant are in its view to be understood in relation to the French Constitution, French legislation, or obligations under the European Convention on Human Rights. To note, by reference to article 2 (1) (d) of the Vienna Convention, that it does not matter how a reservation is phrased or named, cannot serve to turn these interpretative declarations into reservations. Their content is clearly that of declarations. Further, the French notification shows that deliberately different language was selected to serve different legal purposes. There is no reason to suppose that the contrasting use, in different paragraphs, of the phrase "reservation" and "declaration" was not entirely deliberate, with its legal consequence well understood by the Government of the Republic.

The relevant paragraph provides:

"In the light of article 2 of the Constitution of the French Republic, the French Government declares that article 27 is not applicable so far as the Republic is concerned."

Article 2 of the French Constitution provides in relevant part:

"France is a Republic, indivisible, secular, democratic and social. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs."

As is noted in the decisions of the Committee, the Reports of France to the Committee under article 40 of the Covenant have explained that the prohibition in the Constitution of distinction on grounds of origin, race or religion means that there are no minorities in France; and therefore article 27 does not apply. As I believe the French notification concerning article 27 is a declaration and not a reservation, it is in my view ultimately for the Committee to see if the interpretation of the French Government accords with its own. The Committee has, in relation to several States parties, rejected the notion that the existence of minorities is in some way predicated on an admission of discrimination. Rather, it has insisted that the existence of minorities within the sense of article 27 is a factual matter; and that such minorities may indeed exist in States parties committed, in law and in fact, to the full equality of all persons within its jurisdiction. Any many States parties whose constitutions, like that of the French Republic, prohibit discrimination, readily accept that they have minorities on whom they report under article 27.

I therefore conclude that the declaration of the French Government, while commanding the respectful attention of t' e Committee, does not accord with its own interpretation of the meaning and scope article 27; and does not operate as a reservation.

The point of principle seems to me an important one. However, local remedies would require to be exhausted as much in respect of article 27 as of article 26. My views on the French declaration would not lead me to any different conclusion as to admissibility.

C. Communication No. 244/1987, A. Z. v. Colombia (Decision of 3 November 1989, adopted at the thirty-seventh session)

Submitted by: G. G. [name deleted]

Alleged victim: A. Z.

State party concerned: Colombia

Date of communication: 18 September 1987

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

Meeting on 3 November 1989,

Adopts the following:

Decision on admissibility

1. The author of the communication (letter dated 18 September 1987; no further submissions) is G. G., a Colombian lawyer writing on behalf of A. Z., a Colombian student and labourer, born in 1963, at the time of submission of the communication detained at a prison in Bogotá. The lawyer (who states that she is A. Z.'s female companion) alleges that he is a victim of a violation of article 7 of the Covenant by Colombian police authorities.

2.1 It is stated that A. Z. was arrested on 31 August 1987 and that no reasons for his arrest were given by the authorities until 2 September 1987. (The lawyer does not indicate what reasons were then given). It is alleged that A. Z. has been subjected to serious ill-treatment, including a severe beating, evidenced by a hematoma in his upper right arm, and by bruised ribs and legs. These injuries were allegedly caused by blows with rifle butts and by kicks. It is further alleged that A. Z. was blindfolded, that he was forced to breathe smoke, that he was subjected to psychological torture in the form of death threats if he refused to answer questions, and that medical attention was refused.

2.2 With respect to the exhaustion of domestic remedies, it is stated that A. Z. requested an examination by an expert in forensic medicine but that the judge did not order any medico-legal investigation. Furthermore, A. Z. is said to have requested the Attorney General's Office (Procuraduría General de la Nación) to investigate his allegations of torture, hitherto without success.

3. By its decision of 20 October 1987, the Working Group of the Human Rights Committee transmitted the communication to the State party, requesting it, under rule 91 of the rules of procedure, to provide information and observations relevant to the question of the admissibility of the communication.

4. In its submission under rule 91, dated 20 October 1988, the State party confirms that A. Z. was arrested on 31 August 1987 and adds that he was charged with the offences of homicide and rebellion. He was released on parole and subsequently left the country, residing at present in France. The court of first

instance, however, has indicted him and will proceed to judge him in absentia if he fails to appear in court. The State party contends that the communication should be declared inadmissible under article 5, paragraph 2 (b), of the Optional Protocol, since the author has not exhausted domestic remedies. In particular, the State party affirms that a thorough search of the files of the Procuraduría General de la Nación and of the Procuradurías Delegadas did not reveal that the author had filed any complaint. If the author claims to have been subjected to ill-treatment, he may still file a complaint with the competent authorities with a view to the investigation of the case and eventual prosecution of the responsible officials.

5. On 6 December 1988 the Secretariat transmitted the State party's observations to the author, requesting comments thereon. The deadline for the author's comments expired on 3 January 1989. No further submission has been received from the author.

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

6.2 With regard to the requirement of exhaustion of domestic remedies in article 5, paragraph 2 (b), of the Optional Protocol, the Committee has noted the State party's contention that A. Z. has not exhausted them. As to A. Z.'s arrest, the Committee takes into account that criminal proceedings on charges of homicide have been opened against A. Z.; as to A. Z.'s allegations of ill-treatment, he has not contested the State party's contention that he has not filed an official complaint and that he may still do so. Thus the Committee concludes that the author's communication does not meet the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible;

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

D. Communication No. 246/1987, N. A. J. v. Jamaica (Decision of 26 July 1990, adopted at the thirty-ninth session)

Submitted by: N. A. J. [name deleted]

Alleged victim: The author

State party concerned: Jamaica

Date of communication: 6 August 1987 (date of initial letter)

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

Meeting on 26 July 1990,

Adopts the following:

Decision on admissibility

1. The author of the communication (initial submission dated 6 August 1987, model communication dated 3 November 1987 and subsequent correspondence) is N. A. J., a Jamaican citizen currently awaiting execution at St. Catherine District Prison, Jamaica. He claims to be the victim of a violation by the Government of Jamaica of articles 6, 7 and 14 of the International Covenant on Civil and Political Rights. He is represented by counsel.

2.1 On 5 October 1977, the author was convicted and sentenced to death in the Home Circuit Court, Kingston, for the murder, on 15 January 1976, of one P. N. The Court of Appeal of Jamaica dismissed his appeal on 23 February 1978. In January 1988, the death sentence was commuted to life imprisonment by the Governor-General of Jamaica.

2.2 As to the facts of the case, a/ the author states that on 15 January 1976 at about 8 p.m., he went to the deceased's house to visit his girlfriend. Together with his girlfriend and her baby were Mr. M., the prosecution's main witness, P. N. and another individual. The author submits that an argument developed between the deceased and himself in the course of which the deceased produced a knife and tried to stab him. The ensuing fight was interrupted by a friend of the deceased. The author then left the premises. On the following day, he claims, he was informed about N's death.

2.3 The author argues that he was poorly assisted by his court-appointed lawyer; this lawyer, in his statement of defence before the Home Circuit Court, allegedly failed to request that the charges against the author be reduced to manslaughter. Furthermore, it is submitted that the summing-up of the trial judge was unfair and unbalanced, since the judge unduly stressed the weaknesses and discrepancies of the defence evidence in his summing-up, whereas he failed to put to the jury that the medical and expert evidence presented by the prosecution put the credibility of the testimony of the prosecution's sole eye-witness in question.

2.4 Referring to the conditions of his detention, the author indicates that he suffers from handicaps and ailments, without, however, specifying the nature of his disability and whether it developed during his detention. He explains that in the spring of 1987, welfare officers conducted interviews among inmates with permanent handicaps, pursuant to a prison directive that a list with the names of disabled inmates be submitted to the prison authorities. The author states that his name was not included in that list and that, as a result, he has been discriminated against.

3. By decision of 5 November 1987 the Human Rights Committee transmitted the communication, for information, to the State party and requested it, under rule 86 of the rules of procedure, not to carry out the death sentence against the author before it had had an opportunity to consider further the question of the admissibility of the communication. The author was requested, under rule 91 of the rules of procedure, to furnish clarifications about the facts of his case and the circumstances of his trial and his appeal and to provide the Committee with the transcripts of the written judgments in the case.

4. Under cover letter dated 14 January 1988, and upon request by the author, the Secretariat of the Inter-American Commission on Human Rights forwarded to the Committee the documents submitted by the author to the IACHR. The Secretariat of the IACHR indicated that the author had requested that his case be withdrawn from consideration by that body. No clarifications were received from the author in reply to the Committee's request.

5. By further decision of 22 March 1988, the Committee's Working Group transmitted the communication to the State party, requesting it, under rule 91 of the rules of procedure, to provide information and observations relevant to the question of the admissibility of the communication. In particular, it requested the State party to clarify whether the author retained the right to petition the Judicial Committee of the Privy Council for leave to appeal and whether legal aid would be available to him in that respect. The State party was further asked to provide the Committee with the texts of the written judgments in the case. The Working Group further requested the State party, under rule 86 of the rules of procedure, not to carry out the death sentence against the author while his communication was under consideration by the Committee.

6. In its submission under rule 91, dated 25 October 1988, the State party argues that the author's communication is inadmissible on the ground that he has not exhausted domestic remedies, as required by article 5, paragraph 2 (b), of the Optional Protocol, since his case has not been adjudicated upon by the Judicial Committee of the Privy Council, Jamaica's highest appellate court.

7. In his comments, dated 29 March 1989, counsel contends that although Section 3 of the Poor Prisoners' Defence Act provides legal aid for purposes of a petition for special leave to appeal to the Judicial Committee of the Privy Council, an appeal to that body constitutes a remedy of limited scope. He adds that the State party has failed to show how this remedy could have been or could be effective in the circumstances of the case and concludes that the requirements of article 5, paragraph 2 (b), have been met.

8. In a further submission, dated 20 June 1989, the State party submits that a petition for special leave to appeal to the Privy Council is a genuine remedy; thus, in the author's case, such a petition would be considered in a judicial

hearing and adjudicated on grounds that are both judicial and reasonable. If the Privy Council were to refuse the petition as without merit, the author could not claim that he had no remedy; he would merely have been unsuccessful in the pursuit. The State party therefore maintains that the communication is inadmissible on the ground of failure to exhaust domestic remedies.

9. In further comments dated 16 February 1990, counsel affirms that while Section 3 of the Poor Prisoners' Defence Act may provide legal aid for purposes of a petition for special leave to appeal, such a petition would inevitably fail in the author's case. He points out that although the long delays in the judicial proceedings in the case should be deemed to constitute a denial of justice, the Judicial Committee has held, in the case of Riley and others v. The Queen (1981) that whatever the reasons for delays in the execution of a sentence lawfully imposed, the delay could afford no ground for holding the execution to be in contravention of Section 17 of the Jamaican Constitution. Counsel concludes that a petition for special leave to appeal to the Judicial Committee of the Privy Council would not be a remedy "available" to the author within the meaning of article 5, paragraph 2 (b).

10.1 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.

10.2 The Committee has ascertained, as it is required to do under article 5, paragraph 2 (a), of the Optional Protocol, that the matter is not being examined under another procedure of international investigation or settlement.

10.3 With respect to the requirement of exhaustion of domestic remedies, the Committee notes the State party's contention that the author may still petition the Judicial Committee of the Privy Council for special leave to appeal. It notes that the author was sentenced to death on 5 October 1977. Although the application of domestic remedies over a period of thirteen years could be construed as being "unreasonably prolonged" within the meaning of article 5, paragraph 2 (b), it is a well established principle that any appellant must display reasonable diligence in the pursuit of available remedies. In the instant case, it was incumbent upon the author or his representative to pursue the avenue of a petition for special leave to appeal to the Judicial Committee after the Jamaican Court of Appeal had, in April 1978, produced its written judgment in the case. The author and his counsel have not shown, although they were invited to do so, the existence of circumstances which would have absolved them from petitioning the Judicial Committee of the Privy Council in due course. In the circumstances, the Committee concludes that the delays in the judicial proceedings can be attributed mainly to the author, and that the requirements of article 5, paragraph 2 (b), of the Optional Protocol have not been met.

11. The Human Rights Committee therefore decides:

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

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

[Done in English, French, Russian and Spanish, the English text being the original version.]

Notes

a/ The author does not provide a detailed account of the facts. The following account is based on the judgment of the Court of Appeal.

E. Communication No. 251/1987, A. A. v. Jamaica (Decision of 20 October 1989, adopted at the thirty-seventh session)

Submitted by: A. A. [name deleted]

Alleged victim: The author

State party concerned: Jamaica

Date of communication: 24 August 1987 (date of initial letter)

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

Meeting on 30 October 1989,

Adopts the following:

Decision on admissibility

1. The author of the communication (initial submission dated 24 August 1987 and subsequent correspondence) is A. A., a Jamaican citizen currently awaiting execution at St. Catherine District Prison, Jamaica. He claims to be the victim of a violation of his human rights by Jamaica. He is represented by counsel.

2.1 The author claims that on 15 July 1979, a/ on his way home from work in the Parish of St. Ann, he was attacked by an armed person who allegedly wounded him on the hands, back and chest. In an attempt to defend himself, the author fatally wounded the assailant. The author received treatment for his injuries, including, as he claims, several stitches "above the heart". He was subsequently arrested and charged with the murder.

2.2 On 27 May 1981, the author was convicted and sentenced to death in the St. Ann Circuit Court. With respect to the circumstances of the trial, the author claims that he had insufficient opportunity to consult with his court-appointed lawyer. Furthermore, two of the prosecution witnesses are said to have committed perjury, allegedly because they had "bribed" the deceased to attack the author. Some of the evidence presented by the police (apparently the arresting officers), the author submits, was equally "fabricated". Several witnesses sought to testify on his behalf; one of them, one J. B., was allegedly subjected to police intimidation after his testimony and did not return to court. Thus, the author claims, the police "sabotaged" his witnesses.

2.3 On 22 September 1982, the author's appeal was dismissed by the Jamaican Court of Appeal. From the "note of oral judgment" delivered by the Court of Appeal and transmitted to the author under cover of a letter from the Jamaican Ministry of Justice dated 2 November 1988, it transpires that the lawyer assigned to the author failed to appear in court, and that the appeal was dismissed with the author unrepresented. The text of the oral judgment continues as follows:

"The Court examined the Records which indicated that two grounds of appeal were filed by applicant in person vis:

(i) Unfair Trial,

(ii) Evidence is insufficient to warrant a conviction,

and then he added:

'Further grounds of appeal will be filed by my Attorney-at-Law, Mr. E. S., Brown's Town P.O., St. Ann.'

No such grounds were filed.

No further grounds of appeal were in fact filed.

The President of the Court observed that on the evidence for the prosecution it was a clear case of murder. The defence consisted of a Statement by the Accused from the dock in which he raised the issue of self-defence. The Court said that the trial judge identified the issues of fact and gave adequate directions on the law. The application was dismissed as being without merit."

2.4 The author claims that he has been the victim of a miscarriage of justice both during his trial and the hearing of the appeal, and that he should have been acquitted because he had acted in self-defence. In this context, he quotes from a decision of the Judicial Committee of the Privy Council that he alleges should, if applied to his situation, lead to his acquittal. The author does not provide any details about this decision but alleges that some of the guidelines laid down in it were not followed in his case.

3. By decision of 12 November 1987, the Human Rights Committee transmitted the communication, for information, to the State party, requesting it, under rule 86 of the Committee's rules of procedure, not to carry out the death sentence against the author before it had had a chance to consider further the question of the admissibility of the communication. The author was requested, under rule 91 of the rules of procedure, to provide several clarifications concerning the conduct of his trial and his appeal, and to provide the Committee with the texts of the written judgments in his case. In a letter dated 21 March 1988, the author provided some of the clarifications sought by the Committee and indicated that he had the services of a London-based lawyer for the purpose of filing a petition for special leave to appeal to the Judicial Committee of the Privy Council.

4. By further decision of 22 March 1988, the Working Group of the Human Rights Committee transmitted the communication to the State party, requesting it, under rule 91 of the Committee's rules of procedure, to provide information and observations relevant to the question of the admissibility of the communication. The State party was requested, in particular, to provide the Committee with the texts of the written judgments in the case and to specify whether the author retained the right to petition the Judicial Committee of the Privy Council for special leave to appeal. The State party was further requested, under rule 86 of the rules of procedure, not to carry out the death sentence against the author while his communication was under consideration by the Committee.

5.1 In submissions dated 10 July and 21 August 1988, the author indicates that he has been unable to obtain a copy of the written judgment of the Court of Appeal in the case, claiming that the Registrar of the Court of Appeal had informed him that there was no such judgment. In the author's opinion, this constitutes inhuman and degrading treatment, since he has been on death row since May 1981, and a written judgment of the Court of Appeal must be submitted for a petition for special leave to appeal to be entertained by the Judicial Committee of the Privy Council. It is submitted that his counsel in London has been unable to file a petition because of the absence of this written judgement.

5.2 In a further submission, the author reiterates that his legal representation throughout the proceedings was wholly inadequate, and that his legal aid attorney failed even to file further grounds of appeal, as he had requested. He submits that generally, because of the insufficiency of fees paid to attorneys working on legal aid assignments, few lawyers ever take their client's interest seriously in capital cases and that, as a result, many inmates have lost confidence in the system which, on paper, provides them with the possibility to petition the Judicial Committee of the Privy Council for leave to appeal.

6. In its submission under rule 91, dated 7 December 1988, the State party argues that the communication is inadmissible on the ground of non-exhaustion of domestic remedies and that the author retains the right, under Section 110 of the Jamaican Constitution, to petition the Judicial Committee of the Privy Council for special leave to appeal. It adds that legal aid would be available to the author for this purpose pursuant to Section 3, paragraph 1, of the Poor Prisoners' Defence Act. The author did not comment on the State party's submission.

7. On 21 December 1988, the law firm representing the author informed the Secretariat that senior counsel instructed to prepare a submission on the merits of a petition for special leave to appeal to the Judicial Committee of the Privy Council had argued against the merits of such a petition in mid-1988. Subsequently, the firm had received a copy of the "note of oral judgment" of the Jamaican Court of Appeal, dated 22 September 1982, from an unrelated third party in the United States; on the basis of this document, counsel had been instructed to prepare another opinion on the merits of a petition. On 5 September 1989, counsel confirmed that her firm continues its efforts to bring the author's case before the Judicial Committee of the Privy Council and informed the Committee that a petition for special leave to appeal could be expected to be based on two grounds: the issue of the absence of a reasoned judgment of the Court of Appeal and the question of the author's age at the time of the murder.

8.1 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.

8.2 The Committee has ascertained, as it is required to do 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.

8.3 With regard to the requirement of exhaustion of domestic remedies, the Committee has noted the State party's contention that the communication is inadmissible because of the author's failure to petition the Judicial Committee of the Privy Council for special leave to appeal. It observes that the author has

obtained representation by London solicitors for this purpose, after submitting his communication to the Human Rights Committee, and that his representatives continue to prepare a petition for special leave to appeal on his behalf. While expressing grave concern about the delay in making available to the author a copy of the "note of oral judgment" of the Jamaican Court of Appeal in November 1988, the Committee cannot conclude that a petition for special leave to appeal to the Judicial Committee of the Privy Council must be considered a priori futile. It therefore finds that the requirements of article 5, paragraph 2 (b), of the Optional Protocol have not been met.

9. The Human Rights Committee therefore decides:

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

(b) That, since this decision may be reviewed under rule 92, paragraph 2, of the Committee's rules of procedure upon receipt of a written request by or on behalf of the author containing information to the effect that the reasons for inadmissibility no longer apply, the State party shall be requested, taking into account the spirit and purpose of rule 86 of the Committee's rules of procedure, not to carry out the death sentence against the author before he has had a reasonable time, after completing the effective domestic remedies available to him, to request the Committee to review the present decision;

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

Notes

a/ The Notes of Evidence give the date of 15 July 1980.

F. Communication No. 258/1987, L. R. and T. W. v. Jamaica (Decision of 13 July 1990, adopted at the thirty-ninth session)

Submitted by: L. R. and T. W. [names deleted]

Alleged victims: The authors

State party concerned: Jamaica

Date of communication: Undated (received on 15 December 1987)

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

Meeting on 13 July 1990,

Adopts the following:

Decision on admissibility

1. The authors of the communication (initial letter received on 15 December 1987; subsequent submissions dated 9 March, 9 June and 4 October 1988) are L. R. and T. W., two Jamaican citizens awaiting execution at St. Catherine District Prison, Jamaica.

2.1 The authors state that on 4 July 1980 they were arrested and placed on an identification parade on suspicion of involvement in a murder. While Mr. L. R. was not identified, Mr. T. W. was. They were told by police that a man named D. J. had associated them with the crime. The authors allege that this man was forced to give their name to the police. They were subsequently tried, convicted and sentenced to death on 17 May 1982 in the Home Circuit Court of Kingston.

2.2 The Jamaican Court of Appeal dismissed the authors' appeal on 24 October 1984. The authors state that they have not been informed whether they would still be able to petition for leave to appeal to the Judicial Committee of the Privy Council. If this were to be the case, it would have to be *in forma pauperis* because of their precarious financial situation. They state that the Jamaican authorities are well aware of this fact, since they had to assign legal aid to the authors on the occasion of their trial. Since the dismissal of the appeal, the authorities have failed to assign legal aid to the authors, in spite of the fact that they have repeatedly expressed an interest in appealing their case further. This, they argue, demonstrates that the Jamaican Government has failed to fulfil its obligations under article 14, paragraphs 3 (c) and (d), of the International Covenant on Civil and Political Rights, especially inasmuch as the State party's obligation to try the authors without undue delay is concerned.

3. By decision of 15 January 1988, the Special Rapporteur of the Human Rights Committee for cases involving the death penalty transmitted the communication, for information, to the State party, requesting it, under rule 86 of the Committee's rules of procedure, not to carry out the death sentence against the authors before the Committee had had an opportunity to consider further the question of the

admissibility of the communication. The authors were requested to provide a number of clarifications concerning their case.

4.1 In a letter dated 9 March 1988 the authors state that during the trial before the Home Circuit Court in Kingston, they were accused of having killed, on 20 June 1980 in the Parish of St. Agnew, one S. H.. One witness against them testified that he did not see who had fired the fatal shot. The police had told them, however, that a Mr. D. L. had made a statement incriminating them, and that it was on the basis of this statement that they had been arrested. On the occasion of the identification parade, the witness pointed out T. W., but not L. R.. The authors do not recall the date of the identification parade, nor the date when they were first brought to court after they had formally been charged with murder. T. W. recalls that he was not represented when the identification parade was held. L. R. states that at the police station, the police "tricked" him into signing a statement implicating him and T. W. as parties to the crime. He claims that he never made any statement to the police. At the time, he was unable to read and write; this was known to the police officer, who did not read out the incriminating statement signed by L. R.. The authors state that the police brought D. J. to the preliminary hearing in the Gun Court. He testified that he had not given the police any statement and that he had been beaten at the police station. The authors note that, subsequently, the police did not bring D. J. to testify before the Home Circuit Court.

4.2 Both authors state that they did not have adequate opportunities to consult with their lawyers prior to the hearing of the appeal, because the Jamaican authorities only informed them of the date of the appeal and the names of the lawyers assigned to their case on the day of the hearing. It appears that neither the authors nor their representatives sought to have witnesses testify on their behalf. Since the dismissal of the appeal on 24 October 1984, the authors have not received the court's written judgement. They acknowledge that they were represented both during the trial and during the appeal.

4.3 The authors further claim that, since the dismissal of their appeal, they have not been informed as to whether they are entitled to legal assistance for purposes of a petition for leave to appeal to the Judicial Committee of the Privy Council, although they have requested on two occasions that legal aid be assigned to them for that purpose.

5. On 22 March 1988, the State party informed the Committee that the communication was inadmissible because of the authors' failure to exhaust domestic remedies, without specifying further which remedies had not been exhausted. By decision of the same day, the Working Group of the Committee requested the State party, under rule 91 of the rules of procedure, to provide further information and observations relevant to the question of the admissibility of the communication. It requested the State party, under rule 86, not to carry out the death sentence against the authors while their communication was under consideration by the Committee.

6. In its submission under rule 91, dated 20 July 1988, the State party reiterates that the authors have failed to exhaust all available domestic remedies, as required by article 5, paragraph 2 (b), of the Optional Protocol. It adds that they have a right to appeal to the Judicial Committee of the Privy Council under Section 110 of the Jamaican Constitution. The State party further contends that

legal aid would be available to the authors for that purpose pursuant to Section 3, paragraph 1, of the Poor Prisoners' Defence Act.

7. Commenting on the State party's submission, the authors, in a letter dated 4 October 1988, reaffirm that they remain uncertain about their prospects of pursuing a petition for special leave to appeal to the Judicial Committee of the Privy Council. They indicate that they have been informed that there would not be any merit in pursuing such an appeal. Furthermore, they emphasise that the State party has never informed them that legal aid would be available for the purpose of an appeal to the Privy Council. They consider that it is because of their submissions to the Human Rights Committee that the State party now acknowledges the existence of this possibility.

8. By further submissions, dated 27 January and 15 August 1989, the authors state that they have been endeavouring to obtain legal assistance from a London law firm for purposes of a Privy Council application. Accordingly, they request the Committee to defer consideration of their case, pending the outcome of the petition.

9.1 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.

9.2 The Committee has ascertained, as it is required to do 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.

9.3 With regard to the requirement of exhaustion of domestic remedies, the Committee has taken note of the State party's contention that the communication is inadmissible because of the authors' failure to petition the Judicial Committee of the Privy Council for special leave to appeal, pursuant to Section 110 of the Jamaican Constitution. It observes that the authors, although claiming that there would be no merit in pursuing such a petition, has secured pro bono legal representation from a London law firm for this purpose, after submitting their communication to the Human Rights Committee, and that his representative continue to investigate the possibility of filing a petition for special leave to appeal on their behalf. While expressing grave concern about the apparent unavailability of a reasoned judgment of the Jamaican Court of Appeal in the case, the Committee cannot conclude that a petition for special leave to appeal to the Judicial Committee of the Privy Council, even without a written judgment of the Court of Appeal, must be considered a priori futile. It therefore finds that the requirements of article 5, paragraph 2 (b), of the Optional Protocol have not been met.

10. The Human Rights Committee therefore decides:

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

(b) That the State party be requested to make the written judgment of the Court of Appeal available to the authors without further delay, so as to permit an effective recourse to the Judicial Committee of the Privy Council, and to ensure that adequate aid be made available to the authors;

(c) That, since this decision may be reviewed under rule 92, paragraph 2, of the Committee's rules of procedure upon receipt of a written request by or on behalf of the author containing information to the effect that the reasons for inadmissibility no longer apply, the State party is requested, taking into account the spirit and purpose of rule 86 of the Committee's rules of procedure, not to carry out the death sentence against the authors before they have had a reasonable time, after completing the effective domestic remedies available to them, to request the Committee to review the present decision;

(d) That this decision shall be transmitted to the State party and to the authors.

G. Communication No. 259/1987, D. B. v. Jamaica (Decision of 13 July 1990, adopted at the thirty-ninth session)

Submitted by: D. B. [name deleted]

Alleged victim: The author

State party concerned: Jamaica

Date of communication: 19 November 1987 (date of initial letter)

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

Meeting on 13 July 1990,

Adopts the following:

Decision on admissibility

1. The author of the communication (initial letter dated 19 November 1987; several subsequent letters) is D. B., a Jamaican citizen awaiting execution at St. Catherine District Prison, Jamaica. He claims to be the victim of violations of his human rights by the Government of Jamaica.

2.1 The author states that he was charged with the murder, on 24 November 1980, of one H. P., convicted and sentenced to death on 13 July 1983. He claims to be innocent and states that, although he was present at the scene of the crime, he did not participate in the killing but actually risked his own life by pleading with the killers that Mr. Patton be spared, as can be allegedly confirmed by witnesses. No details are provided about the circumstances of the author's trial - it is merely stated that the author was assisted by a legal aid attorney.

2.2 The Jamaican Court of Appeal dismissed the author's appeal on 9 December 1985. For his appeal, the author was also represented by a legal aid attorney. The author had requested to be present during the hearing of the appeal but allegedly was not granted the right to do so.

2.3 The author further states that since the dismissal of the appeal, he has been unable to pursue his case further. He wrote to the Supreme Court in October 1986, requesting the transcripts of evidence in his case, both from the trial and the appeal, but did not receive either. A second letter was sent to the Supreme Court in September 1987; this time the author received a copy of the Notes of Evidence of his trial. At the same time, he was informed that the Court of Appeal had not yet issued a written judgment. This, the author claims, is the situation with regard to many judgments of the Court of Appeal in capital cases.

2.4 With respect to a petition for leave to appeal to the Judicial Committee of the Privy Council, the author alleges that the Jamaican Government does not assist death row inmates in bringing their cases before the Judicial Committee of the Privy Council. He claims that since he cannot afford a legal representative, he is unable to submit his case to the Privy Council, and that if his case cannot be

brought before that body, the Government will not exercise its prerogative of mercy. He further refers to the case of one N. C., an inmate executed on 19 November 1987, who had allegedly been unable to exhaust all available domestic remedies because of lack of means to pay for a lawyer to represent him before the Judicial Committee of the Privy Council.

2.5 The author, finally, claims that the prolonged time spent on death row - since July 1983 - constitutes degrading and inhuman treatment, without how ver, further substantiating this allegation.

3. By decision of 9 February 1988, the Special Rapporteur of the Human Rights Committee for communications involving the death penalty transmitted the communication, for information, to the State party, requesting it, under rule 86 of the rules of procedure, not to carry out the death sentence against the author before the Committee had had an opportunity to consider further the question of the admissibility of the communication. The author was requested, under rule 91 of the rules of procedure, to provide the Committee with several clarifications concerning the conduct of his trial and appeal and to forward to the Committee a copy of the Notes of Evidence. By further decision of 22 March 1988, the Working Group of the Human Rights Committee reiterated the Special Rapporteur's request under rule 86 and asked the State party to provide information and observations relevant to the question of the admissibility of the communication. The State party was further requested to provide the Committee with the texts of the written judgments in the case and to clarify whether the author retained the possibility to petition the Judicial Committee of the Privy Council for special leave to appeal.

4.1 In three submissions dated 19 and 26 February and 18 April 1988, the author replies to the Special Rapporteur's request for clarifications. He states that on 24 November 1980, in the District of Douce Pass, several men forced him to lead them to an isolated house in James Hill. The men broke into the house, demanded money and threatened to shoot the owner, Hedley Patton. Appeals by the author to leave the man alone were unsuccessful. In the end, the men shot H. P. and left the house with what they could find. The next morning, the author temporarily left the area where he resided. Upon his return, he was informed that the police were looking for him. That very night, on 29 November 1980, the police came to the house and arrested him. He made a written statement on 29 December 1980, but since his writing and reading abilities were deficient at the time, he requested, on 1 January 1981, that the statement be rewritten. The author states that he was placed on an identification parade without legal representation. One witness purportedly identified him whereas his co-defendant, A. H., was identified by two witnesses. The author indicates that he was informed of the charges against him on 8 January 1981, and that he was brought for the first time before a Magistrate on 14 January 1981. During the preliminary enquiry, as well as during the trial and the appeal, he was represented by a legal aid attorney.

4.2 The trial did not start until 5 July 1983. The author claims that the prosecution witnesses merely testified that they had identified the author as one of the men who had been at the house at the time of the murder. He does not recall that any of them testified that they had actually seen him commit any crime. According to him, they mainly incriminated his co-defendant. Two witnesses testified that they had heard someone beg for the deceased's life. The author reiterates that it was he who had pleaded for the victim's life and indicates that the witnesses could not agree among themselves on that particular point. On 12 July 1983, the author's representative made a no-case submission, but the judge

ruled against him. The author therefore took the stand and made a sworn statement. According to him, his lawyer further requested the judge to subpoena the author's father to attend court and asked that a police inspector assist in bringing him to court. He explains that his parents are poor and cannot afford the fare to come to court; although his father wanted to attend the court sessions, he was unable to do so.

4.3 The author states that he was able to consult with his lawyer during the trial, but only once while he was awaiting the outcome of his appeal. He indicates that the prosecution's witnesses were cross-examined but doubts whether their examination was thorough enough. He further claims that, as his father was the only witness called to testify on his behalf and was unable to attend court, there were no witnesses who testified on his behalf.

4.4 According to the author, he has lost contact with his legal aid attorney since the dismissal of the appeal and is now without a legal representative. He wrote to the Jamaican Bar Association, with a request for legal assistance and with a request for an investigation of his case. He received one reply, on 11 March 1987, informing him that a letter had been sent by the Bar Association to Mr. F. P. on 5 March 1987. On 10 February 1988, the author also received a letter from a firm of solicitors with a plea to the Government not to execute the author, because of the author's request to have his case submitted to the Judicial Committee of the Privy Council.

4.5 With respect to the possibility of petitioning the Judicial Committee of the Privy Council for leave to appeal, the author points out that if his case is sent to the Privy Council without the written judgment of the Court of Appeal, the Privy Council will simply dismiss his petition and return the case to Jamaica. He further indicates that he is unable to afford the services of a lawyer to take his case to the Privy Council; this, he alleges, has been the situation of many inmates on death row who intended to petition the Privy Council for leave to appeal but were unable to do so, and who were subsequently executed.

4.6 In the author's opinion, the events described above constitute a violation by Jamaica of article 14, paragraphs 3 (d) and (e), and article 14, paragraph 5, of the Covenant.

5. In its submission under rule 91 of the rules of procedure, dated 23 January 1989, the State party contends that the communication is inadmissible on the ground of non-exhaustion of domestic remedies, because the author's "case has not been adjudicated upon by the Judicial Committee of the Privy Council, Jamaica's highest appellate Court".

6.1 In his reply, dated 25 February 1989, the author reiterates that he cannot afford the kind of legal assistance required for his case to be submitted to the Privy Council. He again refers to the case of N. C. as well as to that of two other inmates, who allegedly were made to pay forty thousand Jamaican dollars to have their petition to the Privy Council attended to properly. Finally, he claims that his co-defendant, A. H., has been informed by the Jamaica Council for Human Rights that their case lacked merit to justify filing an appeal to the Privy Council. In a further letter dated 18 May 1989, the author indicates that he has now obtained the services of a London law firm to take his case to the Privy Council and requests the Committee to defer consideration of his communication until the Privy Council has heard his petition for special leave to appeal.

6.2 In a further submission, dated 12 August 1989, the author states that on 20 April 1989, the Jamaica Council for Human Rights informed him that the court papers in his case had been sent to his representatives in London. He indicates that he has not, since then, received any further indication about the status of this petition and requests the Committee to defer consideration of his case.

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 has ascertained, as it is required to do 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.

7.3 With regard to the requirement of exhaustion of domestic remedies, the Committee has taken note of the State party's contention that the communication is inadmissible because of the author's failure to petition the Judicial Committee of the Privy Council for special leave to appeal, pursuant to Section 110 of the Jamaican Constitution. It observes that the author, although claiming that there would be no merit in pursuing such a petition, has secured pro bono legal representation from a London law firm for this purpose, after submitting his communication to the Human Rights Committee. While expressing grave concern about the apparent unavailability of a reasoned judgment of the Jamaican Court of Appeal in the case, the Committee cannot conclude that a petition for special leave to appeal to the Judicial Committee of the Privy Council, even without a written judgment of the Court of Appeal, must be considered a priori futile. It therefore finds that the requirements of article 5, paragraph 2 (b), of the Optional Protocol have not been met.

8. The Human Rights Committee therefore decides:

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

(b) That the State party be requested to make the written judgment of the Court of Appeal available to the author without further delay, so as to permit an effective recourse to the Judicial Committee of the Privy Council, and to ensure that adequate legal aid be made available to the author;

(c) That, since this decision may be reviewed under rule 92, paragraph 2, of the Committee's rules of procedure upon receipt of a written request by or on behalf of the author containing information to the effect that the reasons for inadmissibility no longer apply, the State party is requested, taking into account the spirit and purpose of rule 86 of the Committee's rules of procedure, not to carry out the death sentence against the author before he has had a reasonable time, after completing the effective domestic remedies available to him, to request the Committee to review the present decision;

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

H. Communication No. 260/1987, C. B. v. Jamaica (Decision of 13 July 1990, adopted at the thirty-ninth session)

Submitted by: C. B. [name deleted]

Alleged victim: The author

State party concerned: Jamaica

Date of communication: 20 November 1987 (date of initial letter)

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

Meeting on 13 July 1990,

Adopts the following:

Decision on admissibility

1. The author of the communication (initial letter dated 20 November 1987; further letters dated 27 December 1987 and 2 October 1988) is C. B., a Jamaican citizen born on 5 June 1956, currently awaiting execution at St. Catherine District Prison, Jamaica. He claims to be the victim of a violation by the Government of Jamaica of articles 7 and 14, paragraphs 3 (b), (c) and (d), of the International Covenant on Civil and Political Rights. He is represented by counsel.

2.1 The author, who claims to be innocent of the charges against him, states that he was arrested on 11 August 1981 and told that he was to go on an identification parade, as a suspect in a burglary case. The police officer who conducted three identification parades including the author's allegedly informed him that he had been identified on all three; however, when the legal aid attorney assigned to the author's case asked this officer about the identification parades during a court hearing, the latter stated that the author had not been identified. The author was thus acquitted of the charge in the Gun Court.

2.2 Several days later, the author was taken again to the Gun Court by a different police officer, for a preliminary hearing concerning a murder charge. This, the author states, was the first time he was informed of a murder charge against him. During the preliminary hearing, a police officer came in with a young girl, unknown to the author and allegedly the main witness in the murder case. The author states that during this preliminary hearing no attorney represented him; because of this the judge told him that he himself could cross-examine the witness. The author, however, merely asked that the lawyer who had represented him earlier in the Gun Court be contacted. This, however, proved impossible, and he remained without counsel until his case went to the Home Circuit Court in Kingston, where he was represented by two legal aid lawyers, who also represented him on appeal. On 2 February 1984, the author was convicted of murder and sentenced to death; on 4 December 1985, the Court of Appeal dismissed his appeal. After the dismissal of the appeal, the author received a letter from one of his representatives,

suggesting that he contact the Jamaica Council for Human Rights for further help. The author's letters sent to this lawyer after December 1985 reportedly were not answered.

2.3 The author further states that he intends to take his case to the Judicial Committee of the Privy Council in London. To be able to do so would, however, require the services of a lawyer and the written judgment of the Court of Appeal. Since the dismissal of his appeal and until submitting his case to the Committee, the author, who claims not to have adequate financial means, has unsuccessfully sought to obtain the services of a lawyer. Despite repeated requests, the State party has not provided him with legal aid. In this context, the author refers to the case of N. C., an inmate executed on 19 November 1987, who allegedly had been unable to apply for leave to appeal to the Judicial Committee of the Privy Council, because of lack of means to pay for a lawyer to represent him.

2.4 As regards the written judgment of the Court of Appeal, the author states that he has requested it since the dismissal of his appeal. Only on 30 November 1987 was he informed by the Registrar of the Supreme Court that no written judgment had been rendered by the Court of Appeal in his case.

2.5 The author claims that the State party, by failing to provide him with legal counsel and with the written judgment of the Court of Appeal, has violated its obligations under the Covenant. He offers the following description of how capital cases are handled after inmates have lost what he refers to as the "local appeal". Allegedly, some time after an inmate has lost his appeal, the representative of a legal aid clinic visits the inmate and requests him to sign an appeals form so that the case can be submitted to the Judicial Committee of the Privy Council; when this is done, the legal aid clinic prepares the case superficially, usually without the written judgment of the Court of Appeal, and sends it to London, where it is received by the Secretariat of the Judicial Committee of the Privy Council. The case is examined after some time and, since the case file cannot go before the Judicial Committee unless all requirements have been met, it is returned to Jamaica with a statement that the petition for leave to appeal has been dismissed. Thereupon, in many cases, death warrants are issued for the execution of inmates. The author again refers to the case of N. C.

3. By decision of 9 February 1988, the Special Rapporteur of the Human Rights Committee for cases involving the death penalty transmitted the communication, under rule 91, to the State party, requesting information and observations relevant to the question of admissibility, in particular, whether the author still had the opportunity to petition the Judicial Committee of the Privy Council for leave to appeal, and whether legal aid would be available to the author for that purpose. The State party was further requested, under rule 86 of the rules of procedure, not to carry out the death sentence against the author before the Committee had had the opportunity to decide on the question of the admissibility of the communication.

4. In its submission under rule 91, dated 29 July 1988, the State party indicates that the author may still petition the Judicial Committee of the Privy Council for special leave to appeal in forma pauperis. The State party further explains that legal aid is available to C. B. under Section 3 of the Poor Prisoners' Defence Act.

5.1 Commenting on the State party's submission, the author, in a letter dated 2 October 1988, claims, in particular, that since the day he has been on death row (2 February 1984), he has not heard of one single case in which the Jamaican

Government has granted legal aid pursuant to Section 3 of the Poor Prisoners' Defence Act to inmates who intended to petition the Judicial Committee of the Privy Council for special leave to appeal.

5.2 Concerning his own case, the author states that he recently contacted a firm of London solicitors with a view to obtaining their assistance in filing a petition for leave to appeal to the Privy Council. This firm has declined to represent him and transmitted the file to a different law firm.

5.3 In a submission dated 12 January 1989, the author requests the Committee to defer consideration of his case, pending the outcome of his petition for special leave to appeal to the Judicial Committee of the Privy Council. By letters dated 14 August and 18 September 1989, the author states that he has not received any indication about the status of his petition. By telefax of 19 February 1990, counsel indicates that she has obtained the transcript of the author's trial but that she has not yet received the written judgment of the Court of Appeal which would enable her to assess the merits of a petition for special leave to appeal to the Judicial Committee of the Privy Council.

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 it is required to do 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 With regard to the requirement of exhaustion of domestic remedies, the Committee has taken note of the State party's contention that the communication is inadmissible because of the author's failure to petition the Judicial Committee of the Privy Council for special leave to appeal, pursuant to Section 110 of the Jamaican Constitution. It observes that the author has secured pro bono representation from a London law firm for this purpose, after submitting his communication to the Human Rights Committee, and that his representative continues to investigate the possibility of filing a petition for special leave to appeal on his behalf. While expressing grave concern about the apparent unavailability of a reasoned judgment of the Jamaican Court of Appeal in the case, the Committee cannot conclude that a petition for special leave to appeal to the Judicial Committee of the Privy Council, even without a written judgment of the Court of Appeal, must be considered a priori futile. It therefore finds that the requirements of article 5, paragraph 2 (b), of the Optional Protocol have not been met.

7. The Human Rights Committee therefore decides:

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

(b) That the State party be requested to make the written judgment of the Court of Appeal available to the author and his counsel without further delay, so as to permit an effective recourse to the Judicial Committee of the Privy Council, and to ensure that adequate legal aid be made available to the author;

(c) That, since this decision may be reviewed under rule 92, paragraph 2, of the Committee's rules of procedure upon receipt of a written request by or on

behalf of the author containing information to the effect that the reasons for inadmissibility no longer apply, the State party is requested, taking into account the spirit and purpose of rule 86 of the Committee's rules of procedure, not to carry out the death sentence against the author before he has had a reasonable time, after completing the effective domestic remedies available to him, to request the Committee to review the present decision;

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

I. Communication No. 268/1987, M. G. B. and S. P. v. Trinidad and Tobago (Decision of 3 November 1989, adopted at the thirty-seventh session)

Submitted by: M. G. B and S. P. [names deleted]

Alleged victims: The authors

State party concerned: Trinidad and Tobago

Date of communication: 4 December 1987

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

Meeting on 3 November 1989,

Adopts the following:

Decision on admissibility

1. The authors of the communication (initial letter dated 4 December 1987 and subsequent letters dated 30 December 1988 and 24 January 1989) are M. G. B. and S. P., two Trinidadian citizens born on 27 November 1927 and 1 January 1960, respectively, residing in Trinidad. They claim to be the victims of a violation by the Government of Trinidad and Tobago of articles 2 (3) (a) and (b) and 5 of the International Covenant on Civil and Political Rights. They are represented by counsel.

2.1 The authors state that they applied with the Registrar General of Trinidad to register a company known as the TNT Human Rights and Legal Aid Company Limited. This company was to promote the rule of law, human rights facilities and to assist in providing legal assistance and legal aid to the needy. The Registrar of Companies refused to recognise this company on the grounds that the establishment of a company with such objectives by non-professionals was against public policy. The authors filed an application for judicial review in the High Court of Trinidad and Tobago but the Judge dismissed the application without issuing a written judgment. They then appealed to the Court of Appeal and asked that the appeal be deemed urgent. The Court of Appeal, on 5 November 1987, refused to consider the appeal urgent on the grounds that the authors' application did not show sufficient ground for urgency, because "the incorporation of the Appellants under the name sought is not a sine qua non to the lawful provision of financial assistance to indigent persons directly or otherwise with a view to their obtaining legal aid and/or legal advice."

2.2 The authors indicate that there is no right of appeal against that decision to the Judicial Committee of the Privy Council. They claim that the statistics for hearings and the determination of matters in the Court of Appeal show that there is an "inordinate" delay in the hearings and the determination of appeals, usually three to four years. This, they argue, constitutes a judicial block for the determination of appeals and a denial of the right of access to the court.

3. By decision of 15 March 1988, the Working Group of the Human Rights Committee transmitted the communication to the State party under rule 91 of the Committee's rules of procedure, requesting information and observations relevant to the question of the admissibility of the communication. The Working Group further requested the authors to clarify (a) whether the company they sought to register would have operated on a non-profit basis; (b) whether the persons who would have constituted this company have been in any way prevented from providing legal aid to the needy; and (c) whether there were other associations of lawyers in Trinidad and Tobago which provided similar services.

4.1 By letter dated 30 December 1988, counsel notes that the appeal was discontinued by the authors on 15 December 1988, because they considered it impossible to obtain a positive result in the case since the High Court of Trinidad and Tobago had in October 1988, indicated to them that no written judgment was available. Without such a judgment however, the case could not be entertained by the Court of Appeal of Trinidad.

4.2 By further letter dated 24 January 1989 counsel clarifies that the company as a whole would have operated on a profit basis to achieve its aims but that it would have provided free legal advice and free legal representation in appropriate cases. He further states that the authors have not been prevented from providing legal aid to the needy and that there are other associations in Trinidad and Tobago, such as the Anglican Church and the Caribbean Human Rights Committee, whose aims and objectives are similar to those of the company the author sought to have registered. Counsel provides a copy of the Memorandum and Articles of Association of the company.

5. The State party's deadline for its submission concerning information and observations relevant to the question of the admissibility of the communication expired on 27 June 1988. No comments were received from the State party.

6.1 Before considering any claims in a communication, the Working Group 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 considered the authors' allegations of a violation of articles 2 (3) (a) and (b) and 5 of the Covenant and notes that these are general undertakings by States and cannot be invoked, in isolation, by individuals under the Optional Protocol. The Committee has ex officio examined whether the facts submitted raise potential issues under other articles of the Covenant. It has concluded that they do not. The Committee therefore finds that the communication is incompatible with the provisions of the Covenant within the meaning of article 3 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 authors and to the State party.

J. Communication No. 275/1988, S. E. v. Argentina a/ (Decision of 26 March 1990, adopted at the thirty-eighth session)

Submitted by: S. E. [name deleted]

Alleged victims: The author and her disappeared children

State party concerned: Argentina

Date of entry into force of Covenant and Optional Protocol for Argentina: 8 November 1986

Date of communication: 10 February 1988 (date of initial letter)

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

Meeting on 26 March 1990,

Adopts the following:

Decision on admissibility

1. The author of the communication is an Argentine citizen residing in Argentina. She writes on her own behalf and on behalf of her three disappeared children, born in 1951, 1953 and 1956, respectively, alleging violations of the Covenant by the Government of Argentina. She is represented by counsel.

The background

2.1 The author states that her eldest son, L. M. E., was abducted in Argentina on 10 August 1976 by persons belonging to or associated with the police, security forces or armed forces, apparently on account of his political opinions. Another son, C. E., and her daughter, L. E., were detained on 4 November 1976 in Uruguay and were allegedly seen in November/December 1976 at a detention camp in Argentina known as "The Bank" and at a police station, Brigada Guenes, in Buenos Aires. Their whereabouts have been unknown ever since, in spite of all the steps undertaken by the author to discover what happened to them.

2.2 On 24 December 1986 the Argentine legislature proclaimed Law No. 23,492, the so-called "Finality Act" (Ley de Punto Final), which established a deadline of 60 days for commencing new criminal investigations with regard to the events of the so-called "dirty war" (guerra sucia). This deadline expired on 22 February 1987. On 8 June 1987, Law No. 23,521, the Due Obedience Act (Ley de Obediencia Debida), was promulgated, introducing an irrebuttable presumption that members of the security, police and prison services cannot be punished for such crimes if committed in due obedience to orders. The Act further extends protection to senior

officers who did not have a decision-making role with regard to the violations. The Argentine Supreme Court has upheld the constitutionality of this Act.

2.3 On the basis of an application filed on 19 June 1984, the National Commission on the Disappearance of Persons (CONADEP) opened investigation files on the disappearances of L. M. E. (CONADEP file No. 5448), L. E. (No. 5449) and C. E. (No. 5450). The whereabouts of the disappeared persons, however, could not be established.

2.4 Article 6 of the Finality Act specifically provides that "The extinction of penal action pursuant to article 1 does not affect civil proceedings".

2.5 The author has not instituted civil proceedings to obtain compensation.

2.6 By operation of article 4037 of the Argentinian Civil Code, the period of limitations for instituting civil proceedings is two years. This period runs from the date of the alleged violation.

The complaint

3.1 The author claims that the enactment of the Finality Act and the Due Obedience Act constitute violations by Argentina of its obligations under article 2 of the Covenant, in particular "to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant" (art. 2, para. 2), "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy ..." (art. 2, para. 3 (a)) and "to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities ... and to develop the possibilities of judicial remedy" (art. 2, para. 3 (b)).

3.2 In particular, the author claims that the disappearance of her children was never fully investigated. She requests that the inquiries be reopened.

The State party's observations

4.1 The State party points out that the disappearances took place in 1976 during the period of military government, 10 years prior to the entry into force of the Covenant and of the Optional Protocol for Argentina.

4.2 With respect to the temporal application of the Covenant and of the Optional Protocol, the State party submits that the general rule for all juridical norms is non-retroactivity. In the specific area of treaty law, a firmly-established international practice leads to the same conclusion. Both the Permanent Court of International Justice (Series A/B, No. 4, 24) and the International Court of Justice (I.C.J. Reports 1952, 40) have maintained that a treaty has to be considered as having a retroactive effect only when this intention is explicitly stated in the treaty or may be clearly inferred from its provisions. The validity of the principle of non-retroactivity of treaties was enshrined in the 1969 Vienna Convention on the Law of Treaties (in force on 27 January 1980), article 28 of which codifies this rule of customary international law:

"Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party".

The communication should therefore be declared inadmissible rationae temporis.

4.3 As to the inquiries into the disappearance of the author's three children, the State party refers to the CONADEP investigations, which, unfortunately did not yield positive results. In this connection, the State party cites the CONADEP final report, which concerns over 8,900 disappearances.

4.4 The case of the author's children was also submitted to the United Nations Working Group on Enforced or Involuntary Disappearances on 13 August 1980. The State party's investigations in this respect failed to establish the whereabouts of the author's children, or when and where they were deprived of their lives.

4.5 With regard to the possibility of instituting civil proceedings for compensation, the State party points out that although the author could have presented a claim, she did not do so. The period of limitations for lodging civil actions for compensation has now elapsed.

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 With regard to the application rationae temporis of the International Covenant on Civil and Political Rights and of the Optional Protocol for Argentina, the Committee recalls that both instruments entered into force on 8 November 1986. It observes that the Covenant cannot be applied retroactively and that the Committee is precluded rationae temporis from examining alleged violations that occurred prior to the entry into force of the Covenant for the State party concerned.

5.3 It remains for the Committee to determine whether there have been any violations of the Covenant subsequent to its entry into force. The author has invoked article 2 of the Covenant and claimed a violation of the right to a remedy. In this context the Committee recalls its prior jurisprudence that article 2 of the Covenant constitutes a general undertaking by States and cannot be invoked, in isolation, by individuals under the Optional Protocol (M. G. B. and S. P. v. Trinidad and Tobago, communication No. 268/1987, para. 6.2, declared inadmissible on 3 November 1989). Bearing in mind that article 2 can only be invoked by individuals in conjunction with other articles of the Covenant, the Committee observes that article 2, paragraph 3 (a), of the Covenant stipulates that each State party undertakes "to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy ..." (emphasis added). Thus, under article 2 the right to a remedy arises only after a violation of a Covenant right has been established. However, the events which could have constituted violations of several articles of the Covenant and in respect of which remedies could have been invoked, occurred prior to the entry into force of the Covenant and of the Optional Protocol for Argentina. Therefore, the matter cannot be considered by the Committee, as this aspect of the communication is inadmissible rationae temporis.

5.4 The Committee finds it necessary to remind the State party that it is under an obligation, in respect of violations occurring or continuing after the entry into force of the Covenant, thoroughly to investigate alleged violations and to provide remedies where applicable, for victims or their dependants.

5.5 To the extent that the author claims that the enactment of Law No. 23,521 frustrated a right to see certain government officials prosecuted, the Committee refers to its prior jurisprudence that the Covenant does not provide a right for an individual to require that the State party criminally prosecute another person (H. C. M. A. v. The Netherlands, communication No. 213/1986, para. 11.6, declared inadmissible on 30 March 1989). Accordingly, this part of the communication is inadmissible ratione materiae as incompatible with the provisions of the Covenant.

6. The Human Rights Committee therefore decides:

(a) The communication is inadmissible;

(b) This decision shall be communicated to the State party and to the author through her counsel.

Notes

a/ The text of an individual opinion submitted by Mr. Bertil Wennergren pursuant to rule 92, paragraph 3, of the Committee's rules of procedure is appended

APPENDIX

Individual opinion submitted by Mr. Bertil Wennergren pursuant to rule 92, paragraph 3, of the Committee's rules of procedure, concerning the Committee's decision to declare communication No. 275/1988, S. E. v. Argentina, inadmissible

I concur in the views expressed in the Committee's decision. However, in my opinion, the arguments in paragraph 5.4 of the decision need to be clarified and expanded. In this paragraph, the Committee reminds the State party that it is under an obligation, in respect of violations occurring or continuing after the entry into force of the Covenant, thoroughly to investigate alleged violations and to provide remedies, where applicable, for victims or their dependants.

According to article 28 of the 1969 Vienna Convention on the Law of Treaties (cited under paragraph 4.2 in the Committee's decision) a treaty's provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of entry into force of the treaty in respect of that party; the Permanent Court of International Justice (PCIJ Series A/B, No. 74 (1938), p. 10-48 - Phosphates in Morocco case) has held in this context that both the terms concerning the limitation rationæ temporis and the underlying intention are clear: This clause was inserted in order to deprive the acceptance of the compulsory jurisdiction of any retroactive effects. In this case the Court had to decide whether or not issues arose from factors subsequent to the acceptance of its jurisdiction (which the Court refers to as the "crucial date"), first because certain acts, which, if considered separately, were in themselves unlawful international acts, were actually accomplished after the "crucial date"; secondly, because these acts, if taken in conjunction with earlier acts to which they were closely linked, constituted as a whole a single, continuing and progressive illegal act which was not fully accomplished until after the "crucial date"; and lastly, because certain acts which were carried out prior to the "crucial date" nevertheless gave rise to a permanent situation which was inconsistent with international law and which existed after the said date. The question of whether a given situation or fact occurs prior to or subsequent to a particular date is, the Court explains, one to be decided in respect of each specific case, just as the question of the situations or facts with regard to which the issues arose must be decided in regard of each specific case. I note that the "crucial date" in this case is 8 November 1986.

The Committee has repeatedly indicated in prior decisions that it "can consider only an alleged violation of human rights occurring on or after (the date of entry into force of the Covenant and the Protocol for the State party) unless it is an alleged violation which, although occurring before that date, continues or has effects which themselves constitute a violation after that date". Disappearance cases that cannot be attributed to natural causes (accidents, voluntary escapes, suicides, etc.) but that give rise to reasonable assumptions and suspicions of illegal acts, such as killing, deprivation of liberty and inhuman treatment, may lead to claims not only under the respective material articles in the Covenant (articles 6, 7, 9 and 10) but in connection therewith also under article 2 of the Covenant, concerning a State party's obligation to adopt such measures as may be necessary to give effect to the rights recognised in the Covenant and to ensure that any person whose rights or freedoms are violated shall have an effective remedy. In an early decision involving a disappearance (30/1978 Bleier v. Uruguay) the Committee, after noting that according to unrefuted

allegations "Eduardo Bleier's name was on a list of prisoners read out once a week at an army unit in Montevideo where his family delivered clothing for him and received his dirty clothing until the summer of 1976" (i.e. after the "crucial date"), urged the Uruguayan Government "to take effective steps ... to establish what has happened to Eduardo Bleier since October 1975 (i.e. before the crucial date but with continuation after that date), to bring to justice any person found to be responsible for his death, disappearance or ill-treatment, and to pay compensation to him or his family for any injury which he has suffered". In another case (107/1981 Quinteros v. Uruguay) the Committee was of the view that the information before it revealed breaches of articles 7, 9 and 10, paragraph 1, of the Covenant and concluded that the responsibility for the disappearance of Elena Quinteros fell on the authorities of Uruguay and that the State party should take immediate and effective steps (i) to establish what has happened to Elena Quinteros since 28 June 1976, and secure her release, (ii) to bring to justice any persons found to be responsible for her disappearance and ill-treatment, (iii) to pay compensation for the wrongs suffered, and (iv) to ensure that similar violations do not occur in the future. In the latter case, the author of the communication was the mother of the disappeared victim who had alleged that she, too, was a victim of a violation of article 7, (psychological torture because she did not know about the whereabouts of her daughter) and who had given ample description of her sufferings. The Committee expressed its understanding with the anguish and stress caused to the mother both by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. She had the right to know what had happened to her daughter. The Committee therefore found that in these respects she was also a victim of a violation of the Covenant.

I draw the following conclusions. A disappearance per se does not raise any issue under the Covenant. For it to do so, a link to some of the material articles of the Covenant is required. And it is solely with such a link that article 2 of the Covenant may become applicable and an issue may arise under that article too. Should it become clear that the cause of the disappearance is attributable to a killing for which the State party must be held responsible, but that the killing took place before the "crucial date", then this killing cannot be deemed to constitute a violation of article 6 of the Covenant, notwithstanding that it was a crime against the right to life under domestic penal law. Consequently, a claim regarding the non-fulfillment of a State party's obligations under article 2 of the Covenant also cannot arise. But, on the other hand, if a killing before the "crucial date" is merely one hypothesis among several others, the case law of the Committee clearly indicates that under article 2 of the Covenant the State party is under a duty to carry out a meaningful investigation. Only when it is unimaginable that any act, fact or situation which would constitute a violation of the Covenant may have continued to exist or have occurred subsequent to the "crucial date", such an obligation does not arise. It should be added that a declaration under domestic civil law in respect of a disappeared person's death does not set aside a State party's obligation under the Covenant. Domestic civil law provisions cannot be given precedence over international legal obligations. Whatever the length and thoroughness be deemed necessary for an investigation to satisfy the requirements under the Covenant is to be considered case by case, but an investigation must under all circumstances be conducted fairly, objectively and impartially. Any negligence, suppression of evidence or other irregularity jeopardizing the outcome must be regarded as a violation of the obligations under article 2 of the Covenant,

in conjunction with a relevant material article. And once an investigation has been closed due to lack of adequate results, it must be reopened if new and pertinent information comes to light.

Bertil WENNERGREN

K. Communication No. 278/1988, N. C. v. Jamaica (Decision of 13 July 1990, adopted at the thirty-ninth session)

Submitted by: N. C. [name deleted]

Alleged victim: The author

State party concerned: Jamaica

Date of communication: 8 February 1988 (date of initial letter)

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

Meeting on 13 July 1990,

Adopts the following:

Decision on admissibility

1. The author of the communication (initial communication dated 8 February 1988 and subsequent correspondence) is N. C., a Jamaican citizen currently awaiting execution at St. Catherine District Prison, Jamaica. He claims to be the victim of a violation of his human rights by Jamaica.

2.1 The author states that he was sentenced to death on 12 February 1985 for the murder of a boy which had occurred in March 1982. The Jamaican Court of Appeal dismissed his appeal on 1 December 1986.

2.2 The author states a/ that he was convicted primarily on the evidence of one prosecution witness. This witness testified that on the night of the crime, at about 3 a.m., he and the deceased were walking down a road when he heard a shot. He began to run down the road; turning back after a few moments, he saw the accused, who was holding a short gun, with two of his friends standing next to a gate. The author asserts that this witness, when cross-examined during the trial by his legal aid attorney, made several contradictory statements; still, the evidence was admitted by the judge. It is also stated that prior to the opening of the trial, the witness was seen talking to the police for an entire morning. Asked by the author's lawyer what had been the subject of the discussion with the police, the witness allegedly failed to answer. According to the author, it would have been possible to prove that he was confined to bed when the murder occurred. He states that he had just been released from the hospital following an operation, and that he could prove this. He further states that there were witnesses who could have testified on his behalf; they did not do so, according to the author, because they were never informed of the trial date.

3. By decision of 21 March 1988, the Working Group of the Human Rights Committee transmitted the communication to the State party and requested it, under rule 91 of the rules of procedure, to provide information and observations relevant to the question of the admissibility of the communication. It further requested the State party, under rule 86 of the rules of procedure, not to carry out the death sentence against the author while his communication was under consideration by the Committee

4. In its submission under rule 91, dated 20 July 1988, the State party argues that the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol, on the ground of non-exhaustion of domestic remedies, because the author may still apply, under Section 110 of the Jamaican Constitution, for special leave to appeal to the Judicial Committee of the Privy Council. The State party further indicates that legal aid would be available to N. C. for that purpose under the Poor Prisoners' Defence Act.

5. In his comments, dated 28 September 1988, the author states that he unsuccessfully requested assistance from the Jamaica Council for Human Rights for the purpose of filing a petition for special leave to appeal to the Privy Council. By further letters dated 17 May and 22 June 1989, he indicates that a London law firm has agreed to assist him for the purpose of filing such a petition, adding, however, that his case "is not ready to be tried in the Privy Council", presumably because of the unavailability of relevant court documents. He therefore requests the Committee to postpone consideration of his communication until the Privy Council has adjudicated his case.

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 it is required to do 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 With regard to the requirement of exhaustion of domestic remedies, the Committee has taken note of the State party's contention that the communication is inadmissible because of the author's failure to petition the Judicial Committee of the Privy Council for special leave to appeal, pursuant to Section 110 of the Jamaican Constitution. It observes that the author has secured pro bono legal representation from a London law firm for this purpose, after submitting his communication to the Human Rights Committee, and that his representative continues to investigate the possibility of filing a petition for special leave to appeal on his behalf. While expressing grave concern about the apparent unavailability of relevant court documents in the case, the Committee cannot conclude that a petition for special leave to appeal to the Judicial Committee of the Privy Council must be considered a priori futile. It therefore finds that the requirements of article 5, paragraph 2 (b), of the Optional Protocol have not been met.

7. The Human Rights Committee therefore decides:

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

(b) That the State party be requested to make the written judgment of the Court of Appeal available to the author without further delay, so as to permit an effective recourse to the Judicial Committee of the Privy Council, and to ensure that adequate legal aid be made available to the author;

(c) That, since this decision may be reviewed under rule 92, paragraph 2, of the Committee's rules of procedure upon receipt of a written request by or on behalf of the author containing information to the effect that the reasons for inadmissibility no longer apply, the State party is requested, taking into account

the spirit and purpose of rule 86 of the Committee's rules of procedure, not to carry out the death sentence against the author before he has had a reasonable time, after completing the effective domestic remedies available to him, to request the Committee to review the present decision;

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

Notes

a/ The author's account is confusing. The secretariat has endeavoured to reflect what appears to be the intended meaning.

L. Communication No. 281/1988, C. G. v. Jamaica (Decision of 30 October 1989, adopted at the thirty-seventh session)

Submitted by: C. G. [name deleted]

Alleged victim: The author

State party concerned: Jamaica

Date of communication: 10 February 1988 (date of initial letter)

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

Meeting on 30 October 1989,

Adopts the following:

Decision on admissibility

1. The author of the communication (initial submission dated 10 February 1988 and subsequent correspondence) is C. G., a Jamaican citizen currently awaiting execution at St. Catherine District Prison, Jamaica. He is represented by counsel.

2.1 The author was arrested on 7 April 1984 and charged with the murder, together with a co-defendant, N. D., of one A. I., in the District of Manchester, Jamaica; he claims to be innocent. On 11 October 1984, he was sentenced to death in the Westmoreland District Court; his co-defendant was convicted of manslaughter and sentenced to 30 years imprisonment (reduced to 20 years on appeal). The Court of Appeal of Jamaica dismissed his appeal on 28 July 1987.

2.2 As to the facts of the case, a/ it is submitted that the author broke into Mr. I.'s house at dawn, together with three other men, allegedly with the intention of stealing money. Mr. I. and his family (his wife and two daughters) were threatened with death and forced to hand over all their money. According to Mrs. I.'s account, her husband was shot during the robbery. One of his daughters, L. I., also testified that C. G. allegedly had admitted to her that he had shot her father. During the identification parade on 11 May 1984, L. I. purported to identify the author as the murderer. In this connection, the author claims that the police officers who conducted the parade influenced the deceased's widow and daughter as to whom they were to identify. He further points out that the deceased's widow failed to identify him.

2.3 The author states that the conduct of the identification parade was challenged unsuccessfully by his legal aid attorney during the trial. He further claims that he had no opportunity to consult with his lawyer prior to or during the trial and appeal proceedings.

3. By decision of 21 March 1988, the Working Group of the Human Rights Committee transmitted the communication to the State party and requested it, under rule 91 of the rules of procedure, to provide information and observations relevant to the question of the admissibility of the communication. It further requested the State

party, under rule 86 of the rules of procedure, not to carry out the death sentence against the author while his communication was under consideration by the Committee.

4. In his submission under rule 91, dated 25 October 1988, the State party argues that the communication is inadmissible pursuant to article 5, paragraph 2 (b), of the Optional Protocol because the author may still apply, for special leave to appeal to the Judicial Committee of the Privy Council. It further submits that legal aid will be available for that purpose.

5. In his comments, dated 28 December 1988, author's counsel argues that the sole issue in the case relates to the treatment of identification evidence. He challenges the author's identification by the deceased's daughter and reiterates that the deceased's widow did not identify the author. While conceding that the case does not fall into the category of "fleeting glance identification", counsel contends that the nature of the identification by the deceased's daughter called for a careful and precise summing up by the judge, given the absence of corroborative or other supporting evidence. He further submits that the judge did not comply with the strict rules on identification guidelines laid down by the Court of Appeal of England in the case of R. v. Turnbull (1976) b/ and that, as a result, he misdirected the jury on several relevant issues. In particular, the judge is said to have failed to warn the jury that a mistaken witness may be a credible witness; that he misdirected the jury as to the lack of corroborative or other supporting evidence for the author's identification by the deceased's daughter; that he inadequately directed the jury in relation to identification on the conditions prevailing during the robbery in the middle of the night; that he wrongly inferred that support for the identification by the deceased's daughter could come from identification evidence of N. D.

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 it is required to do under article 5, paragraph 2 (a), of the Optional Protocol, that the matter is not being examined under another procedure of international investigation or settlement.

6.3 With respect to the requirement of exhaustion of domestic remedies, the Committee has noted the State party's contention that the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol, since the author may still petition the Judicial Committee of the Privy Council. It observes that the author has obtained legal representation for this purpose, and that his counsel in London is currently preparing a petition for special leave to appeal to the Judicial Committee of the Privy Council on his behalf. It cannot conclude, on the basis of the information before it, that a petition for special leave to appeal to the Judicial Committee of the Privy Council would not constitute an effective remedy available to the author within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

7. The Human Rights Committee therefore decides:

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

(b) That, since this decision may be reviewed under rule 92, paragraph 2, of the Committee's rules of procedure upon receipt of a written request by or on behalf of the author containing information to the effect that the reasons for inadmissibility no longer apply, the State party shall be requested, taking into account the spirit and purpose of rule 86 of the Committee's rules of procedure, not to carry out the death sentence against the author, before he has had a reasonable time, after completing the effective domestic remedies available to him, to request the Committee to review the present decision;

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

Notes

a/ The author's submissions do not provide a detailed account of the facts. The following description follows the outline of the facts in the judgment of the Court of Appeal.

b/ See 63 Cr. App. R 132. These guidelines are also applied by Jamaican courts. Subsequent to counsel's comments, the Judicial Committee of the Privy Council allowed the appeal of Oliver Whylie and quashed the judgment of the Court of Appeal in his case. In its judgment of 27 July 1989, the Judicial Committee of the Privy Council stated that "Their Lordships have no hesitation in concluding that a significant failure to follow the guidelines laid down in Turnbull will cause the conviction to be quashed because it will have resulted in a substantial miscarriage of justice."

M. Communication No. 290/1988, A. W. v. Jamaica (Decision of 8 November 1989, adopted at the thirty-seventh session)

Submitted by: A. W. [name deleted]

Alleged victim: The author

State party concerned: Jamaica

Date of communication: 16 February 1988 (date of initial letter)

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

Meeting on 8 November 1989,

Adopts the following:

Decision on admissibility*

1. The author of the communication (initial submission dated 16 February 1988 and subsequent correspondence) is A. W., a Jamaican citizen currently awaiting execution at St. Catherine District Prison, Jamaica. He claims to be the victim of a violation of his human rights by Jamaica. He is represented by counsel.

2.1 The author, who claims to be innocent, was arrested on 14 June 1983 and charged, together with one G. S., a/ with a murder, on 13 June 1983, of one R. H.. He was tried in the Westmoreland Circuit Court, Jamaica, convicted and sentenced to death on 7 June 1984. On 7 April 1986, the Court of Appeal of Jamaica dismissed his appeal.

2.2 The author states that on 13 June 1983 he was working in his cane field, when Mr. H. approached him and attacked him with a knife; in the course of the ensuing struggle, the assailant suffered head injuries. Afterwards, the author stopped a passing police car and informed the police officer of the incident. This officer reportedly told the author and his co-defendant to place the wounded man into the back of the police car and drove him to the hospital. Later that day, the same officer returned to the author's home, informed him that Mr. H. had died and proceeded to arrest him. He was charged with murder the following day.

2.3 It is alleged that the trial was conducted in a biased way. Although the author's lawyer allegedly cross-examined the two witnesses against him, the judge is said to have constantly interrupted the defence, objected to several relevant questions and even suggested answers to the witnesses. No witnesses are said to have testified on the author's behalf.

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* The text of an individual opinion by Ms. Christine Chanet is reproduced in the appendix.

3. By decision of 8 July 1988, the Working Group of the Human Rights Committee transmitted the communication to the State party and requested it, under rule 91 of the rules of procedure, to provide information and observations relevant to the question of the admissibility of the communication. It further requested the State party, under rule 86 of the rules of procedure, not to carry out the death sentence against the author while his communication was under consideration by the Committee. The author was requested to provide several clarifications concerning his case.

4. In his reply, dated 10 October 1988, the author claims that the statements of the two prosecution witnesses were contradictory. In particular, one of the witnesses referred to a machete allegedly used by the author as the lethal weapon, the other one to an iron pipe and a stone. No iron pipe was, however, exhibited and no forensic tests were carried out on a stick and a stone which had been introduced in evidence. Moreover, the knife allegedly used by Mr. H. was not recovered by the police and, although the trial judge requested that this point be clarified, the police apparently did not comply with the request. The author contends, in particular, that he did not get a fair trial since the trial judge failed to direct the jury on the issue of self-defence.

5. In his submission under rule 91, dated 2 December 1988, the State party argues that the communication is inadmissible pursuant to article 5, paragraph 2 (b), of the Optional Protocol because the author may still apply, under Section 110 of the Jamaican Constitution, for special leave to appeal to the Judicial Committee of the Privy Council.

6. By further letter dated 5 May 1989, counsel indicates that the author's petition for special leave to appeal was heard and dismissed by the Judicial Committee of the Privy Council on 4 May 1989.

7. In a further submission dated 12 July 1989, the State party contends that, in spite of the dismissal of the author's petition by the Judicial Committee of the Privy Council, the communication remains inadmissible for failure to exhaust domestic remedies, since the author has failed to pursue remedies available to him under the Jamaican Constitution. In this context, the State party submits that the provision of the Covenant invoked by the author (art. 14) is coterminous with the right guaranteed by Section 20 of the Jamaican Constitution, which provides for due process. Under Section 25 of the Constitution, if anyone alleges that any one of the rights guaranteed by Section 25 has been, is being, or is to be contravened in relation to him, he may, without prejudice to any other action with respect to the same matter which is lawfully available, apply to the Supreme Constitutional Court for redress. The State party thus reiterates that the communication is inadmissible.

8.1 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.

8.2 The Committee has considered the material submitted by the author's counsel, including the author's petition for special leave to appeal to the Judicial Committee of the Privy Council. From this information, it appears that the author claims bias of the court, in particular in respect of the adequacy or otherwise of the judge's instructions to the jury, in the light of the evidence that was put before the jury and which it was for the jury to accept or reject. While

article 14 of the Covenant guarantees the right to a fair trial, it is for the appellate courts of the States parties of the Covenant to evaluate facts and evidence in a particular case. b/ Thus the review, by the Committee, of specific instructions to the jury by the judge in a trial by jury or of generalised claims of bias is beyond the scope of application of article 14. In the circumstances, the Committee concludes that the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

9. The Human Rights Committee therefore decides:

(a) The communication is inadmissible;

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

Notes

a/ Mr. G. S.'s communication No. 369/1989 was declared inadmissible by the Committee on 8 November 1989.

b/ For an application of this principle, see communication No. 201/1985 (Hendriks v. Netherlands), final views adopted on 27 July 1988, para. 10.4.

APPENDIX

Individual opinion submitted by Ms. Christina Chanet pursuant to rule 92, paragraph 3, of the Committee's rules of procedure, concerning the admissibility of communication No. 290/1988 (A. W. v. Jamaica)

As emphasised by the Committee in the case of communication No. 290/1988, it is within the competence of national courts, particularly appeal courts, to assess the fairness of the conditions in which a trial takes place.

However, this competence cannot exclude that of the Committee in implementation of the International Covenant on Civil and Political Rights. When a communication is submitted to it, the Committee assesses whether the trial was conducted in accordance with the provisions of article 14 of the Covenant.

At the admissibility stage, the Committee proceeds to a prima facie review of the applicant's grievances. The author of this communication challenges the regularity of the judge's conduct of the hearing. In particular, A. W. referred to an examination of the witnesses which might be contrary to article 14, paragraph 3 (e), of the Covenant.

It is therefore my view that, while the facts adduced by the applicant could be regarded as insufficiently substantiated, they could not be declared incompatible with the provisions of the Covenant on the basis of article 3 of the Optional Protocol.

N. Communication No. 297/1988, H. A. E. d. J. v. the Netherlands (Decision of 30 October 1989, adopted at the thirty-seventh session)

Submitted by: H. A. E. d. J. [name deleted]

Alleged victim: The author

State party concerned: The Netherlands

Date of communication: 29 March 1988

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

Meeting on 30 October 1989,

Adopts the following:

Decision on admissibility

1. The author of the communication (initial letter dated 29 March 1988) is H. A. E. d. J., a Dutch citizen born on 10 April 1957, residing in Utrecht, the Netherlands. He claims to be a victim of a violation by the Government of the Netherlands of article 26 of the International Covenant on Civil and Political Rights. He is represented by counsel.

2.1 On 20 August 1984, the author filed an application for a supplementary allowance under the Dutch General Assistance Act of 13 June 1963. At that time, he was performing civilian service as a recognized conscientious objector to military service and received pocket-money and a number of unspecified benefits. This income was allegedly 10 per cent below the minimum subsistence level applicable nationwide to persons aged 27 who maintain their own household. The executive body established under the General Assistance Act and the appeals board refused to grant the author supplementary benefits under the Act, arguing that the regulations applicable to conscientious objectors provided adequate means of subsistence to individuals in the author's situation.

2.2 In the course of the proceedings, the author challenged the different treatment provided for by Dutch laws and regulations which fix different minimum figures for necessary subsistence costs. Many conscientious objectors are said to live in poor conditions, at about 10 per cent below the minimum subsistence level (in 1984), as formulated in the National Assistance Standardization Act of 3 July 1974. Those conscientious objectors aged 23 and above who, while carrying out their civilian service, seek to maintain their own household, are said to be most seriously affected. Thus, the amount of assistance for an individual aged 23 or over, at the time of the author's request for assistance, was Dutch Guilders 1012.85 per month. The sum the author was entitled to as a conscientious objector was Dutch Guilders 901.76 per month.

2.3 The author submits that he should have received supplementary assistance so as to obtain an income equal to the minimum level referred to in the General Assistance Act, read in conjunction with the National Assistance Standardization

Act. With reference to article 26 of the Covenant the author argues that the mere fact that a person performs alternative national service can be no reason for discriminating against him. If the authorities set standard minimum figures, they may not, without well-founded reasons, apply lower minima to certain groups.

3. By its decision of 8 July 1988 the Working Group requested the author, under rule 91 of the rules of procedure, to forward to the Committee a copy of the relevant documents and to clarify whether he claimed that persons performing civilian service enjoy less benefits than those performing military service.

4. On 15 September 1988, author's counsel submitted the desired documents, and argued "that a conscientious objector fulfilling alternative military service who is aged 23 or over and maintains an independent household, is discriminated against in comparison to other civilians who maintain an independent household. In this case, there is no issue of discrimination between conscientious objectors on the one hand and conscripts on the other hand. Usually conscripts do not keep an independent household, although under certain circumstances a conscript aged 23 or over might be in the same position as a conscientious objector."

5. By its decision of 10 November 1988, the Working Group transmitted the communication under rule 91 of the rules of procedure to the State party, requesting information and observations relevant to the question of the admissibility of the communication.

6.1 In its submission dated 6 February 1988 the State party notes preliminarily, that "[t]he issue of non-discrimination provisions in international law and the Dutch social security system will be discussed in Parliament shortly. In these circumstances, the Government will not address this aspect to the scope of article 26 in the present memorandum, and it reserves the right to turn to this issue, if necessary, in the event that the merits of the complaint in question come under review. In view of the above, there is no impediment to the Dutch Government's responding to the other aspects of the applicant's complaint as it does below with respect to the issue of admissibility."

6.2 The State party further submits that "[t]he legal basis for compulsory military service is provided by article 98 of the Constitution and the National Service Act of 4 February 1922 (published in the Bulletin of Acts, Orders and Decrees, 1922, 24). Military service is compulsory. Article 99 of the Constitution lays down that the conditions subject to which those who have serious conscientious objections may be exempted from military service shall be laid down in the Military Service (Conscientious Objection) Act of 27 September 1962 (Bulletin of Acts, Orders and Decrees 1962, 370).

Broadly speaking, the provisions of the Military Service Act are as follows. Any person who has been found fit for military service, and any member of the armed forces, whether or not on active duty may ask the Minister of Defence to recognise his objections as serious conscientious objections. If, after an investigation has been carried out, those objections are recognised, the person concerned is exempted from military service. The Minister of Social Affairs and Employment is responsible for finding work for conscientious objectors. Alternative service is performed either with government bodies or with suitable organizations, as designated by the Minister of Social Affairs and Employment, which serve the public interest. Conscientious objectors receive the same pay as conscripts, namely

pocket money; certain allowances and fringe benefits are available. As far as possible, the legal position of conscientious objectors is the same as that of conscripts.

As regards the possible payment of general assistance, the Government would make the following observations. The General Assistance Act, in conjunction with which the National Assistance Standardisation Decree sets levels of benefits, is based on the premise that assistance will be granted to those who are unable to support themselves. The purpose of this benefit is to cover the costs of subsistence if normal sources of income fail to meet these minimum costs. The General Assistance Act thus provides a safety net for cases in which all other sources of income have failed. Conscripts and those performing alternative service are deemed to be adequately provided for already, as their position is fully regulated by the National Service Act, the Military Service Act and associated regulations. Under the established case law of the Crown, the statutory arrangements for payments to conscientious objectors are regarded as adequate and they do not require benefit payments. The Royal Decree of 21 January 1988 which was submitted by the applicant is entirely in accordance with this case law. In reply to the Committee's question, it may be observed that neither the General Assistance Act nor the National Standardisation Decree was applicable to the applicant when he was performing his alternative service as a conscientious objector."

6.3 With regard to the Committee's prior jurisprudence, the State party refers to its decisions on admissibility of 5 November 1987 (communication No. 245/1987, R. T. Z. v. the Netherlands) and 24 March 1988 (communication No. 267/1987, M. J. G. v. the Netherlands) and argues that the applicant's case should likewise be ruled inadmissible ... "The applications in question related to conscripts. In paragraph 3.2 of the decisions cited, the Committee observed that the Covenant does not preclude the institution of compulsory military service by State parties, even though this means that some rights of individuals may be restricted during military service, within the exigences of such service." The State party also takes the view that the institution of a compulsory alternative service for conscientious objectors is equally endorsed by the Covenant and refers to article 8, paragraph 3c (ii).

6.4 It is submitted that in cases where conscientious objections have been recognised, alternative service functions as a substitute for military service. "It appears from the applicant's communication that he considers that, as a conscientious objector, he has suffered discrimination in comparison with members of the public. The Government, in this phase of the procedure, will not deal with the factual question whether the non-applicability of the General Assistance Act does result in differences of income as claimed by the applicant. However, referring to the two above-mentioned decisions of the Committee it can be contended that in the present case a comparison of the position of the author with the position of members of the public vis-à-vis the General Assistance Act is not called for. Furthermore the applicant has not claimed that the rules applicable to him were applied to him differently than to other conscientious objectors. The Government concludes that the author has no claim under article 2 of the Optional Protocol."

7. In letter dated 29 June 1989, counsel comments on the State party's submission under rule 91, underlining that the decisive question is whether the difference of treatment between a recognized conscientious objector, above 23 years of age, fulfilling alternative military service and a civilian of the same age constitutes

discrimination within the meaning of article 26 of the International Covenant on Civil and Political Rights. Counsel asserts that a difference of treatment can only be justified insofar as the exclusion of his client's eligibility for a supplementary payment under the General Assistance Act is necessary in order to maintain the character of the alternative military service. The author contests, however, that such a necessity has been proven by the State party and, furthermore, he states that there is no provision under Dutch law to support the discrimination against his client.

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

8.2 The Committee notes that the author claims that he is a victim of discrimination on the ground of "other status" (article 26 of the Covenant in fine), because, as a conscientious objector to military service and during the period that he performed alternative service, he was not treated as a civilian but rather as a conscript and was thus ineligible for supplementary allowances under the General Assistance Act. The Committee observes, as it did with respect to communications Nos. 245/1987 (R. T. Z. v. the Netherlands) and 267/1987 (M. J. G. v. the Netherlands), that the Covenant does not preclude the institution by States parties of compulsory national service, which entails certain modest pecuniary payments. But whether that compulsory national service is performed by way of military service or by permitted alternative service, there is no entitlement to be paid as if one were still in private civilian life. The Committee observes in this connection, as it did with respect to communication No. 218/1986 (Vos v. the Netherlands) that the scope of article 26 does not extend to differences in result of the uniform application of laws in the allocation of social security benefits. In the present case, there is no indication that the General Assistance Act is not applied equally to all citizens performing alternative service. Thus the Committee concludes that the communication is incompatible with the provisions of the Covenant and inadmissible under article 3 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 State party and to the author.

O. Communication No. 306/1988, J. G. v. the Netherlands (Decision of 25 July 1990, adopted at the thirty-ninth session)

Submitted by: J. G. (represented by counsel)

Alleged victim: The author

State party concerned: The Netherlands

Date of communication: 2 June 1988 (date of initial letter)

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

Meeting on 25 July 1990,

Adopts the following:

Decision on admissibility

1. The author of the communication is J. G., a Dutch citizen residing in Rotterdam, the Netherlands. He claims to be a victim of a violation by the Government of the Netherlands of article 26 of the International Covenant on Civil and Political Rights. He is represented by counsel.

The background

2.1 The author, who was born on 1 January 1918, suffers from a physical handicap. On 6 January 1983, after his 65th birthday, he requested admission into subsidized, purpose-built housing, referred to as 'Fokushouses" (cluster dwellings), which are designed to enable their occupants to live, to the extent possible, as non-handicapped persons. The Financial Aid Scheme for the Accommodation of the Disabled lays down the specifications for State-subsidized dwellings. Eligibility for admission into such housing is governed by Section 57 of the General Disablement Benefits Act (AAW) of 11 December 1975, which provides that applicants must be handicapped persons between the ages of 18 and 65. Dwellers of "Fokushouses" receive special assistance called ADL (activities of daily life), intended to contribute to the maintenance, recovery or promotion of the beneficiary's fitness for work, to provide for medical or surgical facilities as well as other measures destined to improve the beneficiary's living conditions.

2.2 By letter of 7 February 1983, the Joint Medical Service (Gemeenschappelijke Medische Diensten, GMD) informed the Ministry of Housing that it would render a negative advice on ADL assistance with respect to a number of persons including the author, who had just become 65 years of age. This position was confirmed by letter dated 24 February 1983 from the ministry of Welfare and Health to the GMD. Thus, although he was permitted to move into a "Fokushouse", he was denied the ADL assistance granted to other persons who moved into the Fokushouse prior to their 65th birthday.

2.3 As to the requirement of exhaustion of domestic remedies, the author affirms that available means of redress have either been or would be ineffective. He acknowledges that since ADL assistance is provided pursuant to Section 57 of the AAW, remedies must in principle be pursued in compliance with the regulations of the AAW, that is by appeal to the Board of Appeal (Raad van Beroep) and the Central Board of Appeals (Centrale Raad van Beroep). He adds, however, that this procedure was not followed in his case because the GMD had informed the Ministry of Housing that it would render a negative advice on ADL. This position was confirmed by letter from the Ministry of Welfare and Health to the GMD, reaffirming that persons aged 65 and above cannot be granted ADL assistance if they move into purpose-built housing. This means, the author contends, that because the regulations under the AAW provide for an age limit of 65 years, persons aged 65 and above who request assistance pursuant to the AAW would be faced with a negative decision. The State party's practice on eligibility for accommodation in purpose-built housing has not changed since the amendments to the Financial Aid Scheme for the Accommodation of the Disabled, according to the author, as shown, by a letter dated 19 February 1990 from the Secretary of State for Social Affairs to the municipality of Veendam, reaffirming the position that individuals older than 65 were not eligible for ADL assistance. Moreover, during parliamentary debates in the Second Chamber of the Dutch Parliament towards the end of 1989, the Secretary of State is said to have promised that a decision on whether ADL assistance could be made available for handicapped persons older than 65 years would be made before 1 January 1992. Thus, at present this possibility does not exist.

2.4 On the basis of these considerations, the author also applied for assistance pursuant to another scheme, the General Assistance Act (ABW), because the ABW does not contain an age limit for applicants and because the procedure under the ABW operates as a form of "last resort" wherever other regulations do not provide for assistance. When the municipality of Rotterdam, on 15 February 1983, rejected his ABW application, the author, on 22 February 1983, requested the local (city) government to intercede with the municipal authorities. His request was rejected on 13 September 1983. On 11 October 1983, he filed an appeal with the Executive Council of the Province of South-Holland (College van Gedeputeerde Staten van de Provincie Zuid-Holland), which was dismissed on 20 March 1985. His subsequent appeal to the Council of State (Raad van State), filed on 12 April 1985, was dismissed on 28 April 1985.

The complaint

3. The author claims that the refusal to grant him ADL assistance constitutes discrimination on account of his age. He points out that for those individuals who move into "cluster dwellings" before they have reached the age of 65 and whose expenses are reimbursed on the basis of the AAW, ADL assistance continues after the age of 65. If an individual moves into purpose-built housing after the age of 65, as he did, or if he reaches the top of the waiting list after the age of 65, that person is excluded because of his age from reimbursement on the basis of the AAW. The author is of the opinion that this differentiation between handicapped persons because of their age is unreasonable and not based on objective criteria and thus constitutes discrimination prohibited under article 26 of the Covenant.

The State party's observations

4.1 The State party contends that the communication should be declared inadmissible because the author failed to bring his case before any court competent

to hear complaints concerning the application of the AAW. It reiterates that any person who considers to have been unjustly denied assistance under the AAW may request a ruling by the competent industrial insurance board. From there appeals to the courts competent in social security matters would be possible, and in the proceedings before these courts, applicants could directly invoke article 26 of the Covenant. The court of first instance would be the Board of Appeal, with the possibility of an appeal to the Central Board of Appeal. The fact that the author did appeal under the terms of the ABW to the municipal authorities and the Council of State does not, in the State party's opinion, change the situation, as his complaint to the Committee does not relate to the ABW.

4.2 The State party further explains the procedure which would have to be followed by the competent organs under the AAW and contends that these would indeed constitute effective remedies within the meaning of the Optional Protocol. Thus, the Board of Appeal would not be bound by the negative advice from the Ministry of Welfare, Health and Cultural Affairs (as contained in the letter of 24 February 1983) or from the GMD (as contained in the letter of 7 February 1983). Any judgment of the Board of Appeal would be determined by the relevant statutory provisions and the relevant provisions of public international law; it would not be required to take into account any recommendation which it considered to be incompatible with these provisions. In this context, the State party recalls that the letter of 24 February 1983 is devoid of legal significance, as it does not emanate from a body with any competence to act in the framework of the AAW or the Financial Aid Scheme for the Accommodation of the Disabled.

Issues and proceedings before the Committee

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

5.2 The Committee has ascertained, as it is required to do 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.

5.3 Article 5, paragraph 2 (b), of the Optional Protocol precludes the Committee from considering any communication from an individual who has failed to exhaust all available domestic remedies. This is a general rule, which applies unless the remedies are unreasonably prolonged, or the author of a communication has convincingly demonstrated that domestic remedies are not effective, i.e. do not have any prospect of success.

5.4 On the basis of the information before the Committee, there are no circumstances which would absolve the author from attempting to pursue all domestic remedies, including those available pursuant to the AAW, namely an appeal to the competent authorities and courts. While the applicable rules and regulations resort to objective criteria in the determination of the beneficiaries of ADL assistance, the State party has shown that the competent courts would not only not be bound by negative recommendations from the administrative authorities in respect of ADL assistance to the author, but that they could set aside the terms of the applicable regulations if they considered them to be in conflict with relevant provisions of international law. The purpose of article 5, paragraph 2 (b), is, inter alia, to direct possible victims of violations of the provisions of the Covenant to seek, in the first place, satisfaction from the competent State party

authorities and, at the same time, to enable States parties to examine, on the basis of individual complaints, the implementation, within their territory and by their organs, of the provisions of the Covenant and, if necessary, remedy the violations occurring, before the Committee is seised of the matter. In the light of the above considerations, and having regard to article 5, paragraph 2 (b), of the Optional Protocol, the Committee considers that the author has not exhausted available domestic remedies.

6. The Human Rights Committee therefore decides:

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

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

[Done in English, French, Russian and Spanish, the English text being the original version.]

P. Communication No. 318/1988, E. P. et al. v. Colombia (Decision of 15 July 1990, adopted at the thirty-ninth session)

Submitted by: E. P. et al.

Alleged victims: The authors

State party concerned: Colombia

Date of communication: 10 June 1988 (date of initial letter)

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

Meeting on 25 July 1990,

Adopts the following:

Decision on admissibility

1. The authors of the communication (initial submission dated 10 June 1988 and subsequent correspondence) are E. P., F. W., D. B., L. G., O. B. and A. H., all citizens of Colombia, residing in the islands of San Andrés, Providence and Catalina, which form an archipelago 300 miles north of mainland Colombia. They invoke articles 1, 2, 25, 26 and 27 of the International Covenant on Civil and Political Rights and claim that, as members of an overwhelmingly English-speaking Protestant population, they are subjected to violations of their rights by Colombia, which has sovereignty over the islands.

2.1 The authors state that in 1819, Colombia asserted sovereignty over the archipelago under the doctrine of uti possidetis and consolidated its administration by military force against the will of the islanders. The authors claim that Colombia has been violating their rights ever since.

2.2 According to the authors, recent Colombian legislation has led to the dispossession of many islanders of their land. As part of a project to "Colombianise" the islands, the Government provides subsidies and incentives to mainland Colombians, particularly to families of four or more, to settle in the archipelago. The process of registering land ownership (Juicio de pertenencia) favours mainlanders by permitting them to post their claims in Spanish at the court house or even in Spanish language newspapers in far-away towns, such as Bogotá or Barranquilla. Indigenous land owners who cannot afford a lawyer, or cannot understand Spanish, or are simply unaware of claims against their land, are in effect victims of expropriation by mainland Colombians. Already 40,000 mainland Colombians and other foreigners have settled on the 44 square kilometre island of San Andrés.

2.3 The authors assert that the overpopulation resulting from the government's policies has caused severe environmental damage. New developments, including more than 30 hotels, 10 banks and 700 imported-goods stores, have put such demands on the water table that an artificial drought has been created, making farming

impossible, thus destroying one of the islanders' traditional livelihoods. The Government has permitted the destruction of the mangrove swamps, formerly rich sources of lobster, fish, crabs and crayfish, by allowing electric power plants freely to dump hot, polluted water. Environmental protection laws are allegedly selectively applied to islanders.

2.4 The authors assert that the Government has granted fishing rights and other concessions to Honduras and other countries without regard to native interests. This has deprived the islanders of another traditional means of survival.

2.5 Spanish has been made the official language. Education is provided only in Spanish and native children are rejected by the schools if they fail to learn Spanish. Public libraries offer books only in Spanish. Natives are presumed to know Spanish in Court. Islanders allegedly are often harassed or even arrested by the police for speaking English in public. Disciplinary actions for these abuses are rare and never result in more than the transfer of the responsible officers; the abuses continue with their replacements. All the mass media are in Spanish. These facts are alleged to constitute violations of article 27 of the Covenant.

2.6 The authors claim that native islanders suffer pervasive employment discrimination. Only 15 per cent of the workers in the private sector are indigenous. Most businesses, and at least one Government agency, La Registraduría de Instrumentos Públicos, hire no natives at all. Natives reap less than 5 per cent of the islands' total income. Natives are also denied equal access to public utilities such as water, electricity and telecommunications. The foregoing, in the authors' opinion, constitutes violations of article 26 of the Covenant.

2.7 With regard to article 25 of the Covenant, the authors note that the archipelago's Governor is not elected by the islanders but is appointed in Bogotá by the President of Colombia. Only 11 of the 90 Governors appointed by the central government have been islanders. Elections to the local council are not by secret ballot. This has led to rampant favouritism and alleged blackmail with regard to jobs, housing, scholarships and other government benefits. In any event, by virtue of law One of 1972, the local council was stripped of much of its power, which was transferred to the Governor. This law also stripped San Andrés of its status of a municipality.

2.8 The authors object to the increasing militarisation of their islands, in particular, the expansion of the Cove-Seaside naval base and other recent land acquisitions by the Colombian Armed Forces. They fear that this may involve them militarily in Central American conflicts of which they wish no part.

2.9 The authors claim to have exhausted domestic remedies, to the extent that they can be deemed available and effective for purposes of article 5, paragraph 2 (b), of the Optional Protocol. A series of letters, telegrams and petitions sent in 1985-1987 to former President Betancur, the Governor and other ministers went unanswered. President Virgilio Barco sent a telegram in reply to one of their letters but nothing that was promised was accomplished. On 4 January 1987, they unsuccessfully submitted a Proyecto de Acuerdo to the Governor seeking restraints on the alienation of land. Several meetings with the Governor produced verbal promises that were not fulfilled. Moreover, the Constitution and the National Bill of Laws of Colombia contain no provisions for the protection or recognition of minorities or their rights, in violation of article 2 of the Covenant.

3. By decision of 21 October 1988, the Working Group of the Human Rights Committee requested the authors to clarify whether they had been individually affected by the alleged activities of the Colombian authorities and to elaborate on their claim that they had complied with the requirements of article 5, paragraph 2 (b), of the Optional Protocol concerning exhaustion of domestic remedies.

4. In their reply, dated 21 December 1988, to the Working Group's request for clarification and elaboration, the authors itemize the effects that the Government's policies are said to have had on them personally:

- O. B. allegedly was denied a teaching position for which she was otherwise qualified because she did not speak Spanish. F. W., D. B., E. P. and L. G., were allegedly unable to qualify for teaching positions in English.

- Three of the authors have children who are allegedly unable to receive education in their native language.

- E. P. was allegedly denied the possibility to apply for a scholarship because he is not Catholic.

- None of the authors claims to have felt able to vote freely because the ballots are not secret.

- All of the authors allege that they are required to speak Spanish in court, before the police and before other officials.

5. By decision of 4 April 1989, the Working Group of the Human Rights Committee transmitted the communication to the State party and requested it, under rule 91 of the rules of procedure, to provide information and observations relevant to the question of the admissibility of the communication.

6.1 In its submission under rule 91, dated 9 August 1989, the State party contends that the authors failed to exhaust domestic remedies, as required by article 5, paragraph 2 (b), of the Optional Protocol.

6.2 The State party outlines in general terms the jurisdiction of the Colombian Supreme Court over constitutional claims emanating from individuals or groups of individuals, and the jurisdiction of the Administrative Courts over collective claims. The State party further notes that administrative remedies are available through the Consejo de Estado (Council of State) or Administrative Tribunals with full jurisdiction and authority to nullify administrative acts deemed to be arbitrary, illegal or an abuse of power. Only after the exhaustion of these remedies may leave to appeal to the Supreme Court be considered and granted.

6.3 The State party finally claims that the authors have failed to clearly identify in their complaint the alleged victims, the rights considered to have been violated or the administrative agents responsible for their situation.

7.1 In their comments, dated 30 August and 2 September 1989 and 17 April 1990, the authors indicate that the domestic remedies suggested by the State party are ineffective. They cite in their support the 1968 decision of the Consejo de Estado, which struck down resolution 206 of INCORA providing land for settlers.

Ostensibly a legal victory, the ruling was allegedly circumvented by the State party through other procedural means, and the dispossession of the natives has continued unabated. Legislation that would have restored San Andrés' status as a municipality was vetoed by President Barco on 30 January 1990 for reasons of "national security and sovereignty".

7.2 Furthermore, the authors contend that resort to domestic judicial remedies would be too prolonged and prohibitively expensive due to the large number of acts and legislation to be contested. They cite the example of a petition to the Attorney General in 1987 in which they asked for collective action on many of their grievances. There was no reply for over two years, and then the authors were merely requested to report in person for confirmation. Meanwhile, the settlement of more Colombians on the islands proceeds at a rate of some 8,000 individuals per year. In view of the urgency of the situation, therefore, the pursuit of protracted domestic remedies is considered ineffective, with no prospect of adequate redress.

7.3 Finally, the authors state that many of the laws and actions in question are constitutional. There is no right of self-determination in the Constitution and article 27 thereof actually guarantees the "free alienation" of land, one of the authors' principal complaints. Contrary to the Government's assertion, the International Covenant on Civil and Political Rights is not incorporated into Colombian law.

8.1 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 the communication is admissible under the Optional Protocol to the Covenant.

8.2 With regard to the issue of the authors' standing, the Committee reaffirms that the Covenant recognizes and protects in most resolute terms a people's right to self-determination as an essential condition for the effective guarantee of observance of individual human rights and for the promotion and strengthening of those rights. However, the Committee reiterates that the authors cannot claim under the Optional Protocol to be victims of a violation of the right of self-determination enshrined in article 1 of the Covenant. a/ The Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated. These rights are set out in part III of the Covenant, articles 6 to 27, inclusive. The Committee further notes that no individual, or group of individuals, can in the abstract, by way of actio popularis, challenge a law or practice deemed to be contrary to the Covenant. An individual, or a group of individuals, can only claim to be a victim in the sense of article 1 of the Optional Protocol if he or she, or they, are actually affected.

8.3 With regard to the requirement of exhaustion of domestic remedies, the Committee reiterates that pursuit of such remedies can only be required to the extent that they are both available and effective. It notes that the authors have not pursued the remedies which the State party has submitted were available to them, because they consider them ineffective and because their pursuit would be "too prolonged and prohibitively expensive". The Committee further observes that the authors did not comply with the Working Group's request for clarifications about the steps they had taken to pursue remedies available to them in respect of their individual grievances (see paragraph 4 above). The Committee concludes that the authors have not shown the existence of circumstances which would have absolved

them from exhausting the remedies which the State party indicates are available to them; it reaffirms b/ that mere doubts about the effectiveness of remedies, as well as the prospect of protracted and costly legal proceedings, did not absolve the authors from exhausting them. Accordingly, the requirements of article 5, paragraph 2 (b), have not been met.

9. The Human Rights Committee therefore decides:

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

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

[Done in English, French, Russian and Spanish, the English text being the original version.]

Notes

a/ See annex X, sect. A above, para. 32.1.

b/ See Communication No. 224/1987 (A. and S. N. v. Norway), inadmissibility decision of 11 July 1988, para. 6.2.

Q. Communication No. 329/1988, D. F. v. Jamaica (Decision of 26 March 1990, adopted at the thirty-eighth session)

Submitted by: D. F. [name deleted]

Alleged victim: The author

State party concerned: Jamaica

Date of communication: 6 May 1988 (date of initial letter)

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

Meeting on 26 March 1990,

Adopts the following:

Decision on admissibility

1. The author of the communication (initial letter dated 6 May 1988 and subsequent correspondence) is D. F., a Jamaican citizen born in 1954, currently serving a 12-year prison term at St. Catherine District Prison, Jamaica. He claims to be the victim of a violation of his human rights by Jamaica.

2.1 The author indicates that he was convicted of felonious wounding by the Circuit Court in Spanish Town on 24 January 1986 and sentenced to 12 years of hard labour. He claims to be innocent of the crime.

2.2 The author, a shopkeeper, states that on 10 March 1985 he was involved in a fight with one younger brother of the victim, E. S., who had allegedly insulted him and tried to steal several bottles of liquor from his shop. On 19 March 1985, stones and a bottle were thrown at his shop, destroying several windows. The author claims that at the time of the crime he was at his shop repairing the damage perpetrated earlier that day, and that he was not the person who, in a fight, had cut four fingers off the victim's hand.

2.3 The author alleges that the testimony of the prosecution's main witness, one R. B., an acquaintance of the victim and of the author, was entirely fabricated. He further claims that the judge misdirected the jury, both about the evaluation of Ms. B.'s testimony, by stating that she was testifying on his behalf, and about the conflicting evidence presented by the public prosecutor and by the author.

2.4 On 16 December 1986, the author's appeal was dismissed by the Court of Appeal of Jamaica. The author states that he cannot afford to file a petition for special leave to appeal to the Judicial Committee of the Privy Council because he lacks the financial means to do so. A request for legal aid to the Jamaica Council for Human Rights apparently remains unanswered. It appears, however, that the author has not formally applied for legal aid under section 3, paragraph 1, of the Poor Prisoners' Defence Act.

3. By decision of 24 October 1988, the Working Group of the Human Rights Committee transmitted the communication to the State party and requested it, under rule 91 of the rules of procedure, to provide information and observations relevant to the question of the admissibility of the communication. It further requested the author to provide several clarifications about his efforts to apply for special leave to appeal to the Judicial Committee of the Privy Council. In several subsequent submissions the author claims, in essence, that the judge misdirected the jury, in the light of the contradictory evidence that was put before the jury and which it was for the jury to accept or reject.

4. In its submission under rule 91, dated 20 January 1989, the State party argues that the communication is inadmissible under article 5, paragraph 2, of the Optional Protocol, on the ground of non-exhaustion of domestic remedies, because the author did not apply, pursuant to section 110 of the Jamaican Constitution, for special leave to appeal to the Judicial Committee of the Privy Council.

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 the communication is admissible under the Optional Protocol to the Covenant.

5.2 The Committee has considered the material submitted by the author. From this information it appears that the author claims that the judge misdirected the jury, in the light of the contradictory evidence that was put before the jury and which it was for the jury to accept or reject. While article 14 of the Covenant guarantees the right to a fair trial, it is for the appellate courts of States parties to the Covenant to evaluate facts and evidence in a particular case. a/ It is not in principle for the Committee to review specific instructions to the jury by the judge in a trial by jury, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice. The Committee has no evidence that the trial judge's instructions suffered from such defects. Accordingly, the author has no claim under article 2 of the Optional Protocol.

6. The Human Rights Committee therefore decides:

(a) The communication is inadmissible;

(b) This decision shall be transmitted to the author and to the State party.

Notes

a/ See communication No. 369/1989 (G. S. v. Jamaica), inadmissibility decision adopted on 8 November 1989, para. 3.2.

R. Communications Nos. 343, 344 and 345/1988, R. A. V. N. et al. v. Argentina* (Decision of 26 March 1990, adopted at the thirty-eighth session)

Submitted by:	R. A. V. N. et al. [names deleted]
Alleged victims:	Relatives of the authors
State party concerned:	Argentina
Date of entry into force of the Covenant and Optional Protocol for Argentina:	8 November 1986
Date of communication:	22 November 1988

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

Meeting on 26 March 1990,

Adopts the following:

A. Decision to deal jointly with three communications

The Human Rights Committee,

Considering that communications Nos. 343, 344 and 345/1988 refer to closely related events said to have taken place in Argentina in 1976 and to the enactment of certain legislation in June 1987,

Considering further that the three communications can appropriately be dealt with together,

1. Decides, pursuant to rule 88, paragraph 2, of its rules of procedure, to deal jointly with these communications;

2. Further decides that this decision shall be communicated to the State party and the authors of the communications.

B. Decision on admissibility

1. The authors of the communications are Argentine citizens residing in Argentina, writing on behalf of their deceased and/or disappeared relatives, Argentine citizens formerly resident in the Province of Córdoba who died or disappeared in 1976, before the entry into force of the Covenant on Civil and Political Rights and the Optional Protocol for Argentina on 8 November 1986.

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* The text of an individual opinion submitted by Mr. Bertil Wennergren pursuant to rule 92, paragraph 3, of the Committee's rules of procedure is appended.

2.1 The authors claim that the enactment of Law No. 23,521 of 8 June 1987 (known as the Due Obedience Law (Ley de Obediencia Debida)) and its application to the legal proceedings in the cases of their relatives constitute violations by Argentina of articles 2, 3, 4, 6, 9, 14 and 24 of the International Covenant on Civil and Political Rights. They are represented by counsel.

2.2 It is claimed that law No. 23,521 is incompatible with Argentina's obligations under the Covenant. The law presumes, without admitting proof to the contrary, that those persons who held lower military ranks at the time the crimes were committed were acting under superior orders; the law therefore exempts them from punishment. This immunity also covers senior military officers who did not act as commander-in-chief, chief-of-zone or chief-of-security police or penitentiary forces, provided that they did not themselves take decisions or that they did not participate in the elaboration of criminal orders.

2.3 With regard to the application of the Covenant to the facts of the cases, the authors acknowledge that their relatives were either killed or disappeared in 1976, under the prior Argentine Government, before the entry into force of the Covenant and of the Optional Protocol for Argentina. They challenge, however, the compatibility of the Due Obedience Law with article 2 of the Covenant, which provides, inter alia, that States parties should adopt the necessary legislative measures to give effect to the rights recognised in the Covenant. They claim that by adopting legislation which effectively guarantees the impunity of military officials responsible for disappearances, torture and murder, the Argentine Government has violated its obligations under the Covenant.

2.4 As to the requirement of exhaustion of domestic remedies, the authors point out that, with respect to the disappearance or death of the alleged victims, the matter was brought before the competent Argentine courts. However, by virtue of law No. 23,521, the pending criminal cases were shelved in June 1987 and May 1988, and the accused were accordingly set free. The authors conclude that domestic remedies have been exhausted.

2.5 It is stated that the same matter has not been and is not being examined under another procedure of international investigation or settlement. a/

2.6 Specifically, the authors request the Committee to find that Argentina violated its obligations under the Covenant, and to urge the Government of Argentina to abrogate law No. 23,521 so as to allow the criminal prosecution and punishment of the persons responsible for the disappearance and/or death of their relatives.

3. By decisions of 4 April 1989, the Working Group of the Human Rights Committee, without transmitting the communications to the State party, requested the authors, under rule 91 of the rules of procedure: (a) to clarify whether and, if so, to what extent the claims contained in their communication go beyond their desire to see those held to be responsible for the disappearance or death of their relatives criminally prosecuted; (b) to specify, bearing in mind that the Covenant and the Optional Protocol entered into force for Argentina on 8 November 1986, which violations they claim took place after that date; and (c) to indicate whether they have instituted legal proceedings before the competent courts with a view to obtaining compensation and, if so, with what result.

4.1 In their reply to the Working Group's questions, the authors state that besides punishing the guilty, the Government of Argentina should reopen the inquiry into the disappearance of one of the alleged victims, although following the investigations of the Comisión Nacional sobre Desaparición de Personas (CONADEP) (National Commission on the Disappearance of Persons), it was presumed, in view of the lapse of time since the disappearances, that the persons in question were dead. The authors stress, moreover, that laws of impunity should be repudiated, lest they be understood as encouraging the commission of similar crimes. In this connection they invoke the principles of the Nuremberg Trials, in particular the rejection of the defence of superior orders.

4.2 As to which violations of the Covenant are said to have taken place after its entry into force for Argentina on 8 November 1986, the authors claim that the enactment of the Due Obedience Law in June 1987 constitutes a violation of the State party's obligation to ensure the thorough investigation of crimes and the punishment of the guilty.

4.3 With regard to legal proceedings aimed at obtaining compensation, the authors indicate that they preferred to demand an investigation of the events, in particular of the whereabouts of disappeared persons, and the identification of the guilty parties. Although it appears that none of the authors ever initiated legal proceedings for compensation, they refer to other persons who have unsuccessfully sought compensation in civil proceedings.

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 the communication is admissible under the Optional Protocol to the Covenant.

5.2 With regard to the application ratione temporis of the International Covenant on Civil and Political Rights and of the Optional Protocol for Argentina, the Committee recalls that both instruments entered into force on 8 November 1986. It observes that the Covenant cannot be applied retroactively and that the Committee is precluded ratione temporis from examining alleged violations that occurred prior to the entry into force of the Covenant for the State party.

5.3 It remains for the Committee to determine whether violations of the Covenant have occurred subsequent to its entry into force. The authors have invoked article 2 of the Covenant and claim a violation of their right to a remedy. In this context the Committee recalls its prior jurisprudence that article 2 of the Covenant constitutes a general undertaking by States and cannot be invoked, in isolation, by individuals under the Optional Protocol (M. G. B. and S. P. v. Trinidad and Tobago, communication No. 268/1987, para. 6.2, declared inadmissible on 3 November 1989). To the extent that the authors invoke article 2 in conjunction with other articles of the Covenant, the Committee observes that article 2, paragraph 3 (a), of the Covenant stipulates that each State party undertakes "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy ..." (emphasis added). Thus, under article 2, the right to a remedy arises only after a violation of a Covenant right has been established. However, the events of disappearance and death, which could have constituted violations of several articles of the Covenant, and in respect of which remedies could have been invoked, occurred prior to the entry into force of the Covenant and of the Optional Protocol for Argentina. Therefore, the matter cannot be considered by the Committee, as this aspect of the communication is inadmissible ratione temporis.

8.4 The Committee finds it necessary to remind the State party that it is under an obligation, in respect of violations occurring or continuing after the entry into force of the Covenant, thoroughly to investigate alleged violations and to provide remedies where applicable, for victims or their dependants.

8.5 To the extent that the authors claim that the enactment of law No. 23,521 frustrated their right to see certain government officials prosecuted, the Committee refers to its prior jurisprudence that the Covenant does not provide a right for an individual to require that the State criminally prosecute another person (H. C. M. A. v. The Netherlands, communication No. 213/1986, para. 11.6, declared inadmissible on 30 March 1989). Accordingly, this part of the communication is inadmissible ratione materiae as incompatible with the provisions of the Covenant.

8.6 As to the question of compensation, the Committee notes that the authors, in reply to the Working Group's questions, explained that this was not the remedy that they sought.

9. The Human Rights Committee therefore decides:

(a) The communications are inadmissible;

(b) This decision shall be communicated to the authors through their counsel, and, for information, to the State party.

Notes

a/ The Secretariat has ascertained that one case was submitted to the Inter-American Commission on Human Rights, which registered it under No. 10288. However, it is not currently being examined by the Commission.

APPENDIX

Individual opinion submitted by Mr. Bertil Wennergren pursuant to rule 92, paragraph 3, of the Committee's rules of procedure, concerning the Committee's decision to declare communications Nos. 343, 344 and 345/1988, R. A. V. N. et al. v. Argentina, inadmissible

I concur in the views expressed in the Committee's decision. However, in my opinion, the arguments in paragraph 5.4 of the decision need to be clarified and expanded. In this paragraph, the Committee reminds the State party that it is under an obligation, in respect of violations occurring or continuing after the entry into force of the Covenant, thoroughly to investigate alleged violations and to provide remedies, where applicable, for victims or their dependants.

According to article 28 of the 1969 Vienna Convention on the Law of Treaties (cited under paragraph 4.2 in the Committee's decision) a treaty's provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of entry into force of the treaty in respect of that party; the Permanent Court of International Justice (PCIJ Series A/B, No. 74 (1938), p. 10-48 - Phosphates in Morocco case) has held in this context that both the terms concerning the limitation rationae temporis and the underlying intention are clear: This clause was inserted in order to deprive the acceptance of the compulsory jurisdiction of any retroactive effects. In this case the Court had to decide whether or not issues arose from factors subsequent to the acceptance of its jurisdiction (which the Court refers to as the "crucial date"), first because certain acts, which, if considered separately, were in themselves unlawful international acts, were actually accomplished after the "crucial date"; secondly, because these acts, if taken in conjunction with earlier acts to which they were closely linked, constituted as a whole a single, continuing and progressive illegal act which was not fully accomplished until after the "crucial date"; and lastly, because certain acts which were carried out prior to the "crucial date" nevertheless gave rise to a permanent situation which was inconsistent with international law and which existed after the said date. The question of whether a given situation or fact occurs prior to or subsequent to a particular date is, the Court explains, one to be decided in respect of each specific case, just as the question of the situations or facts with regard to which the issues arose must be decided in regard of each specific case. I note that the "crucial date" in this case is 8 November 1986.

The Committee has repeatedly indicated in prior decisions that it "can consider only an alleged violation of human rights occurring on or after (the date of entry into force of the Covenant and the Protocol for the State party) unless it is an alleged violation which, although occurring before that date, continues or has effects which themselves constitute a violation after that date". Disappearance cases that cannot be attributed to natural causes (accidents, voluntary escapes, suicides, etc.) but that give rise to reasonable assumptions and suspicions of illegal acts, such as killing, deprivation of liberty and inhuman treatment, may lead to claims not only under the respective material articles in the Covenant (articles 6, 7, 9 and 10) but in connection therewith also under article 2 of the Covenant, concerning a State party's obligation to adopt such measures as may be necessary to give effect to the rights recognised in the Covenant and to ensure that any person whose rights or freedoms are violated shall have an effective remedy. In an early decision involving a disappearance (30/1978

Bleier v. Uruguay) the Committee, after noting that according to unrefuted allegations "Eduardo Bleier's name was on a list of prisoners read out once a week at an army unit in Montevideo where his family delivered clothing for him and received his dirty clothing until the summer of 1976" (i.e. after the "crucial date"), urged the Uruguayan Government "to take effective steps ... to establish what has happened to Eduardo Bleier since October 1975 (i.e. before the crucial date but with continuation after that date), to bring to justice any person found to be responsible for his death, disappearance or ill-treatment, and to pay compensation to him or his family for any injury which he has suffered". In another case (107/1981 Quinteros v. Uruguay) the Committee was of the view that the information before it revealed breaches of articles 7, 9 and 10, paragraph 1, of the Covenant and concluded that the responsibility for the disappearance of Elena Quinteros fell on the authorities of Uruguay and that the State party should take immediate and effective steps (i) to establish what has happened to Elena Quinteros since 28 June 1976, and secure her release, (ii) to bring to justice any persons found to be responsible for her disappearance and ill-treatment, (iii) to pay compensation for the wrongs suffered, and (iv) to ensure that similar violations do not occur in the future. In the latter case, the author of the communication was the mother of the disappeared victim who had alleged that she, too, was a victim of a violation of article 7, (psychological torture because she did not know about the whereabouts of her daughter) and who had given ample description of her sufferings. The Committee expressed its understanding with the anguish and stress caused to the mother both by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. She had the right to know what had happened to her daughter. The Committee therefore found that in these respects she was also a victim of a violation of the Covenant.

I draw the following conclusions. A disappearance per se does not raise any issue under the Covenant. For it to do so, a link to some of the material articles of the Covenant is required. And it is solely with such a link that article 2 of the Covenant may become applicable and an issue may arise under that article too. Should it become clear that the cause of the disappearance is attributable to a killing for which the State party must be held responsible, but that the killing took place before the "crucial date", then this killing cannot be deemed to constitute a violation of article 6 of the Covenant, notwithstanding that it was a crime against the right to life under domestic penal law. Consequently, a claim regarding the non-fulfilment of a State party's obligations under article 2 of the Covenant also cannot arise. But, on the other hand, if a killing before the "crucial date" is merely one hypothesis among several others, the case law of the Committee clearly indicates that under article 2 of the Covenant the State party is under a duty to carry out a meaningful investigation. Only when it is unimaginable that any act, fact or situation which would constitute a violation of the Covenant may have continued to exist or have occurred subsequent to the "crucial date", such an obligation does not arise. It should be added that a declaration under domestic civil law in respect of a disappeared person's death does not set aside a State party's obligation under the Covenant. Domestic civil law provisions cannot be given precedence over international legal obligations. Whatever the length and thoroughness be deemed necessary for an investigation to satisfy the requirements under the Covenant is to be considered case by case, but an investigation must under all circumstances be conducted fairly, objectively and impartially. Any negligence, suppression of evidence or other irregularity jeopardizing the outcome must be regarded as a violation of the obligations under article 2 of the Covenant,

in conjunction with a relevant material article. And once an investigation has been closed due to lack of adequate results, it must be reopened if new and pertinent information comes to light.

Bertil WENNERGREN

S. Communication No. 369/1989, G. S. v. Jamaica (Decision of 8 November 1989, adopted at the thirty-seventh session)

Submitted by: G. S. [name deleted]

Alleged victim: The author

State party concerned: Jamaica

Date of communication: 25 May 1989 (date of initial letter)

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

Meeting on 8 November 1989,

Adopts the following:

Decision on admissibility*

1. The author of the communication (initial submission dated 25 May 1989 and subsequent submission) is G. S., a Jamaican citizen currently awaiting execution at St. Catherine District Prison, Jamaica. He claims to be the victim of a violation by Jamaica of articles 6, 7 and 14 of the International Covenant on Civil and Political Rights. He is represented by counsel.

2.1 The author states that he was arrested on 14 June 1983 and charged, together with Mr. A. W. a/, with murder, on 13 June 1983, of one R. H. He was tried in the Westmoreland Circuit Court, convicted and sentenced to death on 7 June 1984. The Court of Appeal dismissed his appeal on 7 April 1986. A subsequent petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 4 May 1989.

2.2 The author states that on 13 June 1983 he was working in his cane field, when Mr. H. approached him and attacked him with a knife. In the course of the ensuing struggle, the assailant sustained head injuries. Afterwards, he stopped a passing police car and informed the police officer of the incident. This officer reportedly asked the author and his co-defendant to carry the wounded man to the back of the police car and then drove to the hospital. Later that day, the same officer informed the author that Mr. H. had died and proceeded to arrest him. The following day he was charged with murder.

2.3 According to the author, his trial in the Circuit Court was unfair. Thus, the judge is said to have solicited evidence which would not be admissible in law. Furthermore, the judge allegedly misdirected the jury on the issue of self-defence, thus depriving the author of the possibility of a conviction of manslaughter or of an acquittal.

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* The text of an individual opinion by Ms. Christine Chanet is reproduced in the appendix.

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

3.1 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.

3.2 The Committee has considered the material submitted by the author's counsel, including the author's petition for special leave to appeal to the Judicial Committee of the Privy Council. From this information, it appears that the author claims bias of the court, in particular in respect of the adequacy or otherwise of the judge's instructions to the jury, in the light of the evidence that was put before the jury and which it was for the jury to accept or reject. While article 14 of the Covenant guarantees the right to a fair trial, it is for the appellate courts of the States parties of the Covenant to evaluate facts and evidence in a particular case. b/ Thus the review, by the Committee, of specific instructions to the jury by the judge in a trial by jury or of generalised claims of bias is beyond the scope of application of article 14. In the circumstances, the Committee concludes that the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

4. The Human Rights Committee therefore decides:

(a) The communication is inadmissible;

(b) This decision shall be transmitted to the author, to his counsel and, for information, to the State party.

Notes

a/ Mr. W's communication No. 290/1988 was declared inadmissible by the Committee on 8 November 1989.

b/ For an application of this principle, see communication No. 201/1985 (Hendriks v. Netherlands), final views adopted on 27 July 1988, para. 10.4.

APPENDIX

Individual opinion submitted by Ms. Christine Chanet pursuant to rule 92, paragraph 3, of the Committee's rules of procedure, concerning the admissibility of communication No. 369/1989 (G. S. v. Jamaica)

As emphasised by the Committee in the case of communication No. 369/1989, it is within the competence of national courts, particularly appeal courts, to assess the fairness of the conditions in which a trial takes place.

However, this competence cannot exclude that of the Committee in implementation of the International Covenant on Civil and Political Rights. When a communication is submitted to it, the Committee assesses whether the trial was conducted in accordance with the provisions of article 14 of the Covenant.

At the admissibility stage, the Committee proceeds to a prima facie review of the applicant's grievances. The author of this communication challenges the regularity of the judge's conduct of the hearing.

It is therefore my view that, while the facts adduced by the applicant could be regarded as insufficently substantiated, they could not be declared incompatible with the provisions of the Covenant on the basis of article 3 of the Optional Protocol.

T. Communication No. 378/1989, E. E. v. Italy (Decision of 26 March 1990, adopted at the thirty-eighth session)

Submitted by: E. E. [name deleted]

Alleged victims: The author and M. M.

State party concerned: Italy

Date of communication: 19 April 1988 (date of initial letter)

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

Meeting on 26 March 1990,

Adopts the following:

Decision on admissibility

1. The author of the communication (initial submission dated 19 April 1988 and subsequent correspondence) is E. E., a Bangladeshi citizen currently detained at the Regina Coeli Prison in Rome. He submits the communication on his own behalf and on that of his business associate, M. M., who is detained at the same institution. They claim to be victims of a violation of their human rights by Italy.

2.1 It is stated that the author and Mr. M. were engaged in business activities in Italy prior to their arrest on 23 January 1988 in Rome. The author indicates that on 24 December 1987, a suitcase belonging to himself and Mr. M., containing among other items $US 4,500 in cash, was stolen by other Bangladeshi citizens then residing in Rome. These citizens were known to the author, who, together with Mr. M., sought to recover the suitcase and the money during the following month. On 23 January 1988, in a Rome market, the author claims they were attacked with a dagger by one of the thieves, one Mr. J. In the course of the struggle, Mr. J. was injured, and upon their return to their hotel, they were arrested. It appears that Mr. J. subsequently died of his injuries.

2.2 The author alleges that there has been a "conspiracy" by some Bangladeshi citizens, reportedly all criminal elements, against him and Mr. M. Some time during the spring of 1989 (no date is given), the Tribunal of Rome sentenced them to 16 years imprisonment, apparently on a conviction of manslaughter. It is claimed that in the course of the trial, the Italian police called a false witness and also produced evidence that the author and Mr. M. had intended to kill the men who had stolen the suitcase. It is submitted that there was no evidence on the basis of which the author and Mr. M. could have been convicted. The author accuses the Tribunal and the Italian judicial authorities of "racism" in this connection, without further specifying the charge.

2.3 By the time of the author's initial submission, the case had not been adjudicated by the Italian courts. By letters dated 21 July 1988 and 26 May 1989, the author was informed by the Secretariat about the conditions for submission of

communications under the Optional Protocol. In the author's latest submission, dated 23 June 1989, no mention is made of an appeal against the sentence pronounced by the Tribunal of Rome in the spring of 1989.

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

3.1 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.

3.2 The Committee has considered the material submitted by the author. On the basis of the information before the Committee, it appears that the author primarily claims bias on the part of the court, in particular in respect of the evaluation by the trial judge of the evidence presented, which is said to have been "fabricated". While article 14 of the Covenant guarantees the right to a fair trial, it is in principle for the appellate courts of States parties to the Covenant to evaluate facts and evidence in any particular case, unless it can be ascertained that the proceedings before the domestic courts were clearly arbitrary or amounted to a denial of justice. The Committee reiterates that the review of generalised claims of bias is beyond the scope of application of article 14. a/ In the circumstances, the Committee considers that the author has no claim under article 2 of the Optional Protocol.

4. The Human Rights Committee therefore decides:

(a) The communication is inadmissible;

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

Notes

a/ See communication No. 369/1989 (G. S. v. Jamaica), inadmissibility decision of 8 November 1989, para. 3.2.

U. Communication No. 379/1989, C. W. v. Finland (Decision of 30 March 1990, adopted at the thirty-eighth session)

Submitted by: C. W. [name deleted]

Alleged victim: The author

State party concerned: Finland

Date of communication: 6 June 1989 (date of initial letter)

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

Meeting on 30 March 1990,

Adopts the following:

Decision on admissibility

1. The author of the communication dated 6 June 1989 is C. W., a Finnish citizen currently residing in the United States of America. He claims to be the victim of violations of articles 1, 2, 3, 4, 5, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 22 and 26 of the International Covenant on Civil and Political Rights by Finland.

2.1 The author claims that because of his efforts to unravel the existence of a so-called Tampere group and its illegal activities in specific cases, he has been deliberately and systematically harassed and persecuted.

2.2 Reportedly, the group consists of Finnish politicians, bank directors, police officers, public prosecutors, lawyers and businessmen. The goals of the group, which is reportedly engaged in illegal activities, are said to include advancement of the power basis of its members and economic gains through the misuse of legal authority (police, courts), death threats, blackmailing, extortion, confiscation of evidence, unwarranted searches of homes, unwarranted detentions and arrests, denial of medical attention during detention, etc. The author states that he has been used as a "scapegoat" by lower court and police officials. He alleges that the Public Prosecutor of Tampere, Finland, deliberately obstructed investigation proceedings against persons with whom the Prosecutor reportedly had personal and business relations, and that the Prosecutor declined to consider evidence presented by him. He also alleges that judicial and police officers have kept existing evidence from being used in his defence, allegedly in order to protect their own personal interests.

2.3 The author further states that he was unlawfully arrested and detained by the Tampere Police for 15 days in August 1988, that he was subjected to "mental pressure" and that he was denied medical assistance and the right to be visited by relatives, presumably as a form of personal revenge for his petition to the Attorney General of Finland, dated 20 May 1988. Finally, it is stated that his apartment was searched without a search warrant and that the Tampere Police confiscated evidence in an attempt to prevent its use in court.

2.4 With respect to the requirement of exhaustion of domestic remedies, the author does not specify what steps, if any, have been taken in order to seek redress for the events complained of. It is clear, however, from the context of the letter that the author thinks that the pursuit of local remedies would be futile, because he considers the Finnish authorities and domestic courts to be biased against him. In this connection, he mentions that all his letters to the Attorney General of Finland have remained unanswered.

3. Before considering any claims contained in a communication, the Human Rights Committee shall, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant. In doing so, it takes into account the requirements laid down in articles 2, 3 and 5 of the Optional Protocol and the provisions of rule 90 of its rules of procedure. The conditions for declaring a communication admissible include, inter alia, that the claims submitted are sufficiently substantiated and do not constitute an abuse of the right of submission, and that all available domestic remedies have been exhausted. A careful reading of the author's submission reveals that none of these conditions have been met. The Committee notes in particular that the author's allegation that he was arbitrarily arrested and detained in August 1988 has not been further substantiated, although he was invited to do so.

4. The Human Rights Committee therefore decides:

(a) The communication is inadmissible;

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

ANNEX XI

Measures adopted at the thirty-ninth session of the Human Rights Committee to monitor compliance with its views under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights

1. When, in its Views under the Optional Protocol, the Committee makes a finding of a violation, the State party concerned will be asked in the Views itself to inform the Committee of what action it has taken in relation to the case. The Committee often indicates what action it deems appropriate. A time-limit will be indicated for the receipt of such information. This time-limit shall be determined on the basis of the circumstances of each case; it shall not exceed 180 days.

2. States parties have undertaken, under article 2, paragraph 3, of the Covenant, to ensure effective remedies for violations of the Covenant. If no reply is received within the indicated time period, or if the reply shows that no remedy has been provided, this will henceforth be noted in the Committee's Annual Report. Equally, positive responses and co-operation from States parties will also be included in the Annual Report.

3. The Committee's Guidelines for the preparation of Reports, requesting States parties who are also parties to the Optional Protocol, and in respect of whom any finding of a violation had been made in the period under review, shall be amended to include a brief section indicating "the measures which they have adopted which give effect to the rights recognised therein" (art. 40 of the Covenant) in respect of the authors concerned. Because of the periodicity of Reports under article 40, this information is additional to, and does not replace, the information that is to be given to the Committee under the time-limits specified above.

4. Should this information not be made available in the relevant periodic Report, questions relating to it will be included by the Committee in its List of Questions that it customarily prepares for a State party a few days prior to the examination of the Report, and the matter will be pursued in the dialogue with the State party.

5. The Committee will appoint a Special Rapporteur for the Follow-Up of Views. a/

The Special Rapporteur's duties are as follows:

(a) To recommend to the Committee action upon all letters of complaint henceforth received from individuals held, in the Views of the Committee under the Optional Protocol, to have been victims of a violation, and who claim that no appropriate remedy has been provided;

(b) To communicate with States parties, and, if he deems appropriate, with victims, in respect of such letters already received by the Committee;

(c) To seek to provide information on any action taken by States parties in relation to views adopted by the Committee to date, when such information has not otherwise been made available. To this end the Special Rapporteur will communicate with all States parties and, if he deems appropriate, victims in respect of whom findings of violations have been made, in order to ascertain what action, if any,

has been taken. This information, when collected, will also be made available in a future annual report;

(d) To assist the Rapporteur of the Committee in the preparation of the relevant sections of the annual report that will henceforth contain detailed information on the follow-up of cases;

(e) To advise the Committee on the appropriate deadline for the receipt of information on remedial measures adopted by a State party found to have violated provisions of the Covenant;

(f) To submit to the Committee, at suitable intervals, recommendations on possible ways of rendering the follow-up procedure more effective.

1002nd meeting
24 July 1990

Notes

a/ At its 1002nd meeting, the Committee appointed as Special Rapporteur for Follow-Up of Views Mr. János Fodor for a term of one year.

ANNEX XII

Information received from the States parties following the adoption of final views

A. Letter, dated 23 May 1990, from the Secretary of State for Foreign Affairs, of the Dominican Republic to the Human Rights Committee, concerning the views adopted by the Committee on communication No. 188/1984, Martínez Portorreal v. Dominican Republic

With reference to case No. 188/1984, I am pleased to inform you that the Government of the Dominican Republic, pursuant to the decision taken by the Human Rights Committee, has addressed a communication, a copy of which is attached, to Dr. Ramón B. Martínez Portorreal, Chairman of the Executive Board of the Dominican Committee for Human Rights, who replied by a letter dated 10 October 1989 informing the Dominican Government that the Committee accepts as proper and valid the assurances and guarantees extended by the Dominican Government to the Committee, to its members and to its Chairman, to enable them freely to perform their functions of promoting, defending and speaking out against violations of human rights, in the Dominican Republic, and that it considers the case closed.

Dr. Martínez Portorreal has assured us that he will transmit to you the above-mentioned letter, the effect of which is as shown by the relevant correspondence, to indicate the agreement of both parties to consider the case in question closed. In view of the foregoing, the Dominican Government considers that the said letter should remain in its possession.

Accept, Sirs, the assurances of my highest consideration,

(Signed) Joaquin RICARDO
Secretary of State for Foreign Affairs
of the Dominican Republic

Letter, dated 31 August 1988, from the Secretary of State for Foreign Affairs of the Dominican Republic to Mr. Ramón Martínez Portorreal

Dear Sir,

I have the honour to refer to the communication sent by you to the Human Rights Committee of the United Nations on 10 October 1984 (case No. 188/1984), complaining that, on 14 June 1984, you were subjected to unlawful arrest and imprisonment under inhuman conditions by the Government of the time, in violation of article 9 (paras. 1, 2, 3 and 4), article 6 and article 10 (paras. 1 and 2 (a)) of the International Covenant on Civil and Political Rights, to which our country has been a Party since 1977.

In this connection, I have to inform you that, although the acts committed are the responsibility of the previous Government, the present Government presided over by His Excellency, Dr. Joaquín Zalaquer, deplores the violations perpetrated against you by the former Government, and at the same time offers the necessary assurances and guarantees to you in particular, and to all the other members of the Dominican Committee for Human Rights (CDH) to enable them freely to perform their

functions of promoting the effectiveness of human rights, as has been the normal practice under the present administration since 16 August 1986.

Likewise, the Dominican Government will issue to you, as Chairman of the Executive Board, an official passport so that you can carry out without any impediment your international activities, and thereby enhance the image of our country in the forums dealing with human rights.

The Dominican Government hopes that the Committee will accept the foregoing offers as adequate reparation, so that case No. 188/1984 can be finally closed by the Human Rights Committee of the United Nations.

Yours truly,

(Signed) Joaquin RICARDO
Secretary of State for Foreign Affairs
of the Dominican Republic

Letter, undated, of Dr. Martínes Portorreal to the Secretary of State for Foreign Affairs

Sir,

I acknowledge receipt of your communication dated 31 August 1988 referring to case No. 188/1984-10 October 1984 of the Human Rights Committee of the United Nations.

We wish to put on record that the Executive Board of our organisation has authorised me to inform the present Government, presided over by Dr. Joaquín Balaquer, that we accept as proper and valid the assurances and guarantees extended both to the members of the Dominican Committee for Human Rights (CDH) and to its Chairman to enable us freely to perform our functions of promoting and defending human rights and speaking out against violations of them in the Dominican Republic, thereby closing the above-mentioned case as far as we are concerned.

We are particularly interested to note that the present administration is enforcing and implementing all the provisions of the International Covenant on Civil and Political Rights, which has bee ratified by our country; in this regard, the Government can rely on the fullest possible co-operation of our organization.

Yours etc.

(Signed) Dr. Ramón B. Martínes PORTORREAL
Chairman, Executive Board, C.D.H.

B. Note No. 427-17/90, dated 13 February 1990, from the Permanent Mission of Ecuador to the United Nations Office at Geneva concerning the views adopted by the Human Rights Committee on communication No. 238/1987, Floresmilo Bolaños v. Ecuador

The Permanent Mission of Ecuador to the United Nations Office and Other International Organisations at Geneva presents its compliments to the Centre for Human Rights and wishes to refer to communication No. G/SO 215/51 (ECUA(1) of 2 August 1989, in which the Centre kindly informed it of the resolution adopted by the Human Rights Committee on the situation of Mr. Floresmilo Bolaños, who had been accused of killing Mr. Iván Egas.

In this connection, the Permanent Mission of Ecuador would be very grateful to the Centre for Human Rights if it would kindly inform the Human Rights Committee that Mr. Bolaños was at all times at the disposal of the courts, an independent power under the Ecuadorian Constitution, while the relevant proceedings were under way. Once the competent court handed down a decision, Mr. Bolaños was released, having been found innocent of the charges against him.

The National Government, concerned about the situation of Mr. Bolaños, immediately sought to assist him and at present he is working in the Ecuadorian Development Bank (BEDE).

It should be pointed out that, notwithstanding the autonomy of the courts, the Government of Ecuador urged the competent authorities to expedite the cases before them and in this way these proceedings, which had begun under the previous Administration, were concluded by the competent judges.

The Permanent Mission of Ecuador takes this opportunity to convey to the United Naqtions Centre for Human Rights the renewed assurances of its highest consideration.

C. Note No. 2153, dated 9 April 1990, from the Permanent Mission of Finland to the United Nations Office at Geneva, concerning the views adopted by the Human Rights Committee on communication No. 291/1988, M. I. Torres v. Finland (see annex/X (J) above)

The Permanent Mission of Finland to the United Nations Office at Geneva presents its compliments to the Centre for Human Rights and, with reference to the note verbale of 21 December 1989 transmitting the views of the Human Rights Committee in respect of communication No. 291/1988, submitted to the Committee under the Optional Protocol to the International Covenant on Civil and Political Rights by Mr. Martin Ines Torres, citizen of the Kingdom of Spain, has the honour to submit the following supplementary information on the reform of the relevant Finnish legislation.

A Government bill (no. 29/1990) amending the Aliens Act of 26 April 1983 in respect of guaranteeing the right to have the detention without delay reviewed by the court was submitted to Parliament on 2 April 1990. The amendments include, inter alia, the following relevant provisions which as revised read as follows:

Section 23: Taking into custody

An alien who has sought asylum and regarding whom it has been decided to refuse entry or deport or regarding whom such a decision is pending, can if necessary be taken into custody until such time as a decision on asylum has been rendered or the refusal of entry or deportation enforced, or the matter otherwise resolved.

The decision to take into custody shall be rendered only if on account of the alien's personal or other circumstnces there is reason to believe that he will go into hiding or commit crimes in Finland or if his identity is unclear. (Important investigation purposes are proposed to be dropped off from the list of grounds for taking into custody.)

Section 24: Decision to take into custody and obligation to report

An alien taken into custody shall be sent to an institution of custody particularly reserved for this purpose or other suitable institute of custody. The treatment of an alien taken into custody is governed, where applicable, by the provisions on prisoners on remand.

Section 24a: Reporting on the decision to take into custody and the procedure in the court

The police officer who has rendered the decision to take into custody shall report of the decision without delay and at the latest the following day by twelve o'clock to the court of first instance of the institution of custody or other court of first instance as further ordained by the Ministry of Justice. This report can also be given by telephone. A report given by telephone shall be confirmed in writing without delay. The decision to take into custody shall be considered by the court without delay and at the latest within 96 hours after rendering the decision in the order as prescribed for the consideration of warrants of remand for trial.

Section 24b: Decision to take into custody

If there are no grounds for keeping in custody, the court shall rule that the alien taken into custody shall be set free immediately.

Section 24d: Reconsideration of the decision to take into custody

If the person taken into custody has not been ruled to be set free, the court of first instance of the institution of custody shall reconsider the decision on its own initiative not later than two weeks after each decision to keep the alien in custody.

Section 34: Extraordinary appeal on the decision to take into custody

An alien taken into custody has a right to lodge an extraordinary appeal. There is no time-limit for the appeal. The appeal must be treated as urgent.

The law as amended is purported to enter into force as soon as possible, which is most likely in May 1990.

It is also proposed that the act on coercive means is amended so as to introduce a system of 24-hour duty in the courts of first instance. That will allow the courts to consider the decisions to take the alien into custody also during the weekends. a/

Notes

a/ The amendments were adopted on 27 April 1990 and entered into force on 1 May 1990.

ANNEX XIII

List of Committee documents issued during the reporting period

A. Thirty-seventh session

CCPR/C/26/Add.4	Initial report of Saint Vincent and the Grenadines
CCPR/C/37/Add.13	Second periodic report of India
CCPR/C/51/Add.1	Second periodic report of Canada
CCPR/C/58/Add.5	Third periodic report of Finland
CCPR/C/61	Provisional agenda and annotations - thirty-seventh session
CCPR/C/SR.923-950	Summary records of the thirty-seventh session

B. Thirty-eighth session

CCPR/C/46/Add.4	Second periodic report of Jordan
CCPR/C/58/Add.6	Third periodic report of the United Kingdom of Great Britain and Northern Ireland
CCPR/C/58/Add.7	Third periodic report of Sweden
CCPR/C/58/Add.8	Third periodic report of the Ukrainian Soviet Socialist Republic
CCPR/C/62	Consideration of reports submitted by States parties under article 40 of the Covenant - Initial reports of States parties due in 1990: Note by the Secretary-General
CCPR/C/63	Consideration of reports submitted by States parties under article 40 of the Covenant - Second periodic reports of States parties due in 1990: Note by the Secretary-General
CCPR/C/64	Consideration of reports submitted by States parties under article 40 of the Covenant - Third periodic reports of States parties due in 1990: Note by the Secretary-General
CCPR/C/65	Provisional agenda and annotations - thirty-eighth session
CCPR/C/SR.951-979/Add.1	Summary records of the thirty-eighth session

C. Thirty-ninth session

CCPR/C/42/Add.9	Second periodic report of Sri Lanka
CCPR/C/42/Add.10	Second periodic report of Morocco
CCPR/C/66	Provisional agenda and annotations - thirty-ninth session
CCPR/C/SR.980-1008	Summary records of the thirty-ninth session